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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

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1. Appointed Associate Justice by Gov. James B. Hunt, Jr. and took office 3 February 1983 to fill the unexpired term of J. Phil Carlton who resigned 31 January 1983.

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1. Appointed Judge 6 December 1982 to succeed John T. Kilby who retired 5 December 1982.

2. Appointed Chief Judge 2 March 1983 to succeed James O. Israel, Jr. who retired 1 March 1983.

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CASES REPORTED

PETITIONS TO REHEAR

ORDER OF THE COURT

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

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

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

GENERAL STATUTES CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

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COLIN WEGAND BROWN ..... Charlotte, applied from the State of New York 2nd Department
ROBERT MCCORMACK ..... Charlotte, applied from the State of New York 1st Department
BARRY CLAUDE SNYDER ..... Greensboro, applied from the State of New York 2nd Department
STUART MOULTON VAUGHAN, JR. ..... Raleigh, applied from the State of Kentucky
ERNEST JOSEPH WRIGHT ..... Jacksonville, applied from the State of Ohio

On November 9, 1982, the following individual was admitted:

MARDIE MCCREARY ..... High Point, applied from the State of Colorado

Given over my hand and Seal of the Board of Law Examiners this the 23rd day of November, 1982.

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

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MARK ALEXANDER CHARNS ..... Chapel Hill

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Executive Secretary
Board of Law Examiners of
The State of North Carolina

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VAUGHAN E. TAYLOR ..... Jacksonville, applied from the State of Virginia

Given over my hand and Seal of the Board of Law Examiners this the 24th day of February, 1983.

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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 v. MICHAEL EDWARD PINCH

No. 43A81

(Filed 2 June 1982)

1. Constitutional Law § 62; Criminal Law § 135.3— excusal of jurors opposed to death penalty—defendant not deprived of constitutional rights

The trial court properly excused eight prospective jurors for cause due to their stated opposition to the death penalty in a prosecution for first degree murder where seven jurors unequivocally stated they could not impose the death penalty under any circumstances and where the eighth juror, after some initial equivocation, stated that she did not "believe" that she could impose the death penalty regardless of the evidence. The excusal of the jurors did not deprive defendant of his constitutional rights to trial by a jury representative of a cross-section of the community or due process of law.

2. Criminal Law §§ 102.6, 113.2— prosecutor's argument and court's instructions concerning defense of intoxication proper

In a prosecution for first degree murder, the district attorney correctly conveyed the substance of the law and the evidence of defendant's intoxication defense to the jury and the trial court properly instructed upon the defense.

3. Constitutional Law § 30— no duty of State to make eyewitnesses "available" for interviews with medical experts

The trial court did not err in denying defendant's pretrial motion for an order directing the district attorney to make the State's eyewitnesses "available" for interviews with a medical expert who had been appointed to assist in the preparation and evaluation of an intoxication defense since nothing in our statutory discovery provisions would require *the State to compel* its witnesses to submit to any form of interview or questioning by the defense prior to trial. Further, there was nothing in the record to substantiate defendant's claim that defense counsel actually approached the potential witnesses for the stated purpose only to be rejected on account of the district attorney's prior, direct instructions to them not to cooperate.

4. Criminal Law § 38; Homicide § 15— exclusion of testimony concerning intoxication defense proper

In a prosecution for first degree murder, the trial court properly excluded questions which were not competently framed to elicit a witness's opinion about defendant's general intoxication. The court's ruling did not improperly hinder defendant's effort to present his intoxication defense, and none of the questions sought to elicit relevant information having a *direct* bearing upon *defendant's* intoxication impairment *at the time he committed the murders.*

5. Homicide § 24.2— instructions concerning presumption of malice proper—defendant conceding guilt

The trial court did not err in its final instructions by stating that the elements of malice and unlawfulness were implied in an intentional killing with a deadly weapon where the defendant, through his trial counsel, *conceded* his guilt of the second degree murders of the victims and admitted "the intentional killing and the malice involved in" the murders.

6. Homicide § 20.1— introduction of photographs of victims' bodies proper

In a prosecution for first degree murder, the trial court properly admitted into evidence ten photographs of the victims' bodies to illustrate the testimony of a forensic pathologist who had performed autopsies on the bodies. The illustrative relevancy of the photographs was not nullified by defendant's stipulation that "he killed both victims with gunshot wounds."

7. Criminal Law § 102.1— prosecutor's argument to jury—proper

The district attorney's remarks to the jury concerning (1) defendant's pleasure in killing, (2) what defendant must have been thinking before he shot the victims, and (3) "comparisons" between defendant and animals were either entirely warranted by the evidence or not so prejudicial that the trial court was required to take corrective action in the absence of an objection.

8. Criminal Law § 135.4— sentencing hearing—exclusion of evidence—not prejudicial

The trial court did not commit prejudicial error by excluding testimony about defendant's current feelings of remorse over the victims' deaths, about the circumstances of defendant's various hospitalizations for drug overdoses, and testimony concerning defendant's ability to adjust to life in prison in defendant's sentencing hearing after being convicted of two first degree murders. Some of the evidence sought to be introduced was irrelevant and the record as a whole was replete with evidence of other matters which defendant sought to introduce.

9. Criminal Law § 135.4— sentencing phase—improper question by prosecutor—no prejudicial error

At the sentencing phase of defendant's trial for first degree murder, the prosecutor erred in suggesting that defendant stole money in order to support his drug habit; however, as it was a single impropriety, and as the trial court promptly sustained defendant's objection to the disapproved question, the court sufficiently averted any prejudice to defendant.

10. Criminal Law § 135.4— sentencing phase—prosecutor's argument to jury—within bounds of permissible argument

Although the district attorney argued for capital punishment of defendant's murder convictions with vim and vigor, his zeal did not cause him to overstep the bounds of permissible argument.

11. Criminal Law § 135.4— sentencing phase—submission of mitigating circumstances to jury—no prejudicial error

In order for a defendant to demonstrate reversible error in the trial court's omission or restriction of a statutory or timely requested mitigating circumstance in a capital case, he must affirmatively establish three things: (1) that the particular factor was one which the jury could have reasonably deemed to have mitigating value; (2) that there was sufficient evidence of the existence of the factor; and (3) that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant. Therefore, although there was evidence that defendant's I.Q. fell into the "low-normal range of intelligence," the trial court did not err in failing to submit as a mitigating factor defendant's "relatively low mentality" since one would not commonly understand low to normal intelligence to be synonymous with relatively low mentality. Further, the evidence did not support the submission of the statutory mitigating circumstance of G.S. 15A-2000(f)(2), that he committed the murders while he was "under the influence of mental or emotional disturbance."

12. Criminal Law § 135.4— sentencing phase—submission of two killings as aggravating circumstance for one another—no double jeopardy

In the sentencing phase of defendant's trial, the trial court's submission of each of two killings as an aggravating circumstance for the other under the "course of conduct" provision of G.S. 15A-2000(e)(11) did not violate defendant's protection against double jeopardy.

13. Criminal Law § 135.4— sentencing phase—mitigating circumstances not specified by jury

The statutes do not require the jury to specify in the sentencing phase of a trial which mitigating circumstances it found.

14. Criminal Law § 135.4— sentencing phase—duty to recommend death or life imprisonment

The trial court correctly advised the jury that it had a duty to recommend a death sentence if it found three things: (1) that one or more statutory aggravating circumstances existed; (2) that the aggravating circumstances were substantial enough to warrant the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. The jury was also correctly advised that it had the duty to recommend a sentence of life imprisonment if it did not find any one of those three things. G.S. 15A-2000(b) and (c).

15. Criminal Law § 135.4— sentencing phase—submission of aggravating circumstance that murders were heinous, atrocious, or cruel

The trial court correctly instructed the jury upon the statutory aggravating circumstance of G.S. 15A-2000(e)(9), that the murders were "especial-

ly heinous, atrocious, or cruel," where the evidence tended to show that one of the victims was shot once and then shot again at point blank range as he lay moaning on the floor, and the other killing was merciless and conscienceless in that defendant shot the victim as he begged and pleaded for his life.

16. Criminal Law § 135.4— sentencing phase—sentence of death not disproportionate as matter of law

In a prosecution for first degree murder, the sentence of death was not, as a matter of law, "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." G.S. 15A-2000(d)(2).

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

Justice CARLTON concurring.

Chief Justice BRANCH joins in this concurring opinion.

Justice EXUM dissenting as to sentence.

ON appeal by defendant as a matter of right from the judgments of *Walker, Judge*, entered at the 25 August 1980 Criminal Session, GUILFORD Superior Court. Defendant was charged in indictments, proper in form, with the first degree murders of Freddie Pachaco and Tommy Ausley. Upon defendant's motion, the cases were joined for trial. The jury returned verdicts of guilty and recommended the sentence of death in each case. The trial court ordered the imposition of the death penalty for both killings.

In relevant part, the evidence for the State tended to show the following. On 16 October 1979, defendant, a nineteen year old white male, was walking on Merritt Drive in Greensboro with his friend Jimmy Eanes when he happened to meet Freddie Pachaco. Defendant did not like Pachaco because he had been friendly with a girl defendant liked and had, without proper entitlement, worn the personal insignia ("colors") of a motorcycle gang on his jacket. On this occasion, defendant told Eanes that he "hated that punk" (Pachaco) and wanted to fight him right then and there. This did not occur, however, because Pachaco was conciliatory and offered defendant some marijuana. The group then went to a trailer where they smoked marijuana and drank beer. Sometime later, Pachaco asked defendant outright whether he was "after" him. Defendant replied that he was not and further said that "if [he]

was going to kick [Pachaco's] ass, [he] would have already done it."

On the following day starting at about noon, several people began to congregate at the trailer, where defendant apparently lived, to drink beer and listen to music. The merrymakers included Jimmy Eanes, Shawn Feeney, Keith Way, Billy Stanley and Leslie Hearl (who later married Stanley before trial). Pachaco and his friend Tommy Ausley also unexpectedly joined the party and bought two cases of beer. Everybody was calm and pleasant and seemed to be having a good time. However, defendant told several of his friends during the course of the party that he disliked, or didn't have "much use for", Pachaco and said he would like to kill him. Later in the evening, defendant took Feeney's shotgun and fired it at the clothesline three times. A deputy sheriff came to the trailer to investigate the disturbance, but he soon departed after talking to defendant.

Upon defendant's suggestion, everyone decided to leave the trailer and go to the Stroker Motorcycle Clubhouse, which was located in some woods near Wendover Avenue in Greensboro. Defendant had reasoned that they could make as much noise as they wanted to out there and get more beer besides. [It was approximately 10:00 p.m.] While everyone prepared to move, defendant quickly slipped out to a nearby trailer where he borrowed a shotgun. He returned with the gun and told Eanes to ride with Pachaco and Ausley to make sure they got to the clubhouse. The entire party then proceeded to the rendezvous in various vehicles, caravan style. En route, defendant retained the shotgun and told his companions that he was going to kill Pachaco and Ausley.

When the group arrived at the clubhouse, defendant opened the door while he continued to hold the shotgun. Once inside, the members of the party played games, drank beer and listened to music. Billy Stanley and Leslie Hearl left the company and went into an adjacent room to have sexual intercourse. While everyone else engaged in these various recreational activities, defendant sat silently behind the bar with the shotgun in his lap. Sometime later, defendant gave his knife to Eanes and instructed him to cut Pachaco's jugular vein and promised to back him up with the shotgun. Eanes attacked Pachaco but only succeeded in cutting

him on the throat. Pachaco became emotional at this point but did not fight back. Ausley attempted to help Pachaco and was confronted by Eanes who threw a chair at him. At this point in the evening's events, the testimony of the eyewitnesses differed somewhat. Nevertheless, the overall weight of that testimony combined with the evidence of defendant's own pre-trial statements to law officers tended to show the following occurrences.

Immediately after the throat-slashing incident between Eanes and Pachaco, defendant raised the shotgun and pointed it at Pachaco. Pachaco told defendant, "I will go down laughing." Without saying a word, defendant shot him in the chest. Defendant then turned toward Ausley, whom he had never seen before that day. Ausley pleaded with defendant and said, "don't shoot me," "[n]o, not me." Defendant shot him anyway. Pachaco was still moaning. Defendant walked over to where he lay helpless on the floor and shot him again at point blank range just below the heart. Pachaco and Ausley died from the gunshot wounds. During the shootings, defendant had "a sort of grin" on his face.

Defendant, apparently with a full realization of what he had just done, walked outside to the porch of the clubhouse and told Feeney and Way that he had "blown away" two dudes. He then directed everyone to help him dispose of the bodies. The bodies were placed in an automobile which Eanes drove to Causey Street and abandoned in a ditch. Defendant did not return to his residence; instead, he went home with Stanley and Hearl. On the way, he told Stanley that he had killed Pachaco and Ausley because he "didn't have any use for people like that." Defendant was not upset and seemed to have no regrets about the murders. He went to sleep. The next day, Stanley and Hearl returned to the clubhouse at defendant's behest and cleaned up the blood on the floor. Another member of the Stroker motorcycle gang painted the steps to conceal bloodstains.

The bloody car and bodies of Pachaco and Ausley were discovered in the early morning hours of 19 October 1979. Defendant took a bus to California where he was subsequently arrested on 28 January 1980. Defendant waived extradition on 4 February 1980 and was picked up by two officers of the Greensboro Police Department two days later. During the flight back to North

Carolina, defendant made a full confession to the murders. [He was advised of his constitutional rights and executed the required waiver form.]

Defendant presented no independent evidence during the guilt determination phase of the proceedings. The defense did, however, elicit evidence during cross-examination of prosecution witnesses tending to show that defendant was drunk when the killings occurred.

The jury found defendant guilty of two counts of first-degree murder. The State relied on its evidence presented during the guilt phase of the trial and did not offer additional evidence during the sentencing hearing. The State did, however, argue that the murders were especially heinous because defendant committed them for sport and amusement. In addition, the State contended that the killing of the eighteen-year-old Ausley was particularly despicable because defendant had shot him in cold blood as he begged and pleaded for his life. On the other hand, defendant offered much evidence in mitigation of his criminal acts, including the following facts: his youth; the divorce of his parents during his childhood; his chronic drug and alcohol abuse since the age of twelve; his leaving home at the age of thirteen (from that time on, he had lived on his own); his low intelligence; his psychological problems of depression, conflicts in relationships and poor judgment; and his feelings of remorse over the killing of Ausley. In its instructions upon the sentencing phase of the case, the court submitted two aggravating circumstances for the jury's consideration: (1) the murders were especially heinous, atrocious or cruel, G.S. 15A-2000(e)(9); and (2) each murder was part of a course of conduct in which defendant committed a crime of violence against another person, G.S. 15A-2000(e)(11). The court also submitted ten mitigating circumstances to the jury. The jury subsequently found one or more of the mitigating factors but also unanimously found them to be outweighed by the foregoing aggravating circumstances beyond a reasonable doubt. The jury therefore recommended imposition of the death penalty for both murders, and the court so ordered.

Additional facts, which become relevant to defendant's specific assignments of error, shall be incorporated into the opinion.

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

Appellate Defender Adam Stein and Ann B. Peterson pro hac vice for the defendant-appellant.

COPELAND, Justice.

Defendant brings forward many assignments of error which he contends require a new trial of these crimes, or a new sentencing hearing, or both. We disagree and affirm the sentences of death imposed upon the jury's recommendations.

At the outset, we must note that defendant's appellate counsel filed a brief which is 109 pages long.[1] A defendant who stands convicted in a capital case is, of course, entitled to effective and diligent advocacy in the presentation of his appeal. However, defendant's brief seems unduly lengthy and quite repetitious. Common sense dictates that there must be an end to what can be said in behalf of any cause and that good judgment and prudence should prevail in the legal art of brief-writing.[2] Indeed, the volume of a brief should always be an accurate reflection of the substance of the arguments presented therein. We therefore exhort practitioners before this Court to seek excellence first, not excessiveness, in the preparation of briefs and remind them that the ability to be direct and concise is a formidable weapon in the arsenal of appellate advocacy. We now direct our attention to the merits of the case and address defendant's arguments in the order in which they appear in his brief.

GUILT PHASE: I-V

I.

[1] Forty-two veniremen were examined over a period of five days before a jury of twelve was impanelled to try this case. During the selection process, the trial court excused eight prospective jurors for cause due to their stated opposition to the death

1. The State was understandably forced to respond in like kind with a 90 page brief.

2. Our Rules of Appellate Procedure do not set a formal limit upon the length of a brief.

penalty. Defendant contends that the trial court's action deprived him of his constitutional rights of due process and trial by jury. The record plainly refutes this argument.

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). It is unmistakably clear that seven of the eight potential jurors were properly excused according to this standard after they each stated unequivocally that, even before hearing any evidence in the case, they could not under any circumstances impose the death penalty upon this defendant. *State v. Oliver*, 302 N.C. 28, 39-40, 274 S.E. 2d 183, 191 (1981). It is equally clear that the remaining juror, Mary Neal, was also correctly removed from the panel when, after some initial equivocation, she finally stated that she did not "believe" that she could impose the death penalty regardless of the evidence. The court thereupon asked her, "Do I understand that you could not even before you hear the testimony under any circumstances, impose the death penalty?" Ms. Neal replied, "No, I just don't think so." Considering her answers contextually, we find that Ms. Neal expressed a sufficient refusal to follow the law, that of capital punishment, which might become applicable to the case. *State v. Avery*, 299 N.C. 126, 137, 261 S.E. 2d 803, 810 (1980); *see State v. Taylor*, 304 N.C. 249, 266, 283 S.E. 2d 761, 773 (1981).

The excuse of these jurors for cause did not deprive defendant of his constitutional rights to trial by a jury representing a cross-section of the community or due process of law. *State v. Avery, supra*, 299 N.C. at 137-38, 261 S.E. 2d at 810; *State v. Cherry, supra*, 298 N.C. at 106, 257 S.E. 2d at 564. We would add, moreover, that the need for their excuse was manifest. It would have amounted to an absurdity and a mockery of our law to have permitted these jurors to sit on a case where imposition of the death penalty was an available sentencing option. For, if capital cases could be tried by juries which included persons *firmly* opposed to the maximum prescribed penalty sought by the State, the separate sentencing hearing mandated by G.S. 15A-2000

would almost certainly become a futile and meaningless exercise, contrary to the expressed will of our citizenry in the enactment of capital punishment legislation.

II.

[2] At trial, defendant contested the premeditation and deliberation elements of first degree murder primarily through the presentation of an intoxication defense. Defendant believes that he was unconstitutionally deprived of the substance of this defense by certain improper comments of the prosecutor and a series of erroneous rulings by the trial court.[3] We are not so persuaded and overrule these assignments of error.

(a) In his closing argument to the jury, the district attorney stated, in pertinent part, the following:

> [E]ven if you want to conclude that Michael Pinch was drunk because he said in the statement some time that he was, he's still guilty because drunkenness is no defense. You have to be so drunk as to be utterly and totally incapable, unable to form the intent to kill and to carry that out; so drunk as to be unable, incapable of understanding the nature and consequence of your act. That is not present here. There is no way you can conclude that anybody was intoxicated to that extent —not on these facts.
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> . . . .
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> You can't find it in your conscience and mind, your heart to dignify what happened out there and impartially excuse it on voluntary intoxication. It is not present on this evidence. I suggest to you that there is not even ample evidence to find that he was intoxicated or drunk. . . . No drugs in this case. Beer. Just beer. You just—you can't let him sell that to you. It is not there. It didn't happen. Nobody could have been intoxicated to the extent that the law requires and do what he did in the manner he did it. There just simply—it is offensive

3. This "single" argument in defendant's brief really addresses four distinct issues (howbeit with a common denominator: the intoxication defense). Clarity of review is enhanced by the *separate* statement of each question and its corresponding argument. *See* N.C. Rules of Appellate Procedure, Rule 28(b)(3) [Revised Rule 28(b)(5) (Supp. 1981)].

to reason and common sense. It stinks to high heaven. (Record at 241, 250.)

We can perceive no error in this. Contrary to defendant's assertions, the district attorney correctly conveyed the substance of the law of intoxication to the jury. *See State v. Goodman*, 298 N.C. 1, 12-14, 257 S.E. 2d 569, 578-79 (1979). In addition, although some of the foregoing comments were colorful in terminology, we find that as a whole the remarks were compatible with the evidence in the case and that the district attorney was certainly authorized to argue to the jury that the facts did not support a credible defense of intoxication.[4] *See State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974), *death sentence vacated*, 428 U.S. 902, 96 S.Ct. 3203, 49 L.Ed. 2d 1205 (1976).

(b) We likewise believe that the trial court's instructions upon the intoxication defense were entirely correct. The record shows that the able judge carefully explained the law in every respect in accordance with the decisions of this Court. *See State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968); N.C.P.I.—Crim. 305.10 (1970). *See also* 4 Strong's N.C. Index 3d, Criminal Law § 6 (1976). We also reject defendant's argument that the judge improperly shifted the burden to defendant to disprove his capacity to form a specific intent to kill after premeditation and deliberation. Viewed as a whole, the judge's charge was not reasonably susceptible of such an erroneous interpretation.

[3] (c) Defendant contends that the trial court erred in denying his pre-trial motion for an order directing the district attorney to make the State's eyewitnesses "available" for interviews with a medical expert who had been appointed to assist in the preparation and evaluation of an intoxication defense. It should be

4. Under this argument heading in the brief, appellate counsel improperly listed several other exceptions to remarks of the district attorney which were unrelated to the intoxication defense. Such exceptions are not pertinent to the precise question stated. *See* Rule 28(b)(3), *supra*, note 3. Five of these exceptions are argued *again* under assignment of error no. 27 which is reviewed in Part V of the opinion, *infra*. With regard to the remaining "irrelevant" exceptions presented here, it suffices to say that the comments, which were not objected to at trial, did not transcend the permissible bounds of argument in hotly contested cases and certainly did not amount to gross improprieties in any event. *See State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980); *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

recognized at once that nothing in our statutory discovery provisions would require *the State to compel* its witnesses to submit to any form of interview or questioning by the defense prior to trial; in fact, the State does not even have to afford the defense pretrial access to a list of its potential witnesses or copies of any statements they may have made. *See* G.S. 15A-903 and 15A-904; *State v. Lake*, 305 N.C. 143, 286 S.E. 2d 541 (1982); *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978). Nevertheless, it is true that a prosecutor has an implicit duty not to *obstruct* defense attempts to conduct interviews with *any* witnesses; however, a reversal for this kind of professional misconduct is only warranted when it is clearly demonstrated that the prosecutor affirmatively instructed a witness not to cooperate with the defense. *State v. Mason*, 295 N.C. 584, 587-88, 248 S.E. 2d 241, 244 (1978), *cert. denied*, 440 U.S. 984, 99 S.Ct. 1797, 60 L.Ed. 2d 246 (1979); *State v. Covington*, 290 N.C. 313, 343, 226 S.E. 2d 629, 649 (1976).

This record contains no such showing. The only indication of *possible* prosecutorial misbehavior is the bare allegation of defense counsel in the motion that the district attorney had told him of his specific refusal to allow the interviews in question. We find nothing in the record to substantiate this claim nor any evidence tending to show that defense counsel actually approached the potential witnesses for the stated purpose only to be rejected on account of the district attorney's prior, direct instructions to them against their cooperation. Defendant has therefore failed to present adequate grounds for reversal. *State v. Mason, supra.* In addition, the bare summary of the proceedings held by the court upon the motion make it plain that the *witnesses themselves* refused to talk with the defense expert *on the advice of their own individual attorneys.* Record at 51. Under these circumstances, neither the State nor the trial court had the power to interfere with the attorney-client privileges of the witnesses or to jeopardize their own future defenses.[5] Viewed in this light, it would have been a vain act indeed for the trial court to order the State to provide the defense with something which was, for all practical purposes, completely unavailable.

5. The witnesses sought by the defense to construct its intoxication theory were the persons who were present during the commission of the murders (and participated in the concealment thereof).

In this context, the trial court did all that it could reasonably do by initially providing the defense with $1500 in state funds to hire the medical expert. In denying the motion to compel the interviews, the court reminded the defense that the same necessary information could be obtained if the expert attended the trial and listened to the witnesses' actual testimony.[6] If, as it is suggested, the additional cost of the psychiatrist's time to do just that was prohibitive, defense counsel could have taken notes upon the testimony or relayed a transcript to the doctor for his formulation of an opinion upon the extent of defendant's impairment from intoxication at the time of the killings. We conclude that the denial of the motion did not deprive defendant of effective assistance of counsel or a fair trial. *See also State v. Williams* (I), 304 N.C. 394, 404-06, 284 S.E. 2d 437, 445-46 (1981).

[4] (d) We must now consider whether defendant's constitutional rights of confrontation and due process were unlawfully restricted by the trial court's sustension "of the prosecutor's objections to the defendant's cross-examination of the State's witnesses concerning the amount of beer drunk by the defendant, his level of intoxication and the nature of his behavior. . . ." Defendant's Brief at 30. Our review is governed by the well-established rule that the scope of cross-examination rests largely within the discretion of the trial court, and its rulings thereon will not be disturbed absent a clear showing of abuse or prejudice. *State v. Atkins*, 304 N.C. 582, 585, 284 S.E. 2d 296, 298 (1981) (and authorities there cited). Defendant has failed to demonstrate error in the trial court's rulings; consequently, we overrule all of the pertinent underlying exceptions listed in defendant's brief.[7]

6. It should perhaps be mentioned that the motion for the "pre-trial" interviews was actually filed after the jury selection process had already begun and only three working days before the full trial of the matter actually commenced. [In fact, the trial court heard and denied the motion on the very first day of the trial.]

7. Exceptions nos. 42, 45 and 50 bear no rational relationship to the argument concerning the "impairment" of the intoxication defense. *See* Rule 28(b)(3), *supra*, note 4. We have nonetheless reviewed these exceptions and find that the prosecutor's objections were properly sustained within the trial court's discretion. Exception no. 42 involved a question which was argumentative and irrelevant. Exceptions nos. 45 and 50 involved questions which sought impermissible conclusions from the witnesses about matters which were not within the realm of their personal knowledge. *See* 1 Stansbury's N.C. Evidence § 122, at 384-85 (Brandis rev. 1973).

In several instances, the witnesses actually answered the questions of defense counsel despite the prosecutor's objections and the trial court's sustension thereof (exceptions nos. 27, 28, 48A). The prosecutor did not move to strike the answers, and the trial court did not admonish the jury to disregard them. Thus, defendant effectively received the benefit of the evidence sought after, and he has no corresponding cause for complaint on appeal. *State v. Hopkins*, 296 N.C. 673, 252 S.E. 2d 755 (1979).

In another instance, defense counsel attempted to ask an expert medical witness on recross-examination whether the *victims* were legally intoxicated at the time of their deaths (exception no. 35). We believe that this question concerned irrelevant matters which had no logical tendency to prove a fact in issue at defendant's trial for murder. *See* 1 Stansbury's N.C. Evidence § 77, at 234 (Brandis rev. 1973). The relevant issue at trial was whether *defendant* was too intoxicated to form the specific intent to commit murder in the first degree. Obviously, the nature of his criminal acts was not diminished according to the sobriety or drunkenness of the unfortunate victims. Nevertheless, even assuming that this evidence had some degree of relevancy, however slight, it is unquestionably clear that defendant was not prejudiced by its exclusion on *recross*-examination when the doctor had already repeatedly stated during his direct, cross and redirect examinations that the blood alcohol levels of both victims indicated their intoxication at death.

The remaining exceptions argued herein by defendant are equally meritless. Exceptions no. 40 and 41 concerned defense counsel's questioning of the witness Eanes about whether *he* was "influenced by the alcohol [he] had drunk" on the night of the murders. Exception no. 44 related to the overly broad and legally ambiguous question to Eanes about whether he had *ever* seen defendant when he was not "*high*" on drugs or alcohol. Exception no. 48 involved a question as to whether defendant and Billy Wayne Stanley were "drunk" *when* they "mooned" an officer earlier in the evening of the murder (at the trailer). The trial court did not abuse its discretion in sustaining the prosecutor's objections to these questions, and its rulings thereon did not improperly hinder defendant's efforts to present his intoxication defense. None of the questions sought to elicit relevant information having a *direct* bearing upon *defendant's* intoxication impair-

ment *at the time he committed the murders*. Moreover, none of the questions were competently framed to elicit a witness's opinion about defendant's general intoxication based upon the precise legal meaning of that term. *See, e.g., State v. Carroll*, 226 N.C. 237, 239-240, 37 S.E. 2d 688, 690-91 (1946).

III.

[5] The jury was advised by both the prosecutor, in his closing argument, and the trial court, in its final instructions, that the elements of malice and unlawfulness were implied in an intentional killing with a deadly weapon. Defendant maintains that his constitutional right to trial by jury was violated because the jury was not also simultaneously informed that it was not compelled to infer malice and unlawfulness, as the presumption of their existence was rebuttable. *See, e.g., State v. Hutchins*, 303 N.C. 321, 346, 279 S.E. 2d 788, 804 (1981). Upon this record, defendant's position offends reason and is untenable.

The significant and controlling fact in this case is that defendant, through his trial counsel, *conceded* his guilt of the second degree murders of Pachaco and Ausley.[8] Defense counsel stated in his closing argument to the jury:

> When we started the case in selecting the jury, we told you—and also in opening remarks . . . that we were not contesting the fact that this young man over here killed two people intentionally with malice. That's never been at issue in this case. He's guilty of second-degree murder. We've admitted that all along. The State has proved it to you, but they didn't really have to. We admitted that.
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> . . . .
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> . . . [W]e're admitting the intentional killing and the malice involved in this thing. . . .
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> . . . .
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> . . . He's guilty of second-degree murder, two of them. (Record at 226, 236).

8. Defendant only contested his guilt of the more grievous offenses, that of murders in the first degree, with the requisite premeditation and deliberation.

In light of defendant's own affirmative admissions of the existence of malice and unlawfulness in his commission of two "second degree" murders, there could not possibly be any constitutional transgressions or prejudice in the remarks of either the prosecutor or the trial court concerning the presumption of the existence of those very same elements in the charges of first degree murder. "The State is not required to prove malice and unlawfulness unless there is some evidence of their non-existence. . . ." *State v. Simpson*, 303 N.C. 439, 451, 279 S.E. 2d 542, 550 (1981); *State v. Hankerson*, 288 N.C. 632, 650, 220 S.E. 2d 575, 588 (1975), *rev'd on other grounds*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed. 2d 306 (1976). *See also Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979); *State v. White*, 300 N.C. 494, 268 S.E. 2d 481 (1980). Moreover, it is evident from the record that the use of the presumption did not alleviate in any manner the State's overall burden of proving the existence of *every* element of first degree murder beyond a reasonable doubt. The assignment of error is overruled.

IV.

[6] Dr. John D. Butts, a forensic pathologist, performed the autopsies of the victims and testified at trial about the causes of their deaths. In the course of his testimony, Dr. Butts identified ten photographs as accurately depicting the appearance of the bodies at the time of his examinations. The State then introduced the photographs as exhibits (over defendant's objections). The trial court instructed the jury that it could consider the exhibits only for limited illustrative purposes, not as substantive evidence of guilt. As the jury viewed each photograph, Dr. Butts again identified its subject and explained the nature of the body's appearance as shown. Defendant argues that the introduction of these gruesome photographs and the repetitive testimony connected therewith effectively deprived him of a fair adjudication of his guilt and a fair sentencing hearing. Defendant believes that, since he "readily admitted that he killed both victims with gunshot wounds," there was no legitimate purpose or need for the use of the photographs and that they only served to inflame the passions of the jury to his decided prejudice. We disagree.

The record clearly shows that the photographs were properly introduced according to our rules of evidence. *See State v. Mar-*

shall, 304 N.C. 167, 282 S.E. 2d 422 (1981); *State v. Jenkins*, 300 N.C. 578, 268 S.E. 2d 458 (1980). The illustrative relevancy of the photographs, which directly corresponded to Dr. Butts' testimony, was not nullified by defendant's "stipulation" as to the cause of the deaths. *See State v. Elkerson*, 304 N.C. 658, 285 S.E. 2d 784 (1982). In addition, the actual number of the photographs of the two bodies was not impermissibly excessive under the circumstances of this case. *See State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979). Finally, the probative force of these depictions of the unattractive markings of the victims' violent deaths (as seen by the medical examiner) was not outweighed by their tendency to repulse the sensibilities, or to arouse the sympathy, of the viewer. *Compare State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969).

V.

[7] Defendant assigns as error the district attorney's numerous references to facts outside the record during his closing argument to the jury during the guilt phase. No objection was interposed at trial to any of the alleged instances of misconduct. Despite trial counsel's laxity, the State's argument in capital cases is subject to limited appellate review for the existence of gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*. *State v. Smith*, 294 N.C. 365, 377-78, 241 S.E. 2d 674, 681-82 (1978) (and authorities there cited). Considering them contextually and according to the evidence in the case, we hold that the statements challenged here were not extremely or grossly improper.

First, there was nothing wrong with the district attorney's remarks about defendant's enjoyment of the killings. Such comments were supported by the evidence and the reasonable inferences therefrom. *See State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). For example, Billy Wayne Stanley testified that defendant had a grin on his face when he shot the victims, and Officer Fuller testified that defendant had told him that his only regret about the death of Pachaco was that he would not be able to kill him again. Second, the district attorney's statements describing what defendant must have been thinking as he sat quietly behind the bar holding the shotgun were not so prejudi-

cial that the trial court was required to take corrective action even in the absence of an objection. *See State v. King*, 299 N.C. 707, 711-13, 264 S.E. 2d 40, 43-44 (1980). Third, and finally, we perceive no gross error in the following "comparisons" made by the State: "You've got to understand the nature of the animal you're dealing with here. I'm not a zoologist, but I don't know of a single living species on this planet that kills for pleasure. Tigers kill to eat, sharks kill to eat. Michael Pinch kills for pleasure. Think about that." Record at 250. This uncomplimentary and disparaging characterization of defendant was entirely warranted by the evidence, *State v. Ruof*, 296 N.C. 623, 252 S.E. 2d 720 (1979); *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed. 2d 761 (1972).

SENTENCING PHASE: VI-XIX

VI.

Defendant again maintains that the district attorney improperly injected facts outside the record into his jury argument —this time during the sentencing phase of the trial. The scope of argument at the sentencing hearing is governed by the same general rules that apply to argument during the guilt proceedings; consequently, when the remarks challenged on appeal were not objected to at trial, the alleged impropriety must be glaring or grossly egregious for this Court to determine that the trial judge erred in failing to take corrective action *sua sponte*. *See State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E. 2d 752, 760-61 (1979). The prosecutorial expressions attacked in this appeal do not fall within the realm of reversible transgressions.

All three of the exceptions set out in the brief under this assignment of error concern the district attorney's statements that the murders were especially despicable, heinous and cruel because defendant executed the victims for sport, recreation and the amusement of his friends. We have already held in part V of the opinion, *supra*, that the evidence in the case reasonably supported a conclusion that defendant enjoyed committing these crimes. That being so, it is clear that the district attorney's further extrapolations at sentencing about the unusually callous and playful nature of defendant's murderous acts were also legitimate under the evidence and were not extreme or prejudicial *per se*.

VII.

Defendant offered much evidence in mitigation of his acts during the penalty phase. In several instances, however, the trial court excluded certain evidence upon the prosecutor's objections. Defendant argues that the trial court thereby deprived him of due process and the right to be free from cruel and unusual punishment.

Defendant's contentions must be examined against the backdrop of our capital punishment statute which provides, in conformity with the constitutional mandates of the Eighth and Fourteenth Amendments, that any evidence may be presented at the separate sentencing hearing *which the court deems* "relevant to sentence" or "to have probative value," including matters related to aggravating or mitigating circumstances. G.S. 15A-2000(a)(3); *see Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978). The circumstances of the offense and the defendant's age, character, education, environment, habits, mentality, propensities and criminal record are generally relevant to mitigation; however, the ultimate issue concerning the admissibility of such evidence must still be decided by the presiding trial judge, and his decision is guided by the usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation.[9] *See State v. Johnson*, 298 N.C. 355, 367, 259 S.E. 2d 752, 760 (1979); *State v. Cherry*, 298 N.C. 86, 98-99, 257 S.E. 2d 551, 559 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed. 2d 796 (1980). *See also State v. Goodman*, 298 N.C. 1, 30-31, 257 S.E. 2d 569, 588 (1979). Consequently, we believe that a new sentencing hearing should not be ordered by this Court for the trial judge's exclusion of evidence at the penalty phase unless the defendant demonstrates the existence of patent, prejudicial error. No such showing has been made here.

9. This does not mean that the evidentiary rules which normally apply at the guilt phase of the trial should also apply with *equal force* in the sentencing phase. Evidentiary flexibility is encouraged in the serious and individualized process of life or death sentencing. *See Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). However, as in any proceeding, evidence offered at sentencing must be pertinent and dependable, and, if it passes this test in the first instance, it should not ordinarily be excluded. G.S. 15A-2000(a)(3), *supra; see Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed. 2d 738 (1979).

[8] Specifically, defendant argues that the trial court's sustension of various objections by the prosecutor thwarted his attempts to inform the jury about his "growing awareness of the uselessness of his life up to that point, the pain he caused others, a growing sense of maturity and feelings of remorse and regret." Defendant's Brief at 53. We find that, although some evidence was indeed excluded, the record as a whole is replete with evidence of these matters, and defendant suffered no prejudice whatsoever from the trial court's rulings.

It is true that the trial court sustained an initial and single objection to defendant's testimony about his current feelings of remorse over Pachaco's death; nevertheless, defendant thereafter proceeded to testify in detail about his change in heart and regret without further objection by the prosecutor. Record at 278-79. In addition, Dr. Royal, a forensic psychiatrist, testified about defendant's expressed remorse over Ausley's death. Record at 285. Since substantial evidence of defendant's regrets had already been received, it was not error for the court to exclude (upon objection) further testimony upon the same subject by the witness Sherry Olivey. In any event, defendant later succeeded in introducing more evidence about his repentant statements since the killings through the testimony of his sister and mother. Record at 289, 291-92. We likewise find no reversible error in the trial court's limited admission of defendant's five proffered exhibits consisting of letters he had written to his mother while he was incarcerated pending trial. These letters added little to the *in-court* testimony of defendant and his witnesses about his present awareness of what he had done and his sorrow for it. Even so, the trial court permitted defendant's mother to read to the jury all of exhibit five and portions of exhibits three and four in which defendant had essentially stated, both in prose and poem, that it hurt him to know that he was capable of taking another's life, that he was living for the future and cleaning up his act, and that he had a mature and sincere desire to fulfill his part in life and society properly. Record at 297-99. The letters totally excluded by the court, exhibits one and two, merely repeated the same things, howbeit using different words or examples, about his remorse and his wish to be a better person. Moreover, these two letters included much material which plainly was not relevant to sentencing, *i.e.*, his apologies to his mother for not having been a better son

to her despite her good efforts and his rambling philosophical questionings about why he had turned out to be so bad.

Defendant also maintains that the trial court erred in not permitting Sherry Olivey to testify about *the circumstances of his various hospitalizations* for drug overdoses. We disagree. Ms. Olivey testified that she knew of occasions where defendant had taken a drug overdose and that she had visited him in Cone Memorial Hospital three months after the crimes. Certainly, defendant's *habits* regarding alcohol and drug misuse were relevant mitigating factors for the jury's consideration; however, the precise details of his particular overdoses were not pertinent to his sentencing. It was enough that the jury was informed by Ms. Olivey that:

> I can honestly say that he [defendant] drank or took something every day that I've known him [two years] . . . . He always went to the max on everything to where he couldn't walk anymore or was passed out. I have seen him when he has gone too far in the use of alcohol or the use of drugs. I have seen him take alcohol or drugs to the point where he is unconscious or in some state like that. Record at 286-87.

Defendant finally challenges the trial court's refusal to admit certain expert testimony. These contentions lack merit. The court correctly sustained the prosecutor's objection to defense counsel's attempt to elicit an opinion from a psychiatrist about whether defendant "would be able to adjust to life in prison." Such an opinion would have concerned a matter totally irrelevant to sentencing. Defendant stood convicted of two first degree murders. *Regardless* of his ability to adjust to prison life, by law, defendant was already subject to the mandatory imposition of life imprisonment for those crimes. *See* G.S. 14-17; G.S. 15A-2000(a)(1), 15A-2002. The issue to be determined by the jury at the penalty phase was not whether defendant would prove to be a "good" prisoner but whether the overall nature of the murders and defendant's attendant acts warranted imposition of the *maximum* available penalty—death in the gas chamber.[10] The trial court also

10. Even assuming that defendant's ability to cope in prison had some slight relevancy to his sentencing, we would still hold that the psychiatrist's opinion was properly excluded because there was an insufficient foundation in the record for a

properly excluded the opinion of another psychiatrist about defendant's blood alcohol levels at the time of the shootings. Clearly, such evidence would have been relevant; however, as the doctor plainly admitted that he could not render an opinion within a reasonable degree of medical certainty, the evidence was unreliable and lacked probative value.

In sum, defendant is not entitled to a new sentencing hearing upon the ground that the foregoing classes of evidence were erroneously restricted or rejected by the trial court.

VIII.

[9] At the penalty phase, defendant testified that he had been drinking alcohol and taking or injecting all kinds of illicit drugs since he was fourteen years old. He also stated that he had been consuming approximately twelve beers a day for the three years preceding the murders. Obviously, this testimony tended to bolster defendant's evidence of mitigating circumstances. The prosecutor responded by cross-examining defendant about where he got the money to buy all the beer and drugs which he said he had taken every day for five years. Defendant answered that he had money even though he had not been employed. The prosecutor repeatedly asked defendant to identify the specific source of that money, but defendant only replied, "I just got it." The prosecutor finally asked him, "Who did you steal from?" The trial court sustained defense counsel's immediate objection to the question. Defendant complains that the prosecutor's persistent questioning about the money improperly suggested to the jury that he must have committed other criminal offenses to support his habits. On the whole, we find no prejudicial error.

As a general matter, the truthfulness of any aspect of any witness's testimony may be attacked on cross-examination. *See* 1 Stansbury's N.C. Evidence §§ 39-40 (Brandis rev. 1973). This basic rule applies to all trial proceedings, including both the guilt and sentencing phases in capital cases. Thus, it is clear that the pros-

conclusion that he was better qualified to have an opinion on this subject than the jury. There was no evidence specifying the doctor's special experience with the prison environment, and the question posed to him essentially requested nothing more than his speculations about defendant's future prison "performance" based merely upon his observations of defendant's behavior in a mental hospital for three and a half weeks.

ecutor could properly attempt to impeach defendant's testimony about the actual *extent* of his destructive habits. Defendant's ability to afford the necessary items certainly bore upon the credibility of his self-serving statements about their constant use.

In addition, the persistent nature of the prosecutor's questioning was not abusive in light of defendant's evasive and unresponsive answers. The scope and fairness of the cross-examination was a matter left to the sole discretion of the trial judge, and the prosecutor had a right to sift or press defendant in order to get a direct and clear response. *See State v. Williams*, 303 N.C. 142, 147, 277 S.E. 2d 434, 438 (1981); *State v. Currie*, 293 N.C. 523, 529, 238 S.E. 2d 477, 481 (1977).

On the other hand, however, it seems that defendant's objection to the prosecutor's inferential inquiry about the stealing was well taken. The question amounted to a speculative insinuation of prior criminal conduct with no ascertainable good faith *factual* basis. See *State v. Shane*, 304 N.C. 643, 651, 285 S.E. 2d 813, 818 n. 3 (1982). Still, it was a *single* impropriety, and this case is, therefore, markedly different from *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954), where the prosecutor cross-examined the defendant in detail about *seventeen* unproved accusations of prior misconduct. Thus, we hold that the trial court's prompt sustension of defendant's objection to the disapproved question sufficiently averted any prejudice to defendant. *See State v. Williams, supra*, 303 N.C. at 147, 277 S.E. 2d at 438.

IX.

[10] Defendant assigns further error to the district attorney's jury argument during the sentencing phase. We have already overruled several of the same supporting exceptions in Part VI of the opinion, *supra*, where we set forth the controlling standard of review of any jury argument which is not objected to at trial. To avoid redundancy, we shall not plow those rows again, instead, we shall limit our review to a consideration of the *additional* exceptions presented here.[11]

11. We are compelled to question appellate counsel's organizational rationale for raising further challenges to the sentencing argument here when, logically, all contentions of this type should have been argued together in the same portion of the brief.

Let us begin by saying that prosecutorial statements are not placed in an isolated vacuum on appeal. Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred. Moreover, it must be remembered that the prosecutor of a capital case has a duty to pursue ardently the goal of persuading the jury that the facts in evidence warrant imposition of the ultimate penalty. G.S. 15A-2000(a)(4); *State v. Myers, 299 N.C. 671, 680, 263 S.E. 2d 768, 774 (1980); State v. Johnson,* 298 N.C. 355, 367, 259 S.E. 2d 752, 760 (1979); *State v. Westbrook,* 279 N.C. 18, 37, 181 S.E. 2d 572, 583 (1971), *death sentence vacated,* 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed. 2d 761 (1972).

In this case, it is evident that the district attorney argued for capital punishment of defendant's murder convictions with much vim and vigor. Record at 306-10. Contrary to defendant's assertions, however, we do not believe that the district attorney's zeal caused him to overstep the bounds of permissible argument. Examining his statements in their complete context, we are convinced that he did not say anything which would amount to a gross impropriety. His comment that defendant was "not Jack the Ripper yet" was tempered by the prior explanation to the jury that it could consider any facts or circumstances which it deemed to have mitigating value, including defendant's admitted lack of significant criminal history. The district attorney's expressions concerning his belief in the death penalty and the propriety of its imposition in the case must be weighed with his frequent reminders to the jury that *it* would have to determine what the appropriate punishment should be.[12] *Compare State v. Smith,* 279 N.C. 163, 181 S.E. 2d 458 (1971). The characterization of defendant's mind as a "cesspool" cannot be deemed unfair in light of defendant's own admissions that he killed the victims intentionally and maliciously simply because Pachaco had wrongfully worn

12. For example, the district attorney stated:

> I don't know what you will conclude is appropriate. I suggest to you, with all due respect, that the conduct is appropriate to be rewarded with the ultimate sanction that our law provides.
>
> We're all people of great ability and conscience, and I ask you to consider what is appropriate for this act. Consider what is justice for Michael Pinch and for what he did. Consider the two dead boys that he left in his wake.

the insignia or emblem of a motorcycle gang sometime in the past. The statement to the jury that it would not have hesitated to give defendant his "just reward" right there on the spot if it had actually witnessed the murders, although disapproved by us, was not an inflammatory invitation for the jury to act like a lynch mob. The district attorney noted that the law did not work that way. His comment was a colorful attempt to emphasize the cruelty and callousness with which defendant killed the victims. Finally, there was nothing inherently prejudicial in the district attorney's complaints about how he could not bring in family members to testify about the "trials and travails" of *Pachaco's* life, in contrast to all of the evidence about defendant's family and personal history received in mitigation. The district attorney was merely reminding the jury that, although it did not know much about him, it should also carefully consider the value of the victim's life in making its life or death decision about defendant.

X.-XI.

[11] Defendant tendered in writing the following ten circumstances in mitigation:

> 1. The defendant has no significant history of prior criminal activity.
>
> 2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.
>
> 3. The age of the defendant at the time of the crime.
>
> 4. The defendant voluntarily admitted his culpability immediately after his arrest and cooperated with police efforts to clarify the evidence in these cases and other pending cases arising out of the incident.
>
> 5. The defendant since his incarceration has appreciated the severity and error of his conduct.
>
> 6. The defendant since his incarceration has ceased the use of alcohol and drugs and is able to function with more maturity and responsibility.
>
> 7. The defendant lacks education and has a relatively low mentality.

8. The environment in which the defendant lived until the time of his arrest was infused with violence and accepted violence as an [sic] problem-solving technique.

9. The defendant's childhood history, background, and record shows no indication of a habitually violent nature.

10. Any other circumstances or circumstances arising from the evidence which you, the jury deem to have mitigating value. Record at 275.

With the exception of the last portion of number seven regarding defendant's "relatively low mentality," the trial court honored defendant's request and submitted all ten of these mitigating factors to the jury. Defendant argues that the trial court thereby erred in two ways: (1) in failing to submit his low mentality in mitigation as requested and (2) in failing to submit upon its own motion the additional statutory mitigating circumstance of G.S. 15A-2000(f)(2), *i.e.*, that he committed the murders while he was "under the influence of mental or emotional disturbance." We conclude that defendant's contentions cannot be sustained on this record.

This Court has previously established instructive guidelines for the trial judges of our State to follow in the submission of mitigating circumstances, including those which arise upon the evidence in a given capital case as well as those specified in G.S. 15A-2000(f). First, in *State v. Goodman*, we held that, although the jury's consideration of any factor relevant to the circumstances of the crime or the character of the defendant may not be restricted, the trial court "is not required to sift through the evidence and search out every possible circumstance which the jury might find to have mitigating value," especially when the trial court instructs the jury upon the open-ended provision of G.S. 15A-2000(f)(9) and thus does not hinder it from evaluating on its own *anything* of mitigating value. 298 N.C. 1, 33-34, 257 S.E. 569, 589-90 (1979). Second, in *State v. Johnson*, we held that the trial court must include additional factors, which are timely requested by the defendant, on the written list submitted to the jury *if* they are "supported by the evidence, and . . . are such that the jury could *reasonably* deem them to have mitigating value. . . ." 298 N.C. 47, 72-74, 257 S.E. 2d 597, 616-17 (1979) (emphasis added). Third, in *State v. Hutchins*, we held that, although the trial court

has a fundamental duty to declare and explain the law arising upon the evidence, it is not required to instruct upon a *statutory* mitigating circumstance *sua sponte* unless defendant, who has the burden of persuasion, brings forward sufficient evidence of the existence of the specified factor. 303 N.C. 321, 355-56, 279 S.E. 788, 809 (1981); *see State v. Taylor*, 304 N.C. 249, 277, 283 S.E. 2d 761, 779 (1981).

The rules of the foregoing cases are sound and practical, and we therefore exhort our trial judges to adhere to them carefully when presiding over the trial of capital cases. Moreover, we must also point out that common sense, fundamental fairness and judicial economy dictate that any reasonable doubt concerning the submission of a statutory or requested mitigating factor be resolved in the defendant's favor to ensure the accomplishment of complete justice at the *first* sentencing hearing. Nevertheless, the same standard of appellate review continues to apply whether the trial court commits error at the guilt phase or the penalty phase; thus, a new sentencing hearing will *not* be ordered for the erroneous failure to submit a mitigating circumstance if that error was *harmless beyond a reasonable* doubt. G.S. 15A-1443(b); *see State v. Williams* (I), 304 N.C. 394, 425-26, 284 S.E. 2d 437, 456-57 (1981) (erroneous submission of aggravating circumstance was prejudicial and required new sentencing hearing); *State v. Taylor, supra*, 304 N.C. at 285-88, 283 S.E. 2d at 783-85 (erroneous submission of aggravating circumstance was not prejudicial).

The sum of the matter is this—a defendant demonstrates reversible error in the trial court's omission or restriction of a statutory or timely requested mitigating circumstance in a capital case only if he affirmatively establishes three things: (1) that the particular factor was one which the jury could have reasonably deemed to have mitigating value (this is presumed to be so when the factor is listed in G.S. 15A-2000(f)); (2) that there was sufficient evidence of the existence of the factor; and (3) that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant. The defendant in the instant case fails this three-prong test for a new sentencing hearing.

We first analyze defendant's request for an instruction upon his "relatively low mentality." This factor is not listed in G.S.

15A-2000(f); however, our cases plainly indicate that the mentality of a defendant is generally relevant to sentencing and that it can, with supporting evidence, be properly considered in mitigation of a capital felony. *See State v. Johnson*, 298 N.C. 355, 367, 259 S.E. 2d 752, 760 (1979), and part VII of the opinion, *supra*. In this case, a psychiatrist testified that defendant had scored 66 on an intelligence test. This fact unquestionably related to defendant's mentality, and we believe that defendant would have been entitled to an instruction about his specific intelligence quotient *if* he had tendered a properly worded request therefor. *See, e.g., State v. Williams*, 304 N.C. 394, 401, 284 S.E. 2d 437, 443 (1981); *State v. Rook*, 304 N.C. 201, 211 n. 1, 283 S.E. 2d 732, 739 (1981), *cert. denied*, --- U.S. ---, 81 S.Ct. 6143, 72 L.Ed. 2d 155 (1982). However, we do not believe that defendant's evidence adequately authorized the submission of the instruction he did request which used the terms "relatively low mentality." In this regard, the psychiatrist testified that defendant's "other tests indicated that his I.Q. was probably a little higher than [66] and fell at least into the *low-normal range of intelligence*." Although we are not schooled in the medical art of psychiatry, we think that one would not commonly understand low to normal intelligence to be reasonably synonymous with relatively low mentality. Consequently, we hold that the trial court did not err in refusing to instruct the jury in this respect. In any event, the omission could not have possibly been prejudicial since the trial court told the jury it could evaluate "[a]ny other circumstances or circumstances arising from the evidence which you, the jury deem to have mitigating value." G.S. 15A-2000(f)(9).

For similar reasons, we reject defendant's contention that the trial court erred in not instructing upon a statutory mitigating circumstance *sua sponte*. The evidence simply did not support the submission of G.S. 15A-2000(f)(2). The psychiatrist testified that defendant had "psychological problems" and was "a very passive person that exhibits *some* chronic depression in terms of how he functions in life." He also stated that defendant was "not basically a violent person" and that there was no evidence "that he was an angry acting out type person that you ordinarily find in people that are prone to violence." On cross-examination, the psychiatrist further explained the results of his examination of defendant as follows:

> I also found no evidence of any thought disorder. I found his memory to be adequate and his perception to be adequate. I found that he was always oriented as the time, place and person. I would classify his depression as *mild* depression. I believe that part of his depression would be caused by the incarceration and facing two charges of murder in the first degree. I did not find any evidence of the type of anger that you normally find in people of these subculture groups.

Record at 283-86 (emphases added). This evidence did not, in our opinion, sufficiently show that defendant was somehow *under the influence* of a mental or emotional disorder *at the time* he committed the murders. We also have serious doubts as to whether "some" "mild" "chronic depression" qualifies as a bona fide mental or emotional disturbance under our capital punishment statute. *Compare State v. Taylor, supra* (evidence that defendant had "paranoid psychosis"); *State v. Rook, supra* (psychiatrists gave direct opinions that defendant had a mental disorder or illness); *State v. Johnson, supra* (defendant was diagnosed as schizophrenic). Again, even assuming that the trial court should have instructed upon G.S. 15A-2000(f)(2), its failure to do so did not constitute prejudicial error since the jury could have elected to consider this factor pursuant to the trial court's instruction upon G.S. 15A-2000(f)(9).

XII.

[12] The trial court submitted each of the two killings as an aggravating circumstance for the other under the "course of conduct" provision of G.S. 15A-2000(e)(11).[13] Defendant argues that this kind of reciprocal aggravation to enhance his punishment for both crimes constituted double jeopardy and deprived him of due process of law.[14] For a precise understanding of the issue raised by defendant, we quote from his brief as follows:

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13. G.S. 15A-2000(e)(11) lists the following factor for the jury's consideration: "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."

14. Defendant's motion to file a supplemental brief on this question was allowed by the Court on 8 March 1982. We shall address defendant's contentions as they are presented in that amplified brief.

> In summary, the defendant's claim in this case . . . is that the prosecution faced with two homicides committed by the same person in the same "course of conduct" must choose between two options. The prosecution may use one of the homicides as an aggravating circumstance under § 15A-2000 (e)(11) to support the increased penalty of death for the other. The prosecution may seek a separate conviction for each of the homicides, in which case a death penalty for either must be based on aggravating factors that do not include the other homicide. The double jeopardy clause prohibits the prosecution from using both options, i.e., from obtaining a substantive conviction for a homicide and then using it again as an aggravating circumstance under § 15A-2000(e)(11) to support punishment by death for the other killing. Defendant's Supplemental Brief at 4.

To the contrary, we find no constitutional authority mandating a conclusion by us that the submission of G.S. 15A-2000(e)(11) in aggravation of both murders violated defendant's protection against double jeopardy, and we decline to adopt a position which would prevent the administration and availability of equal justice for equal crimes.[15]

In the instant case, defendant killed two persons at the same place and within minutes of each other. The capital charges were tried together pursuant to defendant's own motion for joinder. The jury found defendant guilty of murder in the first degree, upon the theory of premeditation and deliberation, on both counts. The State was thereupon entitled to seek the death penalty for each murder, and it properly did so. The State sought the death penalty based upon the aggravating circumstances of *both* G.S. 15A-2000(e)(9) and (11). The jury found that these aggravating circumstances outweighed the mitigating beyond a reasonable doubt and recommended the death penalty in each case. There was no constitutional error in the procedure employed.

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15. We reach the same conclusion in another death penalty case filed by our Court today: *State v. Williams* (II), 305 N.C. 656, 292 S.E. 2d 243 (1982). In *Williams (II)*, the defendant was tried separately in two counties for two murders. Each murder was submitted as reciprocal aggravation for the other under G.S. 15A-2000(e)(11) at defendant's separate trials. *See State v. Williams* (I), 304 N.C. 394, 284 S.E. 2d 437 (1981).

The cases principally relied upon by defendant are clearly inapposite, and the reasoning of those cases simply cannot be stretched to encompass the imaginative and innovative standard of double jeopardy which defendant seeks to impose at *the initial sentencing hearing jointly held upon dual capital convictions.* For example, both the United States Supreme Court's decision in *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed. 2d 270 (1981), and the decision of this Court in *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981), addressed the double jeopardy implications which arise in the event a new trial or a new sentencing hearing is required in a capital case after the jury has already decided the punishment issue either for or against the defendant. Such is plainly not the situation here, and we need not search out hidden nuances of the double jeopardy clause in order to decide the case before us. It is sufficient to recognize that the thrust of the concept of double jeopardy is that a defendant may not be unfairly subjected to multiple prosecutorial attempts to obtain a conviction or a certain penalty for the same offense nor may a defendant receive multiple punishment for the same offense. *See Bullington v. Missouri, supra; State v. Silhan, supra.*

Regardless of the formula utilized, the jury's *consideration* of a defendant's commission of "other crimes of violence," in making its ultimate penalty recommendation for that defendant's conviction of a related but separate capital offense, is not logically equivalent to the defendant receiving multiple punishment for the same crime. This is especially true where, as here, the prosecution relies on an additional aggravating circumstance which is also subsequently found by the jury. In short, the 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. *See, e.g., State v. Hutchins*, 303 N.C. 321, 347, 279 S.E. 2d 788, 804 (1981) (reciprocal aggravation of two first-degree murders under G.S. 15A-2000(e)(11)). *See also State v. Cherry*, 298 N.C. 86, 113, 257 S.E. 2d 551, 568 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct.

2165, 64 L.Ed. 2d 796 (1980) (discussing the use of an underlying felony, which accompanies the commission of a premeditated murder, as an aggravating circumstance under G.S. 15A-2000(e)(5)).

In conclusion, we hold that the enhancement of defendant's penalty on the one hand for Pachaco's murder did not result in an unconstitutional duplication of defendant's penalty on the other hand for Ausley's death, and vice versa, simply because defendant's overall violent conduct was submitted in aggravation on each hand under G.S. 15A-2000(e)(11). It is the very fact that defendant killed two people, and not just one, that aggravates the nature of his crimes, and it was entirely proper for the jury to consider this fact in determining whether defendant should pay the ultimate price for *each* life he took.

XIII.

[13] Defendant assigns error to the trial court's direction to the jury that it need not specify which mitigating circumstances on the written list it found. This same issue was recently addressed at length in *State v. Rook*, where we stated: "While defendant makes a good argument that it is the better practice, and we agree, to require the jury to specify mitigating factors found and not found for the benefit of this Court in reviewing the appropriateness of the death penalty, we find no such requirement in our statutes." 304 N.C. 201, 231, 283 S.E. 2d 732, 751 (1981), *cert. denied*, --- U.S. ---, 81 S.Ct. 6143, 72 L.Ed. 2d 155 (1982). Moreover, in *State v. Taylor*, we also found "no merit in defendant's contention that since the jury had to answer each aggravating circumstance specifically but did not have to answer which mitigating circumstances they found, that placed undue emphasis on the aggravating circumstances." 304 N.C. 249, 285, 283 S.E. 2d 761, 783 (1981). It suffices to say that defendant's similar contentions must be overruled pursuant to the binding authority of both *Rook* and *Taylor*.

XIV.

[14] Both the prosecutor and the trial court advised the jury that it had a *duty* to recommend a sentence of death if it found three things: (1) that one or more statutory aggravating circumstances existed; (2) that the aggravating circumstances were

substantial enough to warrant the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. On the other hand, the jury was also advised that it had the duty to recommend a sentence of life imprisonment if it did not find any one of those three things. These directions to the jury were based upon the statutory criteria set forth in G.S. 15A-2000(b) and (c) and conformed to the N.C. Criminal Pattern Jury Instructions § 150.10 (1980).[16]

Nevertheless, defendant assigns error to the foregoing on the basis that such instructions "prejudicially withdrew from the jury its final option . . . to recommend a life sentence notwithstanding its earlier findings." Defendant's Brief at 75. This assignment lacks merit.

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). Moreover, defendant's contention was implicitly answered in *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), in which this Court overruled an assignment of error alleging that the trial court had erred in failing to instruct the jury that it could still recommend life imprisonment even though it found that the aggravating circumstances outweighed the mitigating ones. Justice Britt, speaking for the Court in *Goodman*, explained that:

16. Similar instructions about the jury's duty to return a certain sentencing verdict, based upon its affirmative findings under G.S. 15A-2000(c), were given in three other death cases previously decided by our Court, in which no corresponding exception or assignment of error was raised on appeal: *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); *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); and *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, --- U.S. ---, 81 S.Ct. 6143, 72 L.Ed. 2d 155 (1982).

> [I]t would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of *Furman* and the cases which have followed it.

Id. at 35, 257 S.E. 2d at 590. For these reasons, we hold that the jury was correctly informed 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).[17]

XV.

[15] The trial court instructed the jury upon the statutory aggravating circumstance of G.S. 15A-2000(e)(9), that the murders were "especially heinous, atrocious, or cruel." Defendant essentially contends that the evidence did not support the existence of this factor and that the trial court's instruction upon it thus violated the Eighth Amendment.

In accordance with the dictates of the Eighth Amendment, our Court has adhered to the position that the aggravating circumstance of G.S. 15A-2000(e)(9) "does not arise in cases in which death was immediate and in which there was no unusual infliction of suffering upon the victim." *State v. Rook*, 304 N.C. 201, 226, 283 S.E. 2d 732, 747 (1981), *cert. denied*, --- U.S. ---, 81 S.Ct. 6143, 72 L.Ed. 2d 155 (1982); *see Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed. 2d 398 (1980); *see, e.g., State v. Hamlette*, 302 N.C. 490, 504, 276 S.E. 2d 338, 347 (1981) (submission of G.S. 15A-2000(e)(9) was erroneous). Instead, our Court has made it clear that the submission of G.S. 15A-2000(e)(9) is appropriate only when there is evidence of excessive brutality, beyond that normally present in any killing, or when the facts as a whole portray the commission of a crime which was conscienceless, pitiless or unnecessarily tortuous to the victim. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979); *see, e.g., State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, --- U.S. ---, 102 S.Ct. 431, 70 L.Ed.

17. There is no constitutional infirmity in such an instruction. *See, e.g. Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed. 2d 929 (1976) (cited in the dissent).

2d 240 (1981); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981). It is, therefore, plain that an issue concerning the propriety of the submission of this aggravating factor is resolved according to the peculiar surrounding facts of the capital case under consideration.

Examining the case at bar, we hold that there was sufficient evidence whereby the jury could have reasonably concluded that the murders of Pachaco and Ausley were especially despicable and wanton under G.S. 15A-2000(e)(9). The evidence showed that defendant carefully executed a deliberate and premeditated plan for murder. We have already set out the details of the murders at length in the beginning of the opinion, and it would be repetitious to summarize them again here. It suffices to say that the deaths of the unsuspecting victims were not instantaneous and that both killings involved the infliction of unusual physical or psychological torture. Each victim essentially witnessed (or heard) the shooting of the other and was helpless to prevent this unprovoked horror. The killing of Pachaco was excessively brutal in that defendant, having already shot him once, walked over to where he lay moaning on the floor and shot him again at point blank range. The killing of Ausley was merciless and conscienceless in that defendant shot him as he begged and pleaded for his life. Defendant seemed to enjoy the killings, and he showed no remorse for what he had done at that time. In fact, defendant callously evaluated his conduct in his subsequent announcement to his companions that he had "just blown away two dudes." Viewing the circumstances of the murders as a whole, we hold that the trial court correctly instructed the jury upon G.S. 15A-2000(e)(9).

XVI.

[16] The sentence of death in a given case cannot be "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." G.S. 15A-2000(d)(2). Defendant argues that the infliction of the death penalty for these murders would be excessive and disproportionate punishment. We disagree. All things considered, we cannot say, *as a matter of law*, that this defendant is somehow less deserving of capital punishment than the other occupants of death row. *See, e.g., State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981); *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, --- U.S. ---, 81 S.Ct. 6143, 72 L.Ed. 2d 155 (1982); *State v. Hutchins*, 303

N.C. 321, 279 S.E. 2d 788 (1981); *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. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed. 2d 220 (1981); *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). The facts of the instant case speak for themselves and we shall not disturb the factual findings made by the jury under G.S. 15A-2000 (c) in reaching its recommendations for the death penalty in this case.

Within this argument, defendant also urged this Court to adopt several procedures to assist appellate review of the proportionality of the death sentence in a particular case. It would serve no useful purpose to address each suggestion here. Instead, we believe that all of the matters raised by defendant are adequately answered by our two-fold determination that: (1) the review mandated by G.S. 15A-2000(d)(2) (*supra*) provides a sufficient constitutional safeguard against the unconstitutional imposition of cruel and unusual punishment, and (2) the intended *ultimate* emphasis of proportionality review under G.S. 15A-2000(d)(2) is upon the independent consideration of the individual defendant and the nature of the crime or crimes which he has committed.

XVII.-XIX.

The final three "arguments" presented by defendant's appellate counsel ask us to re-examine the constitutional validity of several prior cases without advancing a single good, logical or compelling reason for doing so. Such spurious disputations lack merit, do not warrant discussion and are not well received. Even so, we shall take this opportunity to reaffirm today the constitutionality of the following aspects of our capital sentencing procedure: (1) the bifurcated trial proceedings of G.S. 15A-2000, in which the same jury determines both the guilt and punishment issues, and the use of challenges for cause to excuse therefrom prospective jurors who are unequivocally opposed to the death penalty; (2) the submission of the sufficiently clear statutory aggravating circumstance of G.S. 15A-2000(e)(9), that the capital felony is "especially heinous, atrocious, or cruel," in appropriate cases; and (3) the placement of the burden upon the defendant of persuading the jury, by a preponderance of the evidence, that a

particular mitigating circumstance exists. *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, --- U.S. ---, 81 S.Ct. 6143, 72 L.Ed. 2d 155 (1982); *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980) (and cases cited in part I of the opinion, *supra*); *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); *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979); *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979).

XX.

The decision to take a life pursuant to the law, for the life of another, or others, wrongfully taken, is a very grave and solemn matter. Thus, this Court accords the utmost diligence and care in its review of capital cases. In the instant case, we have fully considered all of the arguments in defendant's brief, which encompassed the multitudinous assignments of error and exceptions in the record on appeal. We are convinced that both phases of defendant's trial were competently conducted without the accompaniment of constitutional defect or prejudicial error, and we so hold.

We also hold that the judgments of death were lawfully imposed. The evidence supported submission of the aggravating circumstances listed in G.S. 15A-2000(e)(9) and (11). There is no indication that the jury recommended capital punishment under the influence of passion or prejudice. Finally, the penalties imposed do not seem excessive or disproportionate considering the premeditated and callous manner in which defendant calmly shot and killed two people in cold blood, suddenly and without any provocation by them, for reasons exhibiting a wanton disregard for human life. Indeed, the record impels the conclusion that justice has been done in every respect. In sum, we have no authority or cause to disturb the duly entered judgments of death.

No error.

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

Justice EXUM dissenting as to sentence.

I.

I find myself, first, in strong disagreement with the majority on an extremely important new question dealing with the construction of our death penalty statute. The majority holds, after somewhat cursory treatment and a bare-bones analysis, that under the statute, G.S. 15A-2000, if the jury finds: (1) the existence of one or more statutory aggravating circumstances, (2) that the aggravating circumstance(s) so found are sufficiently substantial to call for the death penalty and (3) the aggravating circumstance(s) outweigh the mitigating circumstances, then the jury *must* return the death penalty. Nowhere, of course, does the statute so provide. The majority construes the statute in this way on the sole ground that otherwise the statute would be subject to the constitutional attack that a jury could decide between life and death in its unbridled discretion. Yet decisions of the United States Supreme Court, none of which are mentioned in the majority's discussion, have made it abundantly clear that the majority's interpretation is not constitutionally required.

In one of its first cases construing our death penalty statute, this Court noted, "[t]he first maxim of statutory construction is to ascertain the intent of the legislature. To do this, this Court should consider the statute as a whole, the spirit of the statute, the evils it was designed to remedy, and what the statute seeks to accomplish." *State v. Johnson*, 298 N.C. 47, 56, 257 S.E. 2d 597, 606 (1979). In *Johnson*, this Court recognized that our death penalty statute was enacted following a quintet of cases all decided by the United States Supreme Court on 2 July 1976. These cases struck down mandatory death penalty statutes in North Carolina, *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion), and Louisiana, *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion), but sustained death penalty statues which, in varying degrees, sought to control the discretion exercised in capital sentencing in Georgia, *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion); Florida, *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion); and Texas, *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion). This Court noted in *Johnson* that these five cases "made clear that neither unbridled, unguided discretion *nor the absence of all discretion* in the imposition of the death penalty is constitutionally permissible." 298 N.C. at 58, 257 S.E. 2d at 607

(emphasis supplied). After further discussion of United States Supreme Court decisions and various provisions of the Model Penal Code, upon which our statute was largely based, this Court concluded in *Johnson*, 298 N.C. at 63, 257 S.E.2d at 610:

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

Regarding the question before us, the statute, G.S. 15A-2000, provides in pertinent part as follows:

> (b) Sentence Recommendation by the Jury.— . . . In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury *that it must consider* any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.
>
> After hearing the evidence, argument of counsel, and instructions of the court, *the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:*

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) *Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.*

. . . .

(c) Findings in Support of Sentence of Death.— *When the jury recommends sentence of death,* the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

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

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

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

[Emphases supplied.]

In essence, then, the statute provides that in determining whether to impose death or life imprisonment the jury "must consider" certain aggravating and mitigating circumstances; that the jury's sentence recommendation shall be "based upon" the sufficiency of the aggravating circumstance(s) and the mitigating circumstance(s) and their relative weights; and that "when the jury recommends a sentence of death," it must sign a writing in which three questions are answered affirmatively and unanimously beyond a reasonable doubt.

From this statutory scheme the legislative intent clearly emerges. The legislature has sought to strike a balance between

fairness to the individual defendant and consistency among the cases in which the death penalty is imposed. It has designed a statute which avoids the two extremes of mandatory death penalties or unbridled discretionary action by juries. The legislature intended for the jury to consider: first, the sufficiency of the aggravating circumstance(s); second, whether any mitigating circumstance(s) exist which outweigh the aggravating circumstance(s); and third, based on these considerations whether to recommend a death sentence or life imprisonment. *Only when the jury determines to recommend death* is the jury required to sign a writing which shows its affirmative, unanimous findings that one or more statutory aggravating circumstances exist beyond a reasonable doubt, that they are sufficiently substantial to make the death penalty appropriate and that the mitigating circumstances do not outweigh the aggravating circumstances.[1]. Subsection (b) states in two places that the jury's sentence recommendation is to be *based* on these considerations, not decreed by them. There is nothing in this scheme to suggest a legislative intent *to require* the jury to return a sentence of death even if it should answer the three crucial subsection (c) issues affirmatively, just as there is nothing in the statute which permits a jury to ignore the delineated considerations in its deliberations. To hold, as does the majority, that if affirmative answers in writing to these three issues are prerequisite to a jury's recommendation of death, then death *must* be recommended when the prerequisites are met is, logically, a *non sequitur.*

This logical trap is easily sprung; it caught me in my dissent in *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, --- U.S. --- (1982), where I lapsed into the same fallacy now being urged by the majority.[2] In *Rook*, however, both my dissent

1. Although the jury is not required by statute to answer these questions *unless* they recommend death, I believe documentation of the jury's findings in every capital sentencing proceeding, whether they recommend death or life, is necessary for this Court's use in conducting its proportionality review required under G.S. 15A-2000(d)(2).

2. In *Rook, supra*, I wrote:

> Indeed, in Georgia, the jury may return a death sentence upon finding one or more aggravating circumstances, no matter how it regards the mitigating circumstances. In contrast, under our statute the jury may return a death sentence recommendation only if it finds: (1) the existence of one or more ag-

and the majority opinion were addressing a different question, *i.e.*, whether the jury was required to specify which mitigating factors it found to exist. The question now being addressed was not raised in *Rook*, and any conclusion about it was not necessary to the dissent. With the benefit of briefing, argument and my own research, I am convinced that my initial conclusion on the point here in issue, as I expressed it in *Rook*, was wrong, just as I believe the majority's similar conclusion is wrong. The conclusion is not less a *non sequitur* because I once subscribed to it.

Our trial judges initially properly construed the statute to mean that if the jury answered the three issues affirmatively it could, but was not required to, recommend the death penalty. The first Pattern Jury Instruction promulgated after the statute provided that if the jury answered the crucial issues affirmatively then it "*may* recommend the death penalty." N.C.P.I. Crim. 150.10, p. 5 (June 1977) (emphasis supplied). A subsequent revision of the instruction emphasized this point by providing that the jury "*may*, although [it] need not, recommend that the defendant be sentenced to death." N.C.P.I. Crim. 150.10, p. 4 (Replacement, May 1979). These instructions, or a variation of them, have been followed in a large number of death penalty cases.[3]

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gravating circumstances; (2) that the aggravating circumstance(s) found by it are sufficiently substantial to call for the imposition of the death penalty; and (3) that *the mitigating circumstances are insufficient to outweigh the aggravating circumstances.* The clear import of our statute is that a jury, upon finding the requisite existence of aggravating circumstances and their sufficient substantiality, may not recommend life imprisonment unless it further finds that the mitigating circumstances are sufficient to outweigh the aggravating circumstances.

304 N.C. at 242-43, 283 S.E. 2d at 757 (emphasis original) (footnote omitted).

3. *See, e.g., State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981) (R. at 192, "you may recommend death"); *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979) (R. at 238, "you may recommend"); *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979) (R. at 111, "you may recommend"); *State v. Spaulding*, 298 N.C. 149, 257 S.E. 2d 391 (1979) (R. at 333, "Based upon these considerations as instructed by the Court, you will advise the court whether the defendant should be sentenced to life imprisonment or death"); *State v. Cherry*, 298 N.C. 86, 277 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980) (R. at 341, "Based upon these considerations as instructed by the Court, you will advise the Court whether the defendant should be sentenced to life imprisonment or death"); *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979) (R. at 185, "you may then recommend the death penalty"); *State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979) (R. at 276, "you may—but are not compelled to—recommend the death penalty").

After our decision in *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), the Pattern Jury Instruction for our trial judges was changed so as to provide that if the jury answered the three issues affirmatively, it would be its "duty to recommend that defendant be sentenced to death." N.C.P.I. Crim. 150.10, pp. 3-4 (Replacement, May 1980). The case cited in support of this change in the instruction is *Goodman*.

The issue in *Goodman*, however, was not whether the jury should be told it has a "duty" to recommend the death penalty if it answers the three issues affirmatively and unanimously. The issue in *Goodman* was whether, as the defendant contended, the trial court "should have explained to the jury that it had the option of returning a recommendation of life imprisonment even if aggravating circumstances were found to outweigh mitigating circumstances." Brief for Defendant Appellant at 15-16. Defendant argued that "[i]t should be incumbent upon the trial Court to explain in detail that no mandatory recommendation of the death penalty is required regardless of findings as to aggravating and mitigating circumstances set forth in the statute." *Id.*

Thus, defendant Goodman was arguing that the trial court should be required to *explain* to the jury that it could, in effect, *ignore* the considerations which by statute it must consider in recommending a life or death sentence. This goes far beyond the

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Other cases reviewed by this Court have contained instructions which went even further in telling the jury that the death sentence was not mandated by affirmative answers to the crucial issues. For example, in *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981) (R. at 668), the jury was told:

> Unless you have answered Issues One, Two, Four 'yes' you must recommend that a defendant in a given case be sentenced to life. Only if you have answered Issues One, Two and Four 'yes' may you recommend that a defendant be sentenced to death. Even then, though, you are not required to do so. You still may recommend life imprisonment. However, if you answered Issues One, Two and Four 'yes' you are, on further deliberations, satisfied beyond a reasonable doubt that the only just punishment for this defendant is—a given defendant in a given case, is the death penalty, then you may so recommend it; realizing, of course, the tremendous responsibility which rests on your shoulders when you make that recommendation.

See, also, State v. Hutchins, 303 N.C. 321, 279 S.E. 2d 788 (1981) (R. at 231, "you would then further deliberate upon your sentence recommendation"); *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980) (R. at 618, "Even though you are not required to do so, you may still recommend life in prison").

permissive instruction actually given and upheld in *Goodman*, *i.e.*, the instruction that if the jury answered the three subsection (c) issues affirmatively and unanimously, it "may then recommend the death penalty." (R. at 185).

The state's brief in *Goodman* recognizes that "the Court left the jury with the understanding that, even should they find more aggravating than mitigating circumstances, they could still recommend life imprisonment . . . . At no point did the Court state that the jury could not recommend life imprisonment when the aggravating circumstances outweighed the mitigating. What the Court was saying was that (even where such aggravating circumstances appeared to be more substantial than mitigating circumstances) the jury could still recommend life imprisonment." Brief for the state at 19-20.

The Court in *Goodman* answered the defendant's argument as follows, 298 N.C. at 34-35, 257 S.E.2d at 590:

> His argument is that without such instruction the jury will mathematically balance the two types of factors against each other and will impose the death penalty whenever aggravating circumstances outnumber mitigating ones. We do not agree that this is the manner in which a jury will reach its decision on this important question or that the instruction for which defendant contends is required by our statute.
>
> It must be emphasized that the deliberative process of the jury envisioned by G.S. 15A-2000 is not a mere counting process. *State v. Dixon, supra; State v. Stewart, supra.* The jury is charged with the heavy responsibility of subjectively, within the parameters set out by the statute, assessing the appropriateness of imposing the death penalty upon a particular defendant for a particular crime. *Nuances of character and circumstance cannot be weighed in a precise mathematical formula.*
>
> At the same time, we believe that it would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and *impose the sanction of death* at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury

under the court's instruction would be contrary to the rules of *Furman* and the cases which have followed it. For these reasons defendant's seventh assignment of error is overruled. [Emphases supplied.]

The majority's conclusion on this point in the instant case as well as the change in the Pattern Jury Instruction are based on a misreading of *Goodman*. *Goodman* simply recognized that, under the instructions as given, there would be no cause for the jury "mathematically" to balance the aggravating against the mitigating and "impose the death penalty whenever aggravating circumstances outnumber mitigating ones." *Goodman* cautioned that juries should not be instructed in a manner which would cause them to "impose the sanction of death at their own whim." *Goodman* does not support the proposition that a jury has a duty to impose the death penalty whenever it concludes that the statutory aggravating circumstances are sufficiently substantial to call for it and that the mitigating circumstances are insufficient to outweigh the aggravating. *Goodman* recognizes that given such determinations, a jury may yet opt for life imprisonment and notes that there is no way to escape some subjectivity in deciding who shall live and who shall die. Juries are called on in this kind of decision, we said in *Goodman*, to consider "[n]uances of character and circumstance [which] cannot be weighed in a precise mathematical formula."

It is for this reason that a jury ought not be required to return the death penalty simply because it answers the crucial subsection (c) issues affirmatively. Conscientious juries may determine that these issues ought to be answered affirmatively and yet, because of circumstances of the case, "nuances," if you will, not subject to articulation in a statute or a verdict and not perhaps articulable by the jurors themselves, feel impelled to recommend that the death penalty not be imposed.[4] We should

4. Indeed, juries have answered the crucial subsection (c) issues affirmatively and yet either recommended life imprisonment, *State v. King*, 301 N.C. 186, 270 S.E.2d 98 (1980); *State v. Taylor*, 298 N.C. 405, 259 S.E.2d 502 (1979); or were unable unanimously to agree on a sentence, thus requiring the judge to impose a life sentence pursuant to G.S. 15A-2000(b). *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981), on resentencing in Columbus Superior Court (Case No. 79CRS1943); *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980).

not construe our statute to require such a jury, nevertheless, to impose it.

Our statute is designed simply to insure that certain specific (subsection (c)) prerequisites are met before the death penalty is imposed. Its only prerequisites for the imposition of life imprisonment are that the jury base such a decision (subsection (b)) on a weighing against each other of various aggravating and mitigating circumstances which it may find to exist. Although the jury may not recommend death without specifically, and in writing, answering subsection (c) issues affirmatively, even if it does so it may yet recommend life.

The United States Supreme Court has made it quite clear that these kinds of death penalty or life imprisonment decisions do not result in the unbridled discretionary determinations found wanting in *Furman v. Georgia*, 408 U.S. 238 (1972)(per curiam). In *Bullington v. Missouri*, 451 U.S. 430 (1981), the Court had before it a Missouri death penalty statute very similar to ours. In *Bullington*, the Supreme Court noted that a Missouri jury "is instructed that it is not compelled to impose the death penalty, even if it decides that a sufficient aggravating circumstance or circumstances exist and that it or they are not outweighed by any mitigating circumstance or circumstances." 451 U.S. at 434-35. Although the question was not raised, there is no suggestion in *Bullington* that such a statute would be constitutionally infirm.

In *Gregg v. Georgia*, *supra*, 428 U.S. 153, the Supreme Court considered a Georgia death penalty statute which provided that the jury could return a sentence of death only if it found the existence of one of ten statutorily specified aggravating circumstances. The jury was not required to return a death sentence even if it found the existence of one or more of the ten statutorily specified aggravating circumstances and was "not required to find any mitigating circumstance in order to make a recommendation of mercy." *Id.* at 197. On appeal of his death sentence, defendant argued that because a Georgia jury had "the power to decline to impose the death penalty even if it finds that one or more

At least one jury has found ambiguity in the "Issues and Recommendation as to Punishment" form generally submitted to juries deliberating on sentences in capital cases. *State v. Lake*, 305 N.C. 143, 286 S.E.2d 541 (1981) (copy found in Case No. 80CRS5530, Onslow Superior Court).

statutory aggravating circumstances are present," the statute violated the *Furman* prohibition against unbridled discretion. *Id.* at 203. The United States Supreme Court answered by saying:

> This contention misinterprets *Furman* . . . . Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, *the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.*

428 U.S. at 203 (emphasis supplied). In answering defendant's contention that there were other discretionary decisions which could be made in the processing of a murder case which would result in some candidates for the death penalty actually escaping it, the Supreme Court said:

> Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

428 U.S. at 199. Mr. Justice White, joined by the Chief Justice and Mr. Justice Rehnquist, said in a concurring opinion in *Gregg:*

> The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy *on the basis of factors too intangible to write into a statute,* and I cannot accept the naked assertion that the effort is bound to fail.

428 U.S. at 222 (emphasis supplied).

Finally, in *Jurek v. Texas, supra,* 428 U.S. 262, the Supreme Court considered a Texas statute which required the jury to impose the death sentence if it answered three questions affirma-

tively.[5] The attack made on the Texas statute was that it created a mandatory death penalty in violation of the principles laid down in *Woodson v. North Carolina*, *supra*, 428 U.S. 280, and *Roberts v. Louisiana*, *supra*, 428 U.S. 325. The Supreme Court struggled with this question because the Texas statute appeared to have no provision for the jury to consider mitigating circumstances. "Thus," the Court said, "the constitutionality of the Texas procedure turns on whether the enumerated questions allow consideration of particularized mitigating factors." 428 U.S. at 272. The Court concluded that the jury's consideration of mitigating circumstances, under the interpretation given the second question by the Texas Court of Criminal Appeals, was encompassed in its decision on that question. *See supra* note 5. Therefore, the Court concluded that the statute was not subject to the "mandatory death sentence" attack.

Apparently under the rationale of *Jurek*, the majority's interpretation of our statute would pass constitutional muster. But I am satisfied that the interpretation for which I argue is more solidly supported in the decisions of the United States Supreme Court; whereas the majority's view, which could be supported only by *Jurek*, is at least constitutionally suspect.

Assuming that we are free under the United States Constitution to opt for either interpretation, we should adopt the one which most nearly comports with the legislature's intent as that intent is revealed in the plain words of the statute. The legislature has developed a statutory scheme designed to accommodate the twin "goals of measured, consistent application and fairness to the accused." *Eddings v. Oklahoma*, --- U.S. ---, ---, 102 S.Ct. 869, 874, 71 L.Ed.2d 1, 8 (1982). In *Goodman*, *supra*, 298

5. The questions are these:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

See 428 U.S. at 269 (quoting Tex. Code Crim. Proc., art. 37.071(b) (Supp. 1975-76)).

N.C. 1, 257 S.E. 2d 569, we held that instructions which, in effect, explained to the jury that it could ignore the procedure devised by the legislature were not authorized by our statute and would be contrary to the *Furman* standards. Likewise, instructions that tell the jury they *must* impose the death penalty if they answer certain questions affirmatively and unanimously are not authorized by our statute and fail to give appropriate weight to inarticulable, intangible "[n]uances of character and circumstances." *State v. Goodman, supra,* 298 N.C. at 34, 257 S.E. 2d at 590.

Our statute, like the Supreme Court said of its decision in *Lockett,*[6] "is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma, supra,* --- U.S. at ---, 102 S.Ct. at 874, 71 L.Ed. 2d at 8. Both the instructions disapproved in *Goodman* and those given in the instant case upset the statute's finely tuned balance between consistency and sensibility to the uniqueness of an individual. The instruction sought by the defendant in *Goodman* tilts too much in favor of individualized consideration at the expense of consistency; whereas the instruction given here tilts too much in favor of consistency at the expense of individualized consideration.

The instruction most in keeping with the legislative design and which ought to be given in all cases is that recommended by the Superior Court Judges' Pattern Jury Instruction Committee in May 1979. In that instruction jury members are told that if they answer the crucial issues affirmatively and unanimously, "you may, although you need not, recommend that the defendant be sentenced to death." N.C.P.I. Crim. 150.10 at 4.

II.

At least two jurors were excluded for cause in the instant case in violation of the limitations imposed by *Witherspoon v. Illinois,* 391 U.S. 510 (1968), an opinion by Mr. Justice Stewart. Some particularly pertinent language of this landmark case bears repeating, 391 U.S. at 519-23:

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he

6. *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion).

takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it . . . . [A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death . . . . [A] jury composed exclusively of . . . people [who believe in the death penalty] cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for [those who believe in the death penalty].

If the State had *excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death*, it could argue that the resulting jury was simply 'neutral' with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.

. . . .

Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

. . . .

To execute [such a] death sentence would deprive him of his life without due process of law. [Footnotes omitted.] [Emphasis supplied.]

Furthermore, *id.* at 522-23 n. 21,

a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty

> in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out . . . .
>
> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt.* [Emphasis original.]

The test applicable to this case then, under *Witherspoon*, for excuses for cause on death penalty opposition grounds is that the prospective juror must make it "unmistakably clear" that he or she would "automatically" vote against the death penalty "without regard to any evidence that might be developed at the trial of the case." A juror who has scruples, or reservations, or who is even opposed to capital punishment, but who is not "irrevocably committed, before the trial has begun, to vote against [it] regardless of the facts and circumstances" that might be brought out at trial, may not be excused for cause. Neither may a juror who states merely that he or she has " 'a fixed opinion against' capital punishment " or that he or she does not " 'believe in' capital punishment" be excused for cause, because such juror may yet "be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." *Boulden v. Holman*, 394 U.S. 478, 483-84 (1969). Jurors may be excused for cause, however, if their opposition to the death penalty is so strong that they cannot take an oath to "follow the law" in trying the case. *Lockett v. Ohio*, 438 U.S. 586, 595-96 (1978) (plurality opinion).

The United States Supreme Court's latest decision applying *Witherspoon* is *Adams v. Texas*, 448 U.S. 38 (1980). In *Adams* the Court made it clear that *Witherspoon* must be followed even under post-*Furman* guided discretion capital sentencing procedures. *Adams* held that because of *Witherspoon* limitations jurors may not be excused for cause on the ground that their opposition to the death penalty might "affect" their deliberations on issues of fact which might arise in the case.[7] The Court said, 448 U.S. at 46-47:

> [A] Texas juror's views about the death penalty might influence the manner in which he performs his role but without exceeding the 'guided jury discretion,' 577 SW2d, at 730, permitted him under Texas law. In such circumstances, he could not be excluded consistently with *Witherspoon*.

It said, further, 448 U.S. at 49-50, that jurors were improperly excluded

> who stated that they would be 'affected' by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. Others were excluded only because they were unable positively to state whether or not their deliberations would in any way be 'affected.' But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments. Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a

7. *See supra* note 5 and accompanying text.

reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

If only one juror is excused for cause, in violation of *Witherspoon* limitations, a sentence of death cannot stand. *Davis v. Georgia*, 429 U.S. 122 (1976)(per curiam). The *Davis* Court noted, 429 U.S. at 123:

> Unless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings,' 391 US, at 522 n 21, he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

This Court held in *State v. Bernard*, 288 N.C. 321, 325, 218 S.E.2d 327, 330 (1975), that a juror could not be excused merely because "he *thought* he would automatically vote against the imposition of the death penalty regardless of the evidence." (Emphasis original.)

Finally, the meaning of the voir dire colloquy is that which would be given it by the prospective juror rather than one trained in the law. "The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors." *Witherspoon v. Illinois*, *supra*, 391 U.S. at 515-16 n. 9 (quoted with approval in *Boulden v. Holman*, *supra*, 394 U.S. at 481-82).

Turning now to the challenges for cause here under attack, I am satisfied that prospective juror Mary Neal was excused for cause on broader grounds than *Witherspoon* permits. Neal, after an extended colloquy with the prosecutor, never expressed any categorical opposition to the death penalty. She simply said that she would have to be absolutely certain of a defendant's guilt before she could vote to impose it. That portion of the colloquy which accurately reflects her attitude is the following:

Q. Do you have any objection to the death penalty?

A. Well, that's a hard question to answer.

Q. Yes, ma'am.

A. I've never been able to answer it like a cut dried thing. It's hard for me, very hard for me to make decisions, I've never been able to make decisions very well. I had someone to help me, but I'm hard to convince too. I almost have to see something before I could really say so. That's the only way I know to answer you.

. . . .

Q. Let me ask that question a different way, Mrs. Neal, if you're a member of this jury and we get to the second part of the trial, that means you've already found him guilty of murder in the first degree in one or both cases, based on the evidence in this case, what happened in this case and based on the law that Judge Walker gives to you, as he tells you the law, if you deem it to be appropriate, could you impose the death penalty?

A. I don't think so, I really don't believe so.

Q. I understand this is a tough area, but we have to inquire about this now and everyone is entitled to their own opinion. Are you saying, ma'am, that you could not and you would not vote to impose the death penalty in this case, regardless of the evidence?

A. I don't know. I guess if it was proven to me, I guess I could.

Q. If what was proven to you?

A. I would have to be—I would have to absolute know for sure, I mean no doubt whatsoever.

. . . .

Q. As a juror, can you envision a situation where you would impose the death penalty, you're not going to be an eyewitness, you're going to have to act on what other people tell you they saw or heard.

A. Okay, already proven guilty—if I went along with the guilty part, if I decided they were guilty—no, I will not.

Q. You could not impose the death penalty regardless of what the evidence is?

A. I don't believe so.

MR. WANNAMAKER: If your Honor please, we challenge for cause.

THE COURT: I understand, Mrs. Neal. I know this is very difficult for you, but it's necessary to have your candid and frank answers and I thank you for them.

Do I understand that you could not even before you hear the testimony under any circumstances, impose the death penalty?

MARY D. NEAL: No, I just don't think so.

At most, Neal's attitude toward the death penalty "affected" her deliberations on the guilt phase of the case in the sense that she would have to be absolutely certain of defendant's guilt. "[P]rospects of the death penalty may affect what [a juror's] honest judgment of the facts will be or what [a juror] may deem to be a reasonable doubt," *Adams v. Texas, supra*, 448 U.S. at 50, without the juror's subjection on that ground to a challenge for cause. Neal never "unmistakably" said that she would not impose the death penalty, or that she would "automatically" vote for life imprisonment, regardless of what the evidence might show. She said she didn't "believe" and didn't "think" she could vote for death. She never said, absolutely, that she could or would not. She should not have been excused for cause.

Prospective juror Frank Rogers said, "I don't go for [the death penalty] too much" and "I don't think much of the death penalty." He never said he was categorically opposed to the death penalty. When asked whether he could consider imposing the death penalty, the following occurred:

A. I can consider, but as I say—

Q. You tell me you would consider it but then you wouldn't do it, is that what you are saying?

MR. HARRISON: Objection.

A. (By witness) I said I would lean toward life imprisonment, if you want me to tell the truth about it, that's what I'm doing.

At that point, the court intervened as follows:

THE COURT: Mr. Juror, are you saying that before you have heard any evidence in this case, Mr. Rogers, if the defendant should be found guilty of either charge of murder in the first degree, without hearing any evidence, that under no circumstances would you return a verdict which would result in the imposition of the death penalty?

MR. ROGERS: That is true.

Thus Rogers did not say that he could or would not impose the death penalty or that he would automatically vote for life imprisonment, regardless of evidence *that might be introduced at the trial.* He said he could not impose it under any circumstances "without hearing any evidence." Obviously, the learned trial judge was attempting to ask Rogers whether he could impose it under any circumstances regardless of what evidence adduced at trial might show, and to one trained in the law that is what the court's question might mean. To Rogers, a layman, the question could mean no more than what the words actually used by the trial judge would ordinarily convey. Roger's position, then, was simply that he could not impose the death penalty until he at least had heard some evidence in the case. The thrust of the entire colloquy seems to be that, depending on what the evidence adduced tended to show, Rogers could consider the death penalty, that he tended to favor life imprisonment, but that he would not convince himself one way or the other without hearing some evidence. Rogers should not have been excused for cause.

III.

The majority concludes that the trial court did not err in refusing to submit both in his instructions and on the written list defendant's "relatively low mentality" as a mitigating circumstance because there was no evidence to support it and, even if there had been supporting evidence, the error could not have been prejudicial. As the majority correctly notes, a defendant's

low mentality, if it exists, is "properly considered in mitigation of a capital felony."

I cannot agree with the majority that the evidence does not support defendant's "relatively low mentality" mitigating circumstance. Defendant's psychiatric witness, Dr. Billy Royal, testified that defendant scored 66 on an intelligence test; but, he said, "[w]e felt that his other tests indicated that his I.Q. was probably a little higher than that and fell at least into the low-normal range of intelligence." Apparently the majority concludes that any intelligence quotient which is within a "normal range" cannot be considered by a jury in a capital case unless it is proffered by the defendant as an absolute score on an intelligence test. The majority concludes that if it is proffered under the label "relatively low mentality," rather than as a raw score, it may not be considered.

I simply cannot subscribe to, nor do I really understand, the distinction drawn by the majority. Any kind of absolute score on an intelligence test, in order to be meaningful to a lay jury or for that matter to lawyers and judges, needs explanation by competent expert testimony. The testimony in this case was that defendant's intelligence was in the "low-normal range." Defendant asked that his "*relatively* low mentality" be submitted as a mitigating circumstance. The evidence supports that he did have a "*relatively* low mentality." It should be for the jury to assess this quality in terms of its mitigating effect. It is not for the court to say that the jury could not, as a matter of law, consider a person's "relatively low mentality" as a mitigating circumstance because the mentality is within the outer limits of "normal." To me, the phrase "relatively low mentality" accords precisely with the evidence which was introduced. A person whose intelligence is in the low-normal range must perforce have a relatively low mentality. Contrary to the majority's conclusion, the terms are synonymous.

Neither on this record am I able to say that not permitting the jury to consider this mitigating circumstance was harmless beyond a reasonable doubt. Not to permit a jury to consider any relevant mitigating circumstance is an error of constitutional dimension. *Eddings v. Oklahoma*, *supra*, --- U.S. ---, 102 S.Ct. 869, 71 L.Ed.2d 1; *Lockett v. Ohio*, *supra*, 438 U.S. 586. Before we

can deem such an error harmless, we must be satisfied "that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); G.S. 15A-1443(b). The burden is upon the state to so demonstrate. *Id.*

Of the ten mitigating circumstances submitted, we know from the record only that the jury found "one or more." We do not know how many beyond one it found. It is possible that the jury found only one mitigating circumstance to exist out of the list of ten. If it did, the failure to submit an additional mitigating circumstance which should have been submitted and which the jury could have found to exist might well have made a difference in the jury's ultimate recommendation. At least I cannot say beyond a reasonable doubt that it would not have made a difference.

The United States Supreme Court has recently recognized that a youthful defendant's mental development is a significant mitigating circumstance. *Eddings v. Oklahoma*, *supra*, was a capital case in which, under Oklahoma procedure, the sentencing decision was made by the trial judge. The judge, after hearing evidence, found all of three alleged aggravating circumstances to exist beyond a reasonable doubt. He also found that the youth of the defendant (age sixteen) was a mitigating circumstance "of great weight." The trial judge, however, did not believe he could consider "*the fact of this young man's violent background.*" *Id.* at ---, 102 S.Ct. at 873, 71 L.Ed. 2d at 7 (emphasis original). For failure of the trial judge to consider this additional mitigating circumstance, the United States Supreme Court set aside the death penalty and remanded for further proceedings. The Court said, *id.* at ---, 102 S.Ct. at 877, 71 L.Ed. 2d at 12:

> [J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background *and mental* and emotional *development* of a youthful defendant be duly considered in sentencing. [Emphases supplied.]

In the case at bar the trial judge's refusal to submit and instruct on defendant's "relatively low mentality" as a mitigating circumstance deprived the defendant of his right to have the jury consider his "mental . . . development." The error was not cured by submitting to the jury the catchall language of the tenth mitigating circumstance when it was unaccompanied by any

specific instruction relating to the particular circumstance of defendant's low mentality.

For the foregoing reasons, I vote to vacate the death sentence imposed in this case and to remand for a new sentencing hearing. I concur in the majority's conclusion that there was no prejudicial error in the guilt phase of the case.

IV.

This is yet another in a growing number of cases in which a majority of the Court has affirmed the death penalty and in conducting its statutorily mandated "proportionality review" of the death sentence has failed to advise the bar of the manner in which it conducts such a review. The majority, unlike courts in other jurisdictions which have statutes similar to ours, has yet to tell the bar whether its review is based on comparisons with those cases in which the death sentence was imposed at trial and affirmed on appeal, or with those cases in which the jury could have recommended the death penalty but instead recommended life imprisonment and which have been reviewed on appeal, or with cases from some other kind of pool. It is time for the majority to declare itself on this important question, and I urge it to use as a pool for comparison purposes all cases tried under the new death penalty statute, whether the jury recommended death or life imprisonment and which have been reviewed on appeal by this Court.

The statute, G.S. 15-2000(d)(2), requires us to impose a life sentence if we find that a death sentence imposed by the trial court "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." This language is identical to language in Georgia's death penalty statute. *See* Ga. Code Annot. § 27-2537(c)(3) (1978). The Georgia Supreme Court looks to all appealed murder cases, whatever the sentence imposed, in making its comparisons. *Ross v. State*, 233 Ga. 361, 365-66, 211 S.E. 2d 356, 359 (1974), *cert. denied*, 428 U.S. 910 (1976).[8] In sustaining the Georgia death penalty statute, the

8. The Georgia Supreme Court also noted "that nothing in the statute forecloses this court during the course of its independent review from examining non-appealed cases and cases in which the defendant pleaded guilty to a lesser offense." *Ross v. State, supra*, 233 Ga. at 366, 211 S.E. 2d at 359.

United States Supreme Court relied on the Georgia Supreme Court's proportionality review safeguard. Of it, the United States Supreme Court said in *Gregg v. Georgia, supra*, 428 U.S. at 206:

> In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. *If a time comes when juries generally do not impose the death sentence in a certain kind of murder case*, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death. [Emphasis supplied.]

The Florida Supreme Court in conducting its proportionality review also compares all appealed murder cases, including those where a sentence less than death was imposed. It has concluded that ignoring life sentences imposed in factually similar cases would make its review procedure constitutionally defective. *McCaskill v. State*, 344 So. 2d 1276 (Fla. 1977) (per curiam).

The plain words of our statute require that we compare the case before us not only with similar cases in which the death penalty has been imposed but with similar cases in which the jury was permitted to consider it but decided instead to recommend life imprisonment. The basic purpose of proportionality review is to make sure that the death sentence in the case before us is not "excessive" to sentences "imposed in similar cases." If we look for comparison only to cases in which the death penalty has been imposed, the sentence in the case under review could never be excessive because one death sentence never "exceeds" another. It is only by comparing the case being reviewed in which a death sentence was imposed with other similar cases in which life was imposed that we can determine whether the death penalty in the case being reviewed is really excessive to the penalty being imposed in similar caes. For, to reiterate what the Supreme Court said in *Gregg v. Georgia, supra*, if there are certain kinds of murder cases in which our juries are generally not recommending death, then an occasional death sentence imposed in those kinds of cases ought to be set aside by this Court.[9]

9. In my dissenting opinion in *State v. Rook, supra*, 304 N.C. at 245-46, 283 S.E. 2d at 758-59, I pointed out that rarely do juries in this state impose the death penalty in cases where a defendant was found to have been under the influence of a mental or emotional disturbance or whose capacity to appreciate the criminality of

We ought not limit ourselves only to cases where the death sentence was imposed and affirmed. To do so means that we only ask whether the case under review is as bad as the other death cases. The legislature intended us not only to make that determination but also to determine whether the case under review is more deserving of the death penalty than similar cases in which life sentences have been imposed. The statute's plain language requires that we make both kinds of comparisons. Of the two, the latter is the more meaningful and is probably constitutionally required.

Further, by using only other death sentence cases affirmed on appeal, the Court severely limits the pool of cases available for comparison. Since the effective date of our capital punishment statute, 7 June 1977, there have been only six such cases. *See State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981); *State v. Rook, supra*, 304 N.C. 201, 283 S.E. 2d 732; *State v. Hutchins, supra*, 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. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980). The statute requires that we compare factually "similar" cases. Similar cases for comparison purposes are simply not present in such a small sampling. The Court should want to expand, rather than restrict, the pool of cases so that truly similar cases will be more quickly available and we can begin to make the comparisons which the statute requires.

The bar is entitled to know upon what basis we are conducting the proportionality review mandated by the statute. Defendant Pinch has expressly and reasonably requested that we provide this knowledge. We should grant the request. We should not continue to keep the manner in which we perform this duty shrouded in mystery.

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his conduct or to conform his conduct to law was impaired. I suggested that this Court should be slow to affirm death penalties in which either of these mitigating circumstances was found to exist because the penalty might well be excessive to the penalty imposed generally by juries in these kinds of cases.

Justice CARLTON concurring.

I concur with the majority opinion. However, I wish to add that I agree with the views expressed by Justice Exum in section IV. of his dissenting opinion. In my opinion, the comparison pool for proportionality review for first degree murder cases should include all cases tried under the present death penalty statute which have been affirmed on appeal by this Court, regardless of the punishment imposed. I think it is time for this Court to address this issue.

Chief Justice BRANCH joins in this concurring opinion.

STATE OF NORTH CAROLINA v. MILAN ALBERT LEDUC

No. 115A81

(Filed 2 June 1982)

1. Criminal Law § 58— comparison of signatures by jury without opinion testimony

A jury may compare a known sample of a person's handwriting with handwriting on a contested document and thereby determine whether the handwriting is the same on both without the aid of competent lay or expert testimony when the trial judge first satisfies himself (1) that one of the handwritings is genuine and (2) that there is enough similarity between the genuine handwriting and the disputed handwriting to permit a jury reasonably to infer that the disputed handwriting is also genuine. Therefore, the trial court properly permitted the jury to compare known samples of defendant's handwriting with the signature on a charter agreement without the aid of competent opinion testimony to determine whether defendant signed the charter agreement.

2. Conspiracy § 2.1; Narcotics § 4— conspiracy to possess marijuana—inference upon an inference—insufficiency of evidence

The State's evidence was insufficient to support a jury verdict finding defendant guilty of conspiracy to possess 22.4 pounds of marijuana where there was direct evidence only that a boat with marijuana aboard was met shortly after its arrival at a point in Dare County by unknown persons, the jury could infer from a comparison of the signature on the charter for the boat with known samples of defendant's handwriting that defendant was the person who arranged for and executed the charter, and the jury could infer from defendant's fingerprints found on board the vessel, the places where these prints were found, and defendant's Coast Guard license application that defendant participated in navigating the boat and was on board at the time

marijuana was being transported, but it was only by building on these inferences that the jury could further infer that defendant participated in an unlawful agreement to possess the marijuana.

3. Criminal Law § 106.2—sufficiency of circumstantial evidence—inference upon an inference

In circumstantial evidence cases inferences may not be built upon inferences in order for the fact-finder to reach the ultimate facts upon which guilt must be premised.

Justices MEYER and MITCHELL took no part in the consideration or decision of this case.

BEFORE *Judge Fountain*, presiding at the 15 May 1978 Criminal Session of DARE Superior Court defendant was tried on separate indictments charging him with both possession of and conspiracy to possess 22.4 pounds of marijuana. He was found guilty of the conspiracy charge and sentenced to five years imprisonment. The Court of Appeals,[1] with a divided panel, ordered a new trial. The state appeals pursuant to G.S. 7A-30(2). This case was originally argued as No. 127, Fall Term 1980.

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

Gerald F. White and Larry G. Turner, attorneys for defendant appellee.

EXUM, Justice.

In this appeal the state challenges the holding of the Court of Appeals, upon which it ordered a new trial, that the trial court erred in admitting into evidence a boat charter agreement having a signature, "Milan LeDuc" affixed as "charterer," and then permitting the jury to compare known samples of defendant's handwriting with the signature on the charter agreement without the aid of competent opinion testimony.

The Court of Appeals interpreted G.S. 8-40, which deals with "proof of handwriting by comparison," and our rules of evidence, to prohibit handwriting comparisons by a jury unaided by competent lay or expert testimony. Defendant argues that the Court of Appeals was correct in holding that the charter agreement was

1. 48 N.C. App. 227, 269 S.E. 2d 220 (1980).

improperly admitted. In addition, defendant makes several cross-assignments of error under Rule 10(d) of the Rules of Appellate Procedure. The most significant assignment of error is that the evidence is insufficent to support the verdict;[2] therefore, argues defendant, the Court of Appeals erred in sustaining the trial court's denial of his motion to dismiss.

We decide that the Court of Appeals incorrectly concluded that the jury could not compare the handwriting samples without the benefit of opinion testimony, and that it was also error to sustain the trial court's denial of defendant's motion to dismiss. Defendant's conviction is, therefore, reversed.

The state's evidence tends to show as follows:

On 26 April 1977, a man who identified himself as Milan A. LeDuc (herein "LeDuc") chartered the Frances Ann, a sixty-five-foot fishing trawler, from its owners, two commercial fishermen, Andrew Tiner and Charles Daniels, in Fort Myers Beach, Florida. The trawler was then located at Bayou La Batre, Alabama. Tiner and Daniels had purchased the trawler on 14 April 1977. "LeDuc" had on 14 April first approached Tiner and Daniels at Bayou La Batre and told them he had earlier wanted to buy the trawler and wished to charter it. At a later meeting in Tampa, Florida, the parties agreed orally on a charter agreement which was consummated in writing on 26 April in Fort Myers Beach. The charter provided for a term of three months at a rental of $3500 per month, the first month's rent payable in advance. It also called for a $1000 security deposit. "LeDuc" paid only the $1000 security deposit in cash. Neither Tiner nor Daniels saw "LeDuc" sign the charter. "LeDuc" brought the charter to them at some point in the negotiations with the signature "Milan LeDuc" already affixed. Upon the request of Tiner and Daniels for some identification, "LeDuc" produced a Florida driver's license bearing the name "Milan A. LeDuc" and a photograph that appeared to be

2. Defendant also contends that the evidence used at trial was the product of an illegal search and should have been excluded; the admission of an application to the Coast Guard for a boat operator's license purportedly made by defendant violated certain of defendant's constitutional rights; the district attorney argued improperly to the jury about defendant's failure to testify and corrective instructions were inadequate; testimony of a state's witness was incompetent; and, finally, the jury instructions did not sufficiently define the element of willfulness in a conspiracy charge and failed to give equal stress to the contentions of each side.

that of "LeDuc." At all these meetings "LeDuc" was accompanied by the same two companions who were introduced only by their first names, which Tiner and Daniels could not recall. "LeDuc" told Tiner and Daniels that he wanted the trawler for sponge diving. Daniels had noticed diving equipment in a truck driven by "LeDuc." Neither Tiner nor Daniels could identify defendant as being "LeDuc." Daniels testified that defendant was "not the same man"; there was a "likeness, that's all." According to Tiner and Daniels, the hold of the boat was freshly painted when they bought it and there was nothing to indicate that marijuana had ever been aboard.

On 18 May 1977, between 2 and 2:30 a.m., the Frances Ann was observed moored at the dock at Stumpy Point, Dare County, North Carolina, by Raynor Twiford, a commercial fisherman who lived nearby. The boat had not been there at 10 p.m. on 17 May. Twiford observed an unidentifiable truck approach "from towards Engelhard on U.S. 264." He heard noises "similar to what it would be if they were unloading something off a boat." The truck remained in position "20 minutes at the most," then "pulled out . . . headed North on Highway 264." After this truck left the scene Twiford observed three unidentified persons come "from the direction of the Frances Ann," leave the dock and go to a nearby unlocked building where they remained about five minutes. These persons then returned to the dock and left in what sounded like a second pickup truck. Twiford could not say whether these persons were men or women.

On 22 May 1977, Leland Wise, a long-time Stumpy Point resident, who had also been observing the Frances Ann since 18 May, reported its presence at the dock to the sheriff. Wise had observed that the Frances Ann, although a fishing trawler, was not rigged for fishing and was not moored in a manner that would adequately secure the boat to the dock. There were no spring lines; there were only one light stern line and one light bow line used to moor the trawler. The door and windows to the deckhouse were open and the lights were left on.

Investigation of the vessel by law enforcement officers revealed the following: It was unoccupied. Twenty-two and four-tenths pounds of marijuana were discovered in the captain's quarters. Of some thirty latent fingerprints lifted from the vessel

and its contents, eighteen were defendant's, one was that of an investigating deputy sheriff, and the others could not be identified. Defendant's prints were found on a Caribe 55 radio, a coffee cup located in the wheel room just to the right of the wheel, a coffee can located on a cupboard by the stove, a coffee pot located on the stove in the galley, an Aunt Jemima pancake box located on a cupboard in the galley, an oil can, a cardboard Duracell battery box, a Hormel sausage wrapper located in a trash can, and a blank page in a navigational notebook. A small quantity of meat inside the sausage wrapper appeared "fairly fresh." Because of the high humidity which gives fingerprints a "shorter life span" and the nature of "the articles they were on," the fingerprint expert's opinion was, "the prints could not have been there for a very long period of time." The maximum time was "two weeks."[3] The vessel was equipped with navigational equipment suitable for the high seas. Marijuana seeds and green vegetable debris were found in the hold areas. Burlap bag indentations were located on the bulkheads rising five to six feet in two larger holds, and three to three and one-half feet in a smaller hold. The combined volume of the holds was 370 cubic feet. Three bunks on board appeared to have been slept in, and there were three soiled plates in the galley.

From entries in a navigational notebook and various charts found on board, it appeared that the Frances Ann was positioned in Mobile Bay, Alabama on 28 April 1977, then traveled to an area off the north coast of Colombia and Venezuela, and then up the east coast of the United States to Stumpy Point.

Finally, the state offered the charter agreement with the signature "Milan LeDuc" affixed thereto as "charterer," three

3. On cross-examination the witness testified as follows:

Q. Approximately two weeks? It could be three weeks?

A. Yes, sir.

Q. It could be one week?

A. Yes, sir.

Q. It could be four weeks?

A. Yes, sir, it could.

Q. It could be one day?

A. Yes, sir.

samples of defendant's handwriting and signature obtained from him by investigating officers, and a court document bearing defendant's signature, all for the purpose of the jury's "comparing the signatures on the five separate documents pursuant to North Carolina General Statutes 8-40." This Court has examined these documents. In our opinion the known signatures of defendant are sufficiently similar to that on the charter agreement to permit a jury reasonably to infer that defendant signed the charter agreement.

Defendant offered no evidence, but moved to dismiss for insufficiency of the state's evidence. This motion was denied.

The jury acquitted defendant of the charge of possession of marijuana but convicted him of the charge of conspiracy to possess marijuana.

I.

[1] The first question we address is whether at trial the fact-finder may compare a known sample of a person's handwriting with handwriting on a contested document and thereby determine whether the handwriting is the same on both without the aid of competent lay or expert testimony. The Court of Appeals, in *State v. Simmons*, 8 N.C. App. 561, 563, 174 S.E. 2d 627, 629 (1970), and in the instant case, decided that "neither G.S. 8-40 [the applicable statute], nor our rules of evidence, permits the jury, unaided by competent opinion testimony, to compare writings to determine genuineness." We disagree. After examining our common law evidentiary rules, our statute, and the law in other states, we conclude the question should be answered affirmatively.

In order to understand current North Carolina law on handwriting comparison by the jury, it is necessary to emphasize that historically three separate questions have arisen. First, there is the question of the competency of a given witness to express an opinion on the genuineness of a contested writing. Second, there is the question of what may serve as a standard of comparison. Finally, there is the question of the right of the jury to compare a standard with a contested writing. Unfortunately, the Court has inadvertently confused these three questions in several cases. *Martin v. Knight*, 147 N.C. 564, 577, 61 S.E. 447, 453 (1908).

Originally, a person was permitted to give his opinion on the authenticity of a contested writing if he had "seen the party write or [had] obtained a knowledge of the character of his writing from a correspondence with him upon matters of business or from *transactions* between them." *Pope v. Askew*, 23 N.C. (1 Ired.) 16, 20 (1840). Essentially, the witness was allowed to compare a contested writing with an exemplar in his mind based on previous sufficient observation. *Id.*

The group of lay people allowed to testify also has been held to include those persons whose familiarity with an individual's handwriting was based on observation of the author's handwriting in ancient documents. Such a witness is allowed to testify on the authenticity of a document even though he is not an expert in handwriting analysis if he has had "full opportunity and frequent occasion to examine them." *Nicholson v. Lumber Co.*, 156 N.C. 59, 66-67, 72 S.E. 86, 88 (1911). Furthermore, a lay witness may given an opinion on the authenticity of a contested document even though he has never actually seen the author write if he has otherwise gained sufficient awareness of the author's handwriting through observation of documents that are not necessarily "ancient" documents. *See Tuttle v. Rainey*, 98 N.C. 513, 4 S.E. 475 (1887).

Subsequently, a third type of witness, the expert, was allowed to testify on the authenticity of a given handwritten document if he qualified because of his skill in handwriting analysis. *Yates v. Yates*, 76 N.C. 142 (1877). Many of the witnesses who were allowed to testify as experts, particularly in the early cases, had "mediocre qualifications." 2 Stansbury, North Carolina Evidence § 198 (Brandis rev. 1973). For example, in *Yates, supra*, 76 N.C. at 145, the expert's status as such was based on his experience as a clerk, storekeeper, county sheriff, and clerk of court of the county. *See also Abernethy v. Yount*, 138 N.C. 337, 50 S.E. 696 (1905) (stenographer who had studied penmanship and was assistant to clerk of court qualified as expert); *Kornegay v. Kornegay*, 117 N.C. 242, 23 S.E. 257 (1895) (merchant and registrar of deeds qualified as expert); *State v. DeGraff*, 113 N.C. 688, 18 S.E. 507 (1893) (bookkeeper and secretary and treasurer of city qualified as expert); *Tunstall v. Cobb*, 109 N.C. 316, 14 S.E. 28 (1891) (bank cashier qualified as expert). As with other experts, the trial court certifies the witness as an expert, but the weight to be given the testimony is for the fact-finder. 2 Stansbury, *supra* at § 198.

The expert witness, unlike the lay witness, need not have any familiarity with the handwriting at issue before the beginning of the controversy. At trial, he compares the handwriting on the contested document with a genuine standard. Based on this comparison he gives his opinion on the authenticity of the contested document.

The question of what may serve as a standard for comparison was originally answered very narrowly. Only writings received in evidence and admittedly genuine or which the party whose handwriting is at issue was estopped to deny or had conceded were genuine could be used as exemplars. *Tunstall v. Cobb, supra*, 109 N.C. at 321, 14 S.E. at 29. In *Abernethy v. Yount, supra*, the Court held that it was not necessary to put into evidence a document bearing a signature admitted to be genuine in order for an expert to compare its signature with a signature of challenged authenticity. The rule continued, however, that no writings could be used as standards for comparison which required proof that they were genuine. *Boyd v. Leatherwood*, 165 N.C. 614, 81 S.E. 1025 (1914).

The question of what the jury may see when the authenticity of a document was challenged was originally answered so as to prohibit jury examination of the documents either during or after the witness testimony. *See, e.g., Fuller v. Fox*, 101 N.C. 119, 7 S.E. 589 (1888); *Outlaw v. Hurdle*, 46 N.C. (1 Jones) 150, 165 (1853) ("A jury is to *hear* the evidence, but not to *see* it"). In *Martin v. Knight*, 147 N.C. 564, 61 S.E. 447 (1908), however, the *Fuller* and *Outlaw* opinions were scrupulously examined and the Court concluded that the real point decided in those cases "is that the jury may not take the papers with them into the jury room for the purpose of making the comparison." 147 N.C. at 579, 61 S.E. at 452. The Court further reasoned that "[t]o restrict the witness to an explanation and description of loops, curves, lines, shades, etc., etc., found in two letters which he is comparing, concealing from the jury the very object about which he is talking, seems to us both unreasonable and unsafe as a means of enlightening them." *Id.* at 578, 61 S.E. at 452. The Court also noted, *id.* at 578-79, 61 S.E. at 452, that:

> It was supposed in the past that the average juror was not sufficiently intelligent—educated—to comprehend the fine

> shades of difference in handwriting. Whatever may be thought of the soundness of the reason in the past, it is manifest that it has but little force at this time. As education and intelligence have increased and the methods of illustration improved, the capacity of the 'average man' to write and pass upon the handwriting of others has advanced.

Thus, the Court concluded that an opinion witness, expert or not, should be allowed to show the disputed and genuine writings to the jury and explain why he thinks there was or was not a difference in the writings. *Id.* at 577-78, 61 S.E. at 452. The Court made it clear that the jury should not be allowed to compare handwritings without the aid of testimony about the authorship of the documents. *Id.* at 579-80, 61 S.E. at 453.[4] In its opinion the Court recognized that England and many of the states had passed statutes allowing juries to compare documents as a means of illustrating the testimony of witnesses. It also commented that "[t]he subject is of sufficient importance to justify the attention of the Legislature." *Id.* at 580, 61 S.E. at 453.

In 1913 our legislature joined those of a number of states with statutes governing handwriting comparisons when it adopted language substantially similar to that used in the English statute. *Compare* Act of Mar. 5, 1913, ch. 52, 1913 N.C. Sess. Laws 98 *with* The Common Law Procedure Act, 1854, 17 & 18 Vit., ch. 125, § XXVII. Our statute, currently codified as G.S. 8-40, states:

> In all trials in this State, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute . . . .

This statute has been interpreted several times by this Court since its passage as changing the common law in several respects.

4. *See also Nicholson v. Lumber Co., supra*, 156 N.C. at 67-68, 72 S.E. at 86 (jury could not take documents to jury room for inspection during their deliberations); *Boyd v. Leatherwood, supra*, 165 N.C. 614, 81 S.E. 1025 (unaffected by statute passed in 1913).

In *Bank v. McArthur*, 168 N.C. 48, 84 S.E. 39 (1915), the Court noted that the new statute allowed a party to hand the jury the disputed document and a genuine standard for their independent examination, unlike the previous rule that only allowed a witness to show the documents to the jury as he explained his testimony. The jury in *Bank* was given various papers to inspect after a witness had testified on which signatures were genuine. The Court went on, however, to read the statute restrictively with regard to another issue. It held that the nonexpert witness could not be cross-examined by showing him several signatures and asking him to choose the genuine one. The Court reasoned that comparisons were only allowed between genuine and disputed writings, thus other fictitious signatures could not be used to test a witness' expertise. *Id.* at 58, 84 S.E. at 39. Furthermore, imitations of the genuine signatures could not be used to show how easily they could be forged. *Id.*

In *Newton v. Newton*, 182 N.C. 54, 108 S.E. 336 (1921), G.S. 8-40 was viewed as changing the common law rule regarding what may be used as a standard for comparison. The *Newton* Court concluded that under the statute, testimony could be used to satisfy the judge that "there is *prima facie* evidence . . . of the genuineness of writing admitted as a basis of comparison, and then the testimony of the witnesses and 'the writings' . . . themselves are submitted to the jury." *Id*, at 55, 108 S.E. at 336.

Subsequent cases have recognized that the statute liberalized the common law in some respects and have tended to answer specific questions permissively rather than restrictively. For example, in *Gooding v. Pope*, 194 N.C. 403, 140 S.E. 21 (1927), the jury was allowed to examine with a magnifying glass the handwriting on a contested receipt and on papers with genuine signatures while counsel were making their arguments. Then, on the jury's request, the trial court allowed the papers and the magnifying glass to be sent to the jury room for their use in deliberations. On appeal, this Court said that the decision to permit the jury to take writings into the jury room "is a matter resting in the sound discretion of the trial court." *Id.* at 405, 140 S.E. at 22.

In re Will of McGowan, 235 N.C. 404, 70 S.E. 2d 189 (1952), concerned the question whether certain checks could be used as

standards for comparison with a contested handwriting on a purported will even though the checks had not been offered into evidence. The Court held that the rule stated in *Abernethy v. Yount, supra*, 138 N.C. 337, 50 S.E. 696, permitting such comparison had not been changed by the passage of G.S. 8-40. The Court recognized that although the statute had changed common law rules in some respects, it did not construe it as changing the *Abernethy* rule.

Thus we reach the question raised in the instant appeal. In our view the plain words of G.S. 8-40 do not prohibit handwriting comparisons by the jury without the aid of opinion testimony. The statute states "a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, *and such writings and the evidence of witnesses* respecting the same *may be submitted to the court and jury.*" (Emphasis supplied.) The statute does not mandate that writings be submitted *only with* evidence of witnesses; it merely states that writings and testimony may be submitted to the trier of fact as evidence of the authenticity of a contested document.

Even though the statute does not expressly prohibit comparison, it is clear that under our common law rules of evidence the jury was not allowed to compare handwritings without the aid of testimony. *Martin v. Knight, supra*, 147 N.C. at 579-80, 61 S.E. at 453. Because there is not a clear legislative declaration on this issue, however, "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) (modified common law rule regarding competency of spouses to testify against each other in criminal proceeding).

We believe there are sound reasons for modifying the common law rule at issue. During the period in which this rule developed, many jurors had little or no education and little daily experience with handwriting comparison. But it was noted in *Martin v. Knight, supra*, 147 N.C. at 579, 61 S.E. at 452, that by the turn of the century the "capacity of the 'average man' to write and pass upon the handwriting of others [had] advanced." We think this is even more true of the average juror today. As the

Minnesota Supreme Court stated in *State v. Houston*, 278 Minn. 41, 44, 153 N.W. 2d 267, 269 (1967):

> Whatever may have been the experience and competence of common-law jurors to assess the genuineness of signatures, we are of the opinion that this aptitude is one which today most laymen have been obliged to develop in conducting their own affairs. With the widespread use of credit cards and travelers' checks, merchants and others in the field of commerce are frequently confronted with the necessity of comparing signatures. In the light of this common experience and exposure, we hold that a factfinder may, in the discretion of the court, be permitted to resolve the issue of forgery without expert assistance. Under our law it is not incumbent on jurors to accept an expert's opinion blindly. They must come to their conclusion on the basis of their own observations and experience and assessment of all the evidence before them.

In short, the average juror today, through increased education and experience, is as prepared to compare handwriting as many witnesses qualified as experts in earlier cases. *See, e.g., Yates v. Yates, supra*, 76 N.C. 142; *Tunstall v. Cobb, supra*, 109 N.C. 321, 14 S.E. 29.

Furthermore, under present rules, common law and statutory, the jury is permitted to compare documents in evaluating and weighing the witness' testimony, both expert and lay. The jury's determination of the weight it gives such testimony, particularly when testimony conflicts, must be colored by the jury's own comparison of the various documents before it.

Finally, a number of jurisdictions, either by statute or case law, have made the decision to allow a jury to compare writings unaided by testimony. *See, e.g., Parker v. State*, 12 Md. App. 611, 280 A. 2d 29, 30 (1971); *Mitchell v. Mitchell*, 24 Wash. 2d 701, 166 P. 2d 938 (1946); Fed. R. Evid. 901(b)(3); Cal. Evid. Code § 1417 (West 1966). *But see R. v. O'Sullivan*, [1969] 2 All. E.R. 237 (England); *Clark v. State*, 114 So. 2d 197 (Fla. 1959).

Before handwritings can be submitted to the jury for its comparison, however, the trial judge must satisfy himself that one of the handwritings is genuine. The statute so provides. We hold, in

addition, that the trial judge must also be satisfied that there is enough similarity between the genuine handwriting and the disputed handwriting, that the jury could reasonably infer that the disputed handwriting is also genuine. Both of these preliminary determinations by the trial judge are questions of law fully reviewable on appeal. In the instant case, the samples shown to the jury for comparison with the disputed charter were given by the defendant himself. Having examined these samples with the disputed signature on the charter, we are satisfied that there is enough similarity between them for the documents to have been submitted to the jury for its comparison.

Thus, we conclude that the charter agreement was properly submitted to the jury for comparison with handwriting exemplars executed by defendant.

II.

[2] We now turn to the question whether there was sufficient evidence that defendant conspired with others to possess 22.4 pounds of marijuana to survive defendant's motion to dismiss.

The test of the sufficiency of evidence in a criminal case has been articulated by the United States Supreme Court as whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis original). We stated in *State v. Locklear*, 304 N.C. 534, 538, 284 S.E. 2d 500, 502 (1981), after quoting the above language from *Jackson v. Virginia*, that "in substance our test is that 'there must be substantial evidence of all material elements of the offense' in order to create a jury question on defendant's guilt or innocence.[5] As stated in *State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980):

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury

5. For a clear and accurate summary of different articulations of what essentially is the same test and a conclusion that the better articulation is that there must be "substantial evidence" of each element of the crime, see *State v. Smith*, 40 N.C. App. 72, 77-78, 252 S.E. 2d 535, 539 (1979) (cited with approval in *State v. Powell, supra*, 299 N.C. at 98-99, 261 S.E. 2d at 115).

to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

In addition to producing substantial evidence of each of the material elements of the particular offense, the state must produce substantial evidence that the defendant committed it. *In re Vinson*, 298 N.C. 640, 656, 260 S.E. 2d 591, 602 (1979). *See also State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960). If the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed. . . . This is true even though the suspicion so aroused by the evidence is strong." *In re Vinson, supra*, 298 N.C. at 657, 260 S.E. 2d at 602 (citations omitted).

A criminal conspiracy has been defined in this state as "an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Abernathy*, 295 N.C. 147, 164, 244 S.E. 2d 373, 375 (1978). *Accord State v. Bindyke*, 288 N.C. 608, 615, 220 S.E. 2d 521, 526 (1975); *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933). "[N]o overt act is necessary to complete the crime of conspiracy. As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *State v. Bindyke, supra*, 288 N.C. at 616, 220 S.E. 2d at 526. Furthermore, the agreement may be "a mutual, implied understanding" rather than an express understanding. *State v. Abernathy, supra*, 295 N.C. at 164, 244 S.E. 2d at 375.

Although no overt act or express agreement is required, the state must prove defendant's "intent to accomplish some crime or unlawful purpose, or to bring about some end, not in itself criminal or unlawful, by criminal or unlawful means." *State v. Wrenn*, 198 N.C. 260, 263, 151 S.E. 261, 262 (1930). In order to have jurisdiction over the crime the state must also prove that either the agreement itself was formed or some act furthering the ends of the conspiracy occurred within the borders of the state. The rationale behind allowing jurisdiction for a prosecution for conspiracy by a state in which any one of the conspirators commits an overt act in furtherance of the unlawful agreement "is

that the conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design." *State v. Goldberg*, 261 N.C. 181, 203, 134 S.E. 2d 334, 349 (1964).

In order to be guilty as a conspirator, therefore, it is not necessary that a defendant "personally participate in the overt act," but it must "be established by competent evidence that he entered into an unlawful confederation for the criminal purposes alleged." *State v. Andrews*, 216 N.C. 574, 577, 6 S.E. 2d 35, 37 (1939) (quoted with approval in *State v. Carey*, 285 N.C. 497, 503, 206 S.E. 2d 213, 218 (1974)). The conspiracy may be proved by circumstantial as well as direct evidence. *See State v. Phillips*, 240 N.C. 516, 521, 82 S.E. 2d 762, 766 (1954). "It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside, supra*, 204 N.C. at 712, 169 S.E. at 712. Although a conspiracy may be proved by circumstantial evidence alone, " 'there must be such evidence to prove the agreement directly or such a state of facts that an agreement may be legally inferred. Conspiracies cannot be established by a mere suspicion, nor does evidence of mere relationship between the parties or association show a conspiracy.' " *State v. Phillips, supra*, 240 N.C. at 521, 82 S.E. 2d at 766 (quoting with approval *Johnson v. State*, 208 Ind. 89, 96, 194 N.E. 619, 621 (1935)).

Permissible inferences, moreover, do not include those based upon other inferences. "[C]harges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what [has been] called a dragnet to draw in all substantive crimes." *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943); *accord State v. Fair*, 291 N.C. 171, 173-74, 229 S.E. 2d 189, 190 (1976); *State v. Parker*, 268 N.C. 258, 262, 150 S.E. 2d 428, 431 (1966).

Although it is not necessary for the state to prove defendant personally possessed marijuana[6] in order to convict him of conspiracy to possess marijuana, *see, e.g., State v. Andrews, supra*, 216 N.C. 574, 6 S.E. 2d 35, it is necessary to offer evidence from

6. We need not discuss the question whether the evidence was sufficient to convict defendant of possession of marijuana. The jury acquitted defendant of that offense.

which the jury could reasonably infer that he *agreed* with someone else to possess it. We believe the state has failed to produce such evidence.

The Court of Appeals concluded, 48 N.C. App. at 235-36, 269 S.E. 2d at 226:

> Evidence that after a long sea voyage the boat docked at night at an isolated point in Dare County and was almost immediately thereafter met by persons who arrived at the scene in two trucks, furnishes solid support for the inference that the meeting took place by prior agreement. Indeed, it seems almost inconceivable that such a meeting could have occurred without prior arrangement. The inference that the purpose of the meeting was to unload marijuana from the boat into one or both of the trucks is equally solidly supported by the evidence.

We agree that there is direct evidence that a boat with marijuana aboard was met shortly after its arrival at a point in Dare County by unknown persons and that from the fact of such a meeting, a jury could infer that someone had pre-arranged it. The difficulty in the state's case is with the question, "Who arranged the meeting and with whom?" The Court of Appeals said, "that defendant was one of the persons who joined in making the agreement may be reasonably inferred from the evidence that he had chartered and had participated in navigating the boat during the voyage in question." *Id.* at 236, 269 S.E. 2d at 226.

The Court of Appeals seems to have overlooked the proposition that there is no direct evidence that defendant chartered the boat, participated in its navigation, or was ever aboard at the time marijuana was being transported. The jury could, of course, reasonably infer from other evidence adduced that all of these things were true. It could infer, from similarity in the signatures and names and the Florida driver's license shown to the owners of the trawler, that defendant was the same Milan LeDuc who arranged for and executed the charter. It could infer from defendant's fingerprints found on board the vessel, the places where these prints were found, and defendant's Coast Guard license application that defendant had participated in navigating the trawler and was on board at the time marijuana was being transported. It is only by building on these inferences, however,

that the jury might then further infer that defendant participated in an unlawful agreement to possess marijuana.

[3] The state is thus met head-on by our rule that in circumstantial evidence cases inferences may not be built upon inferences in order for the fact-finder to reach the ultimate facts upon which guilt must be premised. *Direct Sales Co. v. United States, supra,* 319 U.S. 703; *State v. Fair, supra,* 291 N.C. at 173-74, 229 S.E. 2d at 190; *State v. Parker, supra,* 268 N.C. at 262, 150 S.E. 2d at 431.

In *Parker,* defendant was convicted by a jury of breaking and entering and larceny of clothing from Robert Hall Clothing Store in Charlotte. The state relied on the doctrine of recent possession. It offered direct evidence that Robert Hall's front glass doors had been broken through on the evening of 28 January 1966. There was blood on the floor inside the doors. From an inventory taken four days before this breaking, it was determined that five suits were missing from the store. At approximately 11 p.m. on the evening of 28 January, a witness observed a man approximately one block from the store drop something and run. The witness said this man "looked just like the defendant" but "I am not for sure that this defendant was the man" and "[I] cannot say beyond a reasonable doubt that the defendant was the man." The item dropped, however, was one of the stolen suits. Shortly after the witness picked up the suit, defendant walked up to him from the direction in which the unidentified person had run. Defendant's hand was cut.

This Court held in *Parker* that the evidence was insufficient to support the verdict on the theory of recent possession because there was no "direct evidence" that defendant ever recently possessed the stolen property. The Court said, 268 N.C. at 262, 150 S.E. 2d at 431:

> There was no direct and clear evidence placing the stolen goods in the possession of defendant.
>
> 'A basic requirement of circumstantial evidence is reasonable inference from established facts. Inference may not be based on inference. Every inference must stand upon some clear and direct evidence, and not upon some other inference or presumption.' [Citations omitted.]

In other words, the Court in *Parker* concluded that since the jury must first infer defendant's recent possession of the stolen property and from that inference further infer that he was the thief, the evidence was insufficient to carry the case to the jury. So it is here.

The decisions of the Court of Appeals concluding (1) that it was error to admit the signature on the charter agreement and other samples of defendant's handwriting for the jury's comparison, and (2) that the evidence was sufficient to be submitted to the jury on the conspiracy charge are, therefore,

Reversed.

Justices MEYER and MITCHELL took no part in the consideration or decision of this case.

CLEO O. GREENE, ET AL., PETITIONER-APPELLANTS v. THE TOWN OF VALDESE, ET AL., RESPONDENT-APPELLEES; IN RE: ANNEXATION ORDINANCE OF THE TOWN OF VALDESE

No. 4PA82

(Filed 2 June 1982)

1. Municipal Corporations § 2.3— annexation—character of area to be annexed—compliance with statute

In order to establish noncompliance with G.S. § 160A-36(d), petitioners had to show two things: (1) that the boundary of the annexed area did not follow natural topographic features, and (2) that it would have been practical for the boundary to follow such features. Upon showing that a large portion of the area to be annexed followed "tree lines" and not "natural topographic features" within the meaning of the statute, the petitioners met the first step; however, petitioners failed to carry their burden of showing that the boundary of the annexed area could *practically* have been drawn along ridge lines, creeks, and streams as prescribed by statute, and where to follow natural topographic features would convert an area which would otherwise meet the statutory test of G.S. 160A-36(b) and (c) into an area that no longer satisfies those requirements, the drawing of boundaries along topographic features is no longer "practical," within the meaning of the language of the statute.

2. Municipal Corporations § 2.6— sewer service to annexed area—compliance with statutory requirements

The trial court properly found that a town's plan for extending sewer services to an annexed area complied with the statutory requirements of G.S.

160A-35(3)(b) where it was clear that any current or future resident of the annexed area who could not be served by sewer lines would receive septic tank maintenance service at the same cost as sewer service and where the record indicated that the substitute septic tank service proposed by the town was already being performed within the town for residents in low-lying areas where sewer lines could not provide proper drainage outflow.

3. **Municipal Corporations § 2.4— annexation—standing to attack agreement between town and area not annexed**

Petitioners had no standing to question the constitutionality of the town's agreement with two corporations concerning a delay in annexation of their property where petitioners failed to allege some direct injury in fact.

Justice CARLTON dissenting.

Justice EXUM joins this dissenting opinion.

APPEAL by petitioners pursuant to G.S. 160A-38(h) from the judgment of *Lamm, J.*, presiding at the 26 May 1981 session of Superior Court, BURKE County.

On 3 November 1980 the Valdese Town Council adopted a resolution of intent to annex the Laurel Road Section adjacent to the Town. On 1 December the Council adopted a report outlining plans for extending municipal services to the annexation area. A properly constituted public hearing was held at which various Laurel Road residents voiced their preferences on the question of annexation. Mr. John Cathey spoke on behalf of Duracell International, a company which operated an industrial plant in the area being considered for annexation on land leased from the Crescent Land and Timber Company. He stated that the annexation came as a surprise to Duracell and requested that the Duracell property not be annexed. At the 5 January 1981 meeting of the Town Council, an agreement was reached between the Town and Crescent and Duracell whereby the Crescent/Duracell property was deleted from the annexation upon the condition that Duracell and Crescent agree to petition for voluntary annexation of the property in three separate areas within the next three years. The Council adopted an ordinance annexing the remainder of the Laurel Road Section at the same meeting.

Petitioners sought judicial review in the Superior Court. The court heard the evidence of petitioners and respondent Town and affirmed the annexation ordinances. We granted petitioners' petition for discretionary review prior to determination by the Court of Appeals on 14 January 1982.

Herbert L. Hyde and G. Edison Hill for appellants.

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

BRANCH, Chief Justice.

[1] By their first assignment of error, petitioners contend that the trial court erred in holding that respondent Town complied with the provisions of G.S. 160A-36(d) in fixing the area to be annexed.

G.S. 160A-36 provides:

§ *160A-36. Character of area to be annexed.*—(a) A municipal governing board may extend the municipal corporate limits to include any area which meets the general standards of subsection (b), and which meets the requirements of subsection (c).

(b) The total area to be annexed must meet the following standards:

(1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun.

(2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.

(3) No part of the area shall be included within the boundary of another incorporated municipality.

(c) The area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.

(d) *In fixing new municipal boundaries, a municipal governing board shall, wherever practical, use natural topographic features such as ridge lines and streams and creeks as boundaries*, and if a street is used as a boundary, include within the municipality developed land on both sides of the street. (Italics added.)

Petitioners do not attack the annexation on the basis of any lack of compliance with subsections (a), (b), or (c) of the above statute but argue that the Town Planner and the municipal governing board violated the italicized portion of subsection (d) by failing to follow natural topographic features in drawing the boundary of the annexed area.

> As a general rule it is presumed that a public official in the performance of his official duties "acts fairly, impartially, and in good faith and in the exercise of sound judgment or discretion, for the purpose of promoting the public good and protecting the public interest. [Citation omitted.] The presumption of regularity of official acts is rebuttable by affirmative evidence of irregularity or failure to perform duty, but the burden of producing such evidence rests on him who asserts unlawful or irregular conduct. The presumption, however, prevails until it is overcome by . . . evidence to the contrary. . . . Every reasonable intendment will be made in support of the presumption. . . ." *Huntley v. Potter*, 255 N.C. 619, 122 S.E. 2d 681 (1961); *accord, Styers v. Phillips*, 277 N.C. 460, 178 S.E. 2d 583 (1971). Hence the burden is on the petitioner to overcome the presumption by competent and substantial evidence. 6 N.C. Index 2d, Public Officers, § 8 (1968).

In re Annexation Ordinance, 284 N.C. 442, 452, 202 S.E. 2d 143, 149 (1974).

In order to establish noncompliance with the above statute, petitioners must show two things: (1) that the boundary of the annexed area does not follow natural topographic features, and (2) that it would have been practical for the boundary to follow such features.

Our examination of this record discloses that the total external boundary of the annexed area was 22,402 feet. Of this, 6,100

feet of the boundary was contiguous to the Town's existing boundary, leaving 16,302 feet of newly drawn boundary involved in the annexation. Approximately 1,600 feet of this boundary followed the meanders of creeks and streams, thereby clearly complying with the statute. A somewhat larger portion of the boundary followed tree lines. The remainder of the boundary followed no topographical features.

Since the statute does not specifically list tree lines, as it does creeks and streams, as acceptable "natural topographic features," we are confronted with the question of whether tree lines constitute "natural topographic features" within the meaning of the statute's requirement. We think not.

As petitioners' witness testified:

> Quite often tree lines follow natural topographic features. It is true that is the reason a lot of people originally divided up lines along natural topographic features.
>
> A tree line is where people stopped cutting trees. I imagine that if people hadn't gone in and cut trees, there wouldn't be a tree line. The absence of the trees on one side shows often the work of people rather than nature.

To satisfy the requirement of G.S. 160A-36(d), tree lines must not only *follow* natural topographic features, they must actually *be* such. The fact that all the tree lines followed in establishing this boundary also coincide precisely with perfectly straight property lines strongly suggests that man and not nature determined the location of these tree lines. We believe, moreover, that the impermanent nature of a tree line distinguishes it from a ridge line or a stream or creek as a natural or desirable feature upon which to base a boundary.

The deciding factor, however, contributing to our opinion that the term "natural topographic features" does not encompass tree lines is our consideration of the legislative intent behind the adoption of the statute's requirement that new boundaries follow natural topographic features where practical. The legislative history of this portion of G.S. 160A-36(d) suggests that the reason for its inclusion was the legislature's concern that the full range of municipal services be available to citizens in the annexed area. Recognizing that water, and particularly, sewer services are

necessarily limited by natural drainage boundaries, the Municipal Government Study Commission, whose recommendations were followed in establishing our present annexation procedures, included topography as an important consideration to be incorporated into the new statutory scheme of annexation. *See Report of the Municipal Government Study Commission* (Supp. Rep. 1959). In order to ensure consideration of such topographic features the portion of G.S. 160A-36(d) under consideration was enacted, specifically enumerating certain features which create natural drainage boundaries. Because tree lines have no bearing on natural drainage boundaries, or for that matter, impose no effective limitation on a municipality's ability to extend any of its major services, we hold that tree lines are not the sort of "natural topographic boundaries" which the legislature intended municipalities to follow in establishing the boundaries of areas to be annexed.

When tree lines are excluded, only 1,600 feet of the 16,302 foot boundary of the annexed area may be said to follow "natural topographic features." The evidence is thus uncontroverted that over 90 percent of the boundary did not follow natural topographic features. With regard to this portion of the boundary, we must now examine the record to determine the *practicality* of following such features in establishing the boundary presently under consideration.

Although our research has not disclosed a specific definition of this term in our own cases, we find that the word "practical" has been adequately defined by the Supreme Court of South Carolina as "that which is possible of reasonable performance." *Woody v. South Carolina Power Co.*, 202 S.C. 73, 81, 24 S.E. 2d 121, 124 (1943); *Locklear v. Southeastern Stages, Inc.*, 193 S.C. 309, 316, 8 S.E. 2d 321, 324 (1940). *Accord Moore v. Wilder*, 66 Vt. 33, 28 A. 320 (1893) ("reasonable"); *Kline v. Johannesen*, 249 Wis. 316, 24 N.W. 2d 595 (1946) ("reasonable").

Our examination of the record reveals that petitioners presented no evidence on the practicality or reasonableness of following topographic features in establishing the boundary. Indeed, the only evidence on the question of practicality was presented by respondent Town to the effect that in order to follow natural topographical features in establishing the boundary

of the annexed area it would be necessary to include expanses of open, undeveloped land which lay contiguous to the annexed area and outside the proposed boundary, but inside the nearest ridge line, stream, or creek. Petitioners do not contest this evidence but admit in their brief that "Respondent Town could not find an area that would meet the statutory subdivision and use tests if it . . . [were to] follow natural topographic features."

We are of the opinion that the words "wherever practical" were included in G.S. 160A-36(d) to meet just such an eventuality as we have before us in this case. The intent of the Legislature controls the interpretation of a statute. The language of subsection (a) of G.S. 160A-36 makes it clear that a municipality may annex any area which meets the general standards of subsection (b) and the requirements of subsection (c). *Lithium Corp. v. Bessemer City*, 261 N.C. 532, 135 S.E. 2d 574 (1964) (decided before G.S. 160-453.4 was recodified as G.S. 160A-36). We emphasize that the provisions of subsection (d) of G.S. 160A-36 contain no mandatory standards or requirements for annexation. Where the boundary of the annexed area, which meets the subdivision and use test of G.S. 160A-36(b) and (c), can be established along ridge lines, streams, and creeks without defeating the area's compliance with the other portions of G.S. 160A-36 the boundary must follow such features. Where, however, to follow natural topographic features would convert an area which would otherwise meet the statutory tests of G.S. 160A-36(b) and (c) into an area that no longer satisfies those requirements, the drawing of boundaries along topographic features is no longer "practical," i.e., not "possible of reasonable performance" within the meaning of the language of the statute.

Petitioners in instant case failed to carry their burden of showing that the boundary of the annexed area could *practically* have been drawn along ridge lines, creeks, and streams. To the contrary, in light of all the evidence, it appears that it would not have been practical to have followed such lines in establishing the boundary because to follow such features would have effectively defeated the proposed annexation which otherwise met the mandatory provisions of G.S. 160A-36. We are of the opinion that it was not the intent of the Legislature to defeat the annexation of an area which was otherwise ripe for annexation because of the

directory language contained in G.S. 160A-36(d). We therefore overrule this assignment of error.

Petitioners next argue that it was error for the trial court to allow respondent's former Town Planner to testify that, in fixing the new boundary, there were no practical topographic features to follow other than the ones actually followed. We agree that this testimony went to one of the ultimate facts to be determined by the court and should not have been allowed into evidence. However, in view of our interpretations of subsection (d) of G.S. 160A-36 and the abundance of competent evidence before the court to the effect that drawing the boundaries along natural topographic features would be impractical because to do so would defeat the annexation of an otherwise suitable area, we hold that the admission of this evidence did not constitute prejudicial error. This holding is buttressed by the fact that the trial judge was sitting as a judge and jury and in such cases it is presumed that he disregarded any incompetent evidence that might have been admitted. *Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E. 2d 248 (1967). Further, petitioners have failed to carry their burden of showing noncompliance with the provisions of subsection (d) of G.S. 160A-36.

[2] Two of the petitioners' assignments of error relate to the Town's plan for extending sewer service to the annexed area. The first of these is directed to the trial court's following finding of fact:

> 13. That the sewer service proposed in the Annexation Report (Respondent's Exhibit 1), can be provided to all current residents of the area to be annexed; that there are certain undeveloped areas East [sic] of Laurel Road that may not be served by the sewer lines proposed in the Annexation Report, but in these areas the report provides, when necessary, for Respondent to provide septic tank maintenance service; that said proposed sewer lines and septic tank maintenance service are in accord with the policies of Respondent currently in effect within the municipality for extending sewer service to its residents.

The second is to the conclusion of law, based upon the above finding, that the Town's plan for extending services to the annexed area complied with statutory requirements.

Petitioners assert that all current residents will not be served by sewer lines. It is unclear from the evidence whether all current residents will be served by sewer lines or not. It is clear, however, that any current or future resident of the annexed area who cannot be served by sewer lines will receive septic tank maintenance service at the same cost as sewer service. Petitioners urge that such substitute service is not sufficient to comply with the statutory mandate that water and sewer lines be extended into a newly annexed area so that property owners "will be able to secure public water and sewer services *according to the policies in effect in such municipality* . . . ." G.S. 160A-35(3)(b) (Emphasis added.)

The record before us indicates that the substitute septic tank service proposed by the Town in low-lying areas of the annexed area was already being performed within the Town for residents in low-lying areas where sewer lines could not provide proper drainage outflow. The evidence was that "[t]here is no difference between the plan for services contained in the annexation report for providing septic tank services for homes that sewer lines cannot be run for and services presently being supplied to houses within the Town of Valdese in which sewer lines cannot be run." As this Court has noted, "Providing a *nondiscriminating* level of services within the statutory time is all that is required." *Moody v. Town of Carrboro*, 301 N.C. 318, 328, 271 S.E. 2d 265, 272 (1980) (Emphasis added.)

The trial court's finding of fact number 13 is fully supported by competent evidence and is therefore binding on us. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E. 2d 189 (1980). Further, the challenged conclusion, under the facts found, is required by our case law. *Montgomery v. Montgomery*, 32 N.C. App. 154, 157, 231 S.E. 2d 26, 29 (1977); 89 C.J.S., *Trial* § 615b (1955). Both assignments of error are therefore overruled.

[3] Petitioners attack the agreement between the Town and Duracell International and Crescent Land and Timber Company to delay annexation of the Duracell plant located on land owned by Crescent. They assert that the agreement violated both statutory and constitutional provisions. We do not reach the substantive questions petitioners attempt to raise because we do not believe petitioners have standing to raise such questions.

A party has the necessary standing to raise a constitutional question only if he alleges some direct injury in fact. *See Charles Stores v. Tucker*, 263 N.C. 710, 717, 140 S.E. 2d 370, 375 (1965). By statute, G.S. 1-271, only a party aggrieved by the ruling of a lower court may appeal. Not only did petitioners fail to advance any of the grounds for appeal specifically enumerated in G.S. 160A-38(f), but they also failed to show how the Town's agreement with Duracell and Crescent amounted to "a denial of [their] personal property right or the imposition of a burden or obligation" upon them. *In re Application for Reassignment*, 247 N.C. 413, 421, 101 S.E. 2d 359, 366 (1958); *Gregg v. Williamson*, 246 N.C. 356, 98 S.E. 2d 481 (1957); *Queen City Coach Co. v. Carolina Coach Co.*, 237 N.C. 697, 76 S.E. 2d 47 (1953). Petitioners made no attempt to show how the Town's failure to annex the Duracell plant could have caused them, for example, to pay more taxes or to receive less services than would have been the case had the plant been annexed.

We therefore hold that petitioners have no standing to question the constitutionality of the Town's agreement with Duracell and Crescent and that they were not aggrieved within the meaning of G.S. 1-271 by the Town's failure to simultaneously annex the Duracell plant. This assignment is therefore dismissed.

Petitioners' assignment of error to the signing and entry of the judgment affirming the annexation is merely formal and requires no discussion.

The judgment of the Superior Court affirming the annexation of the Laurel Road area of the Town of Valdese is

Affirmed.

Justice CARLTON dissenting.

I respectfully dissent to that portion of the majority opinion which holds that the Town complied with the provisions of G.S. 160A-36(d) in fixing the area to be annexed. Like the majority, I have little authority to cite in support of my position. The issue here is one of statutory construction and I simply interpret the statutory scheme in a way which I believe more fully comports with the intent of our Legislature.

The majority has in essence written the provisions of G.S. 160A-36(d) out of our annexation statutes. It holds that if a town complies with the provisions of G.S. 160A-36(a), (b) and (c), the area in question is then "ripe for annexation" and failure then to comply with G.S. 160A-36(d) will not defeat the annexation. I do not attach such little significance to subsection (d). I consider it a provision of *limitation* and believe that failure to comply with it prevents the area from being "ripe for annexation."

In reaching its conclusion that tree lines are not "natural topographic features," a holding with which I agree, the majority acknowledges the legislative intent behind the statute's requirement that new boundaries follow natural topographic features where practical. That intent, suggests the majority, "was the legislature's concern that the full range of municipal services be available to citizens in the annexed area" and resulted in the inclusion of "topography as an important consideration to be incorporated into the new statutory scheme of annexation." The majority then proceeds to hold, in essence, that topography is not a consideration if the other annexation requirements are met. With such reasoning I cannot agree.

The record clearly establishes that the Town primarily followed property lines, not topographic lines, in establishing the boundaries of the area. It was noted that this practice was followed to avoid administrative and tax problems. (R. p. 49.) Stated simply, the Town found that it could not comply with the topographic requirements of subsection (d) of G.S. 160A-36 *and still comply* with the requirements of subsections (a), (b) and (c). When this situation is presented, I believe that the statute clearly precludes annexation.

The 1959 report of the Municipal Government Study Commission, cited by the majority, provides some insight on the Legislature's reason for including the topographic requirement. It noted that topography is frequently an "effective limitation" on a city's ability to extend facilities. For example, it may be impossible to extend sewer lines without expensive pumping stations. As the report concludes, if such services are not available, "then there is no justification for including such land within the city." Thus, it is apparent that the topographical requirement of subsection (d) was intended as a limitation on annexation and not merely a suggestion.

In a word, I believe that *all* the requirements of G.S. 160A-36 must be met before an area is "ripe for annexation" unless, for compelling reasons not given here, it is simply impracticable to comply with the topographic requirement.

Justice EXUM joins this dissenting opinion.

STATE OF NORTH CAROLINA v. WILLIAM ALLEN VICKERS

No. 106A81

(Filed 2 June 1982)

1. **Constitutional Law § 48— failure to raise insanity defense—no denial of effective assistance of counsel**

A defendant charged with arson and the burning of two tobacco barns and one tobacco storage building was not denied the effective assistance of counsel by the failure of his appointed attorney to investigate and raise an insanity defense where a report from a local mental health center finding defendant competent to stand trial noted that defendant did have a history of psychiatric treatment and that defendant's responsibility at the time of the alleged crimes could not be determined because defendant claimed amnesia, but the record in the case did not present such evidence of insanity that it could be concluded that defense counsel's failure to present an insanity defense resulted from neglect or ignorance rather than from informed professional deliberation.

2. **Criminal Law § 75.11— in-custody statement—implied waiver of right to counsel**

Where defendant was advised of his constitutional rights when he was taken into custody and he acknowledged that he heard and understood his rights, and during a general conversation on the way to jail, a deputy sheriff commented that he could not understand why defendant did it, defendant in effect waived his right to counsel when he stated that "these people down here in this community have been wanting to get rid of me for a long time, so I thought I'd give them a reason," and the statement was admissible in evidence at defendant's trial.

3. **Criminal Law § 75.14— mental capacity to confess**

The evidence was sufficient to support the trial court's determination that defendant had the mental capacity to waive his constitutional rights and to make incriminating statements, although the evidence did indicate that defendant had a history of psychiatric treatment, where the evidence showed that he had been living independent of medical supervision for several months prior to the time of his arrest and that he was coherent and able to move about under his own power when the statements were made.

4. Arson and Other Burnings § 2— burning of tobacco barn and storage building—indictment under proper statute

Defendant could properly be indicted under G.S. 14-62 for the burning of a tobacco *barn* and the burning of a tobacco *storage building* rather than under the provisions of G.S. 14-64 relating to the burning of a tobacco *house* since a tobacco *house* as used in G.S. 14-64 does not have a generally accepted connotation or definition.

5. Arson and Other Burnings § 4.2— common law arson—temporary absence of occupants of dwelling

Common law arson results from the burning of a dwelling even though its occupants are temporarily absent at the time of the burning.

APPEAL by defendant from *Strickland, J.*, 1 June 1981 Session STOKES County Superior Court.

Upon pleas of not guilty, defendant was tried on bills of indictment charging him with (1) arson of a dwelling house owned and occupied by Ralph Bullins; (2) burning a tobacco barn belonging to Guy Barker; (3) burning a tobacco barn belonging to John Sheppard; and (4) burning a tobacco storage building belonging to Carol Wester. On the arson indictment, following the name of the district attorney, appears the citation G.S. 14-58. On the other indictments appear the citation G.S. 14-62. All offenses allegedly took place on 22 November 1980.[1]

The state offered evidence at trial tending to show that:

On the evening of 22 November 1980 several fires were set in the Brim Road area of Stokes County. At that time defendant resided with his parents at their home on Route 1, Madison, North Carolina. Ralph Bullins, a neighbor of the Vickers, lived approximately one-tenth of a mile down the road from their house. Early on the night of the fires Bullins saw defendant, loaned him three dollars and drove him to the store and back. Bullins left his house again around 8:30 p.m. after defendant left on foot. When Bullins returned home about 11:45 p.m., portions of his house, including the bathroom and back porch, had been burned out.

John Sheppard's farm adjoined defendant's parents' property. At 11:00 p.m. on 22 November he learned that his tobacco

1. Defendant was also tried on indictments charging him with three counts of attempted arson. At the close of the state's evidence, the court allowed defendant's motion to dismiss these three charges.

barn was burning. The fire had been set from outside the structure and the barn burned to the ground. Fred Smith discovered that his three story packhouse was burning around 11:00 p.m. that evening. The fire rendered the storage building useless and it had no salvage value. The loss was estimated by Smith to be $15,000.00. At approximately 10:30 p.m. Guy Barker learned that his barn was burning. All that was left after the fire was the hole under the barn into which the metal roof had collapsed.

On that same evening defendant visited L. B. Bullins at his home. L. B. Bullins testified that defendant stayed for about 10 minutes then left on foot at approximately 9:30 p.m. While there defendant asked Bullins which barn was his and told him that: "He was going to have some fun; he was going to set some fires." Bullins also observed that defendant was carrying someone else's mail. One of the envelopes was open and contained two packages of matches. Approximately 15 minutes after defendant left the house, Bullins observed a fire about a half mile down the road. He also saw several other structures burning during the night.

Later that evening defendant returned to his parents' home. He told his parents that they should look out the window if they wanted to see something pretty. Defendant's father, Norman Vickers, testified that they could see a large blaze in the vicinity of either the Martin or Barker farm. Vickers also stated that when he asked defendant if he set fire to the barn, defendant answered "I'm not saying that I did and I'm not saying that I didn't."

Defendant was arrested between 3:00 and 4:00 a.m. on the morning of 23 November 1981 after being tracked through the woods by bloodhounds. After he was taken into custody he was transported to the Stokes County Jail by Deputy Sheriff Reeves. Officer Reeves testified that he advised defendant of his constitutional rights when he placed him in the patrol car and that defendant acknowledged that he heard and understood his rights. While driving to the jail, Deputy Reeves remarked that he could not understand why defendant did it, to which defendant replied that "these people down here in this community have been wanting to get rid of me for a long time, so I thought I'd give them a reason."

On arrival at the jail defendant was taken to the office of Detective Collins, an investigator with the Stokes County Sheriff's Department. He was informed of the charges against him and advised of his constitutional rights. Detective Collins testified that he asked defendant if he wanted a lawyer and defendant said no. In acknowledgment that he had been read and understood his constitutional rights, defendant signed the bottom of the form Detective Collins used to inform him of those rights. Detective Collins then proceeded to ask defendant about the various fires. Defendant admitted setting each of them but gave no explanation for his actions.

Defendant offered no evidence at trial. The jury found defendant guilty of the four charges submitted. Judgment was entered by the court sentencing defendant to life imprisonment on the arson conviction. The court consolidated the three convictions under G.S. 14-62 for judgment and imposed a sentence of 15 years to commence at the termination of the life sentence.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Sarah C. Young, for the state.

Adam Stein and James H. Gold, Appellate Defenders, for defendant-appellant.

BRITT, Justice

[1] By his first assignment of error, defendant contends that he was denied effective assistance of counsel by the failure of his appointed attorney to investigate and raise an insanity defense. We find no merit in this assignment.

The right to counsel is guaranteed by the sixth amendment to the United States Constitution and made applicable to the states by the fourteenth amendment, and by Article I, Sections 19 and 23 of the North Carolina Constitution. This constitutional right to counsel has long been recognized as an entitlement to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759 (1970); *Powell v. Alabama*, 287 U.S. 45 (1932); *State v. Speller*, 230 N.C. 345, 53 S.E. 2d 294 (1949); and *State v. Sneed*, 284 N.C. 606, 201 S.E. 2d 867 (1974).

The test of effective assistance of counsel recently adopted by this court is that used by the U.S. Supreme Court to evaluate

advice given a criminal defendant in *McMann v. Richardson, supra; 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). Under the *McMann* test the determination to be made is whether the assistance given was "within the range of competence demanded of attorneys in criminal cases." 397 U.S. at 771.

The record in the case *sub judice* shows that defendant's appointed counsel successfully sought to have his client screened by the Forsyth-Stokes Mental Health Center in order to determine whether further psychiatric evaluation at Dorothea Dix Hospital in Raleigh would be necessary. A lengthy report from the Forsyth-Stokes facility noted that defendant did have a history of psychiatric treatment but found that he was competent to stand trial. No determination of defendant's responsibility at the time of the alleged crimes was possible because defendant claimed amnesia.

Defendant asserts that on the basis of this evaluation, defense counsel should have further investigated the possibility of an insanity defense and sought the assistance of psychiatric experts. We disagree.

Relief is rarely granted by the courts on the ground asserted by defendant and a stringent standard of proof that effective assistance of counsel was denied has been consistently required. *State v. Sneed, supra.*

We cannot conclude that defendant was denied effective assistance of counsel absent some evidence of defendant's insanity or a showing that with the exercise of due diligence an insanity defense could have been developed. *State v. Misenheimer, supra.* The test of insanity as a defense to a criminal prosecution in this jurisdiction is whether defendant, at the time of the alleged act, was laboring under such a defect of reason, from disease or deficiency of mind, as to be incapable of knowing the nature and quality of his act, or if he does know this, was by reason of such a defect of reason incapable of distinguishing between right and wrong in relation to such act. *State v. Jones*, 293 N.C. 413, 425, 238 S.E. 2d 482 (1977).

The record in the case at bar does not present such evidence of insanity that we can conclude that defense counsel's failure to

present an insanity defense resulted from neglect or ignorance rather than from informed professional deliberation. *Marzullo v. Maryland*, 561 F. 2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).

The report from the Forsyth-Stokes Mental Health Center stated that there was no evidence of a thought disorder. The state's evidence showed that defendant was coherent at the time of his arrest in the early morning after the burnings. Defendant, by his own statement, gave a reason for his actions, which while not acceptable to excuse his conduct, clearly shows that he had a motive and that his actions were deliberate.

> "Well, these people down here in this community have been wanting to get rid of me for a long time, so I thought I'd give them a reason. (T p 108)

Further, defendant's psychiatric history revealed abuse of alcohol and drugs and numerous criminal acts. It is completely plausible and within the range of competence required that defense counsel chose not to assert an insanity defense as a trial tactic to keep defendant's long and unsavory record from the jury.

As was noted in *State v. Milano, supra*, and *State v. Sneed, supra*, an ineffective assistance of counsel claim more appropriately should be raised in a post-conviction hearing where evidence can be presented to determine why counsel chose to proceed as he did. We will not try to second guess counsel on this issue. Suffice to say, the record before us does not establish that counsel's assistance was anything less than the standard required. This assignment of error is overruled.

[2] Defendant contends by his next assignment of error that the trial court erred in admitting into evidence defendant's incriminating statement to Deputy Reeves in that the state failed to prove that he knowingly and intelligently waived his right to counsel. Further, defendant asserts that his subsequent incriminating statement made to Detective Collins at the sheriff's department should also have been suppressed as it is presumed to be the product of the first illegally obtained confession.

The U.S. Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436 (1966), that a criminal suspect upon arrest or being taken into custody, must be adequately and effectively informed of his con-

stitutional rights, including the right to retained or appointed counsel. The Court also went on to state that these rights could be waived by a defendant if done voluntarily, knowingly and intelligently.

The reasons for the prophylactic rules created in *Miranda* are to provide safeguards to combat the inherently compelling pressures of in-custody interrogation and to permit a defendant full opportunity to exercise his privilege against self-incrimination. 384 U.S. at 467.

A recent interpretation of *Miranda*, however, rejected the need for an express waiver of constitutional rights, either oral or written.

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver but is not inevitably either necessary or sufficient to establish waiver. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

The facts and circumstances surrounding defendant's statements to law enforcement officers clearly show that defendant was adequately and effectively apprised of his constitutional rights. Findings of fact by the trial court on voir dire indicate that defendant was advised of his rights when he was taken into custody and that he acknowledged that he understood those rights. Further, the court found, and the evidence supports the finding, that defendant was coherent at the time and was neither coerced nor promised any reward for making the statement. According to the testimony of Deputy Reeves the incriminating statement was made during a general conversation that occurred on the way to the jail. Reeves commented that he could not understand the reason for the crimes. Defendant responded that the community wanted to get rid of him so he gave them a reason. It is clear under these circumstances that sufficient evidence was presented to support the trial court's conclusion that defendant knowingly and intelligently waived his rights. This assignment of error is overruled.

Likewise, defendant's contention that his subsequent incriminating statement was tainted by the first and should have been suppressed is also without merit. Defendant's subsequent

confession to law enforcement officials was made at the jail after he had again been apprised of his constitutional rights. On this occasion defendant expressly waived his right to counsel and signed the form Detective Collins used to inform him of his rights.

[3] Defendant also argues that his statements should have been suppressed because of his mental condition and the failure of the state to meet its heavy burden of proof to show waiver when the suspect is known to be mentally disturbed. We disagree. Past indicia of mental instability are not necessarily dispositive on this issue. *See State v. Misenheimer, supra.* While the evidence does indicate that defendant had a history of psychiatric treatment, at the time of his arrest he had been living independent of medical supervision for several months.

Further, evidence presented on voir dire indicated that defendant was coherent and able to move about under his own power when the statements were made. The evidence thus amply supports the trial court's conclusion that defendant was in full understanding of his constitutional rights and that he freely, knowingly, intelligently, and voluntarily waived those rights.

[4] By his third assignment of error defendant contends that his convictions under G.S. 14-62 must be reversed because the indictments charging him with those offenses were fatally defective in that the structure burned did not come within the class designated by the statute. Further, he argues that the trial court erred in its instructions to the jury when it improperly assumed that the buildings in question were covered by G.S. 14-62 rather than G.S. 14-64. This assignment has no merit.

Defendant was charged in three separate indictments with burning Guy Barker's tobacco *barn*, John Sheppard's tobacco *barn*, and Fred Smith's tobacco *storage building.*

At the time these alleged offenses were committed G.S. 14-62 provided:

> If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any uninhabited house, any church, chapel or meetinghouse, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or any building, structure or erection used or intended to be used in

> carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 40 years, and may also be fined in the discretion of the court.

Defendant contends that he should have been charged under G.S. 14-64 which specifically applies to the burning of tobacco *houses*. At that time G.S. 14-64 provided:

> If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any ginhouse or tobacco house, or any part thereof, he shall, on conviction, be imprisoned in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court.

He argues that G.S. 14-64 uses a specific term which encompasses a tobacco barn and a tobacco storage building, while G.S. 14-62 uses general terms; and that the statute using a specific term applies.

It is clear that we have a question of interpretation of statutes and reconciling statutes relating to the same subject matter, feloniously burning buildings. Our task is made difficult by the fact that the term "tobacco house" used in G.S. 14-64 is not defined by the statute. That being true we must apply the general rules employed in construing statutes.

The cardinal principle of statutory construction is that the intent of the legislature is controlling. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975). In *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978), this court, speaking through Justice Huskins, said:

> A construction which will 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, statutes should be given a construction which, when practically applied, will tend to suppress the evil which the

Legislature intended to prevent. 73 Am. Jur. 2d, Statutes, § 157 . . . .

294 N.C. at 96.

It is noted that G.S. 14-64 was enacted in substantially its present form in 1863. Chapter 17, 1863 S.L. It is a matter of common knowledge that buildings, particularly farm buildings, are referred to by various names, *i.e.*, tobacco barns, tobacco curing barns, tobacco packhouses, tobacco storage barns, etc.; and that the terms used in referring to buildings change periodically.[2] The term "ginhouse" has a generally accepted connotation—a building which houses a cotton gin, the mechanism invented by Eli Whitley in the early 19th century to separate the seeds, hulls and foreign material from cotton. *See Webster's Third New International Dictionary.* Webster does not attempt to define a tobacco house but defines a tobacco barn as "a building in which tobacco is cured with or without supplemental heat."

G.S. 14-62 was enacted originally in 1874-5 (Chapter 228, 1874-5 S.L.) and has been amended several times since then. It is clear to us that this statute is intended to encompass, *inter alia*, all farm buildings that do not fall within the common law definition of arson. Since a ginhouse has a generally accepted connotation or definition, it would appear that it would come within the ambit of G.S. 14-64 rather than G.S. 14-62. By the same token, since a tobacco *house* does not have a generally accepted connotation or definition, we hold that an indictment under G.S. 14-62 for burning a tobacco barn or a tobacco storage building is proper. It follows that the court did not err in its jury instructions relating to G.S. 14-62.

[5] By his final assignment of error defendant contends that his common law arson conviction must be vacated because the uncontradicted evidence was that no one was in the house at the time of the burning. This assignment has no merit.

In North Carolina, the crime of arson has not been defined by statute, therefore the common law definition of arson remains in force. *State v. Long*, 243 N.C. 393, 90 S.E. 2d 739 (1956). As de-

2. Although the writer grew up on a North Carolina tobacco farm, he never heard anyone refer to a building as a tobacco house.

fined at common law, arson is the wilful and malicious burning of the dwelling house of another person. *State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976); *State v. Long, supra.* Further, since arson is an offense against the security of the habitation and not the property, an essential element of the crime is that the property be inhabited by some person. *Id.*

This court has held that "dwelling house" as contemplated in the definition of arson means an *inhabited* house. *State v. Clark*, 52 N.C. 167 (1859). We reject defendant's attempt to equate *inhabit* with *occupy.* In *Black's Law Dictionary* 703 (Rev. 5th ed. 1979), we find that inhabit is "synonymous with dwell, live, reside, sojourn, stay, rest"; occupy is not listed as a synonym.

In *State v. Gulley*, 46 N.C. App. 822, 266 S.E. 2d 8 (1980), the defendant was charged with unlawfully burning an uninhabited dwelling pursuant to G.S. 14-62. The court held that defendant was entitled to have his motion for nonsuit granted since the evidence showed that the mobile home burned was used by three people as their place of residence, and their temporary absence at the time of the fire did not make the dwelling an uninhabited house within the meaning of the statute. "Common law arson results from the burning of a dwelling even if its occupants are temporarily absent at the time of the burning." 46 N.C. App. at 823.

In 5 Am. Jur. 2d, Arson and Related Offenses, § 17 (1962), we find: ". . . it has been held or recognized that mere temporary absence of the occupants from a house, so that at the time of its burning there was no human being in it, will not affect the character of the building as a 'dwelling'." *See Johnson v. State*, 48 Ga. 116 (1873); *State v. Warren*, 33 Me. 30 (1851); *Commonwealth v. Barney*, 64 Mass. (10 Cush.) 478 (1852); *People v. Losinger*, 331 Mich. 490, 50 N.W. 2d 137, 44 A.L.R. 2d 1449 (1951), *cert. denied*, 343 U.S. 911 (1952). In *Losinger* the cabin or cottage burned was unoccupied at the time of the fire but was occupied by the owner at frequent intervals, particularly during hunting season, and was intended to serve as the owner's home following his retirement.

We agree with the Court of Appeals and the other authorities cited that common law arson results from the burning of a dwelling even though its occupants are temporarily absent at the time of the burning.

The facts in the case at bar clearly establish that the house burned was the dwelling place of Ralph Bullins. Bullins testified that he left his house at approximately 8:30 p.m. and when he returned later that evening, around 11:45 p.m., portions of his house had been burned out. This temporary absence of the occupant did not render the premises uninhabited. All the elements of common law arson were pleaded and proved.

No error.

STATE OF NORTH CAROLINA v. CHARLES JOE BRANCH

No. 37PA82

(Filed 2 June 1982)

1. Criminal Law § 91.7— denial of continuance to obtain witnesses

The trial court did not abuse its discretion in the denial of defendant's belated motion for a continuance until certain witnesses could be contacted where defendant failed to inform the trial court of the name of any witness he allegedly sought to bring before the court, what defendant expected to attempt to prove through any such witness, or the likelihood that the witnesses could ever be located or be available for trial if they existed, and where defendant presented the trial court with no information tending to show why the four-month period between formal charges and his trial date was not sufficient to locate necessary witnesses and have them present for trial.

2. Criminal Law § 75.8— resumption of questioning by second officer—failure to repeat Miranda warnings

Defendant's confession to an officer after he had previously been questioned by another officer who had given him the *Miranda* warnings was not rendered involuntary and inadmissible by reason of the failure of the second officer to repeat the *Miranda* warnings before questioning defendant where the questioning by the second officer occurred approximately one hour and fifteen minutes after the initial warnings had been given to the defendant; this questioning was conducted in the same sheriff's department in which the warnings had been given to the defendant; the initial questioning of defendant was interrupted at defendant's request in order that he might talk with his brother in private, the first officer was called to another case during this interruption, and the second officer thereafter continued the questioning; the two officers were together when they initially brought defendant and his brother to the sheriff's department, and defendant was aware that both officers were involved in the same investigation; the confession given to the second officer in no way differed from any previous statements made by the defendant; and at the time of the questioning, defendant was a 29 year old man of apparently sound intellect who did not appear to be unduly upset.

3. **Criminal Law § 75.2—voluntariness of confession—no threat to implicate defendant's father**

Defendant's confession was not improperly coerced and rendered involuntary by the fear that his father would be implicated in the theft of tires being investigated where the officer told defendant only that officers had information that the truck occupied by defendant and his brother, which was registered to defendant's father, had been used in an effort to sell stolen tires and that officers "would probably need to check to see if his father had any involvement," but the officer did not indicate that defendant's father would or would not be arrested or investigated if defendant failed to confess, since any motivation or desire that defendant may have had to protect his father from investigation was not suggested by law enforcement officials but originated with the defendant.

4. **Criminal Law § 75.2—voluntariness of confession—officer's promise to talk with district attorney**

An officer's statement that "we would talk with the District Attorney if he made a statement which admitted his involvement" could not have aroused in the defendant any reasonable hope of reward if he confessed and thus did not render his confession involuntary.

BEFORE *Judge Hollis M. Owens, Jr.*, presiding at the December 1980 Session of MCDOWELL Superior Court, the defendant was convicted by a jury of felonious larceny in violation of G.S. 14-72(a) and sentenced to a term of imprisonment of not less than four years nor more than six years. The defendant's appeal to the Court of Appeals was dismissed due to late filing of the record on appeal. On 4 January 1982 the Court of Appeals, with *Judge Clark* dissenting, denied the defendant's petition for certiorari. The defendant's petition to this Court for writ of certiorari was allowed on 3 March 1982.

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

Stephen R. Little, Attorney for the defendant appellant.

MITCHELL, Justice.

The issues raised before this Court are whether the trial court erred by denying the defendant's motion for a continuance and by admitting into evidence the defendant's confession. We find that no prejudicial error occurred in the trial court.

The State's evidence at trial tended to show that on 23 June 1980 the garage supervisor of Ethan Allen, Inc., an industrial plant in Old Fort, North Carolina, found eleven truck tires of a

total value of approximately $1,700 missing from a company garage. He also found footprints leading away from the garage into a path nearby. Weeds in the path had been trampled and a barbed wire fence had been stretched down. One tire missing from the garage was found in a creek near the path. Two days later the defendant and his brother were stopped by Deputy Robert Smith and Lieutenant Jackie Turner of the McDowell County Sheriff's Department. At the time they were stopped, the defendant and his brother were driving a truck which had been seen at the plant on the day of the larceny. The deputes also had received information that the same truck had been used by individuals trying to sell tires to a nearby business. The truck belonged to the defendant's father who was an employee at the Ethan Allen Plant. The deputies advised the defendant and his brother that they were wanted for questioning and took them to the offices of the McDowell County Sheriff's Department. The defendant was advised of his constitutional rights as prescribed in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966) at approximately 7:45 p.m. and signed a written waiver form. After talking with Deputy Smith for a few minutes, the defendant was allowed at his own request to talk privately with his brother in a hallway. When the defendant returned, Deputy Smith received a call and had to leave the office. Lieutenant Turner had been questioning the defendant's brother. When Deputy Smith left the offices, Lieutenant Turner conducted the questioning of the defendant. Lieutenant Turner began questioning the defendant at approximately 9:00 p.m. and did not readvise the defendant of his rights under *Miranda*. The defendant made a statement at that time in the nature of a confession.

During the trial the defendant objected to any evidence being admitted concerning his confession. The trial court conducted a *voir dire* hearing and made findings of fact and conclusions of law. The trial court concluded that the defendant's confession was freely, knowingly and intelligently made and overruled the defendant's objection to the admission of the confession into evidence. Lieutenant Turner then testified that the defendant stated that he and his brother stole the tires from Ethan Allen, Inc. and attempted to sell them in Spruce Pine, North Carolina. The defendant told Lieutenant Turner that his father was not involved in the theft, expressing his concern that his father might

be investigated and might lose his job at Ethan Allen, Inc. Other facts arising from the State's evidence are set forth hereinafter in this opinion where pertinent.

The defendant presented no evidence.

[1] The defendant first assigns as error the failure of the trial court to allow his motion to continue the trial of his case until certain witnesses could be contacted. The defendant failed to file his motion to continue within the time required by G.S. 15A-952(c). This failure to file the motion within the required time constituted a waiver of the motion. G.S. 15A-952(e). Thus, the question before us is whether the trial court abused its discretion by failing to exercise the power granted it by G.S. 15A-952(e) to grant the defendant relief from his waiver of his right to move for a continuance. We hold that the trial court did not abuse its discretion in this regard.

A motion for continuance, even when filed in a timely manner pursuant to G.S. 15A-952, is ordinarily addressed to the sound discretion of the trial judge whose ruling thereon is not subject to review absent an abuse of such discretion. *State v. Weimer*, 300 N.C. 642, 268 S.E. 2d 216 (1980). This rule requiring the defendant to make a showing of abuse by the trial court in denying his motion for a continuance should be applied with even greater vigor in cases such as this in which the defendant has waived his right to make a motion to continue by failing to file the motion within the time prescribed by G.S. 15A-952.

An equally well-established rule, however, is that when a motion raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances presented by the record on appeal of each case. *State v. Searles*, 304 N.C. 149, 282 S.E. 2d 430 (1981). The denial of a motion to continue, even when the motion raises a constitutional issue, is grounds for a new trial only upon a showing by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error. *Id.* The constitutional guarantees of due process, assistance of counsel and confrontation of witnesses unquestionably include the right of a defendant to have a reasonable time to investigate and prepare his case. No precise time limits are fixed, however, and what constitutes a reasonable length of time for the preparation

of a defense must be determined upon the facts of each case. *Avery v. Alabama*, 308 U.S. 444, 84 L.Ed. 377, 60 S.Ct. 321 (1940); *State v. Searles*, 304 N.C. 149, 282 S.E. 2d 430 (1981).

In making our review and reaching our determination upon the facts of a particular case, we can judicially know only what appears of record on appeal and will not speculate as to matters outside the record. *Tomlins v. Cranford*, 227 N.C. 323, 42 S.E. 2d 100 (1947). The record on appeal in the present case fails to reveal that the defendant informed the trial court of the name of a single witness the defendant allegedly sought to bring before the court. The record is also absolutely devoid of any indication as to what the defendant expected to attempt to prove through these witnesses or the likelihood that they could ever be located or be available for trial if they existed. As Justice Huskins, speaking for this Court in a similar case, indicated:

> The oral motion for continuance is not supported by affidavit or other proof. In fact, the record suggests only a natural reluctance to go to trial and affords little basis to conclude that absent witnesses, if they existed, would ever be available. We are left with the thought that defense counsel suffered more from lack of a defense than from lack of time. 'Continuances should not be granted unless the reasons therefor are fully established. Hence, a motion for a continuance should be supported by an affidavit showing sufficient grounds.' (Citations omitted).

State v. Cradle, 281 N.C. 198, 208, 188 S.E. 2d 296, 303, *cert. denied*, 409 U.S. 1047, 34 L.Ed. 2d 499, 93 S.Ct. 537 (1972). We encourage counsel in criminal cases to offer such affidavits or other evidence when making motions to continue pursuant to G.S. 15A-952.

Additionally, the record on appeal reflects that the defendant's case came on for trial and his motion to continue was made approximately five months after his arrest and approximately four months after his indictment. In making his oral motion to continue, the defendant presented the trial court with no information in any form tending to show why the period between formal charges and his trial date was not sufficient to locate necessary witnesses and have them present for trial. As we stated in *State v. Tolley*, 290 N.C. 349, 358, 226 S.E. 2d 353, 362 (1976): "Rather,

the record suggests a natural reluctance to proceed to trial, engendered by the seriousness of the charge and lack of a substantial defense, rather than scarcity of time or absence of *bona fide* witnesses." Given the state of the record before us on appeal, we are unable to say that the action of the trial court in denying the defendant's motion to continue was either an abuse of the trial court's discretion or prejudicial to the defendant. This assignment of error is overruled.

[2] The defendant also assigns as error the admission into evidence of testimony relating to his oral confession made to Lieutenant Turner. In support of this assignment, the defendant first contends that his confession was involuntary and inadmissible by reason of the failure of Lieutenant Turner to repeat the *Miranda* warnings before questioning the defendant. We find this contention without merit.

The evidence introduced during the *voir dire* hearing before the trial court clearly supported its findings and conclusions to the effect that the warnings given the defendant at 7:45 p.m. by Deputy Sheriff Smith were constitutionally adequate and that the defendant made a knowing and voluntary waiver of his rights and agreed to questioning without an attorney present. In *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975), *death penalty vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3210 (1976), this Court speaking through Chief Justice Sharp set forth five factors to be considered among others as part of the totality of circumstances which determine whether initial warnings to a defendant have become so stale and remote as to raise a substantial possibility that the defendant was unaware of his constitutional rights at the time of the subsequent interrogation in question. The five factors are (1) the length of time between the giving of the first warnings and the subsequent interrogation, (2) whether the warnings and subsequent interrogation were given in the same or different places, (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers, (4) the extent to which the subsequent statement differed from any previous statements by the defendant, (5) the apparent intellectual and emotional state of the suspect. In applying the five factors of *McZorn* to the present case, we note that the questioning by Lieutenant Turner occurred approximately one hour and fifteen minutes after the initial warnings were given the

defendant. This questioning was conducted in the same sheriff's department in which the warnings had been given to the defendant, although in an office adjacent to the office in which Deputy Smith had given the defendant the warnings. Although initial questioning had been commenced by Deputy Smith, that questioning was interrupted at the defendant's request in order that he might talk with his brother in private. When the defendant had finished talking with his brother, Deputy Smith had been called to another case and Lieutenant Turner continued the questioning. Lieutenant Turner had been with Deputy Smith when they initially brought the defendant and his brother to the Sheriff's Department. The defendant was well aware that Lieutenant Turner and Deputy Smith were involved in the same investigation. The confession the defendant made to Lieutenant Turner in no way differed from any previous statements made by the defendant. At the time of the questioning, the defendant was a 29 year old man of apparently sound intellect who did not appear to be unduly upset. Given these facts, we find that there is no substantial possibility that the defendant was unaware of his constitutional rights at the time he made his inculpatory statement to Lieutenant Turner. *See State v. Simpson*, 297 N.C. 399, 255 S.E. 2d 147 (1979); *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975), *death penalty vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3210 (1976); *and* Note, *The Need to Repeat Miranda Warnings at Subsequent Interrogations*, 12 WASHBURN L. J. 222 (1973).

[3] The defendant additionally contends in support of his assignment of error relating to his confession that it was motivated by fear that his father would be implicated in the crime under investigation and that this fear was so coercive as to render his confession involuntary. This Court has long recognized the principle that mental or psychological pressure brought to bear against a defendant so as to overcome his will and induce a confession can render such a confession involuntary under the totality of the circumstances attendant. *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); *State v. Roberts*, 12 N.C. 259 (1827). A statement by investigating law enforcement officers that a suspect's relatives will be released from custody or not be arrested if the suspect confesses may, under the totality of the circumstances, render the suspect's resulting confession involuntary. Annot. 80 A.L.R. 2d

1428 (1961). It is generally recognized, however, that a confession is "involuntary" in the constitutional sense in such cases only when it was produced by wrongful pressure applied by law enforcement officials or others acting for them. Confessions or admissions have not been held inadmissible in evidence merely because the accused in making the confession or admission was motivated by a desire to protect a relative threatened with arrest or in custody when such motivation originated with the accused and was not suggested by law enforcement officials. *Id.*, § 6, p. 1438. The defendant in the present case does not rest this contention squarely upon any constitutional ground, but we think that the stated principles should be applied without regard to whether the claim of inadmissibility rests upon constitutional grounds or rests solely upon our rule of evidence requiring the exclusion of involuntary confessions. *See State v. Chamberlain*, 263 N.C. 406, 139 S.E. 2d 620 (1965).

The record in the present case reveals that the truck occupied by the defendant and his brother when they were brought in for questioning was registered to his father. The law enforcement officers investigating the crime charged had additional information that a truck with the same license tag number had been used in an effort to sell tires similar to those stolen to another company in the general area of the larceny. Lieutenant Turner informed the defendant of these facts sometime prior to the defendant's confession and made the statement: "We would probably need to check to see if his father had any involvement." At no point, however, did Lieutenant Turner indicate that the defendant's father would be arrested or investigated if the defendant failed to confess or that his father would not be arrested or investigated if the defendant did confess. After the defendant had made his confession, Lieutenant Turner stated that the defendant's statement seemed to clear his father of any suspicion of operating the truck at the time of the crime under investigation. Based upon these facts in the record, we conclude that any motivation or desire that the defendant may have had to protect his father from investigation was not suggested by law enforcement officials but, instead, originated with the defendant. Assuming *arguendo* that a desire to protect his father from investigation motivated the defendant in making his confession, his confession remained voluntary in a constitutional and legal

sense, as the investigating officers offered him no bargain for his confession and made no threat against his father if the defendant refused to confess. Annot., 80 A.L.R. 2d 1428, §§ 6, 7 and 8 (1961).

[4] The defendant also contends in support of this assignment of error that a comment made to him by Lieutenant Turner held out a hope of benefit or reward in exchange for his confession and thereby rendered his confession involuntary. The record reflects that Lieutenant Turner stated the following during his conversation with the defendant:

> I told Mr. Branch after he talked with his brother that the only promise we could make was that we would talk with the District Attorney if he made a statement which admitted his involvement. I told him another important fact was whether or not the tires were recovered, but at no time was he promised a lighter sentence or anything else.

The defendant contends that the case of *State v. Fuqua*, 269 N.C. 223, 152 S.E. 2d 68 (1967) is controlling in light of this comment by Lieutenant Turner and compels the conclusion that the defendant's confession was the product of a hope of benefit by confessing and, therefore, not freely and voluntarily given. We do not agree. In *Fuqua* the investigating officer told the defendant during interrogation, "if he wanted to talk to me then I would be able to testify that he talked to me and was cooperative." 269 N.C. at 225, 152 S.E. 2d at 69. We held in that case that the quoted statement by a person in authority was a promise which gave the defendant hope for lighter punishment if he confessed and rendered his confession involuntary and inadmissible.

In the present case, Lieutenant Turner merely informed the defendant that the officers would talk with the District Attorney if the defendant made a statement admitting his involvement. We find that this statement by Lieutenant Turner could not have aroused in the defendant, a man 29 years of age and of sound intellect, any reasonable hope of reward if he confessed. Instead, we think that any suspect of similar age and ability would expect that the substance of any statement he made would be conveyed to the District Attorney in the course of normal investigative and prosecutorial procedures. The statement by Lieutenant Turner in no way hinted that the defendant could expect easier or preferred

treatment if he confessed to the crime under investigation. The absence of any such indication that preferential treatment might be given in exchange for his confession makes the present case easily distinguishable from *Fuqua*. Therefore, we conclude that the trial court correctly ruled that the defendant's inculpatory statement was not rendered involuntary by a suggestion of hope reasonably induced by this comment by the interrogating officer. *State v. Young*, 33 N.C. App. 689, 236 S.E. 2d 309 (1977); *see State v. Muse*, 280 N.C. 31, 185 S.E. 2d 214 (1971), *cert. denied*, 406 U.S. 974, 32 L.Ed. 2d 674, 92 S.Ct. 2409 (1972).

We caution the law enforcement officers of the State, however, that they should always be circumspect in any comment they make to a defendant, particularly in connection with any confession the defendant is to give or has given. The better practice would be for law enforcement officers not to engage in speculation of any form with regard to what will happen if the defendant confesses.

We find that the trial court properly allowed Lieutenant Turner to testify with regard to the oral confession made to him by the defendant. This assignment of error is overruled.

The defendant having received a fair trial free from prejudicial error, we find

No error.

STATE OF NORTH CAROLINA v. THOMAS WHEELER MYRICK, JR.

No. 68A81

(Filed 2 June 1982)

1. Burglary and Unlawful Breakings § 5.9— breaking or entering and larceny—sufficiency of evidence

The evidence was sufficient under G.S. 14-54(a) to find defendant guilty of felonious breaking of business premises where the evidence tended to show that defendant had helped the owner of the business premises close the store; that several times before leaving the owner had to relock the back door; that the defendant was aware that the day's receipts were hidden under a counter; that the door to the business had been opened from one to two inches, and the bolt had been dislodged from its locked position; and that defendant offered no

explanation for breaking into the grill, nor did he offer evidence that he was acting with the manager's consent.

2. Burglary and Unlawful Breakings § 6— breaking or entering and larceny instructions proper

In a prosecution for breaking or entering, the trial court properly instructed the jury concerning the elements of larceny, the element of the intent to commit larceny, what constitutes a breaking, what would constitute an entry, and the trial court properly failed to instruct on an attempted breaking and on what would not be a breaking.

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

BEFORE *Judge James C. Davis,* presiding at the 19 September 1979 Criminal Session of DARE Superior Court, defendant was found guilty of felonious breaking. He was sentenced to six to ten years imprisonment. Defendant gave notice of appeal on 21 September 1979 but withdrew that appeal in open court accompanied by counsel. On 2 February 1980 he filed a *pro se* motion for appropriate relief, alleging that he had never been told he had the right to appointed counsel for his appeal. On 14 April 1980 *Judge Wood* appointed counsel to prepare a petition for writ of certiorari to the Court of Appeals. That writ was denied on 24 July 1980, and defendant petitioned this Court for a writ of certiorari. We granted the writ on 2 December 1980, and the case was argued on 15 October 1981.

Rufus L. Edmisten, Attorney General, by Evelyn M. Coman, Associate Attorney, for the state.

Steven D. Michael, attorney for defendant appellant.

EXUM, Justice.

Defendant challenges the sufficiency of the state's evidence to support his conviction of felonious breaking and the adequacy of the trial court's instructions to the jury. We conclude that the trial court properly denied defendant's motion to dismiss for evidentiary insufficiency and that the jury was adequately instructed.

The state's evidence at trial tended to show the following:

Arthur Glidden managed the Ocean Islands Gas and Grill, Inc. in Kill Devil Hills, North Carolina. On 6 March 1979 defend-

ant was helping Glidden lock up the store at 10 p.m. Although defendant was not at that time working for Glidden, he had done so in the past. Defendant had opened the grill for Glidden that morning because Glidden had taken his mother to the hospital. Glidden put the receipts for the day in a moneybag and placed it under the counter. Glidden locked the back door by pushing the button on the doorknob and by placing a two-by-four brace under the doorknob. He and defendant were the only people in the area. Within the next few minutes Glidden found the door unlocked three times; he re-locked the door each time it was unlocked. When he and defendant left the grill shortly after 10 p.m., the back door was locked and the brace was in place. Glidden locked the front door as they left.

Defendant was staying in a room in Glidden's home at the time, but he did not ride home with Glidden that evening. Glidden went to sleep shortly after reaching home. Defendant awakened him during the early morning hours of 7 March with a request to borrow his car. Defendant said he wanted to get something to eat and that his own car was not functioning correctly. Glidden told him his car keys were in his pants pocket. Also in his pants pocket were a second set of keys to the grill. Sometime later that morning Glidden awoke and found defendant had returned; defendant told Glidden he had gotten something to eat.

Glidden opened the grill about 5:30 a.m. on 7 March. He noticed the back door was ajar approximately one to two inches. A metal rod protruded underneath the door. The two-by-four brace was still in place. Glidden notified the police; he then checked the previous day's receipts and found them to be $80 short. Glidden also stated that after a hearing in district court defendant came by his grill and told him "he was sorry and that he wanted me to know that he had broke into the place and he said he didn't do it to me or against me."

Officer James Gradeless of the Kill Devil Hills Police Department responded to Glidden's call on 7 March. At the grill he noted that the rod inserted under the door was a concrete reinforcement rod about 36 or 40 inches long. It protruded inside the grill approximately 12 to 18 inches. The door had been beaten, which caused indentations in the wood of the door and the doorjamb. The door "was ajar enough so that the bolt [the part of the

lock that extends into the doorjamb] was out of the assembly to the jamb, not much more than that." He found a piece of channel lock pliers about 15 to 18 feet from the door. There were a set of footprints leading from the back door to a set of tire tracks, along which he found another piece of the pliers. An impression made from the footprints was examined by an expert from the State Bureau of Investigation and found to match a pair of defendant's tennis shoes. Expert testimony also indicated that the indentations on the door and doorjamb had been made by a rounded tool such as the pliers. A metallic flake from the pliers was found imbedded in the wood around the door.

Defendant told the investigating officers that he had gone out in Glidden's car to get something to eat and had gotten stuck in sand. He said he used a jack and some pliers to free the car. He had borrowed the pliers from a Pizza Hut and had attempted to borrow other tools from a 7-Eleven. Employees from both businesses testified that defendant had asked to borrow tools between midnight and 2 a.m. on 7 March. Defendant told the police that while attempting to extricate the car he had broken the pliers and had thrown them into some nearby brush in a fit of anger. After he got the car unstuck he returned home and went to bed.

The state offered additional evidence that tended to show that the sandy area where defendant said he had been stuck showed no signs of a vehicle having been there. The Pizza Hut and 7-Eleven were about five miles from where defendant said he had been stuck. That place was about one-fourth to one-half mile from where Glidden lived and about one-fourth mile from the grill. The channel lock pliers were found in a place different from where defendant said he had gotten stuck.

Defendant presented no evidence.

[1] Defendant asserts in his first assignment of error that the evidence of a breaking was insufficient to allow the case to be submitted to the jury. Thus, he contends, the trial court erred in failing to grant his motion to dismiss at the close of all the evidence.

The test of the sufficiency of the evidence in a criminal case is whether there is substantial evidence of all the material

elements of the offense charged and that the defendant was the perpetrator of the offense. *State v. Locklear*, 304 N.C. 534, 538, 284 S.E.2d 500, 502 (1981); *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). As stated in *Powell*, *id.* at 99, 261 S.E.2d at 117:

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

Defendant concedes that there was sufficient evidence "to identify him as the perpetrator of the crime." He contends, however, that the evidence was insufficient as a matter of law to support a finding that a breaking had occurred because the two-by-four brace was still in place.

General Statute 14-54(a), the statute which defines the offense for which defendant was charged, provides: "Any person who breaks *or* enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." (Emphasis supplied.) Thus, by the disjunctive language of the statute, the state meets its burden by offering substantial evidence that defendant either "broke" or "entered" the building with the requisite unlawful intent. The state need not show both a breaking and an entering. *State v. Jones*, 272 N.C. 108, 157 S.E.2d 610 (1967); *State v. Barnett*, 41 N.C. App. 171, 254 S.E.2d 199 (1979).

In the instant case there is substantial evidence of at least a breaking.[1] The door had been opened from one to two inches, and the bolt had been dislodged from its locked position. "A breaking in the law of burglary constitutes any act of force, however slight, 'employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed.'" *State v. Jolly*, 297 N.C. 121, 127-28, 254 S.E.2d 1, 5-6 (1979) (quoting *State*

1. Defendant does not contest the fact that a building, as defined in G.S. 14-54(c), was the object of the breaking.

v. Wilson, 289 N.C. 531, 539, 223 S.E. 2d 311, 316 (1976) and 13 Am. Jur. 2d, Burglary § 8 (1964)). Thus, this Court has held that "[t]he breaking of the store window, with the requisite intent to commit a felony therein, completes the offense even though the defendant is interrupted or otherwise abandons his purpose without actually entering the building." *State v. Jones, supra*, 272 N.C. at 109, 157 S.E. 2d at 611. Thus, the dislocation of the door from its locked position was a sufficient breaking even if defendant did not otherwise enter the building.

The state also has offered substantial evidence that defendant possessed the requisite intent to commit larceny, charged by the indictment, when he broke into the grill. His intent "may be inferred from the circumstances surrounding the occurrence." *State v. Thorpe*, 274 N.C. 457, 464, 164 S.E. 2d 171, 176 (1968). Without other explanation for breaking into the building or a showing of the owner's consent, intent may be inferred from the circumstances. *State v. Accor*, 277 N.C. 65, 175 S.E. 2d 583 (1970).

In the instant case the state offered evidence that defendant was aware that the day's receipts were hidden under a counter in the grill. There was evidence that defendant had unlocked the back door to the grill several times while assisting the manager in locking up. Defendant offered no explanation for breaking into the grill, nor did he offer evidence that he was acting with the manager's consent. Thus, there was substantial circumstantial evidence from which the jury could infer that defendant broke into the grill with the intent to commit larceny.

[2] Defendant assigns error to several portions of the trial court's instructions to the jury. First, he asserts that the trial court erred in its charge that "forcing of the door out of its locked position would be a breaking" and that the jury could find him guilty if they found beyond a reasonable doubt that defendant "forced open a locked door" with the intent to commit larceny. These instructions were a correct statement of the law regarding a breaking. *See State v. Jolly, supra*, 297 N.C. at 127-28, 254 S.E. 2d at 5-6.

Second, defendant asserts error in the trial court's explanation of the element of the intent to commit larceny. The court correctly told the jury that in order to find defendant guilty they must find beyond a reasonable doubt "that at the time of the

breaking or entering the defendant intended to commit larceny." *See State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965). It also correctly defined the elements of larceny when it stated, "[L]arceny is the taking and carrying away of the personal property of another, without his consent, and with the intent to deprive him of its possession permanently." *See, e.g., State v. Carswell*, 296 N.C. 101, 249 S.E. 2d 427 (1978). *See also* N.C.P.I.—Crim. 214.30. Thus, this assignment of error is without merit.

Next, defendant argues that the trial court erred by failing to instruct on an attempted breaking. As stated in *State v. Simpson*, 299 N.C. 377, 381, 261 S.E. 2d 661, 663 (1980):

> The trial court is required to submit lesser included degrees of the crime charged in the indictment when and only when there is evidence of guilt of the lesser degrees. *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Carnes*, 279 N.C. 549, 184 S.E. 2d 235 (1971). The presence of such evidence is the determinative factor. *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954). Where all the evidence tends to show that the crime charged in the indictment was committed, and there is no evidence tending to show the commission of a crime of lesser degree, the principle does not apply and it would be erroneous for the court to charge on the unsupported lesser degree. *State v. Griffin*, supra; *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Manning*, 221 N.C. 70, 18 S.E. 2d 821 (1942).

Here all the evidence shows a completed breaking. There is no evidence of an attempt to break. Therefore failure to instruct on attempt to break was not error.

Defendant also asserts that the trial court failed to instruct on what would *not* be a breaking. Since all the evidence shows a completed breaking and there is no version of the evidence which, if believed, would constitute something short of a breaking, this assignment of error has no merit.

Finally, defendant presents several questions regarding the proof and instructions on entering. Specifically, he contends that the evidence offered by the state is insufficient to show an entry and that the trial court erred in its charge on what would constitute an entry, in refusing to instruct on attempted entry, and in failing to instruct on what would not constitute an entry.

The jury specified that it found defendant "[g]uilty of felonious breaking and entering." Under our statute, as already demonstrated, the state need only prove a breaking. We have found that the state offered substantial evidence of felonious breaking, and that the jury was properly instructed. Thus, we do not address defendant's contentions regarding an entry because any error would perforce be harmless.

No error.

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

STATE OF NORTH CAROLINA v. TERRY FRANKLIN COOKE, SR.

No. 20A82

(Filed 2 June 1982)

1. Homicide § 20.1— admissibility of photographs

A photograph was properly admitted in a homicide prosecution for the purpose of illustrating the testimony of a witness concerning the place where the crime occurred, the place to which the victim ran after he was stabbed by defendant, where the victim was when he died, and the substantial amount of blood on the ground.

2. Homicide § 19.1— reputation of deceased—no knowledge by defendant

The trial court did not err in refusing to permit defense counsel to cross-examine a State's witness concerning a murder victim's reputation for being a violent and dangerous person where the record shows that defendant did not know the victim prior to the altercation in question and had no knowledge of the victim's reputation.

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

The State's evidence was sufficient for the jury in a prosecution for second degree murder where it tended to show that a car driven by defendant and a car in which the victim was a passenger almost collided; defendant stuck a Buck knife through the window of the car in which the victim was riding and waved it back and forth; the victim jumped out of the car, defendant swung the knife back and forth at the victim, and defendant and the victim had a fight for some 5-10 minutes; during that time the victim attempted to hit defendant and attempted to kick defendant's hand that was holding the knife; when a third person attempted to separate them, defendant attempted to

shake hands with the victim but held the knife in his hand while talking to the victim and eventually the victim went toward defendant at which time defendant struck the victim in his chest with the knife.

4. Homicide § 28.3— instructions—imperfect right of self-defense

The trial court in a second degree murder prosecution sufficiently charged the jury on defendant's imperfect right of self-defense.

APPEAL by defendant from *Helms, Judge,* 21 September 1981 Criminal Session FORSYTH Superior Court.

Upon a plea of not guilty defendant was tried on a bill of indictment charging him with the murder of Joseph John Willie Young. The state sought a verdict no greater than murder in the second-degree.

Evidence presented by the state is summarized as follows:

At about 6:00 p.m. on 16 June 1981 Joe Young was riding with Robert Devose on Spring Street in the City of Winston-Salem. As they were proceeding on said street, a Toyota automobile drove into the street in front of them from a driveway. Devose had to turn to the left to keep from striking the Toyota; and when he drove to the left, his car was in such a position that he could not move it as the Toyota was right behind him.

Defendant, who was driving the Toyota, got out of his car, pulled out a Buck knife and went to the passenger side of the car in which Young was sitting. Defendant stuck the knife in the car and waived it back and forth to such an extent that Young had to lean back to avoid the knife. A few moments later Young jumped out of the car; he had no weapon. Defendant then swung the knife back and forth at Young and they had a fight for some 5-10 minutes. During that time Young attempted to hit defendant and attempted to kick defendant's hand that was holding the knife. At some point while the two men were engaged in their altercation, a third individual came up with a long stick and attempted to separate them. Thereupon defendant attempted to shake hands with Young but held the knife in his hand while talking to Young. Eventually Young went toward defendant at which time defendant struck Young in his chest with the knife. Young turned, ran a short distance and fell on the sidewalk. He was later taken to a

hospital and died that evening at around 8:00 p.m. from a three inch knife wound in his heart.

Evidence presented by defendant is summarized as follows:

On the afternoon and evening in question, defendant had been practicing music with a band that he played with. He had been drinking on that afternoon and was in an intoxicated state. He went to Doug Reed's house, which is located on Spring Street, and visited there for some period of time.

Later he got back into his automobile with his girlfriend and another man. As he was backing out of Reed's driveway he heard another car slam on brakes. He then heard someone holler "watch where you're going you damn honky."

After both cars stopped, Devose, the driver of the other car, got out and started walking toward defendant. A little later Young got out of the car and at that time defendant became scared and pulled his knife because both of the men were advancing on him. Defendant asked Young to shake hands with him and "just forget it." Young refused to shake hands, saying "I'm not shaking no g.d. honky's hand."

A Mr. James came up and tried to separate defendant and Young as they were standing near the cars. Defendant renewed his efforts to get Young to shake hands with him but Young refused. After Mr. James separated the two men, Young advanced on defendant and kicked him in his groin. Defendant bent over and "sort of" blacked out. He saw Young advancing on him again but he did not remember what happened after that.

Defendant surrendered himself to law enforcement officers sometime later that night and asked the officers to take him to the hospital as he had been injured when he was kicked. Young was a large, strong man, approximately 5 ft. 11 in. tall and weighed approximately 185 pounds. Defendant weighed considerably less than Young. Defendant had been convicted previously of breaking or entering and carrying a concealed weapon.

The court submitted the case to the jury on second-degree murder, voluntary manslaughter or not guilty. The jury returned a verdict finding defendant guilty of second-degree murder and the court entered judgment imposing a life sentence.

Attorney General Rufus L. Edmisten, by Frank P. Graham and Thomas B. Wood, Assistant Attorneys General, for the state.

William Z. Wood, Jr. for defendant-appellant.

BRITT, Justice.

[1] By his first assignment of error defendant contends that the trial court erred in admitting into evidence certain testimony concerning blood and a photograph for the reason that the testimony and photograph had no substantive value and could only inflame and prejudice the jury against defendant. We find no merit in this assignment.

We are advised by the clerk of this court that the photograph complained of was not filed in this court as a part of the record on appeal. That being true, we will attempt to answer this assignment of error without viewing the photograph. "It is the duty of appellant to see that the record is properly made up and transmitted." 4 Strong's N.C. Index 3d, Criminal Law, § 154.

In *State v. Young*, 291 N.C. 562, 231 S.E. 2d 577 (1977), this court, speaking through Justice Huskins, said:

> "It is settled law in this State that a witness may use a photograph to illustrate his testimony and make it more intelligible to the court and jury; and if a photograph accurately depicts that which it purports to show and is relevant and material, the fact that it is gory or gruesome, or otherwise may tend to arouse prejudice, does not render it inadmissible." 1 Stansbury's North Carolina Evidence (Brandis rev. 1973) § 34; *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971); *State v. Atkinson*, 278 N.C. 168, 179 S.E. 2d 410 (1971); *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970).

291 N.C. at 570-71, 231 S.E. 2d at 582.

The record discloses that the photograph in question was first shown to state's witness Devose who was describing the scene where the alleged offense occurred. He stated that the photograph showed Spring Street, the place where the fight took place, the place to which Young ran after he was stabbed, where he was when he died, and substantial blood on the ground. On the

record before us, we conclude that the photograph and evidence were relevant and that defendant has failed to show error.

[2] By his second assignment of error defendant contends the trial court erred when it refused to allow defendant's counsel to cross examine Devose concerning Young's past criminal record and his reputation for being a violent and dangerous person. There is no merit in this assignment.

In *State v. Winfrey*, 298 N.C. 260, 258 S.E. 2d 346 (1979), this court speaking through Chief Justice Branch, said:

> Generally, evidence of a victim's violent character is irrelevant, but when the accused knows of the violent character of the victim, such evidence is relevant and admissible to show to the jury that defendant's apprehension of death and bodily harm was reasonable. *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967). Clearly, the reason for this exception is that, a "jury should, as far as is possible, be placed in defendant's situation and possess the same knowledge of danger and the necessity for action, in order to decide if defendant acted under reasonable apprehension of danger to his person or his life." *Id.* at 219, 154 S.E. 2d at 52.
>
> The second of the recognized exceptions to the general rule permits evidence of the violent character of a victim because it tends to shed some light upon who was the aggressor since a violent man is more likely to be the aggressor than is a peaceable man. The admission of evidence of the violent character of a victim which was unknown to the accused at the time of the encounter has been carefully limited to situations where all the evidence is circumstantial or the nature of the transaction is in doubt. *See* Stansbury, *supra*, § 106; *State v. Blackwell*, 162 N.C. 672, 78 S.E. 316 (1913). The relevancy of such evidence stems from the fact that in order to sustain a plea of self-defense, it must be made to appear to the jury that the accused was not the aggressor. *See State v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135 (1971).

298 N.C. at 262, 258 S.E. 2d at 347.

The record reveals that defendant did not know Young prior to the altercation in question and had no knowledge of Young's

reputation. That being true, the evidence did not come under the first section set forth in Winfrey, *supra.*

The record further reveals that in response to defense counsel's question, Devose testified that Young did not have a bad temper and "he wasn't really violent." The court sustained the state's objection to counsel's question, "Do you know of his past criminal record?" Since the record does not disclose what Devose's answer would have been to this question, the exclusion of the testimony is not shown to be prejudicial. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. Fountain*, 282 N.C. 58, 191 S.E. 2d 674 (1972).

The assignment of error is overruled.

[3] Defendant assigns as error the failure of the trial court "to reduce the charges to voluntary manslaughter at the end of the state's evidence." This assignment has no merit.

In effect defendant is saying that the evidence, viewed in the light most favorable to the state, was not sufficient for the court to submit the charge of second-degree murder to the jury. We disagree. Murder in the second-degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979); *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). The state's evidence summarized above was sufficient to support all elements of the offense of murder in the second-degree.

Defendant assigns as errors the trial court's recapitulation of certain evidence in its charge to the jury. First, he argues that the court erred in stating that the state's evidence tended to show that Young was trying to protect himself when he kicked at defendant; and, second, that the court erred in stating that defendant said he fell to the ground. There is no merit in these assignments.

As to the first instance complained of, we think the court accurately stated what the evidence showed. The witness Rafferty testified that he saw Young kick at defendant's hand, the hand "where the knife was." Witness Parker testified that Young was "trying to knock the knife away but scared to get too close."

As to the second instance, it is true that defendant did not testify that he fell to the ground. What he said was that when he

was kicked he bent over and blacked out. We perceive no prejudice to defendant by this slight misstatement. Furthermore, in order to be reviewable on appeal, slight inadvertences by the judge in the recapitulation of the evidence in his charge to the jury must be brought to his attention in time for him to make a correction. *State v. Willard*, 293 N.C. 394, 238 S.E. 2d 509 (1977); *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968).

[4] By his final assignment of error defendant contends that the trial court erred in its instructions to the jury by failing to instruct on defendant's imperfect right of self-defense. This assignment has no merit.

Defendant relies on our decision in *State v. Norris*, 303 N.C. 526, 279 S.E. 2d 570 (1981). In that case this court, speaking through Justice Huskins, articulated the difference between perfect self-defense, which requires a verdict of not guilty, and imperfect self-defense which would justify a verdict of voluntary manslaughter. We quote from that opinion:

> The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed:
>
> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

(Citations omitted.) The existence of these four elements gives the defendant a *perfect right of self-defense* and requires a verdict of not guilty, not only as to the charge of murder in the first degree but as to all lesser included offenses as well.

On the other hand, if defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter. (Citations omitted.)

303 N.C. at 530, 279 S.E. 2d at 572-73.

The vice of the jury charge in *Norris* was that "the expression 'without justification or excuse' was used as the equivalent of 'self-defense' throughout the charge, not only with respect to murder in the first degree but also murder in the second degree and voluntary manslaughter." We held that this was error requiring a new trial.

The error recognized in *Norris* did not occur in this case. The court instructed the jury on the four elements of self-defense substantially as set forth in *Norris* and charged that a finding of those four elements would completely excuse the killing. Immediately thereafter, the court instructed as follows:

Now, the burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense. However, if the State proves beyond a reasonable doubt that the defendant though otherwise acting in self-defense used excessive force or was the aggressor, though he had no murderous intent when he entered the fight, the defendant would be guilty of voluntary manslaughter.

The charge in the case at hand does not contain the error which we found in the *Norris* charge. The assignment of error is overruled.

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

No error.

STATE OF NORTH CAROLINA v. KENNETH BOYD GILLEY

No. 15A82

(Filed 2 June 1982)

1. Rape and Allied Offenses § 4.3— first degree sexual offense—sexual behavior of victim—testimony properly excluded

In a prosecution for a first degree sexual offense and other crimes, the trial court properly instructed the jury to give no consideration to the following question asked of the victim: "Isn't it true, Mr. Simpson, that you are a homosexual?" The question did not come within the exceptions listed in G.S. 8-58.6(d) and the defendant did not follow the procedure outlined in G.S. 8-58.6(c).

2. Homicide § 21.1— attempted murder—sufficiency of the evidence

The evidence was sufficient to overcome defendant's motion to dismiss the charge of attempted murder where the evidence tended to show that defendant committed a first degree sexual offense, had the victim remove his clothes, ordered the victim to get into the trunk of an automobile, and pushed the automobile over a cliff of a rock quarry.

APPEAL by defendant from *McLelland, Judge*, 12 January 1981 Criminal Session, ALAMANCE Superior Court.

Upon pleas of not guilty, defendant was tried on bills of indictment charging him with (1) first-degree sexual offense, fellatio, (2) armed robbery, (3) kidnapping, and (4) attempted murder. Joseph Simpson was the alleged victim of the offenses which allegedly occurred on the night of 20-21 September 1980.

Evidence presented by the state tended to show:

On the night in question, Simpson, 53, was working at a convenience store in Alamance County. Defendant, 21, with whom

Simpson was acquainted, came into the store and purchased some beer. After a brief conversation, Simpson agreed to meet defendant on the grounds of Western Alamance High School. After Simpson got off work and deposited some funds for the store in a bank, he drove his new Chevrolet automobile to the agreed meeting place. He found defendant there and he got into Simpson's automobile.

They then drove for several miles, left the main highway and drove onto a dirt road. Very soon after getting on the dirt road, Simpson stopped the automobile but did not turn the motor off. Defendant very quickly pulled his pants down, held a knife on Simpson and ordered him to "get on with it." Because of the knife, Simpson performed fellatio on defendant. With threats of using the knife, defendant ordered Simpson to get out of the automobile. After both men got out of the car, defendant ordered Simpson to remove his clothing. When Simpson refused, defendant began tearing his clothes off and cut him on his finger. Defendant then took Simpson's rings and his pocketbook which contained approximately $141.00.

Thereafter defendant ordered Simpson to get into the trunk of the automobile. When Simpson hesitated, defendant pushed him into the trunk and closed the lid. Defendant proceeded to drive Simpson's automobile for several miles to an old rock quarry. Upon arriving at the quarry, defendant got out of the automobile and pushed it over the cliff of the quarry. The automobile went down the rocky edge of the quarry and landed some 60 feet below.

After struggling for some four or five hours Simpson managed to pry the lid of the trunk open and get out. He then wrapped himself with a blanket which he had in the trunk of the car, walked to a service station and called police officers.

Defendant's evidence tended to show that after 10:00 o'clock on the night in question he and his girlfriend, with whom he lived, stopped by the convenience store where Simpson worked; that defendant went in and Simpson asked him "what are you doing later on tonight?"; that defendant knew what Simpson meant and did not like it; that defendant paid for some beer which he had purchased, left and went home; and that he and his girlfriend did not leave the home again that night. Defendant testified that he

had been convicted twice of driving an automobile while under the influence of intoxicants, and of illegal passing, but that he had never been convicted of a felony.

The jury found defendant guilty as charged. The court entered judgments imposing a 10-year prison sentence in the attempted murder case and life sentences in the other three cases, all sentences to run concurrently.

Defendant appealed to this court as a matter of right from the judgments imposing life sentences. On 8 February 1982 we allowed his motion to bypass the Court of Appeals in the attempted murder case.

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

Lamont M. Walton for defendant-appellant.

BRITT, Justice.

[1] By the first assignment of error argued in his brief, defendant contends that the trial court erred in excluding certain testimony which defendant attempted to extract from Simpson, the alleged victim, on cross examination. This assignment has no merit.

The record reveals the following:

> Q. Isn't it true, Mr. Simpson, that you are a homosexual?
>
> MR. XANTHOS: Objection.
>
> A. That is no.
>
> COURT: Just a minute.
>
> The jury will retire while the Court hears a matter concerning the law which must be heard out of your presence. Don't talk about the case while you're out.
>
> (At this time the jury went to the jury room.)

Following a conference with and arguments by counsel in the absence of the jury, the court sustained the state's objection to the question and instructed counsel not to ask the question again. When the jury returned to the courtroom, the court instructed

them to give no consideration to the question asked and to disregard it.

While the record does not disclose why the trial judge sustained the objection to the question, defendant argues that he did it because of G.S. 8-58.6 which provides as follows:

Restrictions on evidence in rape or sex offenses cases.—

(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 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 admissibility 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 used 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.

Defendant argues that he was entitled to ask Simpson if he was a homosexual and to pursue a line of questioning intended to show that on the night in question the victim made sexual advances to defendant and "became noticeably angry" towards defendant when they were rejected. He argues that the question asked and the questions he proposed to ask come within the exception provided by § (b)(2) quoted above.

Clearly the specific question asked is not permissible by virtue of § (b)(2) as it did not relate to *specific* "instances of sexual behavior." Furthermore, the record discloses that Simpson's answer to the question would have been "no", therefore, defendant has failed to show prejudice. *See* 4 Strong's N.C. Index 3d, Criminal Law, § 167.

With respect to the "line of questioning" which defendant intended to pursue, the record fails to disclose what other questions defendant proposed to ask or even a statement summarizing them. Furthermore, it is clear that defendant did not follow the

procedure outlined in § (c) quoted above. In addition, defendant was allowed to testify that Simpson got mad when defendant refused his implied solicitation. We perceive no prejudicial error.

Also under this assignment defendant argues that the trial court did not conduct an in-camera hearing as provided by § (c) quoted above. It suffices to say that defendant did not apply to the court for "a determination of the relevance of the sexual behavior" to which his evidence would relate.

The assignment of error is overruled.

[2] Defendant assigns as error the failure of the trial court to grant his motion to dismiss the charge of attempted murder, contending that the evidence on that charge was not sufficient to submit it to the jury. There is no merit in this assignment.

Clearly the evidence summarized above was sufficient to raise a reasonable inference as to each element of the offense of attempted murder. Furthermore, since the four sentences imposed on defendant are to run concurrently, and the sentence for attempted murder is for a shorter period of time than the other sentences, any error with respect to the attempted murder charge would be unavailing to defendant unless he shows error in the other charges. *State v. Hicks*, 233 N.C. 511, 64 S.E. 2d 871 (1951), *cert. denied*, 342 U.S. 831, 96 L.Ed. 629. *See also State v. Miller*, 271 N.C. 611, 157 S.E. 2d 211 (1967) and *State v. Thomas*, 244 N.C. 212, 93 S.E. 2d 63 (1956).

The assignment of error is overruled.

By the third assignment of error argued in his brief, defendant contends that the trial court abused its discretion in denying his motion for appropriate relief. We find no merit in this assignment.

After the verdicts were returned, defendant made, and the court denied, the following motion:

> At this time I would like to make a motion for appropriate relief and request a new trial based on the fact that the verdict is against the weight of the evidence and the defendant's due process under the State of North Carolina Constitution and the United States Constitution has been

violated by the fact that certain evidence was excluded as per North Carolina Statute.

In his brief defendant argues that his motion should have been granted because the court committed numerous errors, particularly that it permitted improper leading of witnesses, improperly barred certain evidence, and improperly admitted other evidence. We will consider only the two issues stated in the motion made in the trial court.

A motion to set aside the verdict for the reason that it is against the greater weight of the evidence is addressed to the discretion of the trial court and its ruling will not be disturbed absent a showing of abuse of discretion. *See* 4 Strong's N.C. Index 3d, Criminal Law, § 175.3. We find no abuse of discretion in this case.

As to defendant's claim in his motion that he had been denied due process "by the fact that certain evidence was excluded as per North Carolina Statute", clearly he was referring to the exclusion of evidence pursuant to G.S. 8-58.6 discussed above. Since we have addressed that contention, we decline to discuss it further.

The assignment of error is overruled.

In his final assignment of error, defendant contends that the trial court committed reversible error in failing to instruct the jury on the lesser offenses of attempted murder. We find no merit in this assignment.

Even if we should agree that defendant was entitled to instructions on the lesser offenses of attempted murder, defendant would not be entitled to a new trial on this charge. This is so for the reason discussed in the second assignment above, that since the four sentences imposed on defendant are to run concurrently, and the sentence for attempted murder is for a shorter period of time than the other sentences, any error with respect to the attempted murder charge would be unavailing to defendant absent a showing of error in the other charges. *State v. Hicks, supra; State v. Miller, supra.*

This assignment of error is overruled.

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

No error.

STATE OF NORTH CAROLINA v. DONALD DALE COOKE

No. 151A81

(Filed 2 June 1982

1. **Searches and Seizures §§ 10, 13— search of suitcase—absence of warrant, consent or probable cause**

The trial court's conclusion that a search of defendant's suitcase at an airport was unlawful was supported by the court's findings that defendant and a companion became separated at the airport; the companion had in his possession his own and defendant's suitcases; officers requested the companion to permit a search of both suitcases; the companion told the officers he could not give them permission to search defendant's suitcase; the officers searched both suitcases and found LSD and Quaaludes in defendant's suitcase; and the officers did not have a warrant or permission to conduct said search.

2. **Searches and Seizures §§ 15, 43— search of suitcase—contention of abandonment—failure to raise in trial court**

The State's contention that defendant abandoned a suitcase by denying its ownership and leaving it with officers without returning to claim it and that he thereby forfeited any reasonable expectation of privacy regarding its contents so that a warrantless search of the suitcase was lawful will not be considered on appeal where the State failed to raise such issue at the suppression hearing in the trial court.

APPEAL by the State pursuant to G.S. 7A-30(2), of the decision of the Court of Appeals (*Judge Becton*, with *Judge Whichard* concurring, and *Judge Robert Martin* dissenting) reported at 54 N.C. App. 33, 282 S.E. 2d 800 (1981). The Court of Appeals affirmed the order entered by *Burroughs, Judge*, at the 8 February 1980 Criminal Session of Superior Court, MECKLENBURG County.

Defendant was charged in an indictment, proper in form, with felonious possession of Lysergic Acid Diethylamide (LSD) in violation of G.S. 90-95, the Controlled Substances Act.

Prior to trial, defendant made a motion to suppress physical evidence of the LSD tablets on the ground that it was obtained

pursuant to an unlawful, warrantless search and seizure of his suitcase at Douglas Municipal Airport in Charlotte, North Carolina. The officers involved and defendant's travelling companion testified at the subsequent suppression hearing. Upon its evaluation of this testimony, the trial court granted defendant's motion and entered an order for suppression of the challenged evidence. That order provided as follows:

> [T]he Court hearing evidence presented by Officer D. R. Harkey, Agent J. A. Davis and Richard K. Turney, makes the following findings of facts:
>
> 1. That the defendants Donald Dale Cooke and Richard Kenneth Turney flew into the Douglas Municipal Airport at Charlotte on October 29, 1979.
>
> 2. That each of the defendants had in his possession a suitcase and that the suitcase of the defendant Cooke contained a quantity of lysergic acid diethylamide.
>
> 3. That the defendants Cooke and Turney became separated for some period of time and that the defendant Turney had in his possession both of the suitcases when he was approached by Officer D. R. Harkey of the Charlotte Police Department, and Agent J. A. Davis of the State Bureau of Investigation.
>
> 4. That the officers made a request of the defendant Turney to search the suitcases in his possession and that defendant Turney gave them permission to search his suitcase but stated to the officers that he could not give them permission to search the suitcase belonging to the defendant Cooke.
>
> 5. That the officers proceeded to search both suitcases and found in defendant Cooke's suitcase a quantity of lysergic acid diethylamide and Quaaludes.
>
> 6. That the officers did not have in their possession a warrant nor did they have permission to conduct said search.
>
> Based upon the foregoing findings of fact, the Court concludes as a matter of law that the search of the suitcase of the defendant Cooke was unlawful as the officers did not have consent, probable cause or a warrant.

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the motion of the defendant Cooke to suppress the evidence consisting of lysergic acid diethylamide and Quaalude is hereby granted.

Record at 16. [The State only took exception to the fourth finding of fact, the single conclusion of law and the trial court's entry of the order.]

The State appealed from the suppression order in accordance with the provisions of G.S. 15A-979(c) and 15A-1445(b). The Court of Appeals held that "the trial court's suppression order was correct and supported by the evidence." 54 N.C. App. at 45, 282 S.E. 2d at 809. As a consequence, the State now appeals to this Court.

Attorney General Rusus L. Edmisten, by Special Deputy Attorney General, Richard N. League, for the State.

Lyle J. Yurko, J. Marshall Haywood, James H. Carson, Jr., for the defendant-appellee.

COPELAND, Justice.

We affirm the trial court's entry of an order against the State suppressing the evidence seized from defendant's suitcase.

The Court of Appeals correctly noted that the scope of appellate review of an order such as this is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law. 54 N.C. App. at 35, 282 S.E. 2d at 803; *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); 4 Strong's N.C. Index 3d §175 (1976). Indeed, an appellate court accords great deference to the trial court in this respect because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred. As Justice Higgins stated, in *State v. Smith*, 278 N.C. 36, 41, 178 S.E. 2d 597, 601, *cert. denied*, 403 U.S. 934, 91 S. Ct. 2266, 29 L. Ed. 2d 715 (1971), the trial judge:

sees the witnesses, observes thier demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth. The appellate court is much less favored because it sees only a cold, written record. Hence the findings of the trial judge are, and properly should be, conclusive on appeal if they are supported by the evidence.

[1] Our full and careful review of the record in the instant case convinces us that more than enough evidentiary support existed therein for the findings of fact made by Judge Burroughs, and it is equally plain that his legal conclusion was properly based upon, and entirely consistent with, those findings. In addition, we find no constitutional error in the judge's conclusion "that the search of the suitcase of the defendant Cooke was unlawful."

The governing premise of the Fourth Amendment is that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances. *Robbins v. California*, 453 U.S. 420, 101 S. Ct. 2841, 69 L. Ed. 2d 744 (1981); *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed. 2d 576 (1967); *accord State v. Allison*, 298 N.C. 135, 257 S.E. 2d 417 (1979); *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). Hence, when the State seeks to admit evidence discovered by way of a warrantless search in a criminal prosecution, it must first show how the former intrusion was exempted from the general constitutional demand for a warrant. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L. Ed. 2d 685 (1969); *United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 96 L. Ed. 59 (1951). In other words, an unlawful search does not become lawful simply because of the incriminating discoveries made thereby. *State v. McCloud*, 276 N.C. 518, 173 S.E. 2d 753 (1970); *see* 68 Am. Jur. 2d Searches and Seizures § 35 (1973).

In the case at bar, Judge Burroughs was called upon, as are we, to decide the reasonableness of the warrantless search and seizure in light of its individual attendant facts and circumstances. *State v. Boone*, 293 N.C. 702, 239 S.E. 2d 459 (1977). We

shall not debate the facts which he found and by which we are bound. It suffices to say that the State did not fulfill its burden, *at the suppression hearing*, of demonstrating with particularity a constitutionally sufficient justification for the officers' search of defendant's suitcase absent his consent or a duly obtained warrant *after it was under their exclusive dominion and control. Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L. Ed. 2d 235 (1979); *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L. Ed. 2d 538 (1977); *United States v. Presler*, 610 F. 2d 1206 (4th Cir. 1979). Moreover, it appears that the State essentially waived any challenge in this regard by failing to enter an appropriate exception and a specific assignment of error in the record to Judge Burroughs' critical finding of fact that the officers had neither a warrant nor consent to search (number six, *supra*). Rule 10, N.C. Rules of Appellate Procedure. The natural and necessary implications of that finding were that the circumstances of the case were not "covered" by *any* exception to the Fourth Amendment and that only a warrant or defendant's consent could have authorized the officers' actions. Thus, as a practical matter, this finding supported Judge Burroughs' conclusion of law and entry of the suppression order, almost by itself. If the State was indeed then relying upon some other constitutional theory or exception to justify the search, it should have preserved a direct, substantive objection to the all-inclusive nature of finding of fact number six.

[2] Nevertheless, the State presently attempts to do in this Court what it failed to do at the suppression hearing in the trial court, *i.e.*, justify this warrantless search on the ground that the protection of the Fourth Amendment does not apply. The State now contends that defendant abandoned the suitcase, by denying its ownership and leaving it with the officers without returning to claim it, and that he thereby forfeited any reasonable expectation of privacy regarding its contents. This may well be. *See Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L. Ed. 2d 387 (1978); *State v. Jones*, 299 N.C. 298, 261 S.E. 2d 860 (1980). However, the State's argument is advanced much too late to afford it benefit on appeal.

It would clearly be unfair to the defendant for us either to consider this contention on the record as it stands, for we cannot determine the necessary underlying matters of fact, or to allow

the State a gratuitous second chance to develop a theory of abandonment, in opposition to the formerly contested motion to suppress, by remanding to the trial court for further hearing, findings of fact and conclusions of law upon the issue. We note that the United States Supreme Court has also reached such a conclusion upon very similar facts. *Steagald v. United States*, 451 U.S. 204, 208-11, 101 S.Ct. 1642, 1645-47, 68 L.Ed. 2d 38, 43-45 (1981). Moreover, any other holding would certainly seem to be incongruous and conflict with our analogous decision in *State v. Hunter*, 305 N.C. 106, 112, 286 S.E. 2d 535, 539 (1982), in which we said the following:

> 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 745, 765 (1978).
>
> . . . [W]hen 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 no 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.

The basic rationale of *Hunter* applies equally well here. [What is sauce for the goose is sauce for the gander.] There is no affirmative indication in the record that the State intended to, or tried to, rely upon defendant's lack of an expectation of privacy in the suitcase to defeat his Fourth Amendment claim at the suppression hearing in the lower court. In addition, the record does not disclose any type of objection or protest by the State to the trial court's references in its order to the subject matter of the search as "*defendant Cooke's* suitcase" and "the suitcase of the *defendant Cooke.*" (Emphases ours). Such characterizations would, of course, be entirely inconsistent with a finding that defendant Cooke had abandoned both the suitcase and his corresponding constitutional claim thereto. In sum, the State has "abandoned" the argument.

For the reasons stated, the decision of the Court of Appeals is affirmed. Judge Burroughs' order to suppress the evidence seized from defendant's suitcase shall remain in full force and effect.

Affirmed.

Justice CARLTON concurs in result.

STATE OF NORTH CAROLINA v. SHARON JOHNSTON BRACKETT

No. 68A82

(Filed 2 June 1982)

Arson and Other Burnings § 4.2 — wantonly and willfully burning dwelling house — sufficiency of evidence

The trial court erred in denying defendant's motion to dismiss the charge of wantonly and willfully burning her dwelling house, in violation of G.S. 14-65, at the close of all the evidence since there was no substantial evidence of willfulness and wantonness. Defendant's house was located on a large lot and the fire did not endanger other homes, defendant herself reported the fire, and she was alone at her home when the fire started.

ON appeal of right from the decision of the Court of Appeals, 55 N.C. App. 410, 285 S.E. 2d 852 (1982), one judge dissenting, finding no error in defendant's trial for and conviction of willfully and wantonly setting fire to and burning her own dwelling house. The trial was held before *Sitton, Judge*, at the 27 October 1980 Criminal Session of Superior Court, MECKLENBURG County.

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

Paul L. Pawlowski for defendant-appellant.

CARLTON, Justice.

I.

Defendant was charged in an indictment proper in form with wantonly and willfully burning her dwelling house, a violation of G.S. 14-65. At trial the State's evidence tended to show that on the evening of 6 May 1980, defendant was seen leaving her home and hurriedly driving away. A few minutes later, smoke and flames were seen coming from the dwelling. The fire was reported and quickly extinguished. Defendant came to the dwelling while the firefighters were still on the scene. Her right foot was slightly burned and the legs of her pants were melted and scorched. Investigations conducted after the fire revealed it to be of incendiary origin and tests performed on several samples of burned items from the home indicated the presence of gasoline. A burn pattern on the living room carpet tended to show that a flammable substance had been poured on the carpet in a circular configuration and had subsequently caught fire.

The State also introduced evidence that defendant's home had been appraised at $4,170 in 1974 for property tax purposes and had been insured in January of 1980 for $35,000.

Defendant's evidence tended to show that she had a good reputation in her community and that she had lived there most of her life. Defendant took the stand in her own behalf and testified that on the evening of 6 May 1980, at about 7:30, she decided to take her two sons and some other neighborhood children to a movie. The children were told to return home to get their money and to gather at defendant's mother's house, about a block away from defendant's home, at 8:00. Her two sons left her home short-

ly after 7:30 that evening and walked to her mother's to return a chain saw. Defendant talked to two other children about going to the movie, went into the house to get her pocketbook and newspapers and came out to start the car at about 7:35 p.m. After she started the car she let it warm up for a few minutes while she cleaned out the car. She then realized that she had forgotten a book and went back to the house to retrieve it. About ten to fifteen minutes elapsed between the time she left the house and the time she re-entered it. When she pushed open the door and stepped in she was met by a wall of flames. She backed out and closed the door. Then she realized that her pants leg was on fire. She took off her pants and put out the fire. She ran to her car and drove to her mother's home where she reported the fire. She didn't use a neighbor's telephone to report the fire because she was clad only in a blouse and undergarments.

Defendant was found guilty as charged by the jury and was sentenced to three to five years' imprisonment.

Defendant appealed her conviction to the Court of Appeals. That court, in an opinion by Judge Webb, in which Judge Robert Martin concurred, found no error in her conviction. Judge Wells voted for a new trial. Defendant appeals to this Court as of right pursuant to G.S. 7A-30(2).

II.

The question dispositive of this appeal is whether the trial court erred in denying defendant's motion to dismiss the charge at the close of all evidence. We conclude that the charge should have been dismissed and reverse and remand for entry of an order of dismissal.

The statute under which defendant was charged, former G.S. 14-65, provided:

> If any person, being the occupant of any building used as a dwelling house, whether such person be the owner thereof or not, or, being the owner of any building designed or intended as a dwelling house, shall wantonly and willfully or for a fradulent purpose set fire to or burn or cause to be burned,

> or aid, counsel or procure the burning of such building, he shall be guilty of a felony. . . .[1]

The indictment upon which defendant was tried charged her with wanton and willful burning and not with burning for a fraudulent purpose. Thus, an essential element of this crime is that the burning was done willfully and wantonly. When intent is an essential element of a crime the State is required to prove the act was done with the requisite specific intent, and it is not enough to show that the defendant merely intended to do that act. *E.g., State v. Morgan*, 136 N.C. 628, 48 S.E. 670 (1904). In *Morgan*, *id.* at 629-30, 48 S.E. at 671, this Court stated:

> It must be conceded that it is not always necessary to show either a motive or an intent, for in some offenses the intent to do the forbidden act is the criminal intent, and the act committed with that intent constitutes the crime. If the person has done the act which in itself is a violation of the law, he will not be heard to say that he did not have the intent. *S. v. King*, 86 N.C., 603; *S. v. Voight*, 90 N.C., 741; *S. v. Smith*, 93 N.C., 516; *S. v. McBrayer*, 98 N.C., 619; *S. v. McLean*, 121 N.C., 589, 42 L.R.A., 721. But this principle does not apply when the act is itself equivocal and becomes criminal only by reason of the intent. *S. v. King* and cases *supra*. In the latter case, if the act may be innocent or not according to the intent with which it is done, or if its criminality depends upon the intent, it is incumbent on the State to show the intent or to show the facts and circumstances from which the intent may be inferred by the jury, and it is necessary that the jury should find the intent as a fact before the defendant charged with the commission of the act can be adjudged guilty of a crime. *S. v. McDonald*, 133 N.C., 680.

Thus, in order to prove that this defendant's conduct violated G.S. 14-65 the State was required to prove (1) that she was the owner or occupier (2) of a dwelling house (3) that she burned or set on fire (4) wantonly and willfully. Defendant contends that the State did not present sufficient evidence of willfulness and wantonness. We agree.

1. G.S. 14-65, as presently codified, now makes this crime punishable as a Class H felony and applies only to offenses committed after 1 July 1981.

The requirement that an act be done willfully and wantonly has previously been considered by this Court. In *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973), we considered the meaning of that requirement in the context of a prosecution for murder based on the underlying felony of willfully and wantonly discharging a firearm into an occupied dwelling and stated:

> In our view, the words "wilful" and "wanton" refer to elements of a single crime. Ordinarily, " '[w]ilful' as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law." *State v. Arnold*, 264 N.C. 348, 141 S.E. 2d 473 (1965). "Wantonness . . . connotes intentional wrong-doing. . . . Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others." *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E. 2d 393, 396-97 (1956). The attempt to draw a sharp line between a "wilful" act and a "wanton" act . . . would be futile. The elements of each are substantially the same.
>
> We hold that a person is guilty of the felony created by G.S. 14-34.1 if he intentionally, without legal justification or excuse, discharges a firearm into an *occupied building* with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons.

Id. at 72-73, 199 S.E. 2d at 412. Thus, for a burning of a dwelling to be criminal under G.S. 14-65 as a willful and wanton burning, it must be shown to have been done intentionally, without legal excuse or justification, and with the knowledge that the act will endanger the rights or safety of others or with reasonable grounds to believe that the rights or safety of others may be endangered.

Defendant challenged the sufficiency of the evidence on this and every other essential element of the crime by moving to dismiss the charge at the close of all the evidence. The evidence is sufficient to withstand a motion to dismiss if, when viewed in the light most favorable to the State, there is substantial evidence of all essential elements of the offense. *E.g., State v. Locklear*, 304 N.C. 534, 284 S.E. 2d 500 (1981); *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981). In deciding whether the evidence is sufficient:

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Powell, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980) (citations omitted).

When viewed in the light most favorable to the State, there is no substantial evidence of willfulness and wantonness. There is no evidence that defendant set fire to her dwelling house with reckless disregard of the rights or safety of others. To the contrary, her house was located on a large lot and the fire did not endanger other homes, defendant herself reported the fire, and she was alone at her home when the fire started. Although the State argues that there is evidence that the fire was set in disregard of the public's interest in not having the building destroyed, that is not the sort of right which would make defendant's conduct wanton.

Although there was some evidence from which it could be inferred that defendant set fire to her home for the purpose of collecting insurance proceeds worth more than her home, this intent is not wanton. Had plaintiff had this intent to collect on the insurance, her action would have been done for fraudulent purposes and would have been criminal under the other clause of G.S. 14-65. However, the indictment charged defendant with willful and wanton burning and not with burning for fraudulent purpose and her conviction can be sustained only if willfulness and wantonness is shown.

For the reasons stated above we conclude that the trial court erred in denying defendant's motion to dismiss that charge at the close of all evidence. 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, Mecklenburg County, for entry of judgment of dismissal. In light of our holding, it is not necessary to address other questions raised.

Reversed and remanded.

STATE OF NORTH CAROLINA v. MERRILL LANE ANDREWS

No. 69A81

(Filed 2 June 1982)

1. **Searches and Seizures § 8— search of gym bag in car—incident of lawful arrest**

Officers had probable cause to believe that defendant and his companion had committed a burglary, and the officers' search of defendant's car and a gym bag found inside the car fell within the constitutional boundaries established by *New York v. Belton*, 453 U.S. 454 (1981), permitting the warrantless search of the passenger compartment of a vehicle, including any containers therein, as a contemporaneous incident of the lawful arrest of an occupant of that vehicle.

2. **Burglary and Unlawful Breakings §§ 5, 10.3; Receiving Stolen Goods § 5.1— second degree burglary—larceny—possession of burglary tools—possession of stolen property—sufficiency of evidence**

The State's evidence tending to show that defendant and a companion were caught with instrumentalities and fruits of a burglary committed at a nearby residence was sufficient to support conviction of defendant for second degree burglary, felonious larceny, possession of a burglary tool and possession of stolen property.

3. **Criminal Law § 26.5; Larceny § 1; Receiving Stolen Goods § 1— punishment for larceny and possession of stolen property—double jeopardy—legislative intent**

While double jeopardy considerations do not prohibit the punishment of a defendant for both larceny and possession of the same stolen property, the Legislature did not intend to punish a defendant for possessing the same goods that he stole.

4. **Criminal Law § 22— failure of defendant to sign waiver of arraignment**

Defendant failed to establish that his right to a fair trial was impaired or prejudiced because he did not personally sign the written waiver of formal arraignment in accordance with G.S. 15A-945 where the record showed that defendant's counsel signed the written waiver of arraignment and entered pleas of not guilty on his behalf, and defendant did not suggest that the waiver and pleas were entered without his full knowledge or concurrence.

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

APPEAL by defendant, pursuant to G.S. 7A-30(2), of the decision of the Court of Appeals (*Judge Harry C. Martin*, with *Judge Arnold* concurring, and *Judge Clark* dissenting) reported at 52 N.C. App. 26, 277 S.E. 2d 857 (1981). The Court of Appeals found

no error in the judgments of conviction entered by *Brannon, Judge*, at the 16 June 1980 Criminal Session of Superior Court, WAKE County.

Defendant was charged in indictments, proper in form, with second degree burglary, felonious larceny, possession of a burglary tool and possession of stolen property. Defendant pleaded not guilty. The State's evidence at trial was adequately summarized in the Court of Appeals' opinion which we quote:

> [T]he Raleigh Police Department, Wake County Sheriff's Department, and the SBI were jointly involved in a special investigation of residential burglaries. They had received reliable information from an informant about breakins in Wake, Johnston, Wilson, and New Hanover counties. The investigation focused upon defendant and his associates, one being defendant's sister who was hospitalized. Several burglaries had happened in the Hayes-Barton and Five Points area of Raleigh, involving homes of people who were also in the hospital on the same floor as defendant's sister. The officers had a list of the people on that floor of the hospital and noted those who had homes located in the suspect area. Their investigation showed that the thefts occurred around dusk, that the burglars left their car parked and walked to the house using a pillowcase or small bag to carry the stolen articles, usually coins and silver, back to the car.
>
> On 19 March 1980, an officer received a call from the informant telling him that defendant and Larry Rudd were leaving in defendant's car to commit a burglary. Several officers went to the Five Points area where defendant, with another man, was seen driving his car. For a time, the officers lost sight of defendant's car, but soon located it parked on the street unattended. The officers waited nearby and saw the taillights of the car come on. Rudd approached, carrying a gym bag, and entered the car. The officers followed the car as it drove away and stopped it at a red light. When the officers approached the car with drawn weapons, defendant put his hands on top of his head and his car rolled forward toward a police car. An officer reached into the car, turned off the ignition, and put the car in parking gear. In so doing, he saw the gym bag on the floor, with a shiny object on top.

> Another officer, in removing Rudd from the car, saw the same bag with silver protruding from the top. Defendant and Rudd were arrested and the bag was seized. Upon checking the neighborhood, the officers located a house which had been entered by breaking through a basement door. The silver in the bag was identified by a resident of the house and was offered into evidence.

52 N.C. App. at 27-28, 277 S.E. 2d at 859-60.

Defendant offered no evidence in his behalf. The jury found defendant guilty as charged on all counts. The trial court thereupon imposed the following terms of imprisonment: thirty years for the burglary, six years for the larceny, and two years each for possession of the burglary tool and stolen property. All of these sentences ran consecutively. In a 2-1 decision, the Court of Appeals affirmed the entry of judgment upon all of defendant's convictions.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas F. Moffitt, for the State.

Loflin & Loflin, by Thomas F. Loflin III, for the defendant-appellant.

COPELAND, Justice.

Defendant contends that the Court of Appeals erred in failing to reverse his convictions or order a new trial. Our recent decision in *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982), requires us to vacate defendant's conviction for felonious possession of stolen property. In all other respects, however, we affirm the Court of Appeals.

I.

[1] Defendant argues that all of the evidence seized from his car should have been suppressed at trial because neither his arrest nor the subsequent vehicular search was accompanied by probable cause to believe that he had committed a crime. The Court of Appeals held, *inter alia*: (1) that, considering the circumstances existing at the time, a reasonably prudent person had ample cause to believe that defendant and his companion had committed a burglary and (2) that a reasonable search of the car incident to

defendant's lawful arrest was also lawful. We agree with both of these holdings and cite as additional authority in support thereof the decision of the United States Supreme Court in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed. 2d 768 (1981).

According to the authority of *Belton, supra*, a police officer may constitutionally search the passenger compartment of a vehicle, *including* any containers located therein, as a contemporaneous incident of the lawful arrest of an occupant of that vehicle. We are, of course, aware that the *Belton* decision was filed on 1 July 1981, approximately six weeks after the Court of Appeals filed its opinion in the instant case, and over a year after defendant's actual trial. However, we have previously held that retroactive application of the *Belton* rule is warranted in cases raising similar issues about the legality of a warrantless search. *State v. Cooper*, 304 N.C. 701, 286 S.E. 2d 102 (1982). Thus, we hold that the police officers' search of defendant's car and the gym bag found inside the car fell squarely within the constitutional boundaries established by *Belton*, and defendant's motion to suppress the incriminating evidence thereby discovered was properly denied.

II.

[2] Defendant argues that the State's evidence was insufficient to convict him of any of the crimes submitted to the jury. This contention lacks merit, and we shall not restate the evidence at length here. Simply put, the State's evidence showed that defendant and his companion were caught red-handed with the instrumentalities and fruits of a burglary committed at a nearby residence. Consequently, we agree with the Court of Appeals that the State adduced substantial evidence of defendant's guilt upon the essential elements of the charged crimes. *See* G.S. 14-51, 14-55, 14-71.1 and 14-72.

III.

[3] Defendant asserts that he "was placed in double jeopardy by being convicted and sentenced on duplicative charges—the charge of felonious larceny and the charge of felonious possession of the identical property which was the alleged subject matter of that larceny."[1] Defendant's Brief at 20-21. The Court of Appeals'

1. Defendant moved for a dismissal of either the larceny or the possession charge at trial upon this basis. The motion was denied.

majority rejected this claim and held that defendant could be constitutionally tried and punished for both larceny and possession because the offenses were separate and distinct, with each crime including an element not present in the other. Judge Clark dissented and stated his belief that the issue of former jeopardy was governed by the opinion of another panel of the Court of Appeals filed on the very same day which had reached a contrary conclusion. *See State v. Perry*, 52 N.C. App. 48, 278 S.E. 2d 273 (1981), *modified and affirmed*, 305 N.C. 225, 287 S.E. 2d 810 (1982). Our recent decision in *State v. Perry, supra*, is dispositive of these matters.

In *Perry*, this Court held "[n]othing in the United States Constitution or in the Constitution of North Carolina prohibits the Legislature from punishing a defendant for both offenses" of larceny and possession since each crime required proof of an additional fact which the other did not. 305 N.C. at 234, 287 S.E. 2d at 815-16. Notwithstanding that, however, our Court further held that, considering the legislative history, case law background and internal provisions of the possession statutes, the state legislature "did not *intend* to punish an individual for larceny of property and the possession of the same property which he stole." *Id.* at 235, 287 S.E. 2d at 816 (emphasis added). Our final conclusion in *Perry* was 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." *Id.* at 236, 237, 287 S.E. 2d at 817 (footnote omitted).

The situation presently before us is indistinguishable from that in *Perry*. We must therefore reverse the Court of Appeals and vacate defendant's additional conviction for possession of stolen property.

IV.

Defendant assigns error to several portions of the trial court's final instructions to the jury. We hold that these contentions were fully and correctly addressed in the Court of Appeals' opinion, and, for the reasons there stated, the assignments are overruled.

V.

[4] Defendant finally argues that judgment should be arrested on all of his convictions because *he* did not sign the written

waiver of formal arraignment upon the charges in accordance with G.S. 15A-945. Defendant's position is untenable. Defendant failed to take an exception or bring forward an assignment of error on this basis in the record on appeal, and he did not brief or argue the point in the Court of Appeals.[2] Obviously, the matter is not properly raised for the first time in this Court. *See* N.C. Rules of Appellate Procedure, Rule 10(a). In any event, defendant has no justifiable cause for complaint. The record reveals that his counsel signed the written waiver of arraignment and entered pleas of not guilty on his behalf. Defendant does not even suggest, much less affirmatively show, that the waiver and pleas were entered without his full knowledge or concurrence. Consequently, defendant has not fulfilled his burden of establishing that his right to a fair trial was impaired or prejudiced due to the mere fact that he did not also personally sign the written waiver of arraignment. *See State v. Small*, 301 N.C. 407, 430-31, 272 S.E. 2d 128, 142-43 (1980); *State v. Smith*, 300 N.C. 71, 73, 265 S.E. 2d 164, 166-67 (1980); *State v. McCotter*, 288 N.C. 227, 234, 217 S.E. 2d 525, 530 (1975). This "assignment" is overruled.

VI.

In summary, we affirm the Court of Appeals' decision to the extent that it found no error in the entry of the judgments of conviction against defendant upon charges of burglary, larceny of property and possession of a burglary tool. However, we must reverse the Court of Appeals to the extent that it did not vacate defendant's conviction of possession of stolen property. The Court of Appeals is hereby directed to remand the cause to the trial court for a dismissal of that charge.

Affirmed in part; reversed in part.

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

2. Defendant's counsel in this appeal did not represent him at trial or at the Court of Appeals.

STATE OF NORTH CAROLINA v. CLAYTON LEAK

No. 40PA82

(Filed 2 June 1982)

BEFORE *Judge DeRamus* presiding at the 3 March 1981 Session of RICHMOND Superior Court defendant was tried on an indictment charging assault with a deadly weapon with intent to kill inflicting serious injury. He was convicted of an assault with a deadly weapon with intent to kill and sentenced to ten years' imprisonment. The Court of Appeals, in an unpublished decision, ordered a new trial. The opinion was by *Judge Whichard* with *Judges Clark* and *Becton* concurring. 55 N.C. App. 481, 286 S.E. 2d 908 (1982). We allowed the state's petition for further review on 3 March 1982.

Rufus L. Edmisten, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the state appellant.

Adam Stein, Appellate Defender, by Nora B. Henry, Assistant Appellate Defender, for defendant appellee.

PER CURIAM.

The Court of Appeals awarded a new trial for failure of the trial judge to instruct on the legal effect of an accidental shooting. In its petition for further review the state urged primarily that the trial judge's instructions sufficiently charged on accident. Alternatively, the state urged that there was no evidence to support a charge on accident.

In its brief and on oral argument in this Court, the state conceded that the trial court's instructions did not adequately charge on the legal effect of accident and relied solely on its contention that there was no evidence to support such a charge.

After a careful review of the record and briefs and the decision of the Court of Appeals, we conclude that we improvidently allowed the state's petition for further review.

Discretionary Review Improvidently Allowed.

STATE OF NORTH CAROLINA v. DAVID J. BROWN

No. 30A81

(Filed 13 July 1982)

1. **Constitutional Law § 30— defendant not entitled to view crime scene**

Unlike Rule 16 of the Federal Rules of Criminal Procedure, G.S. 15A-903 does not specifically confer the right to "discover buildings or places." Therefore, under G.S. 15A-903(d) defendant was not entitled to inspect the crime scene.

2. **Constitutional Law § 30— discovery—denial of motion to view crime scene—denial of due process—harmless beyond reasonable doubt**

On the facts of a prosecution for first degree murder, it was a denial of fundamental fairness and due process for defendant to be denied, under police prosecutorial supervision, a limited inspection of the premises of the crime scene in order to search for exculpatory evidence. However, because the evidence of defendant's guilt was overwhelming, the error was harmless beyond a reasonable doubt.

3. **Constitutional Law § 30; Bills of Discovery § 6— motion to inspect pretrial written statements denied—in camera inspection—placing statements in sealed envelopes**

In a prosecution for first degree murder in which four witnesses testified that a ring found in one victim's body belonged to defendant, the trial court did not err in denying defendant's request for copies of the statements which each witness had given to the police and in reviewing the statements *in camera* and then placing the statements in a sealed envelope pursuant to the procedure enunciated in *State v. Hardy*, 293 N.C. 105 (1977). Nor did the court err in denying defendant's motion to inspect "any statements written whether in longhand or otherwise" since this request was obviously a shotgun tactic and the record disclosed no evidence of any other statements which were available to the court to inspect and seal.

4. **Constitutional Law § 30— statement of witness not revealed to defendant—no abuse of discretion**

The trial court did not err in failing to exclude a witness's statement pursuant to G.S. 15A-910 or in denying defendant's motions for a dismissal, a mistrial, and a continuance on the grounds that the defendant had not been provided with information concerning the witness's statement since the record revealed that (1) the district attorney was not aware of the information until trial, (2) the defense counsel became aware of the information a week before trial and had, in fact, talked with the witness, and (3) the witness testified before the jury and the jury heard a full account of what he had observed on the evening of the crime.

5. **Criminal Law § 157.2— answers of witness not in record—no prejudicial error by court**

In a prosecution for first degree murder where one of the witnesses was asked by defendant if he determined that "one or more persons" may have

seen the victim after 1:00 a.m. on the night of the murder and the witness answered yes, and the trial court sustained the State's objections to questions seeking the names of the persons, the trial court erred in not allowing the defendant to have the questions answered for the record, but the error was not prejudicial since another witness testified that he had seen the victim alive at 12:30 or 1:00 a.m. on the night in question.

6. **Searches and Seizures § 14— consent to search given voluntarily and free from coercion**

In a prosecution for first degree murder, the evidence fully supported the trial court's conclusion that defendant's consent to the search of his home was voluntarily given free from coercion in any form where the evidence tended to show that two SBI agents talked with defendant about the alleged murders and informed him that they wanted to search his apartment; that they read defendant a "Consent to Search" form; that defendant signed the consent form in the presence of two police officers and a friend of defendant's with whom he had consulted; that defendant stated that he understood the form and understood his rights; that defendant was not under any influence of alcohol or drugs; and that no force or coercion was used against him or any promises made to him.

7. **Searches and Seizures § 13— obtaining search warrant does not negate prior consent to search**

Where the State obtained a search warrant subsequent to obtaining defendant's consent to search his apartment, the obtaining of the warrant did not negate the consent originally given.

8. **Jury § 6— denial of individual voir dire**

Defendant's contention that in a capital case, an individual voir dire of the jury should be allowed in order for defendant to receive a fair trial was overruled.

9. **Jury § 7.13— two capital offenses—no additional peremptory challenges**

A defendant charged with two capital offenses should not be given additional peremptory challenges.

10. **Criminal Law §§ 21.1, 22— remand after arraignment—absence of preliminary hearing**

Defendant's arraignment was not illegal because the proceedings were remanded for findings of fact by the district court concerning the reasons for the continuance of his probable cause hearing, and defendant's rights were not violated by the elimination of the probable cause hearing because of an imminent indictment.

11. **Homicide § 18— first degree murder—elements of premeditation and deliberation correctly submitted to jury**

In a prosecution for first degree murder, the nature and number of the victims' wounds were one circumstance from which inference of premeditation and deliberation could be drawn; however, evidence of the premeditation and deliberation required to sustain defendant's conviction was supplied by many other instances of circumstantial evidence.

12. Criminal Law § 111— failure to submit charge to jury in writing—no error

In a prosecution for first degree murder, the trial court did not err by failing to submit its charge to the jury in writing as requested by defendant.

13. Criminal Law § 114.3— judge's referring to defendant as "the defendant"—no expression of opinion

The trial court did not impermissibly express its opinion by refusing to grant the defendant's request that he be referred to by his name and not as "the defendant."

14. Criminal Law § 117— failure to charge jury on issue of defendant's good character—no error

Where the defendant did not introduce character evidence, but only offered several witnesses' personal opinions of the defendant, the trial court did not err in failing to charge the jury on the issue of his good character.

15. Constitutional Law § 31— indigent defendant—appointment of polygraph examiner

There was no abuse of discretion in the denial of the defendant's request for the appointment of a polygraph examiner.

16. Constitutional Law § 30— no provision for discovery of criminal records of State's witnesses

G.S. 15A-903 does not provide for discovery of the criminal records of the State's witnesses.

17. Criminal Law § 135.4— sentencing phase—submission of aggravating circumstance of "especially heinous, atrocious and cruel"—basis in State's proof of first degree murder

In a prosecution for first degree murder in which defendant was tried and convicted on the basis of premeditation and deliberation, the trial court did not err in submitting the aggravating circumstance that the murders were "especially heinous, atrocious and cruel" under G.S. § 15A-2000(e)(9) where the facts underlying the State's theory of the case were also the elements used to support the submission of this aggravating circumstance.

18. Criminal Law § 135.4— sentencing phase—submission of aggravating circumstance of "especially heinous, atrocious and cruel"—doubt that wounds inflicted before death of victims

In a prosecution for first degree murder, the trial court did not err in submitting the aggravating circumstance that the murders were especially heinous, atrocious and cruel on the basis that the evidence did not support the conclusion beyond a reasonable doubt that the wounds inflicted were administered before the death of the victims. There was abundant evidence that many of the wounds were inflicted prior to death, and the character and severity of the wounds supported the submission of this aggravating circumstance.

19. Criminal Law § 135.4— sentencing phase—refusal to submit requested mitigating circumstances—no error

The trial court did not err in refusing to submit mitigating circumstances that (1) the defendant did not act in a calculated manner, (2) the defendant did not act for pecuniary gain, and (3) the defendant was under the influence of mental or emotional disturbance. Evidence that a bloody knife was found in the victim's apartment which was the same type as the knives in defendant's tool box, was evidence from which the jury could have inferred that defendant acted in a calculated manner. Even assuming the evidence showed that defendant did not act for pecuniary gain, the evidence merely showed the absence of an aggravating circumstance and not the presence of a mitigating one. Defendant's use of alcohol and drugs was properly submitted under the mitigating circumstance of G.S. 15A-2000(f)(6), impaired capacity, and not under G.S. 15A-2000(f)(2), mental or emotional disturbance.

20. Criminal Law § 135.4— sentencing phase—testimony relating to guilt or innocence not presented at guilt phase of trial—admissible

Testimony by a fellow prisoner that defendant told the prisoner that he had murdered two people using a knife and that he did not understand why his ring was not given back to him, was admissible at the sentencing phase of defendant's trial even though it had not been presented during the guilt determination phase of the case since it was relevant and had probative value, and since the evidence was relevant to rebut evidence submitted by the defendant at the guilt phase of the trial which would support mitigating circumstances.

21. Criminal Law § 135.4— sentencing phase—refusal to allow questioning of district attorney concerning promises made by State to witness—proper

The trial court did not err in the sentencing phase of a trial for first degree murder by refusing to allow defendant to question the assistant district attorney on voir dire concerning promises made by the State to the witness who testified only at the sentencing phase. The appropriate avenue of inquiry into the bias of a witness is to ask the witness himself.

22. Criminal Law § 135.4— sentencing phase—inquiry from jury concerning chances for parole from life sentence—response from court correct

In the sentencing phase of a trial for first degree murder, where the jury, after some deliberation, inquired of the court concerning the chances for parole from the life sentence and the court instructed the jury that "the question of eligibility for parole is not a proper matter for you to consider in recommending punishment," the court tendered an instruction which was correct and in accordance with the instructions previously approved by this Court. The trial court was not required to instruct the jury in the precise words requested by the defendant.

23. Criminal Law § 135.4— sentencing phase—each of two killings as aggravating circumstance for the other—no violation of double jeopardy

The trial court's submission of each of the two killings for which defendant had been tried as an aggravating circumstance for the other under the "course of conduct" provision of G.S. 15A-2000(e)(11) did not violate double jeopardy.

24. Criminal Law § 135.4— sentencing phase—failure to list all aggravating circumstances upon which State relied in response to defendant's motion for bill of particulars

The trial court did not commit prejudicial error by submitting an aggravating circumstance which was not listed by the State in its response to defendant's motion for a bill of particulars since the trial court's order merely required the State to disclose those aggravating circumstances which it knew it intended to use at the time it responded to the motion for the bill of particulars. G.S. 15A-925(b).

25. Criminal Law § 135.4— sentencing phase—aggravating circumstances outweighing mitigating circumstances—instruction that death must be recommended

The trial court did not err in instructing the jury that it *must* recommend that defendant be sentenced to death if it found that the aggravating circumstances outweighed the mitigating circumstances.

26. Criminal Law § 135.4— no instruction on inability of jury to agree on sentence—proper

The trial court did not err in denying defendant's request to charge that a sentence of life imprisonment would be imposed in the event that the jury failed to reach a unanimous agreement on the proper sentence.

27. Criminal Law § 135.4— Court's review of record in capital case—imposition of death not disproportionate or excessive

Upon reviewing the record as required by G.S. 15A-2000(d)(2), the Court concluded that the sentence of death imposed was not disproportionate or excessive considering both the crime and the defendant.

Justice EXUM dissenting as to sentence.

BEFORE *Rousseau, Judge*, at the 8 December 1980 Criminal Session of Superior Court, UNION County.

Defendant was charged in indictments, proper in form, with the murders of Christina S. Chalflinch and Shelly Diane Chalflinch. Due to pretrial publicity, the trial court ordered the trial moved from Moore County, where the crimes occurred, to Union County. The jury found defendant guilty of the two counts of first degree murder and recommended that defendant be sentenced to death for both convictions. Based on the jury's recommendation, the trial court imposed a death sentence for each conviction. Defendant appeals to this Court as a matter of right.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Issac T. Avery III, for the State.

James R. Van Camp and Douglas R. Gill, for the defendant.

CARLTON, Justice.

Defendant brings forth several assignments of error in the guilt determination phase of his trial and several alleged errors relating to the sentencing phase of his trial. After a careful consideration of these assignments, as well as the entire record before us, we find no prejudicial error in any of these proceedings and affirm his convictions and the sentences imposed.

I.

At trial, evidence for the State tended to show that Shelly Diane Chalflinch, aged twenty-six, and her daughter, Christina S. Chalflinch, aged nine, resided in apartment 9 of the Marriage Quarters behind the Pinehurst Hotel in Pinehurst, North Carolina. They visited with Ms. Chalflinch's father, G. W. Frye, in Aberdeen on Sunday, 24 August 1980. Mr. Frye never saw his daughter or granddaughter alive after that evening.

On the morning of Tuesday, 26 August 1980, the bodies of Ms. Chalflinch and her daughter were found in a mutilated condition in the Chalflinch apartment. Police officers who entered the apartment saw blood on the floors and walls of the apartment. Pieces of flesh were scattered throughout the living area of the apartment. Small pieces of furniture had been overturned and several chairs were broken. It was hot in the apartment and the bodies had already begun to decompose. Ms. Chalflinch's body had been mutilated beyond recognition, and several feet of her intestines protruded from a large wound to her abdomen. Christina's body also bore multiple stab wounds and a brown electrical cord had been wrapped around her neck.

A bloody knife blade, broken at both ends, with the inscription "R. H. Forschne," was found in the apartment.

Following the initial investigation, the apartment was secured and remained padlocked until the time of trial. Sergeant Don Davis of the Pinehurst Police Department was placed in charge of the investigation and kept the only key to the apartment.

The bodies of the Chalflinches were taken to Chapel Hill on 26 August 1980 where autopsies were performed. An autopsy performed on the body of Ms. Chalflinch revealed approximately 100 stab and cut wounds all over her body. At least 20 of these wounds were to the facial area, 12 were in the neck area, and 16 stab wounds on the right arm appeared to be defensive in nature. In addition to the numerous wounds to the chest and shoulder area, a large gaping cut extended down the left leg from buttock to ankle and a V-shaped penetrating stab wound in the vaginal and rectal area created a virtual hole in the body. The medical examiner found a ring under the edge of the liver in the abdominal cavity. The pathologist who performed the autopsy testified, "I could place my own hand and arm through the wound in her genital area up to the area where the ring was." The ring was silver in color and had a large rectangular surface with a heraldic pattern with two animals on each side and two shields and a crown on top. In the pathologist's opinion, Ms. Chalflinch died as a result of "a combination of stab and incised wounds to all parts of her body, that some wounds might possibly have been inflicted after death and that, given the condition of the body and the temperature of the Chalflinch apartment, death could have occurred on Monday night, 25 August."

An autopsy performed on the body of Christina Chalflinch revealed multiple stab wounds, slashes, puncture marks and extensive mutilation of the genital area with a portion of the tissue removed. The head had a large number of stab wounds, one of which extended through the brain from right to left. The electrical cord which had been wrapped around the neck left a faint bluish mark. Four wounds in the chest area penetrated into the tissues of the chest and abdomen. Seven of the multiple stab wounds in the abdominal region penetrated internal organs. In the pathologist's opinion, Christina Chalflinch died as a result of multiple stab wounds to the head, chest and abdomen.

On 28 August 1980 SBI Agent Wade Anders obtained permission from the defendant to search his home, apartment 4 at the Marriage Quarters complex. Defendant was asked to sign a form indicating his consent to a search of his apartment. He signed the form after it was read to him and after he talked with a friend. The form was signed at 5:21 p.m. on 28 August 1980. The apartment was searched that same evening, while defendant was pres-

ent. Items seized during the search included the tool box in which defendant kept his kitchen equipment for his job as a cook at the Pinehurst Hotel. In the box were knives bearing the inscription "R. H. Forschner" on the blades.

A forensic serologist with the SBI examined the apartment of Ms. Chalflinch and the area outside it on 28 August 1980. He observed blood all over the apartment. Additionally, he performed luminol and phenolphthalein tests to determine the presence of blood undetectable to the human eye. Through use of these tests, blood was discovered in the corner of the kitchen in the shape of two partial footprints of the balls and toes of the feet, side by side. Patterns of blood were discovered outside the front door of Ms. Chalflinch's apartment and also on the deck outside the front door, on the fourth and tenth steps leading down from her apartment, and on the concrete pad at the foot of the steps. Blood was also observed between the concrete pad and the first stepping stone, and this bloodstain was in a shape resembling a bare foot. At the door to defendant's apartment, visible bloodstains were found on the concrete stoop. The luminol test indicated the presence of blood on the doorknob. The tool box taken from defendant's apartment had a small spot on the lid which tests revealed to be blood and the blade of one of the R. H. Forschner knives tested positive with phenolphthalein. A bloodstain was also found on a pillow at the head of defendant's bed. Blood was found in other areas throughout the apartment and bare footprints of blood were found all over the floor in the kitchen. On that evening, defendant had a cast on his left hand.

An SBI agent who qualified as an expert in the field of fingerprint and palm print identification testified that a latent palm print on the wall of the bedroom of Ms. Chalflinch's apartment was the same as that of the left palm print of the defendant.

Several friends of defendant's testified that the ring found in Ms. Chalflinch's body was the ring normally worn by defendant.

Other evidence for the State tended to show that defendant attended a party on Sunday evening, 24 August 1980, where he played the role of disc jockey. He drank alcoholic beverages throughout the evening and took at least five "Black Beauties." During the party defendant was wearing his ring. At approximately 11:30 p.m., defendant and a group left the party and went

to a nightclub known as the Crash Landing. Members of the Southern Pines Police Department on patrol observed the defendant walking on the highway near the Crash Landing at approximately 2:10 a.m. on Monday, 25 August 1980. He was staggering, carrying his shoes and was barefooted. The officers gave him a ride to the kitchen entrance of the Pinehurst Hotel. They left him there at approximately 2:45 a.m.

A co-worker of defendant testified that she saw the ring in question on the Saturday before 25 August 1980. On the following Monday at approximately 7:00 a.m., she saw the defendant at work and he had two bandaids on his left hand in the thumb area. She did not observe the ring at that time. Defendant was in pain and told her that he had cut his hand.

Evidence for the defendant tended to show that the night shift supervisor at the Pinehurst Hotel saw the defendant in the hotel's front office between 2:30 and 3:00 a.m. on 25 August 1980. He left the front of the hotel at approximately 3:00 a.m.

A co-worker and friend of defendant's testified that defendant had been in apartment 9 of the Marriage Quarters before 25 August 1980. Two residents of apartments in the Marriage Quarters testified that they had been at home on the night of 24 August 1980 and had not heard anything unusual. One of these residents saw Ms. Chalflinch at approximately 11:00 p.m. on 24 August 1980. They talked and she stated that she had to do some laundry. He saw her through his apartment window again around 12:30 or 1:00 a.m. on 25 August 1980, heading toward the laundry.

Becky Mills, a nurse at Moore Memorial Hospital, testified that she first saw the defendant at approximately 11:00 p.m. on 25 August 1980. He was in the emergency room recovering from surgery resulting from cut tendons on his left hand and had a cast on his left arm. He left the hospital at approximately 4:10 a.m. on 26 August 1980.

Gaston Yarborough and Raymond Pate, employees of the hotel, testified that they passed by the Marriage Quarters on their way home from work on Monday, 25 August. They left work at approximately 11:00 p.m. They heard a lady hollering from the direction of the Marriage Quarters and a banging noise. Yarborough drove by the Marriage Quarters and saw that lights

were on only in the end apartment on the corner. Pate testified that he did not see Ms. Chalflinch's car in the parking lot when he went to work at approximately 2:30 p.m. on 25 August 1980. At 11:00 p.m., as he was walking to his truck to leave work, he heard noises from the direction of the Marriage Quarters. He heard a young girl's voice say, "Leave her alone, leave her alone." He then drove by the Quarters. He saw lights on only in the apartment in the right-hand corner. He looked up toward the lighted apartment and saw a white male with sandy blonde hair jump from the balcony. Pate told the police about this on 27 August 1980. He saw the person again on the following weekend and followed him into the hotel but lost him. He reported this to the police the same day, but they never inquired about it further until the Sunday prior to trial. On cross-examination, Pate testified that the person jumped off the balcony outside of apartment 12 and that he saw no one near apartments 9 and 10.

Upon receiving the jury verdict finding the defendant guilty of both murders, the court convened the sentence determination phase of the trial before the same jury. The State essentially relied on the testimony presented at the guilt phase but also offered the testimony of Roy Junior Brown. Brown testified that he was in Moore County jail as a prisoner at the time defendant was placed in the jail. Brown asked defendant what he was charged with and defendant said that he was charged with a double homicide. Brown testified:

> He said he murdered two people. He called one of their names Shelley (sic). He told me he killed them with a knife. He said he couldn't understand why they didn't give him his ring back, that they gave him his watch back, and it got broke off his arm, the band broke off, and I asked him where his ring was or something, I don't recall exactly what I asked him, but anyhow he said the ring turned up in one of the bodies.

Defendant presented several witnesses in his behalf. Several co-workers testified that they had known him for some time and had never seen or heard him threaten anyone with any act of violence and that he got along well with other people. Other testimony indicated that he had never been seen with a weapon; that he was an honest and dependable worker; that he was a

quiet person and did not use profanity. Some of defendant's relatives testified essentially that they had never known defendant to be violent and that he was always friendly and self-controlled.

At the conclusion of the testimony, the trial court instructed the jury on the sentencing phase. Two aggravating circumstances were submitted to the jury: (1) whether the murder was especially heinous, atrocious or cruel, and (2) whether the murder was part of a course of conduct in which the defendant engaged and whether that course of conduct included the commission by the defendant of other crimes of violence against another person. Six mitigating circumstances were submitted to the jury: (1) whether the defendant had no significant history of prior criminal activity, (2) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to requirement of law was impaired, (3) whether, although the act itself may have been horrible, the defendant had not shown himself to be otherwise evil, (4) whether the defendant had no previous conviction of offenses involving injury to another person, (5) whether prior acts of defendant's behavior were inconsistent with the act of which he was convicted, (6) whether any other circumstance or circumstances arising from the evidence had mitigating value. The jury found both aggravating circumstances and all six mitigating circumstances. The jury also answered affirmatively the issues of whether, beyond a reasonable doubt, the aggravating circumstances found were sufficiently substantial to call for the imposition of the death penalty and of whether, beyond a reasonable doubt, the aggravating circumstances outweighed the mitigating circumstances. The following instruction appeared on the sheet handed the jurors immediately following the issue last mentioned: "If you answer issue 4 'No,' indicate life imprisonment under 'recommendation as to punishment.' If you answer issue 4 'Yes,' indicate death under 'recommendation as to punishment.'" Thereupon, the jury recommended that defendant be sentenced to death. Identical issues were submitted in both murder cases and the answers and recommendations were the same.

The trial court then entered judgment imposing the death penalty for each of the crimes committed. From these judgments, the defendant appealed of right to this Court.

II.

GUILT-INNOCENCE PHASE

Defendant presents numerous contentions about the guilt-innocence portion of his trial. We discuss each of these below.

A.

In pre-trial discovery motions and motions made during the trial and immediately after judgment was entered, defendant sought a trial court order allowing him to inspect the premises known as apartment 9 of the Marriage Quarters, the scene of the crimes. The trial court denied defendant's motion in each instance. The apartment had been cordoned off and had been under the control of the Pinehurst Police Department from the time the victims' bodies were found until the time of the trial. Defendant claims that he was entitled to inspect the crime scene under G.S. 15A-903(d) and by virtue of his constitutional right to due process of law.

Defendant contends before this Court that an inspection of the crime scene was critical to his defense. He argues that the only way the State could prove that he committed the murders was to show that they occurred between 3:00 a.m. and 7:00 a.m. on 25 August 1980 and that he needed the opportunity to inspect the crime scene in order to discover whether there was any evidence which tended to show that the victims were alive after this period. An inspection of the crime scene, therefore, was critical to the preparation of his defense.

[1] We first turn to defendant's contention that he was entitled to view the crime scene under G.S. 15A-903(d). That statute provides in pertinent part:

> (d) Documents and Tangible Objects.—Upon motion of the defendant, the court must order the solicitor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, *tangible objects*, or copies or portions thereof which are within the possession, custody, or control of the State and which are material to the preparation of his defense, are intended for use by the State as

evidence at the trial, or were obtained from or belonged to the defendant.

(Emphasis added.)

Defendant contends that "tangible objects" include such objects as an apartment. We do not agree. "Tangible objects," as used in this statute, refers only to tangible, movable objects, and not to buildings or rooms.

Rule 16 of the Federal Rules of Criminal Procedure, the federal counterpart of our G.S. 15A-903, specifically confers the right to "discover buildings or places." Our statute, on the other hand, does not include "buildings or places" in the list of things which may be discovered. This omission is, we think, significant. Had our Legislature intended for "buildings or places" to be included in the statute, it would have said so in the same words utilized in the federal statute. Thus, defendant is not entitled, under the terms of G.S. 15A-903(d), to inspect the crime scene.

[2] Defendant's contention that denial of his motions to view the crime scene amounted to a denial of due process of law is persuasive. We start with the proposition established by the Supreme Court of the United States that there is no general constitutional right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed. 2d 30 (1977). As that Court has stated, "the Due Process clause has little to say regarding the amount of discovery which the parties must be afforded . . . ." *Wardius v. Oregon*, 412 U.S. 470, 474, 93 S.Ct. 2208, 2212, 37 L.Ed. 2d 82, 87 (1973). We must, therefore, consider defendant's claim under the facts of this particular case. Here, the record discloses that the apartment occupied by the victims was secured and cordoned off by the Pinehurst Police Department from the time the bodies were discovered on 26 August 1980 through the time of defendant's trial. The defendant sought on several occasions to obtain access to the apartment in order to search for exculpatory evidence. The record does not disclose that the defendant would have been unwilling for his attorneys to be accompanied by police personnel so that no harm would be done to the crime scene. The defendant cogently presented the theory of his defense to the trial court. The State relied heavily on information gained from the crime scene for its case against the defendant. On these facts, we think it a denial of fundamental

fairness and due process for defendant to be denied, under police prosecutorial supervision, a limited inspection of the premises of the crime scene. We emphasize, however, that our holding is limited to the particular facts of this case and our holding is in no way to be construed to mean that police or prosecution have any obligation to preserve a crime scene for the benefit of a defendant's inspection. The crime scene here was preserved by the police for the several months from the time the bodies were found until the trial was conducted and rudimentary fairness would have allowed defendant to inspect these premises under these circumstances.

Our inquiry does not end here, however. Error committed at trial infringing upon a defendant's constitutional rights is presumed to be prejudicial and entitles him to a new trial unless the error committed was harmless beyond a reasonable doubt. G.S. 15A-1443(b); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967); *see Moore v. Illinois*, 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed. 2d 424 (1977); *Milton v. Wainwright*, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed. 2d 1 (1972); *Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed. 2d 340 (1972). Overwhelming evidence of guilt may render constitutional error harmless. *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed. 2d 284 (1969).

As stated in *Chapman*, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24, 87 S.Ct. at 828, 17 L.Ed. 2d at 710-11. Here, we declare our belief that the trial court's error in denying defendant access to the crime scene was harmless beyond a reasonable doubt because of other overwhelming evidence of defendant's guilt.

Our reading of the record here leaves no doubt that the trial court's error was harmless. This is so because evidence of this defendant's guilt was overwhelming. A ring identified as one previously worn by defendant was found in the body of Ms. Chalflinch. A bloody palm print lifted from the bedroom wall of the apartment was unquestionably identified as being that of the defendant. A bloody and broken knife blade similar to ones owned by defendant and used by him in his work was found at the crime scene. In addition to the blood at the crime scene, blood was located at the entrance of defendant's apartment and throughout

the apartment. Defendant confessed to his cellmate, after being arrested, that he had murdered two people, one named Shelly, with a knife and that his ring had turned up in one of the bodies.

In summary, we hold that the trial court erred under the facts of this case in failing to allow defense counsel to view the crime scene but that the trial court's error was harmless beyond a reasonable doubt. *See United States v. Valenzuela-Bernal*, 454 U.S. 963, 102 S.Ct. 3440, 73 L.Ed. 2d 1193 (1982).

B.

[3] Following the testimony of Mike Pagan, Marlene Ethal McIntosh, Ann Quick and Debra McLaughlin, witnesses who testified that the ring found in Ms. Chalflinch's body belonged to defendant, defense counsel requested copies of the statements which each witness had given to the police. At that point, the court noted that it had reviewed *in camera* the statements of the four witnesses and, based on its review, entered findings that the statements were not inconsistent with the witnesses' testimony, that the statements contained no evidence which exonerated the defendant, and that defense counsel was not entitled to copies of the statements given to the District Attorney's office prior to trial. Copies of the statements were made and were placed in a sealed envelope. Following the trial court's entry of this order, defense counsel asked that the court seal not only the four statements specifically requested, "but any statements written whether in longhand or otherwise." The trial court denied this motion.

By this assignment defendant requests that we review the sealed statements of the four witnesses to determine if the trial court ruled properly. He then contends, however, that he has a constitutional right to inspect the statements himself and that the procedures enunciated by this Court in *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977), are inadequate in capital cases. Finally, defendant contends that the trial court erred in failing to inspect and seal any other written statements.

In *Hardy* this Court established the rules for our trial courts to follow in instances where a specific request is made at trial for disclosure of evidence in the State's possession that is obviously

relevant, competent and not privileged. As Justice Copeland stated, "justice requires the judge to order an *in camera* inspection when a specific request is made at trial for disclosure of evidence in the State's possession that is obviously relevant, competent and not privileged. The relevancy for impeachment purposes of a prior statement of a material State's witness is obvious." *Id.* at 127-28, 235 S.E. 2d at 842. The North Carolina discovery procedures, unlike the federal statute, do not automatically entitle the defendant to such statements at trial.

> Instead, . . . since realistically a defendant cannot know if a statement of a material State's witness covering the matters testified to at trial would be material and favorable to his defense, *Brady* and *Agurs* require the judge to, at a minimum, order an *in camera* inspection and make appropriate findings of fact. As an additional measure, if the judge, after the *in camera* examination, rules against the defendant on his motion, the judge should order the sealed statement placed in the record for appellate review.

Id. at 128, 235 S.E. 2d at 842.

Here, the trial court clearly complied with the mandates of *Hardy* with respect to the statements of the four named witnesses. Having found as a fact that the statements were not inconsistent with their testimony at trial and that they contained no evidence exculpatory to the defendant, the trial court declined to order them provided to the defense counsel and correctly ordered them placed in a sealed envelope. In accordance with the review procedure set out by *Hardy*, we have opened the sealed envelopes, read the statements in question and concur in every respect with the trial court's findings and order.

Nor are we persuaded that the procedure adopted in *Hardy* should be modified. Defendant has presented no new reasons for our doing so, and we continue to believe that the *Hardy* procedure fully assures a defendant that no material and exculpatory pretrial statement will be suppressed. Ordering the statements placed in sealed envelopes provides for effective appellate review. *See State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978); *State v. Tate*, 294 N.C. 189, 239 S.E. 2d 821 (1978).

Finally, we reject defendant's contention that the trial court failed to comply with *Hardy* with respect to "any statements

written whether in longhand or otherwise." This request by defense counsel was obviously a shotgun tactic. Our review of the record discloses no evidence of any other statements which were available for the court to inspect and seal. Defendant apparently would have this Court assume that some other statements were available and that the trial court knew of them. This we are unwilling to do. We have no reason to suspect that any other statements were available and find no indication from the record that any witness was asked by defense counsel if he or she had previously given a statement in writing to police personnel.

These assignments of error are overruled.

C.

[4] Defendant next contends that the trial court erred in denying his several motions concerning discovery of information in the State's possession indicating that a witness had seen a white male jumping from the balcony of a Marriage Quarters apartment on the evening of 25 August 1980, which information had not previously been provided defendant. We find no merit to defendant's contention.

After learning that law enforcement officers had been told by a witness, Raymond Pate, that he had observed a white male jump from a balcony of a Marriage Quarters apartment on Monday evening, the trial court conducted a lengthy voir dire. The voir dire revealed that officers had discounted this testimony because Pate had indicated to them, upon viewing the apartment complex that he had actually seen the man jump from the balcony of an adjacent apartment. Moreover, this information had not been disclosed to the District Attorney. It had been independently discovered by counsel for defendant approximately one week prior to trial. During the course of this voir dire, defendant moved for a dismissal, a mistrial, and a continuance. All three motions were denied by the trial court.

At the conclusion of the voir dire, the trial court found the facts as noted above and concluded that the District Attorney had not intentionally tried to hide any information contrary to the pre-discovery order entered in the cause and further found that the defense attorney had had substantially the same information as the District Attorney. We find the trial court's findings of fact

fully supported by the evidence adduced at the voir dire and that those findings properly support the conclusions of law.

G.S. 15A-910 gives the trial court ample authority to provide relief when either the State or defendant fails to comply with the discovery provisions of Chapter 15A. However,

> the exclusion of evidence for the reason that the party offering it has failed to comply with the discovery statutes granting the right of discovery, or with an order issued pursuant thereto, rests in the discretion of the trial court. . . . The exercise of that discretion, absent abuse, is not reviewable on appeal.

State v. Hill, 294 N.C. 320, 331, 240 S.E. 2d 794, 801-02 (1978) (citations omitted).

We find no abuse of discretion here. The record reveals that the District Attorney was not aware of this information until trial. The record further reveals that defense counsel became aware of the information a week before trial and had, in fact, talked with the witness. Most importantly, the witness testified before the jury and the jury heard a full account of what he observed on that evening. On these facts, there is no abuse of discretion. *See State v. Allison*, 298 N.C. 135, 257 S.E. 2d 417 (1979); *State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981).

[5] In a related argument, defendant contends that the trial court erred in refusing to permit him to inquire into the knowledge of a State's witness concerning another witness who allegedly had seen the decedents alive after 12:30 a.m. or 1:00 a.m. on 25 August 1980. On cross-examination of Sergeant Davis, a Pinehurst police officer, defendant asked, "Did you determine that one or more persons may have seen Diane Chalflinch after 1:00 a.m. on Monday morning?" The witness answered affirmatively. Defendant then sought to obtain the names of the witnesses and the State's objections were sustained. Defendant then attempted to have the questions answered for the record and the trial court refused. The trial court's explanation was that, "You have asked me to look and I looked *in camera* at a statement a witness gave where you contended that somebody saw Diane Chalflinch alive after midnight, and I have ruled that you were not entitled to that information at this time." Defendant

contends that (1) he was entitled to have the witness answer the question, and (2) at the very least, the question should have been answered for the record.

While we agree with defendant that the trial court should have allowed the witness to answer for the record, that alone does not warrant a new trial. The record discloses that regardless of defense counsel's inability to get his questions answered, the witness who claimed to have seen Ms. Chalflinch alive at 12:30 or 1:00 a.m. on 25 August 1980, Clarence Harding, was available to the defense and testified for the defense. Because defendant got this testimony before the jury he was in no way prejudiced by the trial court's earlier rulings and is not entitled to a new trial on this ground.

In this instance, we are bound by the trial court's ruling that the information was not exculpatory. We have not been provided a copy of the statement provided the trial court for *in camera* inspection and on which the trial court based its previous ruling. Moreover, the basis for the court's ruling in this instance was that it had previously found the information in the statement not to be exculpatory to the defendant. There is no indication that defendant requested that this statement be sealed or otherwise preserved for our review as provided by *Hardy*.

These assignments of error are overruled.

D.

Defendant next attacks the admission into evidence of numerous items taken during a warrantless search of his apartment. The State sought to justify the search on the basis of consent. He argues that the search of his apartment was not based on lawful consent because (1) the evidence did not support a finding of consent, (2) a search warrant had supplanted the effect of any consent; and (3) evidence relevant to a determination of lack of consent had been improperly excluded. We discuss these arguments *seriatim*.

[6] Defendant essentially contends that the totality of the circumstances surrounding his "consent" impels the conclusion that it was not voluntarily given. He notes that he had been questioned by the SBI the day before the consent was given and that he had been followed by SBI agents for several miles prior to be-

ing stopped and questioned. He also notes that he was kept under surveillance by police personnel who later went with him to the security office of his employer, where he was kept for another two and one-half hours in the presence of several officers. Such circumstances, defendant argues, are tantamount to an arrest and the "psychological atmosphere" in which his consent was obtained should preclude allowance into evidence of those items seized during the search.

When the validity of a consent to search is challenged, the trial court must conduct a voir dire hearing to determine whether the consent was in fact given voluntarily and without compulsion. *State v. Cobb*, 295 N.C. 1, 243 S.E. 2d 759 (1978). "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-48, 36 L.Ed. 2d 854, 862-63 (1973); *accord, State v. Jolly*, 297 N.C. 121, 254 S.E. 2d 1 (1979); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971).

Here, the trial court conducted an extensive voir dire and heard the testimony concerning the events leading up to the signing of the consent form. The court found that the two SBI agents had talked with defendant and others about the alleged murders of the Chalflinches and informed defendant that they wanted to search his apartment; that they read defendant a printed form entitled "Consent to Search" which fully advised him that the search was for "any other material of evidence of any crime which they may desire," and that the officers did not have any authority to make such search without his consent; that the defendant signed the consent form in the presence of two police officers and a friend of defendant's with whom he had consulted; that defendant stated that he understood the form and understood his rights; that defendant was not under the influence of any alcohol or drugs; that no force or coercion was used against him or any promises made to him. From these findings of fact the trial court concluded that the defendant voluntarily, willingly and understandingly consented to the search of his premises and that any items seized as a result of the search were admissible at his trial.

We find that the trial court's findings of fact are amply supported by the evidence adduced at the voir dire hearing and that these findings fully support the trial court's conclusions of law. Taking into account all of the factors enunciated in *Schneckloth*, we hold that defendant's consent to the search was voluntarily given free from coercion in any form.

[7] Defendant next contends that, even assuming he had given consent, such consent was superseded and negated by the issuance of a search warrant which was read to him prior to the search of his apartment. We disagree.

Defendant cites no authority for the proposition that obtaining a search warrant negates prior consent to the search. It is clear from the record before us that the State relied on a consensual search and, as discussed above, the trial court properly ruled that defendant's consent was freely and voluntarily given. We cannot agree with defendant's reasoning that obtaining the warrant negates the consent originally given. Assuming the State had a valid search warrant, it had two bases to justify the search of defendant's apartment. At trial, the State had every right to rely on either. *See State v. Ratliff*, 281 N.C. 397, 189 S.E. 2d 179 (1972).

Nor do we find, as defendant contends, any evidence to conclude that defendant withdrew his consent as a result of the issuance of the search warrant. Indeed, the evidence is that, until the time of his arrest some one and one-half hours later, defendant was cooperative with the search and was allowed to go in and out of his apartment unrestrained. We hold that issuance and service of the search warrant in no way negated the consent originally given by defendant for the search of his premises and that the items seized during the search were admissible at trial.

Finally, defendant contends the trial court improperly refused to permit testimony on several matters relating to the circumstances leading to his giving consent to the search of his apartment. We have previously discussed the trial court's treatment of the defendant's challenge to the consensual search and find it unnecessary to do so again. Most of the matters which defendant now contends he was not allowed to pursue, such as the number of persons present at the time of the search, were otherwise before the trial court. The trial court had before it ade-

quate information concerning the totality of circumstances leading to the defendant's consent for the search. We reject defendant's contention here that the trial court abused its discretion by refusing, in effect, to relitigate the issue of consent.

These assignments of error are overruled.

E.

Defendant next challenges the admission of certain items of evidence: photographs of the victims taken at times prior to the murders, items seized during the search of defendant's apartment on which there were traces of blood, jewelry found in defendant's apartment and knives owned by defendant similar to the one found at the crime scene.

We have reviewed the photographs and testimony concerning the other items of evidence and find that they were properly admitted into evidence. We note only that the inability of the forensic serologist to state that the traces of blood found on items seized from defendant's apartment came from either of the victims goes to the weight or credibility of his testimony and not its admissibility. *See State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973).

F.

Defendant next assigns error to certain portions of the jury charge. Specifically, he contends that the trial judge erred (1) by expressing an opinion that defendant committed the killings, (2) by mischaracterizing the theory of the defense, (3) by incorrectly stating the evidence, (4) in more forcefully stating the law favorable to the State, and (5) by implying that the jury could find as a fact something that was not contained in the record. We have examined the portions of the charge to which defendant assigns error and find that the jury was properly instructed. These assignments of error are without merit and are hereby overruled.

G.

Counsel for defendant has been helpful to this Court in arranging his brief so that the remaining contentions concerning the guilt phase of defendant's trial are summarily presented. Counsel acknowledges that many of these issues have been previously addressed and candidly concedes that he would have

to "overcome substantial precedent" in order to prevail. Without unduly burdening this Court with extended argument, defendant requests that we review these issues and reconsider our prior holdings. We address them below.

[8] (1) Defendant first contends that in a capital case, an individual voir dire of the jurors should be allowed in order for defendant to receive a fair trial. He argues that it is inherently impossible for other members of the jury pool not to be affected by the types of questions asked potential jurors in a capital case. Defendant cites no new authority for his position and, indeed, this Court has previously rejected this argument. *E.g., State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. Taylor*, 298 N.C. 405, 259 S.E. 2d 502 (1979); *State v. Johnson*, 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 (1980). On the point here presented, we reiterate our holdings in these cases. This assignment of error is overruled.

(2) Defendant next contends that he was denied due process and the effective assistance of counsel when the trial court refused to order that bench conferences be recorded. Defendant cites no authority for his position and our research discloses none. Defendant's bare assertion that the ability of counsel to raise points and record their disposition during trial was "so chilled" that he was denied the effective assistance of counsel and due process is simply unpersuasive. This assignment of error is overruled.

(3) Defendant next contends that he was unconstitutionally tried by a "death qualified" jury. He contends that a "death qualified jury is more likely to convict than a jury which is not "death qualified." This Court has previously rejected the argument here presented and is not inclined to disturb those holdings. See, *e.g., State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183; *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510; *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980).

[9] (4) Defendant next contends that the trial court improperly limited the number of additional peremptory challenges which he requested. He argues that one charged with two capital offenses should be given additional peremptory challenges. This Court re-

jected a similar argument in *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752. This assignment of error is overruled.

[10] (5) Defendant next contends that his arraignment was illegal because the proceedings were remanded for findings of fact by the district court concerning the reasons for the continuance of his probable cause hearing. He argues that the result was to eliminate his hearing because of an imminent indictment.

This assignment of error is without merit. The failure to conduct a formal arraignment itself is not reversible error. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). The purpose of an arraignment is to allow a defendant to enter a plea and have the charges read or summarized to him and the failure to do so is not prejudicial error unless defendant objects and states that he is not properly informed of the charges. *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980). Moreover, there is no constitutional requirement for a preliminary or probable cause hearing. *State v. Hudson*, 295 N.C. 427, 245 S.E. 2d 686 (1978). A probable cause hearing is unnecessary after the grand jury returns an indictment. *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978). As this Court discussed in *Hudson*, a probable cause hearing is not designed to afford a means of discovery to defendant. Its function is to determine whether there is probable cause to believe the crime has been committed and that defendant committed it. This assignment of error is overruled.

[11] (6) Defendant next contends that the only source for a conclusion by the jury that premeditation and deliberation existed was the evidence concerning the nature and number of the victims' wounds. As we understand it, defendant is contending that his conviction of first degree murder should not stand because the essential ingredients of premeditation and deliberation were based upon a presumption.

This argument is clearly without merit. Evidence of the premeditation and deliberation required to sustain this defendant's conviction was supplied by circumstantial evidence, not by any presumption. The nature and number of the victims' wounds, as defendant notes, is one circumstance from which an inference of premeditation and deliberation could be drawn. There are, however, many others appearing of record. The trial court

correctly submitted the issues of premeditation and deliberation to the jury.

[12] (7) Defendant next contends that the trial court erred by failing to submit its charge to the jury in writing as requested by defendant. Defendant cites no authority in support of his position and no persuasive reasoning has been advanced. We note that the jury requested no clarification of the trial court's instructions and that it returned a verdict in just over one hour. Nothing in the record indicates that the jury was in any way confused or unable to understand or remember the trial court's instructions. This assignment of error is overruled.

[13] (8) Defendant next contends that the trial court impermissibly expressed its opinion by refusing to grant the defendant's request that he be referred to by his name and not as "the defendant." This is particularly true, defendant contends, when the victims are referred to by name. This Court is unable to imagine the slightest prejudice resulting to defendant from the historical practice in our trial courts of referring to the defendant as "the defendant." This assignment of error is overruled.

[14] (9) Defendant next contends that the trial court improperly failed to charge the jury on the issue of his good character. We disagree. Defendant did not introduce character evidence. The testimony offered in his behalf did not indicate his general reputation among a group of people but consisted only of several witnesses' personal opinion of the defendant. As this Court stated, in rejecting a similar contention, in *State v. Williams*, 299 N.C. 652, 662, 263 S.E. 2d 774, 781 (1980), "Such evidence is not competent character evidence and the trial judge's failure to instruct the jury on this evidence is accordingly not error."

[15] (10) Defendant next contends that the trial court improperly denied his request for the appointment of a polygraph examiner. Defendant argued that he had no independent recollection of the events occurring between 4:00 a.m. and 7:00 a.m. on 25 August 1980, and that polygraph results could be used to show his state of mind. This Court has recently written at length concerning the appropriate legal principles for appointment of assistance of an expert and find it unnecessary to repeat that extensive discussion here. *See State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981). Suffice it to say that the decision of whether to appoint an expert is

a matter within the discretion of the trial judge and will not be disturbed absent an abuse of that discretion. Here we can perceive no abuse. *See State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980); *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025 (1981); *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752.

[16] (11) Defendant next contends that he was entitled to receive, upon request, criminal records of the State's witnesses. G.S. 15A-903 nowhere provides for discovery of the criminal records of the State's witnesses. Indeed, a provision authorizing the discovery of such material was included in the draft of the original bill and was subsequently deleted. G.S. § 15A-903, Official Commentary (1978); *accord, State v. Smith*, 291 N.C. 505, 523-24, 231 S.E. 2d 663, 675 (1977). This assignment of error is overruled.

III.

SENTENCING PHASE

Defendant next assigns several errors relating to the sentencing proceedings. We discuss these contentions *seriatim*.

A.

Defendant first contends that the trial court improperly submitted the aggravating circumstance that the murders were "especially heinous, atrocious, and cruel," G.S. § 15A-2000(e)(9) (1978). In support of this argument, defendant argues that (1) the only evidence on which this finding could have been based was also an essential element of the State's proof of first degree murder and (2) the only evidence suggesting unnecessary cruelty to the victim was the multiplicity of wounds which were not established beyond a reasonable doubt as having occurred before the death of the victim.

[17] Defendant's first contention is based on this Court's holdings in *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979) and *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551. In those cases we held that the underlying felony in a first degree murder conviction based upon the felony-murder doctrine could not be submitted as an aggravating circumstance. Recognizing the doctrine of merger, we held that the underlying felony merged with the murder convictions and therefore use of the same felony to

enhance the punishment violated the double jeopardy provisions of the federal constitution. We did not hold that the jury was prohibited from considering the evidence justifying the conviction of the underlying felony but held only that the underlying felony itself could not be used as an aggravating circumstance.

Here, of course, defendant was not tried under the felony-murder rule. He was tried and convicted of these first degree murders on the basis of premeditation and deliberation. No underlying felony was involved. This Court has rejected similar arguments in *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183, and *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981). In *Oliver*, we interpreted *Cherry* and *Goodman* to apply only to the underlying felony itself and not to the facts surrounding the commission of the felony. In *Hutchins*, we rejected the argument that the facts underlying the State's theory of the case merged with the offense and could not be used to enhance the penalty.

[18] We also disagree with defendant that this aggravating circumstance should not have been submitted because the multiplicity of wounds was the only fact to support a jury finding necessary to establish the murder as one especially heinous, atrocious and cruel because the evidence does not support the conclusion beyond a reasonable doubt that the wounds inflicted were administered before the death of the victims. Here, defendant is relying on the testimony of the pathologists who stated that they could not be certain that all of the victims' wounds were inflicted prior to death. Defendant's contention is that an especially heinous, atrocious and cruel murder must be one inflicted on a conscious victim.

This assignment is patently without merit. We will not lengthen this opinion by again reciting the gruesome and gory facts summarized above. Indeed, it is unnecessary for us to answer the question whether this aggravating circumstance may be employed when the evidence establishes that a portion of the defendant's acts took place after the death of the victim. This is so because there was abundant evidence here that many of the wounds were inflicted prior to death. Additionally, the character and severity of the wounds support the submission of this aggravating circumstance. Of particular importance is the pathological evidence that some of the wounds appeared to be

defensive, some sixteen on Ms. Chalflinch's right arm. Indeed, the inference from the evidence appearing in this record arises above the level of that we have reviewed in previous cases in which we have upheld the admission of this particular aggravating circumstance. This assignment of error is overruled.

B.

[19] Defendant next contends that the trial court erred in refusing to submit requested mitigating circumstances that (1) the defendant did not act in a calculated manner, (2) the defendant did not act for pecuniary gain, and (3) the defendant was under the influence of mental or emotional disturbance.

This Court has previously defined a mitigating circumstance as follows:

> A definition of mitigating circumstance approved by this Court is a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first-degree murder, which may be considered as extenuating, or reducing the moral culpability of killing or making it less deserving of the extreme punishment than other first-degree murders.

State v. Irwin, 304 N.C. 93, 104, 282 S.E. 2d 439, 446-47 (1981). That the murder was not committed in a calculated manner is not, in our opinion, a mitigating circumstance. Indeed, it is difficult for this Court to understand how a murder committed after premeditation and deliberation is not done in a calculated manner.

Moreover, the State does not have the burden of proof that, in a given capital case, no mitigating circumstances exist. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510. It is the responsibility of the defendant to go forward with evidence that tends to show the existence of a given mitigating circumstance and to prove its existence to the satisfaction of the jury. *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788. Our review of the record discloses no evidence from the defendant that he did not act in a calculated manner. Indeed, as discussed in connection with other contentions above, the evidence is to the contrary. From the evidence that a bloody knife blade was found in the victims' apartment which was of the same type as the knives in defendant's tool box, the jury could have, and apparently did, infer that the knife used to kill

the victims was taken up to their apartment by the defendant for that purpose.

We express no opinion on whether the evidence shows that defendant did not act for pecuniary gain. Even assuming that it does, the evidence merely shows the absence of an aggravating circumstance and not the presence of a mitigating one.

At trial, defendant contended that he was entitled to the mitigating circumstance that he acted under the influence of mental or emotional disturbance as contemplated by G.S. 15A-2000(f)(2). In support, he relied on the testimony concerning his use of alcohol and drugs on Sunday evening, 24 August 1980.

We have answered this issue in *State v. Irwin*, 304 N.C. at 106, 282 S.E. 2d at 447-48. There, we said:

> voluntary intoxication by alcohol or narcotic drugs at the time of the commission of a murder is not within the meaning of a mental or emotional disturbance under G.S. 15A-2000(f)(2). Voluntary intoxication, to a degree that it affects defendant's ability to understand and to control his actions . . . is properly considered under the provision for impaired capacity, G.S. 15A-2000(f)(6).

(Citation omitted.) The trial judge here correctly followed the law established by *Irwin*. He submitted the mitigating circumstance of impaired capacity and the jury found this mitigating circumstance in both murders.

This assignment of error is overruled.

C.

[20] During the sentencing phase of the defendant's trial, the State presented the testimony of Roy Junior Brown (Roy). Roy testified that defendant told Roy in jail that he, defendant, had murdered two people using a knife and that he did not understand why his ring was not given back to him. Defendant's next contention is that this testimony was improperly admitted because it referred only to the guilt or innocence of the defendant and not to any aggravating or mitigating circumstances. Defendant's contention is without merit.

G.S. 15A-2000(a)(3) provides that the State is not required to resubmit evidence presented during the guilt determination

phase of the case at the sentencing phase. However, all such evidence is competent for the jury's consideration in passing on punishment. Moreover, "[a]ny evidence which the court deems to have probative value may be received." G.S. § 15A-2000(a)(3) (1978). Here the trial court obviously deemed Brown's testimony to be relevant and to have probative value. Because the testimony would have been admissible at the guilt phase of the trial, we are unwilling to hold that evidence clearly proper for the jury to consider under the statute had it been presented at the guilt phase of the trial is inadmissible simply because it was introduced at a later stage of the proceedings.

Additionally, the evidence is relevant to rebut evidence submitted by the defendant at the guilt phase of the trial which would support mitigating circumstances. This is especially true with respect to the mitigating circumstance that defendant was suffering from a mental impairment as a result of alcohol and drug use. The testimony from the witness Roy Brown that defendant stated that he had killed two persons with a knife and that his ring was later found in one of the bodies is some evidence that defendant was not so intoxicated at the time of the murders that he was not aware of what he was doing and could not remember them. The testimony also tended to rebut other testimony introduced by the defendant at the guilt phase concerning his good conduct in the past and was, therefore, relevant to the mitigating circumstance of "although the act itself may have been harmful, the defendant has not shown himself to be otherwise evil" by showing defendant's lack of remorse.

For the reasons stated, this assignment of error is overruled. However, we would note for the benefit of the trial courts that the better procedure, in a situation in which the evidence relates only to guilt or innocence, is to present such evidence during the guilt determination phase.

[21] Finally, under this contention, defendant argues that the trial court erred by refusing to allow him to question the assistant district attorney on voir dire concerning promises made by the State to the witness who testified at the sentencing phase. We think the trial court acted properly in refusing to allow defendant to examine, as a hostile witness, a fellow officer of the

court concerning information which defendant failed to elicit from the witness whose testimony he was seeking to discredit. During the lengthy voir dire, Roy Brown took the stand and stated that some time after revealing the information to officers, he was taken before a judge and tried for two of the counts for which he was in prison and that he received a suspended sentence and his bond was substantially reduced. With this information from the voir dire, defendant had, it seems to us, sufficient information to pursue his concern that Roy Brown's testimony was in exchange for favorable treatment by the State. However, when the witness testified before the jury, Roy Brown was not asked any questions about any such consideration or about the disposition of charges against him. We agree with the State that the appropriate avenue of inquiry into the bias of a witness is to ask the witness himself.

This assignment of error is overruled.

D.

[22] Defendant next argues that the trial court improperly charged the jury concerning the possibility of parole for a life sentence. We find no error in these instructions.

The jury, after some deliberation during the sentencing phase, inquired of the court concerning the chances for parole from a life sentence. The defendant requested that the jury be instructed that "life sentence means life sentence, and death means death." Instead, the court gave the following instruction:

> I instruct you that the question of eligibility for parole is not a proper matter for you to consider in recommending punishment and it should be eliminated entirely from your consideration and dismissed from your mind. In considering whether to recommend death or life imprisonment, you should determine the question as though life imprisonment means exactly what it says, imprisonment in the State Prison for life. You should decide the question of punishment according to the issues submitted to you by the Court wholly uninfluenced by consideration of what another arm of the government might or might not do at some time in the future.

After the jury had been given this instruction, defendant requested that the court charge the jury as follows:

> Under the law of the State of North Carolina, a defendant sentenced to life imprisonment for first degree murder is never entitled to a parole and a defendant who is sentenced to two consecutive terms of life imprisonment for first degree murder is not even eligible for consideration for parole until 40 years has passed.

The trial court refused his request. Defendant assigns error to the refusal to charge the jury according to his requests.

While the tendered instruction by the defendant is a correct statement of the law, that submitted by the trial court is also correct and in accordance with instructions previously approved by this Court. The trial court is not required to instruct the jury in the precise words requested by the defendant. The instruction given by the trial court conveyed the substance of defendant's first request. No more is required.

The long-standing rule in this jurisdiction is that a defendant's eligibility for parole is not a proper matter for consideration by a jury. *E.g., State v. Conner*, 241 N.C. 468, 85 S.E. 2d 584 (1955). That is exactly what the trial court told the jury. Defendant's requested instruction concerning the eligibility for parole, although a correct statement of the law, was not appropriate information for the jury to consider in its deliberations. We find no error in the instruction given by the trial court or in its refusal to instruct the jury according to defendant's requests.

This assignment of error is overruled.

E.

[23] The trial court submitted each of the two killings as an aggravating circumstance for the other under the "course of conduct" provision of G.S. 15A-2000(e)(11). Defendant argues that the submission of each murder as an aggravating circumstance for the other violates double jeopardy. This Court has rejected a similar argument, based on similar reasoning, in *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982). Justice Copeland, writing for the Court, has presented a thorough discussion of this contention in Section XII of the opinion in *Pinch*, 306 N.C. at 29, 292 S.E. 2d

at 225, and it is unnecessary for us to repeat it here. Suffice it to say that for the reasons stated in *Pinch*, this assignment of error is overruled.

[24] In connection with this contention, defendant also argues that the trial court committed prejudicial error by submitting an aggravating circumstance which was not listed by the State in its response to defendant's motion for a bill of particulars. In its motion for a bill of particulars defendant requested notice of which aggravating circumstances would be relied on by the State at trial. The State responded, but did not include in its list the aggravating circumstance that the murder was part of a course of conduct in which the defendant engaged in crimes of violence against another person, G.S. § 15A-2000(e)(11) (Cum. Supp. 1981). Defendant contends that (1) due process requires such notice, and (2) the order of the trial court concerning defendant's motion for a bill of particulars required the disclosure.

This Court has previously rejected defendant's due process argument in *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981). There, we reasoned that the only aggravating circumstances on which the State may rely are enumerated in G.S. 15A-2000(e) and that this statutory notice is sufficient to meet the constitutional requirements of due process. We reiterate that holding here.

We also disagree with defendant that the trial court erred in submitting this aggravating circumstance because the State did not comply with the order resulting from his motion for a bill of particulars. The trial court's order stated:

> That the Court ORDERS that the State disclose to the defendant's counsel the aggravating circumstances in the above referenced case; that the Court further ORDERS that the State may disclose the aggravating circumstances without prejudice and that the State may rely on other circumstances as the evidence and circumstances become known to the State.

The State did disclose the other aggravating circumstances on which it eventually relied. We think the trial court's order merely required the State to disclose those aggravating circumstances which it knew it intended to use at the time it responded to the motion for the bill of particulars. In that light,

the State complied with the trial court's order. We do not believe the trial court intended to limit the State to those disclosed. Indeed, the court clearly indicated that its order was to be "without prejudice" to the State.

While not essential to our decision here, we do agree with the State that G.S. 15A-925 does not authorize a trial court to order the State to disclose its aggravating circumstances prior to trial. That statute provides:

> (b) A motion for a bill of particulars must request and specify items of *factual information* desired by the defendant which pertain to the charge and which are not recited in the pleading, and must allege that the defendant cannot adequately prepare or conduct his defense without such information.

(Emphasis added.)

The trial court ordered the State to "disclose to the defendant's counsel the aggravating circumstances in the above-referenced case." We agree with the State that aggravating circumstances are not "factual information" within the meaning of G.S. 15A-925.

This assignment of error is overruled.

F.

[25] Defendant next contends that the trial court erred in instructing the jury that it *must* recommend that defendant be sentenced to death if it found that the aggravating circumstances outweighed the mitigating circumstances. This argument, based on similar reasoning, has been recently rejected by this Court in *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982), and *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243 (1982). These opinions fully discuss this assignment of error and we find it unnecessary to lengthen this opinion by repetition of the discussions contained in those cases. For the reasons stated in *Pinch* and *Williams*, this assignment of error is overruled.

G.

[26] Defendant next contends that, in a capital case, the trial court on request should instruct the jury on the consequences of

the inability of all of its members to agree on a sentence. Defendant asked the trial court to charge that a sentence of life imprisonment would be imposed in the event that the jury failed to reach unanimous agreement on the proper sentence.

Again, this Court has specifically addressed and rejected the argument here presented by the defendant in *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788; *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752. We reiterate those holdings and overrule this assignment of error.

H.

Defendant finally contends that the death penalty constitutes cruel and unusual punishment under the eighth amendment of the United States Constitution and may not be imposed.

This assignment of error has been rejected on numerous occasions, *e.g.*, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976); *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979), and we are presented with no additional reasoning to change our position.

IV.

[27] As noted in *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, --- U.S. --- (No. 81-6143, March 22, 1982), G.S. 15A-2000(d)(2) directs this Court to review the record in a capital case to determine whether the record supports the jury's finding of any aggravating circumstance, whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[1] As stated in *Rook*, this mandate serves as a check against the capricious or random imposition of the death penalty, and our review function in this regard is limited to those instances where both phases of the trial of the defendant in a capital case have been found to be

1. This Court has not yet stated whether the "similar cases" for comparison purposes consist of cases in which the death penalty was imposed or all first degree murder cases regardless of the punishment. As noted in my concurring opinion in *State v. Pinch*, --- N.C. ---, --- S.E. 2d --- (No. 43A81, filed 2 June 1982), I would compare the death sentence in the case at issue to all similar first degree murder cases regardless of the punishment.

free from prejudicial error. In fulfilling this role, we are sensitive not only to the mandate of the Legislature but to the constitutional dimensions of our review.

Mindful of the very serious responsibility placed on us by G.S. 15A-2000(d)(2), we have carefully reviewed the record of this case along with the briefs and oral arguments. We conclude that there is sufficient evidence in the record to support the jury's findings as to the aggravating circumstances submitted. We also find nothing in the record to indicate that the sentence of death was imposed under the influence of passion, prejudice and any other arbitrary factor.

The record before us reveals two of the most bloodthirsty and brutal crimes which have ever been reviewed by this Court. We again refrain from repeating gory details summarized at the beginning of this opinion. Suffice it to say that this defendant has been convicted of stabbing to death a young mother and her child, with no apparent motive, and extensively mutilating their bodies. The bloody facts disclosed by the record before us leave this Court with no choice but to conclude that the sentence of death imposed is not disproportionate or excessive considering both the crime and the defendant. We, therefore, decline to exercise our discretion to set aside the death sentence imposed.

In all phases of the trial below, we find

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. at 38, 292 S.E. 2d at 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.

Therefore I vote to vacate the death sentence and to remand for a new sentencing hearing. I concur with the result reached by the majority in the guilt phase of the case.

CHARLES G. LONG, JR., AND WIFE, MARY P. LONG v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION

No. 132A81

(Filed 13 July 1982)

1. **Appeal and Error § 42— conclusiveness of record**

The Supreme Court will consider only what appears in the record which was before the superior court and will not consider additional "facts" appearing only in the briefs of the parties before it.

2. **Eminent Domain § 1.3— taking of land for public use—just compensation**

The requirement that just compensation be paid for land taken for a public use is guaranteed by the "law of the land" clause of Article I, § 19 of the N.C. Constitution and by the Fourteenth Amendment to the U.S. Constitution.

3. **Aviation § 2; Eminent Domain § 13— harm from aircraft overflights—inverse condemnation as sole remedy**

Inverse condemnation is the sole remedy for recovery by a landowner harmed by aircraft overflights involving an airport owned and operated by a city or county. Therefore, plaintiffs were not entitled to recover for personal injuries and property damages allegedly resulting from direct overflights of aircraft upon allegations of trespass and nuisance.

4. **Aviation § 2; Eminent Domain § 13— aircraft overflights—inverse condemnation—necessity for diminution in market value of property**

In order for a landowner to recover in an inverse condemnation action for the interference with his property by aircraft overflights, the owner must establish not merely an occasional trespass or nuisance, but an interference substantial enough to reduce the market value of his property.

5. **Aviation § 2; Eminent Domain § 13— inverse condemnation—owners not residing directly beneath flight paths**

Recovery in an inverse condemnation action is not limited to those property owners residing directly beneath aircraft flight paths. Rather, a landowner is entitled to compensation if the interference caused by the flights is sufficiently direct, sufficiently peculiar and of sufficient magnitude to support a conclusion that a taking has occurred.

6. **Aviation § 2; Eminent Domain § 5— inverse condemnation—measure of damages**

Where a person's right to possess, use, enjoy or dispose of his land is substantially impaired, his property has been taken, and he is entitled to recover to the extent of the diminution in his property's value, the measure of damages being the difference in the fair market value of the property immediately before and immediately after the taking.

7. **Eminent Domain § 1.3— taking of property for public use—governmental immunity no defense**

Governmental immunity is not a defense where there is a "taking" of private property for public use whether that use be proprietary or governmental in nature.

8. Aviation § 2; Eminent Domain § 13.4— inverse condemnation—evidence of physical distress and mental anguish

Evidence of plaintiffs' stress, anxiety, fear, annoyance and loss of sleep and of the denial of their quiet use, possession and enjoyment of their property would be admissible in an inverse condemnation action to prove the cause and extent of the diminution in value of their real property.

9. Aviation § 2; Damages § 11.2; Eminent Domain § 13.3— punitive damages not allowable against municipal corporation

No punitive damages are allowable against a municipal corporation unless expressly authorized by statute. Therefore, the trial court properly struck allegations as to punitive damages in an inverse condemnation action against a municipality.

10. Aviation § 2; Eminent Domain § 13.3— inverse condemnation action—compliance with G.S. Ch. 136 unnecessary

The trial court properly denied defendant city's motion to dismiss plaintiffs' inverse condemnation action for failure to comply with the provisions of G.S. 136-111.

11. Aviation § 2; Eminent Domain § 13; Rules of Civil Procedure § 21— inverse condemnation action—trustee and noteholder as necessary parties—order for joinder

Where plaintiffs in an inverse condemnation action alleged that the value of their property had been so greatly diminished as to be "almost unsellable and almost unlivable," the trustee and holder of the note secured by the deed of trust on the property were necessary parties to the action. However, dismissal of plaintiffs' action for failure to join the trustee and noteholder would not be a proper remedy for nonjoinder, and the trial court properly denied defendant's motion to dismiss for failure to join necessary parties and properly ordered the joinder of the trustee and noteholder. G.S. 1A-1, Rules 19 and 21.

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

APPEAL by plaintiffs from judgment of *Snepp, J.*, at the 18 May 1981 Session of Superior Court, MECKLENBURG County, entered out of session by agreement of counsel and filed 29 June 1981, dismissing their trespass and nuisance claims and striking their allegations of punitive damages against the defendant.[1] The

1. This case was consolidated for argument on the City's motion to dismiss the plaintiffs' complaint with more than sixty other cases pending against the City in Mecklenburg County including the case of *Clyde O. Robinson and Louise P. Robinson v. City of Charlotte* (No. 80CVS6036). It so happened that the case *sub judice* and *Robinson* were pending before this Court at the same time and appeared on the same docket. While there are some differences in specific allegations, the complaints in both actions were filed on the same date and are essentially similar in all material respects. The Longs and the Robinsons reside on opposite ends of the new runway—the Longs approximately one mile north of the northern end and the Robinsons approximately one and one-half miles south of the southern end.

appeal was docketed in the Court of Appeals on 10 August 1981. We allowed plaintiffs' petition for discretionary review prior to determination by the Court of Appeals on 6 October 1981.

Weinstein, Sturges, Odom, Groves, Bigger, Jonas & Campbell, P.A., by T. LaFontine Odom and L. Holmes Eleazer, Jr., for plaintiff-appellants.

Caudle, Underwood & Kinsey, P.A., by William E. Underwood, Jr. and C. Ralph Kinsey, Jr., for defendant-appellee.

MEYER, Justice.

The major issue brought forward for review is the permissible scope of relief sought by the petitioners for alleged injuries and damages to their persons and property. More specifically, the issue is whether plaintiffs in addition to recovering for the diminution in the value of their real property upon the theory of inverse condemnation, may recover (1) for personal injuries and property damages resulting from direct overflights upon allegations sounding in trespass and nuisance and (2) punitive damages. For the reasons stated herein, we affirm Judge Snepp's dismissal of the plaintiffs' trespass and nuisance counts and the striking of plaintiffs' allegations for punitive damages and hold that plaintiffs' recovery is limited to the diminution in the value of their real property. We further affirm Judge Snepp's action in striking the allegations of plaintiffs' stress, anxiety, fear, annoyance and

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Unquestionably, the subject matter of these two cases has significant public interest and involves legal principles of major significance to the jurisprudence of this State. *See* G.S. § 7A-31; Rule 15 of the North Carolina Rules of Appellate Procedure. It was alleged in the *Long* petition that there are over two hundred similar cases against the City of Charlotte currently pending in the Superior Court of Mecklenburg County. It also appears from consent orders entered by Judge Snepp in both the *Long* and *Robinson* cases (similar in all pertinent respects and both signed on 29 June 1981) that forty-five similar cases filed by counsel for Long and eleven similar cases filed by counsel for Robinson against the City were consolidated with "numerous other cases" brought by four other law firms for the purpose of hearing the City's motions to dismiss the complaint. It also appears from those consent orders that "The resolution of these legal questions will govern the individual trials of approximately two hundred cases already pending" and perhaps more to be filed. It appears from the record and briefs before this Court that most of these two hundred pending cases have been continued pending appellate review of the case *sub judice*. Judicial economy and efficiency could best be served by a definitive resolution of the legal questions involved. For these reasons the petitions of both Long and Robinson were allowed for discretionary review prior to determination by the Court of Appeals and consolidated for oral argument before this Court.

loss of sleep as independent elements of damage in the trespass and nuisance counts but hold that evidence of such conditions is admissible to prove the cause and extent of the diminution in value of plaintiffs' real property in the inverse condemnation count.[2]

[1] The matter is before this Court, in effect, on the complaint, pre-answer motions to dismiss, and the order of the court only. The record before us does not contain the arguments of counsel or other matters which transpired at the hearing of the motions. In short, there is little record material before us concerning the facts of the claim. The briefs of both parties contain recitals of facts no doubt well-known to the attorneys who prepared them but which do not appear in and are not supported by the brief record before us. The Supreme Court will consider only what appears in the record which was before the Superior Court and will not consider additional "facts" appearing only in the briefs of the parties before it. See *Penland v. Coal Co.*, 246 N.C. 26, 34, 97 S.E. 2d 432, 438 (1957), wherein this Court, in addressing a similar situation, said:

> The Supreme Court can judicially know only what appears in the record which was before the Superior Court. (Citations omitted.) Accordingly, matters which were not in the record before the Superior Court, but which are sent up with the transcript to the Supreme Court, are no more a part of the record in the Supreme Court than they were in the Superior Court, and may not be made so by certificate of the court below.

We will first examine such facts as may be gleaned from the complaint which, pursuant to Rule 12(b) standards, must be deemed true for the purpose of the trial judge's ruling on the motions and our review of that ruling.

This action against the City of Charlotte (hereinafter "City") was instituted by Mr. and Mrs. C. G. Long on 18 June 1980. In the original complaint there are three "counts" denominated as

2. We are not called upon to decide and do not decide the issue of whether one suffering from a specific bodily injury, such as injury to the eardrum affecting hearing (as opposed to several health conditions), resulting directly from passing aircraft may recover from the owner or operator of the aircraft or airport.

follows: "Count I (Inverse Condemnation)," "Count II (Trespass)," and "Count III (Nuisance)," as well as a prayer for compensatory and punitive damages.

The following is a brief summary of the allegations of Count I (Inverse Condemnation) of the complaint. The City of Charlotte owns and operates Douglas Municipal Airport. In 1969 the City approved an expansion of the airport by adding a new 10,000-foot, North/South runway known as "Runway 18R/36L" west of the then existing North/South runway. Land acquisition began in 1969, construction began in 1973 and the new runway was opened for traffic on 19 June 1979. Plaintiffs' property is located approximately one mile north of the northerly end of the new runway and is directly in line with and under the take-off and landing paths of aircraft using the new North/South runway 18R/36L. Since the opening of the new runway substantial numbers of commercial, freight and general aviation aircraft, both civilian and military, jet and propeller-driven, using it have passed directly over, adjacent to and near plaintiffs' property at low altitudes ranging from 100 to 500 feet. Such flights have occurred at all hours of every day and night.

Plaintiffs allege that when the aircraft pass over or near their property, in taking off or landing, they create intense noise and vibration which shake plaintiffs' home so badly that it vibrates the house and personal property and makes ordinary conversation, radio listening, television viewing and any reasonable use of plaintiffs' home impossible. Fumes and other pollutants are emitted from the low-flying aircraft as they pass over or near plaintiffs' property polluting plaintiffs' property, disrupting outdoor activities, and leaving a coat of pollutants on plaintiffs' home, yard, motor vehicles, and other objects. The frequency and intensity of the noise and vibration created by such aircraft at dangerously low altitudes is so great that it is unbearable to a normal human being and has rendered plaintiffs' property greatly diminished in value, almost unsellable and almost unlivable. It is also alleged that the noise and vibration have physically damaged the house itself.

Plaintiffs further allege that as a direct result of the overflights they have been deprived of the free and peaceful use and enjoyment of their property, and therefore their property has

been taken and condemned without just compensation and without due process of law contrary to the North Carolina and United States constitutions. They further allege that prior to the construction of the new runway some residents of the area sought to enjoin the City because of expected damage but their suit was dismissed and therefore the City was, within the context of a public meeting, notified of plaintiffs' claim but failed to respond.

In "Count II (Trespass)," after incorporating the allegations of Count I, plaintiffs allege *inter alia* that the overflights create noise, vibration, air pollutants and dust which invade their property and that they suffer stress, anxiety, fear, annoyance and loss of sleep, all resulting in injury to their physical and mental health; that the City had prior knowledge that these adverse effects would occur and failed to relieve these conditions; and that its continual operation of the runway with such knowledge constitutes intentional, willful, reckless and wanton conduct in utter disregard of plaintiffs' rights and safety and entitle plaintiffs to punitive as well as compensatory damages.

In "Count III (Nuisance)," after incorporating the allegations of Counts I and II, plaintiffs further allege *inter alia* that the City's operation of the new runway constitutes a nuisance which destroys the peaceful use, enjoyment and possession of their property and is injurious to their health; that such nuisance is maintained and will continue to be maintained intentionally, willfully, wantonly and recklessly, with full knowledge of the effects, entitling plaintiffs to recover punitive as well as compensatory damages.

Prior to filing answer, the City of Charlotte filed motions pursuant to Rule 12 of the Rules of Civil Procedure as follows:

(1) to dismiss the inverse condemnation count on grounds that the exclusive remedy available to the plaintiffs was a proceeding under Chapter 136 of the General Statutes with which their action did not comply.

(2) to dismiss the trespass count on the grounds that any trespass which had occurred or might occur would be in the approach of the runway which trespass is sanctioned in the public interest.

(3) to dismiss both the trespass and nuisance counts on the grounds that no claim for relief upon a theory of tort may be stated against the City if it calls into question the City's decision to provide a public facility.

(4) to strike allegations in the complaint concerning the City's advance knowledge of the adverse impact of the runway's operations and its inaction in spite of that prior knowledge on the grounds that such allegations attempted to litigate the propriety and wisdom of the City's decision to construct the runway.

(5) to strike allegations in the complaint concerning plaintiffs' stress, anxiety, fear, annoyance and loss of sleep, etc., on the grounds that the alleged physical and mental injuries are not proper elements of damages in the case.

(6) to dismiss the complaint for failure to join the trustee and holder of the deed of trust on plaintiffs' property as necessary parties to the action.

(7) to strike allegations of the complaint concerning punitive damages on the grounds that punitive damages cannot be awarded against the City.

The plaintiffs subsequently amended their complaint to conform their allegations to the requirements of the Chapter 136 procedure.

The City's Rule 12 motions were heard before Judge Snepp on 19 May 1981 and by agreement of the parties, his rulings were made in an order entered out of session and filed 29 June 1981. In his order Judge Snepp denied the City's motion to dismiss the inverse condemnation count and denied the motion to dismiss for failure to join necessary parties but ruled the holder of the deed of trust and the trustee to be necessary parties and ordered them joined. He granted all of the City's remaining motions to dismiss and to strike. The plaintiffs excepted to those parts of the order granting the City's motions and appealed, and the trial court certified that there was no just cause for delay for purposes of obtaining appellate review. The City cross-assigned as error the denial of its motion to dismiss the inverse condemnation count. We allowed plaintiffs' petition to bypass the Court of Appeals.

We are called upon to determine whether the trial court erred (1) in dismissing the trespass and nuisance counts of the

plaintiffs' complaint, (2) in denying the City's motion to strike plaintiffs' inverse condemnation count for its failure to comply with the requirements of Chapter 136 of the General Statutes, and (3) in denying the City's motion to dismiss for failure to join necessary parties and in ordering the joinder of the trustee and noteholder of an outstanding deed of trust.

(1)

The continuously developing area of the law in the airport noise cases has, as of this date, not fully evolved. Fully developed legal doctrines seldom spring forth full-blown in a single opinion or even a few opinions. As a house is built brick upon brick, doctrines are built decision upon decision until a workable solution is developed and its soundness and logic is finally recognized. We are still in the early stage of this development in the airport cases. Not unexpectedly, there is a confusion of concepts when landowners claiming losses attempt to adapt traditional legal remedies such as inverse condemnation, trespass and nuisance to the relatively new phenomenon of major airport noise damage.

The maxim that "he who owns the soil owns it to the heavens" has given way in face of need created by the rapid growth of air commerce. The right to the exclusive possession of land today extends upward only to the point necessary for its practical use and enjoyment, the balance of the airspace being regarded as open to air commerce and avigation. The landowner still has the right of occupancy incident to his reasonable use and enjoyment of the surface which will prevail over the privilege of invasion of the airspace above the land, but the height to which the landowner may exclusively occupy the airspace varies depending upon what is reasonable under the facts of each case. The same flexibility of result exists in determining how low an airplane may fly over the property of others in taking off and landing. *See Hoyle v. City of Charlotte*, 276 N.C. 292, 172 S.E. 2d 1 (1970); 8 Am. Jur. 2d Aviation § 3 (1980); Annot., 77 A.L.R. 2d 1355 (1961).

The impact of airport and aircraft operations on persons and property has been a fertile source of litigation[3] and legal writing[4]

3. *See generally* Annot., 79 A.L.R. 3d 253 (1977) (airport operations as nuisance); Annot., 5 A.L.R. Fed. 440, 447-85 (1970) (suits under the Federal Tort

since the landmark case of *United States v. Causby*, 328 U.S. 256, 90 L.Ed. 1206 (1946), which involved overflights by military aircraft from the Greensboro airport during World War II.

The Fifth Amendment to the United States Constitution provides in pertinent part, "nor shall private property be taken for public use without just compensation." In *Causby*, described as "a case of first impression," the United States Supreme Court faced the issue of whether property was taken within the meaning of this provision by frequent and regular flights of aircraft over respondents' land at low altitudes. The Court found a compensable taking, stating:

> The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.

328 U.S. at 265, 90 L.Ed. at 1212.

[2] Every state constitution, except North Carolina's, contains similar provisions prohibiting the taking of private property for public use without just compensation. 1 Nichols, The Law of Eminent Domain § 4.8 (rev. 3d ed. 1981); Note, *supra*, 24 Syracuse L. Rev. 793 n. 1. While North Carolina does not have an express con-

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Claims Act); Annot., 81 A.L.R. 2d 1058 (validity of statute imposing liability for injury or damage occurring from flight or ascent of aircraft) (1962); Annot., 77 A.L.R. 2d 1355 (1961) (airport operations or flights of aircraft as taking or damaging of property); Annot., 66 A.L.R. 2d 634 (1959) (municipal liability for airport-related torts); Annot., 60 A.L.R. 2d 310, § 23 (1958) (injunctive relief against invasion of airspace).

4. Alekshun, *Aircraft Noise Law: A Technical Perspective*, 55 A.B.A.J. 740 (1969); Bohannon, *Airport Easements*, 54 Va. L. Rev. 355 (1968); Faden & Berger, *A Noisy Airport Is a Damned Nuisance!*, 3 Sw. 39 (1971); Harvey, *Landowners' Rights in the Air Age: The Airport Dilemma*, 56 Mich. L. Rev. 1313 (1958); Kettelson, *Inverse Condemnation of Air Easements*, 3 Real Prop., Prob. and Tr. J. 97 (1968); Spater, *Noise and the Law*, 63 Mich. L. Rev. 1373 (1965); Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 Dick. L. Rev. 207 (1967); Comment, *Governmental Nuisance Liability: An Inadequate Remedy for Aircraft Noise*, 9 Cal. W. L. Rev. 310 (1973); Comment, *The Airport Noise Cases: Condemnation by Nuisance and Beyond*, 7 Wake Forest L. Rev. 271 (1971); Note, *Inverse Condemnation and Nuisance: Alternative Remedies for Airport Noise Damage*, 24 Syracuse L. Rev. 793 (1973).

stitutional provision against the "taking" or "damaging"[5] of private property for public use without payment of just compensation, this Court has allowed recovery for a taking on constitutional as well as common law principles. Stoebuck, *supra*, 71 Dick. L. Rev. 207, 226 n. 102. We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of "the law of the land" within the meaning of Article I, Section 19 of our State Constitution.[6] *Midgett v. Highway Commission*, 260 N.C. 241, 132 S.E. 2d 599 (1963); *Debruhl v. Commission*, 247 N.C. 671, 102 S.E. 2d 229 (1958). *See Morganton v. Hutton & Bourbonnais Company*, 251 N.C. 531, 112 S.E. 2d 111 (1960); *Sale v. Highway Commission*, 242 N.C. 612, 89 S.E. 2d 290 (1955); *Eller v. Board of Education*, 242 N.C. 584, 89 S.E. 2d 144 (1955). The requirement that just compensation be paid for land taken for a public use is likewise guaranteed by the Fourteenth Amendment to the Federal Constitution.[7] *City of Raleigh v. Mercer*, 271 N.C. 114, 155 S.E. 2d 551 (1967); *Yarborough v. Park Commission*, 196 N.C. 284, 145 S.E. 563 (1928).

[3] For a landowner harmed by aircraft overflights involving an airport owned and operated by a city or county, inverse condemnation is the remedy most frequently employed. *See* Kettelson, *Inverse Condemnation of Air Easements*, 3 Real Prop., Prob. and Tr. J. 97 (1968). The common law action for inverse condemnation has been recognized by this Court as an appropriate remedy in airport cases. *Hoyle v. City of Charlotte*, 276 N.C. 292, 172 S.E. 2d

5. The constitutions of twenty-six states require compensation for "damaging" as well as for "taking." For a list of those states and citations to pertinent provisions of their constitutions, see Stoebuck, *supra*, 71 Dick. L. Rev. 207, 223 n. 87. The apparent purpose of the use of the word "damaged" as well as the word "taken" was to abolish the old test of direct physical injury to the property. *See Chicago v. Taylor*, 125 U.S. 161 (1888).

6. N.C. Const. art. I, § 19 provides in pertinent part, "No person shall be . . . in any manner deprived of his . . . property, but by the law of the land . . . . "

7. The Fourteenth Amendment to the United States Constitution provides in pertinent part, "No State shall . . . deprive any person of . . . property, without due process of law; . . . . "

1. We hold that the remedy of inverse condemnation is indeed the sole remedy by which the plaintiffs may recover. While in some cases the facts proven may also establish a trespass or a nuisance, such is not required and is not relevant.

While some courts have allowed (and have even shown a preference for) the trespass and nuisance theories,[8] they have been criticized as being inadequate.

> There are basically three legal theories on which landowners and residents have sought relief: trespass, nuisance and compensation for a taking under the eminent domain theory. The weakness of the trespass theory is having to prove the element of a physical invasion of the landowner's property, meaning there would be liability only when an aircraft enters the zone of airspace 'owned' by the plaintiff. Also, the strict trespass theory requires identifying and naming as defendant the operator of a particular single flight, and only an owner immediately below the flight may maintain a trespass action. The nuisance theory overcomes some of these difficulties, but it protects the landowner's interest inadequately, particularly when there are only infrequent interferences.

Kettelson, *supra*, 3 Real Prop., Prob. & Tr. J. 97.

In Rossi, *Inverse Condemnation and Nuisance: Alternative Remedies For Airport Noise Damage*, 24 Syracuse L. Rev. 793 (1973), the author says:

8. *See*, for example, *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 496 P. 2d 480, 101 Cal. Rptr. 568 (1972). There the court upheld a trial court decision that an action in inverse condemnation could not support recovery for aircraft noise because no diminution of property market value had been shown. But the court reversed the trial court's dismissal of plaintiff's action in nuisance, suggesting that a common law nuisance action could remedy airplane noise interference in some cases in which inverse condemnation would fail. *Thornburg v. Port of Portland*, 233 Or. 178, 376 P. 2d 100 (1962) (inverse condemnation action v. municipal airport; no direct overflights but a question for the jury as to whether there was a taking by noise nuisance); *Greater Westchester v. City of Los Angeles*, 26 Cal. 3d 86, 603 P. 2d 1329, 160 Cal. Rptr. 733 (1979), *cert. denied*, 449 U.S. 820, 66 L.Ed. 2d 22 (1980). *See also* Comment, *Governmental Nuisance Liability: An Inadequate Remedy For Aircraft Noise*, 9 Cal. W. L. Rev. 310 (1973); Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 Dick. L. Rev. 207 (1967); Comment, *The Airport Noise Cases: Condemnation by Nuisance and Beyond*, 7 Wake Forest L. Rev. 271 (1971).

> The remedy most frequently implemented by such landowners, inverse condemnation, is a claim that part of their property, *i.e.*, an air easement for landings and takeoffs, has been taken by the airport without compensation and, therefore, in violation of the fifth amendment provision that 'private property [shall not] be taken for public use without just compensation.' Actions based on this provision have generally been limited to recovery for damage caused by flights which actually pass through a plaintiff's airspace, and even then only to the extent the market value of the property has been decreased. Beyond this constitutionally protected action, landowners have occasionally resorted to the ancient remedies of trespass and nuisance to right their modern wrong . . . . [A]n action in trespass seems unsatisfactory for practical and theoretical reasons, ...

In explaining the difficulty with the trespass action, he says that:

> In order to recover in trespass, a landowner would have to prove that his ownership extended to airspace at the altitude of the offending flight, and that the flight transgressed the imaginary vertical boundaries of his land. Even assuming proof of ownership of the invaded space, each trespassing plane must be sued separately. The problem of accurately identifying the plane and the expense of proving a case against each offending craft would normally make suit unprofitable.

24 Syracuse L. Rev. 793 n. 3.

Under our holding, it is of no importance that the taking may be accomplished by trespass or nuisance. Often where nuisance has been alleged, this Court has found the gravamen of the complaint to be a taking of property. *See*, for example, *Clinard v. Kernersville*, 215 N.C. 745, 3 S.E. 2d 267 (1939); *Gray v. High Point*, 203 N.C. 756, 166 S.E. 911 (1932); *Hines v. Rocky Mount*, 162 N.C. 409, 78 S.E. 510 (1913). *See also Midgett v. Highway Commission*, 260 N.C. 241, 132 S.E. 2d 599 (1963); *Ivester v. City of Winston-Salem*, 215 N.C. 1, 1 S.E. 2d 88 (1939); *Rhodes v. Durham*, 165 N.C. 679, 81 S.E. 938 (1914).

Modern construction of the "taking" requirement is that an actual occupation of the land, dispossession of the landowner or

even a physical touching of the land is not necessary; there need only be a substantial interference with elemental rights growing out of the ownership of the property. *Hines v. City of Rocky Mount*, 162 N.C. 409, 78 S.E. 510, held that the odors from a trash dump near the plaintiff's land constituted a nuisance and a taking. *Gray v. City of High Point*, 203 N.C. 756, 166 S.E. 911 (1932), held that odors from an adjacent sewage disposal plant were a nuisance and a taking. *Ivester v. City of Winston-Salem*, 215 N.C. 1, 1 S.E. 2d 88 (1939), held that odors, smoke, ashes, rats, mosquitoes and other insects from a sewage disposal plant next to the plaintiff's premises constituted a nuisance and were a taking of property. Though no physical touching was present in those cases, the wafted smoke, odors, dust, or ashes over the plaintiff's land warranted compensation for a "taking." *See Dayton v. City of Asheville*, 185 N.C. 12, 115 S.E. 827 (1923) (holding that the statute of limitations for eminent domain actions applied to an action to recover damages for smoke, ashes, and odors from a city incinerator next to the plaintiff's land). *See also City of Louisville v. Hehemann*, 161 Ky. 523, 171 S.W. 165 (1914); *City of Georgetown v. Ammerman*, 143 Ky. 209, 136 S.W. 202 (1911); *Brewster v. City of Forney*, 223 S.W. 175 (Tex. Comm. App. 1920); *Jacobs v. City of Seattle*, 93 Wash. 171, 160 P. 299 (1916).

In order to recover for inverse condemnation, a plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental; a "taking" has been defined as "entering upon private property for more than a momentary period, and under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." *Penn v. Coastal Corp.*, 231 N.C. 481, 57 S.E. 2d 817 (1950).

Obviously not every act or happening injurious to the landowner, his property, or his use thereof is compensable. Landowners must suffer the usual, normal and occasional disturbances, annoyances and discomforts of life such as a passing siren, a humming transformer or electric substation, the odor of a sewage treatment plant or paper mill "when the wind is right," a distant sonic boom or airplanes passing high overhead.

Flights at altitudes that would in no way damage or interfere with the use and enjoyment of land have been held not to constitute a taking or damaging of the property, the permissible altitude being determined by the circumstances and facts peculiar to each situation, and it has been recognized that there must be a substantial interference with the use and enjoyment of the land, not merely incidental damage, before a taking results. 77 A.L.R. 2d 1355, 1360.

> A compensable taking of a flight or avigation easement does not occur until overflights constitute a *material* interference with the use and enjoyment of property, such that there is substantial diminution in fair market value.

Cochran v. City of Charlotte, 53 N.C. App. 390, 397, 281 S.E. 2d 179, 186 (1981) (emphasis original), *cert. denied*, 304 N.C. 725, 288 S.E. 2d 380 (1982).

As stated in *Causby*, "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." 328 U.S. at 266, 90 L.Ed. at 1213.

The public importance and social utility of commercial aircraft and publicly owned and operated airports must be balanced against the inconvenience, annoyance and aggravation to those in their vicinity. This balancing of interests necessarily and properly places a heavy burden on the landowner.

[4] The individual must bear a certain amount of inconvenience and loss of peace and quiet as the cost of living in a modern progressive society. *Martin v. Port of Seattle*, 391 P. 2d 540 (Wash. 1964). The balance of interests is established by the requirement that in order to recover for the interference with one's property, the owner must establish not merely an occasional trespass or nuisance, but an interference substantial enough to reduce the market value of his property. If the individual landowner is unusually sensitive to interference caused by airport operations not sufficiently substantial to constitute a taking, the public interest in maintaining the airport operations leaves him without remedy. On the other hand, if the interference caused by the airport's operation is sufficient to cause a diminution in the market value of the property, the right of individuals to use and enjoy

their property requires that the public bear the cost of the taking of that property.

[5] Recovery is not limited to those property owners residing directly beneath flight paths. A rule which denies recovery to a landowner who does not occupy land directly beneath the take-off and landing routes (the glidepath) of an airport is indefensible so long as a landowner who is subject to direct overflights and suffers identical damages is allowed a full recovery. Without regard to the *elements* of damage or injury and with regard only to the issue of compensability (entitlement to recover), the fair and logical rule is that a landowner is entitled to compensation if the interference caused by the flights is sufficiently direct, sufficiently peculiar and of sufficient magnitude to support a conclusion that a taking has occurred.

The test is whether the value of plaintiffs' property has been substantially impaired by a taking.

We point out that:

> The word 'property' extends to every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value. The term comprehends not only the thing possessed but also, in strict legal parlance, means the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use.

Hildebrand v. Telegraph Co., 219 N.C. 402, 408, 14 S.E. 2d 252, 256 (1941). *See United States v. General Motor Corp.*, 323 U.S. 373, 89 L.Ed 311 (1945).

[6] Thus, where a person's right to possess, use, enjoy or dispose of his land is substantially impaired, his property has been taken, and he is entitled to recover to the extent of the diminution in his property's value. *Eller v. Board of Education*, 242 N.C. 584, 89 S.E. 2d 144; *Clinard v. Kernersville*, 215 N.C. 745, 3 S.E. 2d 267. The measure of damages is the difference in the fair market value of the property immediately before and immediately after the taking. *See* 5 N.C. Index 3d, Eminent Domain § 5 (1977). It is clear from the allegations of the complaint that plaintiffs allege a "taking" as of the date of the opening of the new runway 18R/36L on 19 June 1979 by which their "property has been condemned and

made almost useless," "greatly diminished in value," and "almost unsellable and almost unlivable."

[3] Since inverse condemnation is the sole remedy by which the plaintiffs may recover,[9] Judge Snepp was correct in dismissing plaintiffs' trespass and nuisance counts.

9. It is perhaps appropriate at this point to allude to a decision in a federal case pertinent to the consideration of the issues before us now. The petitioner, Charles G. Long, together with others, not including the petitioners Robinson, filed suit in the United States District Court for the Western District of North Carolina (C-C-79-356) to compel the Federal Aviation Administration to take certain steps to control excessive aircraft noise near their homes. By an Order of Dismissal dated 17 March 1980 and filed 18 March 1980, United States District Court Judge James B. McMillan dismissed the suit because the plaintiffs had no legal remedy against the FAA Administrator under the Federal Aviation Act. 49 U.S.C. § 1348. In Section II of the order, entitled "Remedies Against the Airport Operator," Judge McMillan stated in effect that he would be more willing to recognize a right to sue the Administrator if he were convinced that plaintiffs' legal remedies against the City of Charlotte were as bleak as the plaintiffs contended. Judge McMillan stated that, "[a]ccording to Plaintiffs, their only relief would be through an inverse condemnation suit in which they would be able to recover only the difference in the fair market value of their property before and after the City 'took' the air easement over their homes." He then concluded that this would indeed be a harsh and unjust result and he suggested that in order to avoid it a court "should consider creating an adequate remedy against the city or the FAA" on constitutional grounds. He further concluded, however, that the court "need not undertake the task of fashioning an adequate legal remedy" because "it is clear that one is already provided by state law." Judge McMillan then proceeded to say that those plaintiffs, under North Carolina law, "could recover for *all* injuries" on the theory of *trespass*, including "compensation for loss of property value, injury to health, and the expense of acquiring and moving to another residence to avoid further injury, and mental suffering." Judge McMillan stated that "*punitive* damages are available for trespass to the same extent as for other torts. If punitive damages are recoverable at all against a North Carolina municipality, . . . they would appear to be available in this case." (Emphasis original.) He also concluded that punitive damages would be available under the nuisance theory. The issue of the availability of punitive damages against the City is decided to the contrary elsewhere in this opinion. In the interpretation of whether State law permits punitive damages for common law liability, the federal courts are bound by State decisions. *See United Mine Workers of America v. Patton*, 211 F. 2d 742 (4th Cir. 1954), *cert. denied*, 348 U.S. 824, 99 L.Ed. 649.

Judge McMillan's remarks with regard to those plaintiffs' rights against the City of Charlotte in the case before him are pure dictum as those issues were not necessary to a decision as to whether a remedy existed against the FAA Administrator nor even presented in the case. Clearly we are not bound by Judge McMillan's pronouncements on those issues. Even if those issues have been before him, we would not be bound by his determination of them. Just as federal courts are not bound by State court precedents on federal questions, State courts are not bound by federal court precedents on State questions. 20 Am. Jur. 2d, Courts §§ 222, 225 (1965).

[7] We note that a significant portion of appellants' brief is devoted to the proposition that the operation of Douglas Municipal Airport is a proprietary function. Having determined that appellants' sole remedy is in the nature of inverse condemnation (as opposed to trespass or nuisance) and that recovery is limited to diminution in value of appellants' property, the question of whether the operation of municipal or county owned airports is a governmental or a proprietary function is no longer of consequence here. If a "taking" has occurred, it is compensable though it results from a function which is governmental in nature. Governmental immunity is not a defense where there is a "taking" of private property for public use whether that use be proprietary or governmental in nature. "The test of liability is whether, notwithstanding its acts are governmental in nature and for a lawful public purpose, the municipality's acts amount to a partial taking of private property. If so, just compensation must be paid." *Insurance Co. v. Blythe Brothers Co.*, 260 N.C. 69, 79, 131 S.E. 2d 900, 907 (1963); *Hines v. Rocky Mount*, 162 N.C. 409, 78 S.E. 2d 510 (1913).

The trial court struck certain enumerated paragraphs relating to damages appearing within the counts which were in turn dismissed in their entirety. All of the paragraphs relating to plaintiffs' physical distress and mental anguish and punitive damages which were stricken from the complaint appear in Count I (Trespass) and Count II (Nuisance), both of which were dismissed in their entirety. The question which then arises is whether such allegations would be proper in an inverse condemnation count. While this issue is not before us, it will likely arise in the further proceedings in this and similar cases. In the interest of judicial efficiency, we will now consider whether the trial court erred in (A) striking plaintiffs' allegations of physical distress and mental anguish, and (B) striking plaintiffs' allegations and prayer for punitive damages.

(A)

[8] Plaintiffs' stricken allegations concerning physical distress and mental anguish as contained in the trespass count were: "The landing and taking-off 'Aircraft' have caused plaintiffs stress, anxiety, fear, annoyance and loss of sleep thereby injuring the physical and mental health of plaintiffs causing them great physi-

cal and mental suffering." Also stricken was plaintiffs' allegation that: "The Aircraft with their attendant intense noise, vibration and air pollution have . . . denied them quiet use, possession and enjoyment of their property . . . . " Likewise stricken were plaintiffs' allegations that the aircraft and their attendant circumstances "damaged the physical and mental health of the plaintiffs." Similar allegations in Count III (Nuisance) were to the effect that the conditions were "injurious to plaintiffs' health and well being" and caused them "great annoyance."

The trial court properly struck these allegations as they were stated as independent elements of damage resulting from the alleged torts of the trespass and nuisance counts which were stricken. Had these same allegations appeared in the inverse condemnation count to show the cause and extent of the diminution in value of the property, a different result would have obtained.

In any event plaintiffs are not prejudiced by the absence of those allegations in the context of this case because the same evidence concerning plaintiffs' stress, anxiety, fear, annoyance and loss of sleep, and the denial of their quiet use, possession and enjoyment of the property which would have supported the stricken allegations is admissible to prove the allegations of diminution in fair market value of the property in the inverse condemnation count. *See* 4A Nichols, The Law of Eminent Domain §§ 14.241, 14.246-.247 (rev. 3d ed. 1981); 1 Stansbury's North Carolina Evidence § 100 (Brandis rev. 1973).

In *R. R. v. Armfield,* Hoke, J., in discussing the damage elements of smoke and noise occurring in connection with a railroad right-of-way, said this:

> [I]n these and all other cases where this question of condemning a right of way is substantially presented, the principle, as stated, is only intended to exclude considerations of sentiment or personal annoyance detached from any effect on the pecuniary value of the property or the allowance of damages purely of a speculative character, and accordingly it is held here and in well considered cases elsewhere that in awarding damages for a railroad right of way plaintiff shall be allowed to recover the market value of the property actually included, and for the impairment of value done to the remainder,

and that in ascertaining the amount it is proper, among other things, to consider the inconvenience and annoyances likely to arise in the orderly exercise of the easement which interfere with the use and proper enjoyment of the property by the owner and which sensibly impair its value, and in this may be included the injury and annoyance from the jarring, noise, smoke, cinders, etc., from the operating of trains and also damage from fires to the extent that it exists from close proximity of the property and not attributable to defendant's negligence. (Citations omitted.) And it may be well to note that these damages are allowed and estimated, as stated, on the theory that the right is to be exercised in an orderly and proper manner; for notwithstanding the acquirement of such an easement, if an owner is subsequently injured in his proprietary rights by the negligence on the part of the company, a case presented in *Duval v. R. R.*, 161 N.C. 448, and to some extent involved in *Thomason v. R. R., supra*, or if, in the enjoyment of the right, a nuisance is clearly and unnecessarily created, a case presented in *R. R. v. Fifth Baptist Church*, 108 U.S., 317, an action lies, and because it does, compensation for injuries attributable to negligence, etc., are not as a rule included.

167 N.C. 464, 467-68, 83 S.E. 809, 811 (1914).

In the early case of *R. R. v. Church*, 104 N.C. 525, 530-31, 10 S.E. 761, 763 (1889), land was being condemned for a railroad right-of-way, and evidence that passing trains interrupted and disturbed the church services, distracted the worshippers, and frightened the worshippers' horses was held to be admissible on the question of the diminution of the value of the site for a church and not as separate items of damages. Merrimon, C.J., speaking for the Court said:

> The purpose of the evidence was not, as contended on the argument, to show how much or how little the worshippers, severally or collectively, were, would or might be shorn of religious impressions and advantages, but to show that the property was less valuable in that worshippers would not go there, but would find some safer, more quiet and agreeable place to worship, until the church as a place of worship would be deserted and of little or no value for church purposes, un-

til the church building would be useful only to be torn down and the lumber devoted to other purposes, and the land would be worth for any other purpose only a nominal price.

Church was cited in *R. R. v. Manufacturing Co.*, 169 N.C. 156, 85 S.E. 390 (1915), as "direct and valuable authority" in pointing out "the marked difference between showing a diminution in value of the property, on account of the several annoyances from passing trains, and proving them for the purpose of recovering special damages for the annoyance itself, as a distinct element of damage. The one is proper, and the other is not." It should be noted, however, that *Church*, *Armfield* and *Manufacturing Co.* involved physical occupation of land for railroad rights-of-ways and that at that time and stage in the development of our law, evidence of the elements of smoke and noise was admitted because they accompanied an actual physical invasion. They are cited here only for the purpose of illustrating that such evidence was admitted solely for the purpose of showing its influence on the diminution in value of the real property.

We conclude that the trial court did not err in striking the allegations concerning plaintiffs' physical distress, mental anguish and the denial of their quiet use, possession and enjoyment of their property as they were alleged in the trespass and nuisance counts for the purpose of recovering special damages for them as independent and distinct elements of damage separate and apart from their effect on the value of the property. Such allegations would be appropriate in an inverse condemnation count only for the purpose of showing their effect, if any, on the cause and extent of the diminution in the value of the real estate.

(B)

[9] The petitioners also assign as error the striking of their punitive damage allegations in Count II (Trespass) and Count III (Nuisance) of their complaint. Apparently the question of whether punitive damages may be allowed against a municipality is one of first impression with us. We are unable to discover any North Carolina case deciding the issue of whether punitive damages may be assessed against a governmental body. The common law and the overwhelming weight of modern authority have rejected the award of punitive damages against a municipal corporation. Annot., *Recovery of Exemplary or Punitive Damages From*

Municipal Corporation, 1 A.L.R. 4th 448 (1980). The general rule is that no punitive damages are allowed against a municipal corporation unless expressly authorized by statute. *See generally* F. Burdick, The Law of Torts § 200 at 245 (4th ed. 1926); 4 J. Dillon, The Law of Municipal Corporations § 1712 (5th ed. 1911); 18 McQuillan, Mun. Corp. § 53.18a (rev. 3d ed. 1977); *Municipal Liability for Exemplary Damages*, 15 Clev-Mar L. Rev. 304 (1966).

In *Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 69 L.Ed. 2d 616 (1981), the United States Supreme Court held that a municipality is immune from punitive damages under 42 U.S.C. § 1983. In that case the Court examined at length the historical and public policy considerations of allowing punitive damages against municipalities and other governmental agencies and concluded that neither consideration supports exposing a municipality to punitive damages for the bad faith actions of its officials.

> Punitive damages by definition are not intended to compensate the injured party, but rather to *punish* the tortfeasor whose wrongful action was intentional or malicious, and to *deter* him and others from similar extreme conduct. (Citations omitted.) Regarding retribution, it remains true that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort . . . . Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers (emphasis added).

453 U.S. at 266-67; 69 L.Ed. 2d at 632.

Ordinarily it is the wrongdoer himself who is made to suffer for his conduct by the imposition of punitive damages—here it is the governmental entity itself. The retributive purpose is not significantly advanced, if it is advanced at all, by exposing municipalities to punitive damages.

With regard to the *deterrent* aspect, the Court noted that it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the

threat of large punitive awards against the wealth of their municipality and its taxpayers. This is particularly true in the absence of a law making indemnification available to the municipality. Likewise, there is no reason to suppose that corrective action such as discharge of the offending officials who were appointed or the removal of those who were elected will occur simply because punitive damages are awarded against the municipality. 453 U.S. at 268-69; 69 L.Ed. 2d at 632-33.

We believe that public policy considerations[10] mitigating against allowing assessment of punitive damages are compelling and are applicable to the actions of municipal corporations without regard to whether the function is governmental or proprietary. We hold that in the absence of statutory provisions to the contrary, municipal corporations are immune from punitive damages. The trial court did not err in striking those allegations of the complaint alleging punitive damages.

We likewise find no error in the striking of plaintiffs' allegations of prior notice by the defendant of the likely consequences of construction and use of the new runway as they were supportive only on the issue of punitive damages and are not pertinent to the issue of diminution in value of plaintiffs' property.

(2)

[10] The City cross-assigned as error the trial court's denial of its motion to dismiss plaintiffs' Count I (Inverse Condemnation)

10. With regard to public policy considerations, the United States Supreme Court in *Newport* sounded an alarm in view of the anticipated effect of one of its recent opinions broadening the liability of municipalities:

> Finally, although the benefits associated with awarding punitive damages against municipalities under § 1983 are of doubtful character, the costs may be very real. In light of the Court's decision last Term in *Main v. Thiboutot*, 448 US 1, 65 L Ed 2d 555, 100 S Ct 2502 (1980), the § 1983 damages remedy may now be available for violations of federal statutory as well as constitutional law. But cf. *Middlesex Cty. Sewerage Authority v National Sea Clammers Assn.* --- US ---, 69 L Ed 2d 435, 101 S Ct --- (1981). Under this expanded liability, municipalities and other units of state and local government face the possibility of having to assure compensation for persons harmed by abuses of governmental authority covering a large range of activity in everyday life. To add the burden of exposure for the malicious conduct of individual government employees may create serious risk to the financial integrity of these governmental entities.

453 U.S. at 270, 69 L.Ed. 2d at 634.

for failure to comply with the provisions of Chapter 136 of the General Statutes (G.S. § 136-111).

Article 9 of Chapter 136 of the General Statutes vests eminent domain power in the Department of Transportation. It also provides a procedure to be used by the Department commonly known as the "Quick-take" procedure. Chapter 216 of the 1967 N.C. Session Laws authorizes the City of Charlotte to utilize the "quick-take" procedures of Article 9, Chapter 136, in acquiring land for airport purposes. *See also* 1969 N.C. Sess. Laws ch. 384. The April 1967 amendment to Section 7.81 of the City Charter only added Chapter 136 of the General Statutes to the procedures that the City is authorized to use. The specific language of Section 7.81 of the charter provides:

> In the exercise of the power of eminent domain, the city is hereby vested with all power and authority now or hereafter granted by the laws of North Carolina applicable to the City of Charlotte, and the city shall follow the procedures now or hereafter prescribed by said laws; provided, that in the exercise of its authority of eminent domain for the acquisition of property to be used for streets and highways, water and sewer facilities, airport purposes, and off-street parking and parks, and for all other purposes authorized by the provisions to G.S. 160A-241; *the City of Charlotte is hereby authorized to use the procedure and authority prescribed in Article 9 of Chapter 136* of the General Statutes of North Carolina. . . . (Emphasis added.)

The City contends that because it is "authorized" to use this statutory procedure it is the exclusive remedy available to the plaintiffs and their failure to employ it entitles the City to dismissal of plaintiffs' inverse condemnation count. We cannot agree. The City also suggests that under Chapter 136 procedures plaintiffs, as well as many others, would be barred by the statute of limitations as it was not filed within two years of 19 June 1979, the date runway 18R/36L was opened.

The City's contention that the Chapter 136 procedure is the exclusive remedy available to the plaintiffs is supported by neither statutory or case law nor logic. Legislative authority for the exercise of the power of eminent domain for airport purposes is found in Chapter 63 of the General Statutes (specifically G.S.

§ 63-5). The procedure to be used is not specified by Chapter 63. Neither is the procedure specified in the general legislative authority for municipal exercise of eminent domain, G.S. § 160A-241. That section does however refer to the procedures which *may* be used by municipalities:

> In exercising the power of eminent domain, a city *may in its discretion* use the procedures of Article 2 of Chapter 40 of the General Statutes, or the procedures of this Article, or the procedures of any other general law, charter or local act applicable to the city.

G.S. § 160A-241 (emphasis added).

It thus appears that the City has several procedures available to it and from which it can choose in condemning property for airport purposes, to-wit: the procedures of Chapter 40, Chapter 136, and Chapter 160A. Certainly it is not restricted to the procedures to which it seeks to restrict the plaintiffs.

We find no indication in either the City Charter provision or Chapter 160A that, because the *City* is authorized to use the Chapter 136 procedures against property, *landowners* are required or even authorized to use those procedures *against* the city. Where there is an adequate statutory remedy, North Carolina is in accord with the general rule that an action for inverse condemnation will not be recognized. *Williams v. Highway Commission*, 252 N.C. 772, 114 S.E. 2d 782 (1960). Even though not factually pertinent, we find the following language in *Midgett v. Highway Commission*[11] instructive:

> The statutory remedy for the recovery of damages to private property taken for public service is ordinarily exclusive, and when the statutory procedure is available, the owner, failing to pursue the statutory procedure, may not institute an action in superior court to recover his damages. (Citation omitted.) But there is an exception to this rule. A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, and

11. 260 N.C. 241, 250, 132 S.E. 2d 599, 608. *Midgett* deals with a situation in which the statute of limitations would have run before the property owner would have been expected to know that an interest in his property had been appropriated. *See also Eller v. Board of Education*, 242 N.C. 584, 89 S.E. 2d 144.

> neither requires any law for its enforcement nor is susceptible of impairment by legislation. And where the Constitution points out no remedy and no statute affords an adequate remedy under a particular fact situation, the common law will furnish the appropriate action for adequate redress of such grievance.

Chapter 160A clearly contemplates landowner recourse to a common law inverse condemnation action where there has been an uncompensated taking by a municipality and even provides for payment by the City of the costs of a successful landowner's action. G.S. § 160A-243.1.

We conclude that the trial court did not err in denying the City's motion to dismiss plaintiffs' Count I (Inverse Condemnation).

(3)

[11] The trial court denied the City's motion to dismiss for failure to join the trustee and *cestui que trust* of a deed of trust on the plaintiffs' property but concluded that they are "necessary parties" and ordered their joinder. Such action by the trial court is specifically authorized by Rule 19 of the Rules of Civil Procedure if they are indeed necessary parties. The question here is whether under the allegations of the complaint the trustee and noteholder are parties without whom a judgment completely and finally determining the controversy cannot be rendered. Looking to the complaint we find that plaintiffs have alleged in the surviving inverse condemnation count that the value of their property has been so greatly diminished as to be "almost unsellable and almost unlivable." This allegation cannot be otherwise interpreted than to mean that their property has almost no market value and virtually cannot be occupied as a residence. Assuming this allegation to be true, as we must, the trustee and the holder of the note secured by the deed of trust on that property would be vitally interested in having the debt satisfied from the proceeds of the jury verdict.[12]

12. The factual allegations in plaintiffs' brief concerning their notice of the suit to the noteholder, the balance due on the note secured by the deed of trust, the attitude of noteholder concerning being joined, etc., are an embellishment of the facts by counsel not appearing in or supported by the complaint. As such we disregard them.

Rule 19 of the Rules of Civil Procedure provides in part:[13]

> (a) . . . those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint; . . . .
>
> (b) *Joinder of Parties Not United in Interest.* The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

Necessary parties *must* be joined in an action. Proper parties *may* be joined. Whether proper parties will be ordered joined rests within the sound discretion of the trial court. *Booker v. Everhart*, 294 N.C. 146, 240 S.E. 2d 360 (1978). A party is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. *Strickland v. Hughes*, 273 N.C. 481, 160 S.E. 2d 313 (1968); *Manning v. Hart*, 255 N.C. 368, 121 S.E. 2d 721 (1961); *Garrett v. Rose*, 236 N.C. 299, 72 S.E. 2d 843 (1952). When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in. *MacPherson v. City of Asheville*, 283 N.C. 299, 196 S.E. 2d 200 (1973); *Strickland v. Hughes*, 273 N.C. 481, 160 S.E. 2d 313.

The noteholder and trustee here are persons "united in interest" with the owners and whose presence is necessary in order for the court to determine the claim before it without prejudicing their rights. *See Ludwig v. Hart*, 40 N.C. App. 188, 252 S.E. 2d 270, *cert. denied*, 297 N.C. 454, 256 S.E. 2d 807 (1979). Yet, dismissal of plaintiffs' action for failure to join the trustee and

13. These rules make no substantive change in the rules relating to joinder of parties as formerly set out in G.S. § 1-70 and G.S. § 1-73. Both G.S. § 1-70 and G.S. § 1-73 were repealed by 1967 Session Laws ch. 954, s. 4, effective 1 January 1970. *Booker v. Everhart*, 294 N.C. 146, 240 S.E. 2d 360 (1978). 1 McIntosh, North Carolina Practice and Procedure 2d, § 585 (Supp. 1970).

noteholder would not be an appropriate remedy for nonjoinder. Rule 21 of the Rules of Civil Procedure provides that neither misjoinder nor nonjoinder of parties is a ground for dismissal of an action. *See Booker v. Everhart*, 294 N.C. 146, 240 S.E. 2d 360. The trial court properly ordered the joinder of the trustee and noteholder and properly denied the City's motion to dismiss.

Having found no error prejudicial to either party, the order of the trial court filed and entered on 29 June 1981 out of session by stipulation of the parties is hereby in all respects

Affirmed.

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

CLYDE O. ROBINSON AND LOUISE P. ROBINSON v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION

No. 131A81

(Filed 13 July 1982)

APPEAL by plaintiffs from judgment of *Snepp, J.* at the 18 May 1981 Session of Superior Court, MECKLENBURG County, entered out of session by agreement of counsel and signed 29 June 1981, dismissing their trespass and nuisance claims and striking their allegations of punitive damages against the defendant. The appeal was filed and docketed in the Court of Appeals on 7 August 1981. We allowed plaintiffs' petition for discretionary review prior to determination by the Court of Appeals on 6 October 1981.

George Daly, Attorney for plaintiff-appellants.

Caudle, Underwood & Kinsey, by William E. Underwood, Jr. and Ralph C. Kinsey, Jr., Attorneys for defendant-appellee.

MEYER, Justice.

This case was consolidated for oral argument before this Court with the case of *Charles G. Long and wife, Mary P. Long v.*

City of Charlotte (No. 80CVS6097). While there are some differences in specific allegations, the complaints in both actions were filed on the same date and are essentially similar in all material respects. The issues presented by the appeal in this case are identical to those presented in *Long* and are determined by our decision in that case.

For the reasons stated in *Long v. City of Charlotte*, --- N.C. ---, --- S.E. 2d --- (1982) (filed this date), the judgment appealed from is

Affirmed.

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

TRACY BURCL, ADMINISTRATRIX OF THE ESTATE OF PATRICIA B. HYLTON v. NORTH CAROLINA BAPTIST HOSPITAL, INC.; DR. KATHRYN W. COLLIER; DR. JOHN S. COMPERE; DR. DAVID M. DEWAN; DR. DONALD A. DEWHURST; DR. C. NASH HERNDON, ASSOCIATE DEAN; DR. LAURENCE F. HILLER; DR. JAMES J. HUTSON; DR. THOMAS H. IRVING, CHAIRMAN OF THE DEPARTMENT OF ANESTHESIOLOGY; DR. RICHARD JANEWAY, DEAN OF BOWMAN GRAY SCHOOL OF MEDICINE; DR. WAYNE JARMAN; DR. JOSEPH E. JOHNSON, III, CHAIRMAN OF THE DEPARTMENT OF MEDICINE; DR. JULIAN F. KEITH, CHAIRMAN OF THE DEPARTMENT OF FAMILY AND COMMUNITY MEDICINE; FAYE L. MAGNESON; DR. MANSON MEADS, DIRECTOR OF MEDICAL CENTER BOARD; DR. JESSE H. MEREDITH; DR. JOHN C. MUELLER; DR. JOHN MUSTOL; DR. RICHARD T. MYERS, CHAIRMAN OF THE DEPARTMENT OF SURGERY; DR. PATRICIA POTTER; DR. THOMAS J. POULTON; DR. RICHARD PROCTOR, CHAIRMAN OF THE DEPARTMENT OF PSYCHIATRY; DR. L. EARL WATTS; JOHN LYNCH, ADMINISTRATOR OF NORTH CAROLINA BAPTIST HOSPITAL, INC.; AND WAKE FOREST UNIVERSITY, INC., d/b/a BOWMAN GRAY SCHOOL OF MEDICINE OF WAKE FOREST UNIVERSITY

No. 112A81

(Filed 13 July 1982)

Death § 4.3; Executors and Administrators § 3— wrongful death action—foreign administratrix—supplemental pleading to show qualification as local administratrix—relation back

Where the original pleading in a wrongful death action instituted by a foreign administratrix who had not qualified locally gave notice of the transactions and occurrences upon which the claim was based, plaintiff was entitled

under G.S. 1A-1, Rules 15(c) and 17(a) to file a supplemental pleading to show due qualification locally as ancillary administratrix occurring after the statute of limitations had run and to have the pleading relate back to the commencement of the action so that the claim was not time barred. Furthermore, plaintiff as ancillary administratrix was entitled under G.S. 28A-13-1 to adopt and ratify the original pleading which she filed as foreign administratrix.

Chief Justice BRANCH and Justice MITCHELL took no part in the consideration or decision of this case.

ON plaintiff's petition for further review of the Court of Appeals' decision, 47 N.C. App. 127, 266 S.E. 2d 726 (1980), opinion by *Judge Erwin* with *Chief Judge Morris* and *Judge Clark* concurring, which affirmed an order of *Judge Hairston*, presiding at the 8 October 1979 Session of FORSYTH Superior Court, denying plaintiff's motion to amend and allowing defendants' motions to dismiss the complaint. Plaintiff's petition for further review was initially denied on 15 August 1980, 301 N.C. 86, --- S.E. 2d ---, but on reconsideration was allowed on 7 October 1980, 301 N.C. 234, 273 S.E. 2d 444. This case was argued as No. 59 at the Spring Term 1981.

Michael J. Lewis, Attorney for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by R. M. Stockton, Jr., and Robert J. Lawing, Attorneys for defendant appellees, North Carolina Baptist Hospital, Inc., Dr. Kathryn W. Collier, Dr. David M. Dewan, Dr. Laurence F. Hiller, Dr. James J. Hutson, Dr. Wayne Jarman, Faye L. Magneson, Dr. John Mustol, Dr. Thomas J. Poulton and John Lynch.

Bell, Davis & Pitt, by William K. Davis, Attorneys for defendant appellees, Dewhurst, Herndon, Irving, Janeway, Johnson, Keith, Meads, Mueller, Potter, Proctor, Watts, and Wake Forest University, d/b/a Bowman Gray School of Medicine.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr., and Nigle B. Barrow, Jr., Attorneys for defendant appellees, Dr. Jesse H. Meredith and Dr. Richard T. Myers.

EXUM, Justice.

This is a wrongful death action in which plaintiff sued in her capacity as foreign administrator of decedent's estate within the

two-year period of limitations. After this period had run she qualified locally as ancillary administrator and sought to plead in the trial court to show this fact and have this pleading relate back to the commencement of the action. The question is whether such a pleading may be permitted to defeat defendants' motions to dismiss grounded on the running of the statute of limitations. We recognize that our older cases answered this question negatively; but we believe that our present Rules of Civil Procedure 15 and 17(a) require that such a pleading now be permitted and that the holdings of these older cases be overruled.

Plaintiff alleges that her daughter's death on 29 July 1977, following abdominal surgery at Baptist Hospital, was caused by defendants' negligence. When complaint was filed on 25 July 1979, plaintiff had duly qualified as administrator of her daughter's estate in Henry County, Virginia, where her daughter resided, but she had not qualified as ancillary administrator in North Carolina. The caption of the complaint, nonetheless, showed that plaintiff was suing in her capacity as administrator, and she alleged in her complaint that she was "the duly qualified and acting" administrator of her daughter's estate.

On 13 September 1979 all defendants, before filing answer,[1] moved to dismiss the action on the ground, among others, that plaintiff, not having qualified locally, lacked "capacity," "standing" and "authority" to maintain the action. Plaintiff responded by qualifying on 20 September 1979 as ancillary administrator in Forsyth County and moving on 21 September 1979 to be permitted to plead to show her ancillary qualification. Plaintiff's motion recited that having qualified as administrator in Virginia and being unaware of any requirement that she likewise qualify in North Carolina, she brought her action in this state "in good faith [believing] that I was in all respects duly qualified and appointed to represent the Estate of my daughter." She based her motion on North Carolina Rules of Civil Procedure 15(c) and 17(a) and asked that the plea showing her local qualification relate back to the commencement of her action. She also asked in her proper capacity as ancillary administrator to be permitted under

1. The parties had earlier stipulated that answer would not be due until 14 September 1979.

G.S. 28A-13-1 to adopt and ratify the pleadings filed by her as foreign administrator of her daughter's estate.

Judge Hairston, after hearing arguments, concluded that "plaintiff cannot have an amendment to the Complaint relate back so as to defeat the bar of the statute of limitations." He denied plaintiff's motion and allowed defendants' motions to dismiss.

The Court of Appeals concluded likewise and affirmed. It relied on several of its own decisions[2] which had, in turn, relied on decisions of this Court made before the adoption of our present Rules of Civil Procedure. We conclude that present Rules 15 and 17(a) dictate a different result from that which has so far been reached by the Court of Appeals on this question, and which was reached by our cases decided before the enactment of these rules. We, therefore, reverse the Court of Appeals and remand for further proceedings not inconsistent with this opinion.

We begin by recognizing familiar legal principles: A wrongful death action is a creature of statute and may be brought only as the authorizing statutes permit. *Reeves v. Hill*, 272 N.C. 352, 158 S.E. 2d 529 (1968); *Graves v. Welborn*, 260 N.C. 688, 133 S.E. 2d 761 (1963) (discussed in Annot., 3 ALR 3d 1234 (1965)); *Webb v. Eggleston*, 228 N.C. 574, 46 S.E. 2d 700 (1948). Thus a wrongful death action may be brought only "by the personal representative or collector of the decedent." G.S. 28A-18-2; *Graves v. Welborn*, *supra* (interpreting predecessor of G.S. 28A-18-2). Parents may not maintain such actions in their individual capacities for deaths of their children. *Killian v. Southern Ry. Co.*, 128 N.C. 261, 38 S.E. 873 (1901); *Scarlett v. Norwood*, 115 N.C. 284, 20 S.E. 459 (1894). A foreign administrator lacks "capacity to sue" in a wrongful death action in North Carolina. *Monfils v. Hazlewood*, 218 N.C. 215, 216,

2. These were *Sims v. REA Construction Co.*, 25 N.C. App. 472, 213 S.E. 2d 398 (1975); *Johnson v. Wachovia Bank & Trust Co.*, 22 N.C. App. 8, 205 S.E. 2d 353 (1974); *Merchants Distributors, Inc. v. Hutchinson*, 16 N.C. App. 655, 193 S.E. 2d 436 (1972); and *Reid v. Smith*, 5 N.C. App. 646, 169 S.E. 2d 14 (1969). The present Rules of Civil Procedure were not applicable in *Reid*. The Court of Appeals did not discuss these rules in any of the other cases except *Merchants Distributors, Inc.* In that case there was no attempt by the locally qualified ancillary administrator to invoke Rule 15(c). Only a foreign administrator attempted to invoke the rule, although there was in existence a locally qualified ancillary administrator. 16 N.C. App. at 660-61, 193 S.E. 2d at 440.

10 S.E. 2d 673, 673 (1940);[3] *see also* G.S. 28A-26-6. The plaintiff in a wrongful death action must both allege and prove that he has the capacity to sue. N.C.R. Civ. P. 9(a); *Carr v. Lee*, 249 N.C. 712, 107 S.E. 2d 544 (1959); *Journigan v. Little River Ice Co.*, 233 N.C. 180, 63 S.E. 2d 183 (1951).

Before our present Rules of Civil Procedure became effective, it was also a familiar principle that if a wrongful death action was brought by a foreign personal representative who had not qualified locally within the period permitted for bringing the action, the complaint could not be amended to show that after the expiration of such period the plaintiff had locally qualified. Instead, the action was dismissed as not having been timely filed. *Hall v. Southern Ry. Co.*, 149 N.C. 108, 62 S.E. 899 (1908).[4] Sensitive to the harshness of this rule, this Court in *Graves v. Welborn*, *supra*, 260 N.C. 688, 133 S.E. 2d 761, created an exception to it in the case of a wrongful death plaintiff who had applied for letters of administration at the time the action was brought and who in good faith believed she was then the duly qualified administrator, even though she had not been issued letters of administration because the surety failed to execute the bond. After the surety executed the bond, letters were issued but the statute of limitations had then run. *Graves* held that under such circumstances plaintiff could amend her complaint to show her due qualification and the amendment would relate back to the beginning of the action so that the action would not be barred by time.

Graves is the most thoroughly considered decision by this Court on the point in question. In a well-researched opinion by Justice, later Chief Justice, Sharp, the Court noted: "[I]t is the universal rule that all previous acts of the personal representative prior to his appointment which were beneficial in nature to

3. When *Monfils* was decided a nonresident could not be appointed ancillary administrator in North Carolina. 218 N.C. at 216, 10 S.E. 2d at 673. Under the statute applicable to this case, a nonresident may qualify locally as ancillary personal representative. G.S. 28A-26-3.

4. When this rule was established, the period of limitation was a condition precedent to maintaining the action. Later it was made a true statute of limitations. See discussion of the change in *Graves v. Welborn*, *supra* in text, 260 N.C. at 691, 133 S.E. 2d at 763. It is noteworthy that *Graves* is our only case involving a question similar to the one at bar decided after this change, and *Graves* permitted a similar amendment to relate back.

the estate and which would have been within the scope of his authority had he been duly qualified, are validated upon his appointment which relates back to the death of the intestate for this purpose." 260 N.C. at 692, 133 S.E. 2d at 764.[5] The Court recognized, however, that state courts were not in accord on whether the due appointment of a personal representative "will relate back so as to validate *an action* brought prior to the appointment." 260 N.C. at 693-94, 133 S.E. 2d at 764 (emphasis supplied).[6] But the "long established rule in the Federal courts [was] that a lack of letters of administration may be cured, and an objection to want of capacity to sue, may be avoided by amendment or by substitution of the proper party at any time before hearing. Later appointments of this nature will relate back and validate the proceedings from the beginning regardless of the statute of limitations." 260 N.C. at 694, 133 S.E. 2d at 765. The *Graves* Court also recognized that the majority rule prevailing at that time was that "an amendment which changes the capacity in which a plaintiff sues does not change the cause of action so as to let in the defense of the statute of limitations," but that this was not the rule followed in North Carolina. 260 N.C. at 691, 133 S.E. 2d at 763.

A strong argument can be made that because plaintiff here brought her action not as an individual, but in her representative capacity as administrator, and believed in good faith that she was duly authorized to bring it, she should under the *Graves* rationale be permitted to amend her pleading to show her local qualification and have it relate back to the commencement of her action. We need not, however, rest our decision on this ground, for we are satisfied that Civil Procedure Rules 15 and 17, enacted since *Graves*, require the result reached in that case.

To understand the change wrought by these new rules, it is necessary to examine the rationale upon which our older cases on the point in question were decided. In essence, they were based on the notion that a change in plaintiff's capacity to sue was tan-

5. *Graves* is our only decision on the relation-back question which recognized this principle. This principle is now codified in G.S. 28A-13-1.

6. For an annotation showing the division among the states recognized in *Graves*, see Annot., "Change in party after statute of limitations has run," 8 A.L.R. 2d 6 (1949) (sections 38-41 especially pertinent).

tamount to bringing a new cause of action. The rigidity of the notion is well illustrated in *Bennett v. Railroad*, 159 N.C. 345, 74 S.E. 883 (1912). Complaint in a wrongful death action was filed on 4 July 1910 by the widow of the deceased in her individual capacity. After the period within which the action could be brought had expired, the trial court permitted plaintiff to amend her complaint "at Spring Term, 1912" by adding the word "administratrix" after her name. On defendant's appeal, the Supreme Court reversed and dismissed the action. The Court concluded that "plaintiff individually had no cause of action against the defendant for the alleged death of her husband by reason of the defendant's negligence . . . [and] the effect of the amendment is to change the entire character of the action [and] . . . the court has no power to convert a pending action that cannot be maintained into a new and different action by the process of amendment." *Id.* at 346-47, 74 S.E. at 883.

The first case holding that an action brought by a foreign administrator within the period required could not be saved when the administrator qualified locally after the expiration of the period by an amendment showing the local qualification was *Hall v. Southern Ry. Co., supra*, 149 N.C. 108, 62 S.E. 899. The Court said the trial court "should not have allowed the amendment, but the plaintiff, under his qualification as administrator in this State, should have been required to bring a separate and independent action." 149 N.C. at 110, 62 S.E. at 899.

This same notion was applied when the question whether plaintiff was the real party in interest was raised. Pleading statutes in effect in older cases required, as Rule 17 now requires with certain exceptions not here pertinent, that "[e]very action shall be prosecuted in the name of the real party in interest." *Compare* N.C. Rule Civ. P. 17(a) *with* G.S. 1-57 (1953), C.S. § 446 (1919), Rev. § 400 (1908), Code § 177 (1883), and Code of Civ. P. § 55 (1868). In *Home Real Estate, Loan and Ins. Co. v. Locker*, 214 N.C. 1, 197 S.E. 555 (1938), an action for rent was brought by the landlord's rental agent. The claim arose in 1931 when the tenant defaulted and vacated. When the matter came on for trial, a motion that the landlord be made a party plaintiff was allowed by order signed 5 February 1938. When the landlord was made a party plaintiff, defendant pleaded the three-year statute of limitations in bar of the claim. A verdict for plaintiff at trial was

reversed on appeal. The Court, noting that "[a]ctions must be instituted in the name of the real party in interest," 214 N.C. at 2, 197 S.E. at 556, stated further, *id.*:

> The court has the power to make additional parties plaintiff or defendant. C.S., 547. However, when the court makes a new party plaintiff it constitutes a new action against the defendant as to the new party and the action as to him does not relate back to the date of the institution of the original cause so as to deprive the defendants of the right to plead the statute of limitations in bar of recovery in such action.

When these older cases were decided, it was also a rule of pleading that any amendment to a complaint which stated a new cause of action, even on the same facts originally alleged, could not be allowed if the statute of limitations had intervened. The rule was "that a new cause of action may be introduced by way of amendment to the original pleading; but . . . if the amendment introduce[s] a new matter, or cause of action different from the one first propounded, and with respect to which the statute of limitations would then operate as a bar, such defense or plea will have the same force and effect as if the amendment were a new and independent suit." *Capps v. Atlantic Coast Line R. R. Co.*, 183 N.C. 181, 187, 111 S.E. 533, 536 (1922). *See generally,* Note, "Pleading—Amendments Changing the Cause of Action—Limitations of Action—New Statute Proposed," 25 N.C. L. Rev. 76 (1947). William A. Dees, Jr., author of the cited note, pointed out the difficulty in distinguishing between permissible and impermissible amendments. Amendments which only "enlarged, narrowed, amplified, or fortified" the complaint were allowed even after the statute of limitations had intervened, while amendments which stated a new cause of action were not. *Id.* at 77-79. He concluded the article as follows:

> The purpose of the statute of limitations is to prevent a plaintiff from taking advantage of a defendant by instigating a claim arising out of a transaction or conduct which occurred so long before as to place the defendant at a disadvantage in defeating the claim or defending himself. The statute can be tolled by a summons sketchily defining the transaction or conduct complained of. It would seem that the greatest

liberality in amending the pleading would be called for in this situation for the sake of fairness to all parties. In speaking to this very point Mr. Justice Holmes said, 'Of course an argument can be made on the other side, but when the defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule should be applied.'

It has been suggested that the desired liberality may be attained by changing the rule rather than liberally defining the term 'cause of action.' Several states and the federal courts have done so. The North Carolina amendment statutes are closely in accord with the Federal Rules except in connection with the all important matter of relation back. The relation back provision of the Federal Rules is as follows:

> '15(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.'

This rule does not defeat the legitimate use of the statute of limitations. It does, however, prevent the defendant from defeating the plaintiff's claim on a technicality in the pleading. This is the desired result and avowed purpose of modern pleading. The adoption of the above provision from the Federal Rules by the North Carolina legislature would clarify the present confusion on this issue and place the North Carolina rules of pleading in accord with the liberal and just practice of modern pleading.

Id. at 83-84 (footnotes omitted).

New Rules of Civil Procedure were finally adopted by North Carolina in 1967, Act of June 27, 1967, ch. 954, 1967 N.C. Sess. Laws 1274, and certain amendments were added in 1969, Act of June 19, 1969, ch. 895, 1969 N.C. Sess. Laws 1026. The rules originally became effective on 1 July 1969 and the 1969 amendments on 1 January 1970. Rules 15 and 17 are pertinent to this

case. Rule 15, as its caption indicates, deals with "[a]mended and supplemental pleadings." It provides, in pertinent part, as follows:

> (a) *Amendments.*—A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served . . . .
>
> . . . .
>
> (c) *Relation back of amendments.*—A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.
>
> (d) *Supplemental pleadings.*—Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Rule 17 is captioned: "Parties plaintiff and defendant; capacity." As originally adopted, subsection (a) of this rule provided, in pertinent part, simply that "[e]very claim shall be prosecuted in the name of the real party in interest." Act of June 27, 1967, ch. 954, 1967 N.C. Sess. Laws 1274, 1293. Subsection (a) was amended in 1969 by addition of the following language:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Act of June 19, 1969, ch. 895, 1969 N.C. Sess. Laws 1026, 1029-30.

These rules, like most of our Rules of Civil Procedure, are modeled after the federal rules and, like the federal rules, draw in some instances on the Civil Practice Rules of New York. Thus, as this Court said in *Sutton v. Duke*, 277 N.C. 94, 101, 176 S.E. 2d 161, 165 (1970): "[S]ince the federal and, presumably, the New York rules are the source of NCRCP, we will look to the decisions of those jurisdictions for enlightenment and guidance as we develop 'the philosophy of the new rules.'" The United States Supreme Court in *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966), said:

> These rules [federal rules] were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits.

It is at once apparent from the face of Rules 15(c) and 17(a) that they have changed our approach to the problems, respectively, of whether a given pleading relates back to the beginning of the action and how to deal with a claim brought by a party who has no capacity to sue. Whether an amendment to a pleading relates back under Rule 15(c) depends no longer on an analysis of whether it states a new cause of action; it depends, rather, on whether the original pleading gives "notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." N.C. R. Civ. P. 15(c). The Official Comment to North Carolina Rule 15(c) quotes Wachtell, *New York Practice under the CPLR* 141 (1963), in part as follows: "The amended pleading will therefore relate back if the new pleading merely amplifies the old cause of action, or now even if the new pleading constitutes a new cause of action, provided that the defending party had originally been placed on notice of the events involved." *See also* Sizemore, *General Scope and Philosophy of the New Rules*, 5 Wake Forest Intra. L. Rev. 1, 22-23 (1969). Rule 17(a) will necessarily change the result reached in cases like *Home Real Estate, Loan and Ins. Co. v. Locker, supra*, 214 N.C. 1, 197

S.E. 555. No longer is the real party in interest in a case precluded from being made the plaintiff after the statute of limitations has run on a claim timely filed by one who lacked the capacity to sue because he was not the real party in interest. Rather, under Rule 17(a), "a reasonable time [must be] allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." This language was added to the federal rules effective 1 July 1966, 383 U.S. 1029, 1045 (1965), and, as already noted, to our rules effective 1 January 1970.

Our Eastern District Federal Court pointed out in *McNamara v. Kerr-McGee Chemical Corp.*, 328 F. Supp. 1058, 1060-61 (E.D. N.C. 1971):

> The notes of the Advisory Committee on federal rules state that the amendment was intended to codify the salutary principle of *Levinson v. Deupree*, 345 U.S. 648, 73 S.Ct. 914, 97 L.Ed. 1319 (1953) and *Link Aviation, Inc. v. Downs*, 117 U.S. App. D.C. 40, 325 F. 2d 613 (1963). In *Levinson* the court held that under federal practice where a libel to recover damages under a state wrongful death act was timely filed by an ancillary adminstrator appointed, as here, by a state court without jurisdiction to do so, the libel could be amended at a time when a new suit would be barred so as to allege the subsequent effective appointment of the same person as ancillary administrator by a state court having jurisdiction. In *Link* where a suit for damages was brought by the insured after the insurers had paid their claim prior to the filing of the suit and therefore became the real party in interest, the court held that a motion to amend the complaint to substitute the insurers as plaintiffs did not set forth a new cause of action which would be barred because the statute of limitations had run at the time the motion was made.[7]

7. The notes of the Advisory Committee are indicative of the limits of the amendment as well as its purpose:

> This provision keeps pace with the law as it is actually developing. Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed—in both

McNamara held specifically that under Rules 15(c) and 17(a), as adopted by North Carolina, a plaintiff in a wrongful death action brought in a North Carolina federal district court as a diversity action may amend the complaint to show due qualification as personal representative occurring after the two-year statute of limitations has run and have the amendment relate back to the beginning of the suit so that the claim will not be time barred. The Court concluded its opinion by saying, 328 F. Supp. at 1061:

> North Carolina has now adopted the federal rules relevant to the issues in this case, and it is reasonable to assume that the legislature was aware of the long established interpretation of such rules by the federal courts, and such interpretation is entitled to great weight in determining the legislative intent.
>
> The court being of the opinion that it is bound by these interpretations of Rule 17(a), and that plaintiff's motions for substitution and ratification were made within a reasonable time after defendant's objection, hereby grants said motions. For the reasons above, defendants' motions to dismiss alleging plaintiff's lack of capacity to sue are hereby denied.

Federal courts in interpreting Rules 15(c) and 17(a) have uniformly held that amendments showing a change in plaintiff's

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maritime and nonmaritime cases. See *Levinson v. Deupree*, 345 U.S. 648 (1953); *Link Aviation, Inc. v. Downs*, 325 F. 2d 613 (D.C. Cir. 1963). The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made. It does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period. It does not even mean, when an action is filed by the personal representative of John Smith, of Buffalo, in the good faith belief that he was aboard the flight, that upon discovery that Smith is alive and well, having missed the fatal flight, the representative of James Brown, of San Francisco, an actual victim, can be substituted to take advantage of the suspension of the limitation period. It is, in cases of this sort, intended to insure against forfeiture and injustice—in short, to codify in broad terms the salutary principle of *Levinson v. Deupree*, 345 U.S. 648 (1953), and *Link Aviation, Inc. v. Downs*, 325 F. 2d 613 (D.C. Cir. 1963).

Fed. R. Civ. P. 17 advisory committee note.

capacity to maintain the action relate back to the action's commencement. *See* 3 J. Moore, Moore's Federal Practice ¶15.15[4.-1] at 15-212 (1982); C. Wright & A. Miller, Federal Practice & Procedure, § 1555 (1971). This principle has been specifically applied to wrongful death actions in which the plaintiff had not under applicable state law duly qualified as the personal representative until after the statute of limitations had run on the claim. The courts have permitted plaintiffs to show by a new pleading the due qualification and have the pleading relate back to the action's commencement. *See, e.g., Davis v. Piper Aircraft Corp.*, 615 F. 2d 606 (4th Cir.), *cert. dismissed*, 448 U.S. 911 (1980); *Hunt v. Penn Central Transp. Co.*, 414 F. Supp. 1157 (W.D. Pa. 1976); *McNamara v. Chemical Corp., supra*, 328 F. Supp. 1058; *Holmes v. Pennsylvania New York Central Transp. Co.*, 48 FRD 449 (N.D. Ind. 1969); *cf. Longbottom v. Swaby*, 397 F. 2d 45 (5th Cir. 1968) (complaint allowed amended to change description of plaintiffs from "minor children" to "dependents," a substantive change under applicable law); *Crowder v. Gordon's Transport, Inc.*, 387 F. 2d 413 (8th Cir. 1967) (complaint amended to show claims brought by minor children of decedent). Indeed, this is the result reached presently "in the great majority of cases" more recently decided by state courts. Annot., "Running of Statute of Limitations as Affected by Doctrine of Relation Back of Appointment of Administrator," 3 A.L.R. 3d 1234, 1237 (1965). Presumably this is because more states have adopted the federal rules or rules similar to them.

We agree with the Fourth Circuit Court of Appeals' *Davis* decision, *supra*, 615 F. 2d 606, that plaintiff's motion to "amend" her complaint by showing her due qualification as ancillary administrator is more properly denominated a supplemental pleading under Rule 15(d) because the matter alleged occurred after the original complaint was filed. As the Court in *Davis* said, however: "For relation back purposes, the technical distinction between [a supplemental pleading and an amendment of a former pleading] is not of critical importance, and is frequently simply disregarded by courts [citation omitted]. So long as the test of Fed. R. Civ. P. 15(c) is met, a supplemental pleading should ordinarily be given the same relation back effect as an amended pleading [citation omitted]. On that basis, our analysis will treat Fed. R. 15(c) as applying to the supplemental pleading actually at-

tempted here." *Id.* at 609, n. 3. We also agree with this statement from C. Wright & A. Miller, Federal Practice & Procedure, § 1508 at 556: "There is little basis to distinguish an amended and a supplemental pleading for purposes of relation back if defendant had notice of the subject matter of the dispute and was not prejudiced in preparing his defense."

Therefore, for relation back purposes, we shall treat supplemental pleadings filed pursuant to Rule 15(d) the same as amendments filed pursuant to other sections of Rule 15.[8] We hold that where, as here, the original pleading gives notice of the transactions and occurrences upon which the claim is based, a supplemental pleading that merely changes the capacity in which the plaintiff sues relates back to the commencement of the action as provided in Rule 15(c).

Defendants argue that until plaintiff had duly qualified in North Carolina as ancillary administrator she had no authority to "invoke the jurisdiction" of the court; therefore her claim as originally filed is a nullity and there is nothing to which her amendment showing later qualification can relate back. Defendants base this argument on G.S. 28A-26-6 which provides:

> (a) A domiciliary personal representative of a nonresident decedent *may invoke the jurisdiction of the courts of this State after qualifying as ancillary personal representative* in this State except that he may invoke such jurisdiction prior to qualification for the purpose of appealing from a decision of the clerk of superior court regarding a question of qualification.

8. *But see Williams v. Rutherford Freight Lines, Inc.*, 10 N.C. App. 384, 179 S.E. 2d 319 (1971), where a supplemental pleading of special damages occurring after the complaint was filed in a slander *per quod* action was not permitted to relate back. The Court of Appeals rested its opinion on the peculiar facts of that case, saying: "We express no opinion as to whether supplementary pleadings may, in some cases, relate back to the original pleading in order to prevent an action from being barred by the statute of limitations." 10 N.C. App. at 392, 179 S.E. 2d at 325. By our holding here, we do not mean to intimate that the Court of Appeals reached the wrong result in *Williams*. Indeed, relation back in *Williams* was arguably improper because the original pleading did not give defendants notice of the transaction upon which the claim was based, the crucial transaction being that sought to be alleged by the supplemental pleading.

(b) A domiciliary personal representative of a nonresident decedent submits to the jurisdiction of the courts of this State:

(1) As provided in G.S. 1-75.4, or

(2) By receiving payment of money or taking delivery of personal property under G.S. 28A-26-2; or

(3) By acceptance of ancillary letters of administration in this State under G.S. 28A-26-3; or

(4) By doing any act as personal representative in this State which if done as an individual would have given the State jurisdiction over him as an individual.

(Emphasis supplied.)

We do not interpret G.S. 28A-26-6 to mean that a claim filed by a foreign personal representative who has not yet locally qualified is a nullity *ab initio* requiring the institution of a new claim after qualification. At most, the statute is simply another way of saying that the foreign administrator must qualify locally before he has capacity to sue in North Carolina. The statute neither addresses nor answers the question of what must happen procedurally to a claim brought by a foreign personal representative who locally qualifies after the claim is filed. Indeed, G.S. 28A-13-1 speaks more to this question when it provides:

> The powers of a personal representative relate back to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. . . . A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.

Whether a claim brought by a foreign personal representative before he is locally qualified must be dismissed and reinstituted or whether this defect can be cured by supplemental pleading in which the claim as instituted is duly ratified by the personal representative after he is locally qualified are questions which must be answered as we have answered them by reference to the principle codified in G.S. 28A-13-1 and to rules of pleading as set out in Rules 15 and 17(a).

Finally defendants argue that Rule 17(a) deals only with real party in interest questions, not questions relating to capacity to sue, which, they say, are governed by Rule 9. We disagree. Rule 9, by its caption, deals with "Pleading special matters." It sets out those things which must be specially and specifically pleaded, one of which is the capacity in which plaintiff sues. Rule 17 is captioned "Parties plaintiff and defendants; capacity." Subsection (a) of this rule deals specifically with what happens when an action is brought by one who is not the real party in interest. Thus Rule 17(a) speaks to a problem very much like, although not identical to, the one we have here, *i.e.*, what happens when an action is brought by a person who has no capacity to sue. Rule 17(a) permits the real party in interest to ratify the action after its commencement and to have the ratification relate back to the commencement. Indeed, amendments to pleadings which substitute the real party in interest for a person who did not enjoy that capacity when he brought the claim is a more drastic change in the kind of claimant than an amendment which merely changes the capacity in which the same named individual is suing. Rule 17(a) expressly authorizes the former substitution of one party for another. Rule 15, particularly subsection (c), when considered in light of Rule 17(a), just as clearly authorizes the latter change in capacity in which the same plaintiff brings his claim.

Defendants had full notice of the transactions and occurrences upon which this wrongful death claim is based when the claim was originally filed within the period of limitations by plaintiff in her capacity as a foreign administrator. They can in no way be prejudiced by allowing plaintiff by supplemental pleading to show the change in her capacity to that of locally qualified ancillary administrator, even though this change occurred after the period of limitations had run. The purpose served by the statute of limitations—protection against stale claims—is in no way compromised by allowing such a pleading to relate back to the action's commencement. To hold otherwise would be to return to hypertechnical pleading restrictions inimical to just resolution of disputed claims, restrictions which our present rules of pleading were designed to overcome.

For the reasons stated we hold that the Court of Appeals erred in affirming Judge Hairston's denial of plaintiff's motion to file a supplemental pleading to show her due qualification as an-

cillary administrator, to adopt and ratify the complaint as filed, and to have the pleading relate back to the commencement of her action, and in allowing defendants' motion to dismiss on the ground that such a procedure was not available. The decision of the Court of Appeals is, therefore, reversed and the matter remanded to Forsyth Superior Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Chief Justice BRANCH and Justice MITCHELL took no part in the consideration or decision of this case.

GEORGE MILTON LACKEY v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF MEDICAL ASSISTANCE

No. 88PA82

(Filed 13 July 1982)

1. **Social Security and Public Welfare § 1— Medicaid meaning of disability—federal decisions not binding**

Federal decisions interpreting and applying the definition of disability in the federal Social Security Act are not necessarily binding on the North Carolina Supreme Court.

2. **Administrative Law § 4; Social Security and Public Welfare § 1— social security hearing—report evaluating plaintiff's medical evidence**

A report prepared by defendant agency's medical advisor evaluating plaintiff's medical evidence was admissible in an administrative hearing to determine whether defendant was entitled to Medicaid disability benefits since the report was a proper use of defendant's "experience, technical competence and specialized knowledge" within the meaning of G.S. 150A-30.

3. **Social Security and Public Welfare § 1— report evaluating medical evidence—no substantial evidence to support denial of Medicaid benefits**

Where a report prepared by defendant agency's medical advisor evaluating plaintiff's medical evidence was the only evidence supporting a denial of Medicaid disability benefits to plaintiff and was contrary to all the other medical evidence as well as the opinions of the treating physicians, the report did not constitute substantial evidence to support a decision denying such benefits to plaintiff.

4. **Social Security and Public Welfare § 1— Medicaid disability benefits—burden of proof**

In order to recover Medicaid disability benefits, plaintiff has the burden of proving that he suffers from a physical or mental impairment which can be expected to last for a continuous period of not less than 12 months and which not only renders him unable to perform his usual job, but given his age, education and experience, prevents him from engaging in any other kind of substantial gainful employment existing in the national economy. However, once plaintiff has established that he is disabled and can no longer perform his usual work, the burden of going forward shifts to the defendant agency to show that there are other specific jobs which exist in the national economy that plaintiff can perform.

5. **Social Security and Public Welfare § 1— *Medicaid disability benefits—sufficiency of medical reports***

Medical reports and opinions must be supported by medically acceptable clinical or laboratory diagnostic data or findings in order to establish disability under the Social Security Act, but the medical reports and opinions need not be supported by x-rays or other "objective" tests. 42 U.S.C. § 1382(c)(3)(C).

ON certiorari to review the decision of the Court of Appeals, 54 N.C. App. 57, 283 S.E. 2d 377 (1981), reversing judgment entered in favor of defendant Department of Human Resources by *Farmer, J.*, at the 20 October 1980 Session of WAKE Superior Court.

This cause arises out of the denial of medical assistance (Medicaid) benefits sought by plaintiff after he received a stab wound to his abdomen on 6 May 1978 which seriously lacerated his liver.

Plaintiff initially applied to the Iredell County Department of Social Services for Medicaid disability benefits on 14 July 1978. The Iredell County department forwarded plaintiff's application to the Disability Determination Section of the N.C. Department of Human Resources (hereinafter DDS) for evaluation. DDS reviewed the medical records submitted and advised that benefits should be denied because plaintiff was not "disabled" under Social Security standards as the "impairment should not be disabling for 12 months." The application was re-opened on 11 October 1978 to permit consideration by DDS of additional medical records submitted by plaintiff. After evaluating this additional evidence of disability, however, DDS reached the same conclusion as before and advised that the claim be denied. By notice dated 3 November 1978, plaintiff's application for Medicaid disability

benefits was formally denied by the Iredell County Department of Social Services.

On 8 November 1978 plaintiff, acting without assistance of legal counsel, gave notice of appeal to the Department of Human Resources for an administrative hearing pursuant to G.S. 108-44.[1] A hearing was held on 24 January 1979. At that hearing additional medical evidence was submitted. The hearing officer referred this evidence to DDS with a request that plaintiff's application be reevaluated in light of the additional information. DDS again concluded that plaintiff's condition was not disabling for a period of 12 months because the medical records revealed that "the drainage has now stopped and his wound is clear."

On 4 June 1979 defendant's administrative hearing officer rendered a decision finding the denial of plaintiff's application correct because his condition had not been disabling for 12 consecutive months.

On 3 July 1979, plaintiff petitioned for judicial review by the Superior Court of Wake County. Although the hearing was originally scheduled for 28 April 1980, it was continued by mutual consent of the parties in order to allow DDS to reconsider its decision in light of additional medical records from the N.C. Department of Corrections' Central Hospital discovered shortly before the hearing.

DDS reaffirmed its decision that plaintiff did not meet the disability standard.

On 6 October 1980 the case was heard by Judge Farmer who proceeded on the record developed at the administrative level. This included all medical data previously considered by defendant. The court neither heard testimony nor took new evidence. After reviewing the record, Judge Farmer made findings of fact and conclusions of law. He ordered that the decision of defendant denying benefits to plaintiff be affirmed.

Plaintiff appealed to the Court of Appeals. The Court of Appeals reviewed Judge Farmer's order pursuant to the standards set forth in the Administrative Procedures Act, G.S. 150A-51. In

1. The General Assembly has repealed Chapter 108 and in its place enacted Chapter 108A, effective 1 October 1981. 1981 Session Laws, ch. 275.

an opinion by Wells, J., that court reversed the order of the superior court, holding that the decision of defendant was "both affected by errors of law and was unsupported by substantial evidence." 54 N.C. App. at 61.

Defendant petitioned this court for a writ of certiorari. That petition was allowed on 3 March 1982.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Henry T. Rosser for defendant-appellant.

Turner, Enochs & Sparrow, P.A., by Wendell H. Ott and B. J. Pearce for petitioner-appellee.

BRITT, Justice.

We agree with the Court of Appeals that the appropriate standard of review in this action is provided by the review provisions of the Administrative Procedures Act. G.S. 150A-51 provides in pertinent part that a reviewing court may reverse the decision of an agency if:

> "[T]he substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions or decisions are:
>
> * * *
>
> (4) Affected by . . . error of law; or
>
> (5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted . . . ."

We also agree with the Court of Appeals that the defendant erroneously denied plaintiff's application for Medicaid benefits in that defendant's decision was both affected by errors of law and unsupported by substantial evidence. However, careful study of the Social Security and Medicaid laws requires us to modify some of the holdings made by the Court of Appeals in reaching its decision to reverse.

I

The elemental question we must answer is whether defendant's decision that plaintiff was not disabled was supported by

substantial evidence. However, before that question can be answered we need to address several other issues bearing directly on the ultimate outcome. The first of these requires a determination of the law applicable to this case.

Medicaid, established by Congressional enactment of Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, is a cooperative federal-state program providing medical assistance and other services to certain classes of needy persons. States which adopt the program and administer it in conformity with federal laws and regulations receive federal funds which defray a substantial portion of the program costs. Participation by a state in the Medicaid program is entirely optional. However, once an election is made to participate, the state must comply with the requirements of federal law. *Harris v. McRae*, 448 U.S. 297 (1980); *Smith v. Miller*, 665 F. 2d 172 (7th Cir. 1981); *Alabama Nursing Home Association v. Harris*, 617 F. 2d 388 (5th Cir. 1980). North Carolina adopted the Medicaid program through the enactment of Part 5, Article 2, Chapter 108 of the General Statutes, amended and recodified effective 1 October 1981 at Part 6, Article 2, Chapter 108A.

In order for the state Medicaid program to qualify for federal grant funds, the state must develop a "plan for medical assistance", the contents of which are prescribed by 42 U.S.C. § 1396(a). 42 U.S.C. § 1396a(a)(5) indicates that the determination of eligibility for medical assistance shall be made under the disability standards of Title XVI of the Social Security Act, Supplemental Security Income (SSI). 42 U.S.C. § 1381 *et seq.*

Disability under title XVI is partially defined as follows:

> "An individual shall be considered to be disabled for purposes of this sub-chapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . ." 42 U.S.C. § 1382c(c)(3)(A).

The statutes establishing the medical assistance program in North Carolina specifically provide that "[a]ll of the provisions of the federal Social Security Act providing grants to the state for

medical assistance are accepted and adopted and the provisions of this Part shall be liberally construed in relation to such act so that the intent to comply with it shall be made effectual . . . ." G.S. 108A-56 (formerly G.S. 108-61).

The federal judiciary has amassed a substantial body of case law interpreting the disability provisions of the Social Security Act and the regulations promulgated thereunder. The vast majority of these cases involve interpretation of the disability definition under Title II of the Social Security Act, Federal Old Age, Survivors and Disability Insurance Benefits. 42 U.S.C. § 401 *et seq.* There are notably few decisions directly interpreting and applying the Title XVI SSI disability definition. In those disability cases which have arisen under Title XVI, however, the federal courts have looked to decisions under Title II and found them to be persuasive authority. *Strickland v. Harris*, 615 F. 2d 1103 (5th Cir. 1980). This is so because the relevant provisions of Title II are identical to those of Title XVI. Further, judicial review of Title XVI SSI disability determinations, is governed by the judicial review provisions of Title II, 42 U.S.C. § 405(g). 42 U.S.C. § 1383 (c)(3).

[1] In its effort to resolve the legal issues presented by the case at bar, the Court of Appeals found that the federal decisions interpreting the Title II disability definition were binding on the North Carolina courts. We disagree. These federal decisions, and those interpreting and applying the Title XVI SSI disability definition are not necessarily controlling on this court. *See Unemployment Compensation Commission v. Trust Co.*, 215 N.C. 491, 2 S.E. 2d 592 (1939). However, we do deem them to be persuasive authority on the relevant issues.

II

[2] We next focus on the issue of whether the report evaluating plaintiff's medical evidence prepared by defendant's medical advisor, Dr. Cozart, was admissible evidence. The Court of Appeals, without discussing the question, held that the evaluation was not evidence. We disagree.

It is clear that the written medical reports of physicians are admissible evidence in social security hearings. *Allen v. Weinberger*, 552 F. 2d 781, 786 (7th Cir. 1977); *Landess v. Weinberger*, 490

F. 2d 1187, 1189 (8th Cir. 1974); *see also Richardson v. Perales*, 402 U.S. 389 (1971).[2]

Further, such reports are acceptable as evidence under state law as recognized by the N.C. Administrative Procedures Act, G.S. 150A *et seq.* Specifically:

> "An Agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it." G.S. 150A-30.

One of the purposes behind the creation of administrative agencies was the necessity for the supervision and experience of specialists in difficult and complicated fields. *See Elmore v. Lanier*, 270 N.C. 674, 155 S.E. 2d 114 (1967); 1 Am. Jur. 2d, Administrative Law § 12 (1962).

The complex area of disability determinations under the Social Security Act is indubitably an appropriate area for the use of experts, especially medical experts, and is essential to its purpose and function. The reports resulting from defendant's medical advisor's evaluation of an applicant's medical records obviously represent a proper and acceptable use of defendant's "experience, technical competence and specialized knowledge." Such reports are admissible evidence in administrative hearings and subsequent judicial review. The Court of Appeals should have so considered Dr. Cozart's report in its review of the evidence.

III

[3] Having concluded that the report of defendant's medical advisor was evidence, we are now confronted with the issue of the proper weight to be given it in our evaluation of the record. That report was the sole evidence presented by defendant which supports its decision to deny disability benefits to plaintiff. We must determine, therefore, whether Dr. Cozart's report constituted substantial evidence to support defendant's decision.

As indicated above, our conclusion will rest on whether there was substantial evidence in view of the entire record as submit-

2. The use of medical advisors was expressly approved in *Richardson v. Perales, supra.* That opinion described them as used "primarily in complex cases for explanation of medical problems in terms understandable to the layman-examiner." 402 U.S. at 408.

ted. G.S. 150A-51(5). This standard of judicial review in North Carolina is known as the "whole record" test. *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). The "whole record" test does not permit the reviewing court to substitute its judgment for the agency's as between two reasonably conflicting views; however, it does require the court to take into account both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached. *Id.* at 410.

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 80, 231 S.E. 2d 882, 888 (1977). It is more than a scintilla or a permissible inference. *Comr. of Insurance v. Automobile Rate Office*, 287 N.C. 192, 214 S.E. 2d 98 (1975).

With these principles in mind we now turn to the medical evidence presented in the record.

Plaintiff's evidence revealed that he was initially admitted to Statesville's Iredell Memorial Hospital through the emergency room on 6 May 1978 with a stab wound in his abdomen. The following day an exploratory laparotomy disclosed that the wound had penetrated the dome of his liver causing severe hemorrhaging. A large Penrose drain was inserted into the wound.

On 8 May 1978 plaintiff was admitted to Baptist Hospital in Winston-Salem. His admission history and physical examination revealed the same stab wounds described above plus a collection of blood in the right pleural cavity. Plaintiff was discharged from Baptist Hospital back to the care of Dr. Goode in Statesville on 17 May 1978 following a clearing of the pleural cavity and removal of the Penrose drain.

On 1 June 1978 plaintiff was readmitted to Baptist Hospital, bleeding from the injury to his liver. He underwent two additional surgical operations to address problems associated with a liver abscess, bleeding, and a removal of a necrotic portion of the gallbladder. Dr. J. H. Meredith was the surgeon in charge of plaintiff's case.

On 21 July 1978, plaintiff was discharged from Baptist Hospital. The discharge diagnosis indicated that he had a healing

billiary cutaneous fistula from a hepatic abscess secondary to the trauma. During his stay from 1 June to 21 July, plaintiff's weight dropped from 135 pounds to 103 pounds. Part of his course of treatment at home required a special dietary supplement to provide him with adequate nutrition.

Plaintiff was again admitted to Baptist Hospital on 31 July 1978. During the two weeks after his discharge plaintiff's weight dropped from 103 pounds to 95 pounds. His admission on 31 July was for "evaluation of his nutritional and failing status."

In a diagnostic report requested by the Iredell County Department of Social Services dated 7 August 1978, Dr. Scott Chatham of Baptist Hospital further defined plaintiff's condition. This report showed that plaintiff continued to experience drainage of bile and pus from a large open wound in his abdomen and suffered from general atrophy of the bones, joints and muscles. It also noted that it would be very difficult to maintain nutrition with the amount of protein being lost through the fistula, that plaintiff required virtual bedrest for the fistula to heal and would need an NG feeding tube for an indeterminate period of time. Dr. Chatham indicated that plaintiff would be incapacitated for work for a period "probably greater than one year."

A summary of outpatient visits and evaluations by Dr. Meredith from 29 August 1978 through 6 March 1979 revealed that plaintiff's fistula continued to drain. In a letter dated 6 March 1979, Dr. Meredith stated: "Mr. Lackey's fistula stopped draining just two days ago. Today the drainage from two sites in his abdominal wound is clear. Let's hope that he has stopped draining and that he won't get an abscess. He was instructed that if he does get an abscess to return here."

In another letter dated 15 August 1979, Dr. Meredith indicated that by May 1979 plaintiff's drainage had completely stopped only to reoccur in June 1979. He also noted that the primary disabling factors were the extensive management problems associated with the billiary fistula and a general weakened and undernourished physical condition produced by poor nutrition again associated with the fistula. Dr. Meredith further stated: "On January 22, 1979, and again on July 6, 1979, I certified that Mr. Lackey had been totally disabled from May 5, 1978. In retrospect,

I see no reason to modify that opinion. For all practical purposes, Mr. Lackey has simply been unable to engage in any substantial physical activity."

Finally the record contains a discharge summary from the N.C. Department of Correction's Central Hospital indicating that from 18 July 1979 through 5 September 1979 plaintiff was still experiencing watery drainage from the fistula.

Defendant's denial of Medicaid benefits was based on its determination that plaintiff's condition would not be disabling for more than 12 months. The sole evidence submitted by defendant supporting this determination was the evaluation by Dr. Cozart of plaintiff's medical records, specifically plaintiff's outpatient treatment on 24 October 1978, 14 November 1978 and 6 March 1979.[3] It is important to note that Dr. Cozart never saw or examined plaintiff, nor conducted any independent laboratory tests.

Although the reports of non-examining physicians may in some circumstances constitute substantial evidence to support an agency's determination, *see Oldham v. Schweiker*, 660 F. 2d 1078 (5th Cir. 1981); *Janka v. Secretary, H.E.W.*, 589 F. 2d 365 (8th Cir. 1978); they deserve little weight in the overall evaluation of disability. *Veal v. Califano*, 610 F. 2d 495, 497 (8th Cir. 1979); *Allen v. Weinberger, supra*, at 786; *Landess v. Weinberger, supra*, at 1190. Further, it has been held specifically that where the non-examining physician's opinion is the only evidence supporting a denial of disability benefits and is contrary to all the medical facts as well as the opinion of the treating physician, that opinion alone cannot constitute substantial evidence to support a conclusion relying solely on it. *Strickland v. Harris, supra; Johnson v. Harris*, 612 F. 2d 993 (5th Cir. 1980); *Martin v. Secretary, H.E.W.*, 492 F. 2d 905 (4th Cir. 1974); *Hayes v. Gardner*, 376 F. 2d 517 (4th Cir. 1967).

3. It is worthy of note that in his report Dr. Cozart stated: "The drainage has now stopped and his wound is clear." To the contrary, Dr. Meredith's report of 6 March 1979 stated "Mr. Lackey's *fistula* stopped draining just two days ago. Today the drainage from *two sites in his abdominal wound* is now clear." Dr. Cozart apparently misunderstood the medical data before him. According to Dr. Meredith the billiary fistula had stopped draining, but the wound itself was still draining a clear discharge. This apparent misreading renders Dr. Cozart's report of questionable value. However, because the issue is raised by the holding in the Court of Appeals, we will address the legal implications presented by the existence of the report.

In the case at bar, the report prepared by Dr. Cozart, the non-examining physician, was the sole evidence supporting defendant's conclusion that plaintiff's disability would not continue for 12 months. The opinions of Dr. Meredith and Dr. Chatham, plaintiff's treating physicians, both expressed opinions to the contrary.

In addition to their considered opinions were plaintiff's medical treatment records which indicated that even as of late summer 1979, some 17 months after the original injury, plaintiff was still being treated for and having drainage from the fistula.

We hold that although Dr. Cozart's report was evidence, standing alone it was not substantial evidence to support defendant's denial of disability benefits.

IV

[4] The next issue we must resolve involves the burden of proving disability in order to secure Medicaid benefits.

Judge Farmer's judgment included the following pertinent conclusion of law:

> 1. The petitioner had the burden of proving that he had a medically determinable physical or mental impairment which had lasted or could be expected to last for a continuous period of at least twelve (12) months from May 5, 1978, the date of injury and, further, that the impairment prevented him from engaging in any activity during the entire twelve (12) month period which would produce earnings of at least $260 per month.

The Court of Appeals discerned that the thrust of defendant's decision and Judge Farmer's conclusion was that plaintiff had the burden not only of showing that his physical impairment prevented him from engaging in his usual employment, but also that he was prevented from engaging in any substantial gainful activity. The Court of Appeals went on to hold that plaintiff's burden was not so heavy; that after plaintiff made a showing that he was unable to engage in his usual employment, the burden then shifted to defendant to show that plaintiff had the capacity to perform other specific jobs existing in the national economy.

After careful study of the numerous federal decisions dealing with this issue, we conclude that both the Court of Appeals and Judge Farmer were correct.

The applicable complete federal definition of disability is contained in 42 U.S.C. § 1382c(a)(3) as follows:

> (A) An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or, in the case of a child under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).
>
> (B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.
>
> (C) For purposes of this paragraph, a physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

In support of Judge Farmer's conclusion of law we find that the burden is on plaintiff to prove he is disabled within the meaning of the social security statutes. *Fortenberry v. Harris*, 612 F. 2d 947 (5th Cir. 1980); *Johnson v. Harris, supra.* Plaintiff's burden is considered to be a very heavy one. Indeed it is so stringent

that it has been described as bordering on the unrealistic. *Walden v. Schweiker*, 672 F. 2d 835 (11th Cir. 1982); *Johnson v. Harris, supra.*

To meet this burden plaintiff must show that he suffers from a physical or mental impairment which can be expected to last for a continuous period of not less than 12 months, that not only renders him unable to perform his usual job, but given his age, education and experience, prevents him from engaging in any other kind of substantial gainful employment existing in the national economy. *Johnson v. Harris, supra.*

However, plaintiff need not establish all these factors initially. As was stated in an early social security decision on this issue:

> "Under the Social Security Act . . . it is not the burden of the claimant to introduce evidence to negative every imaginable job open to men with his impairment, and of his age, experience and education. It is quite enough if he offers evidence of what he has done, of his inability to do that kind of work any longer, and, of his lack of particular experience for any other type of job."

Rice v. Celebreeze, 315 F. 2d 7, 17 (6th Cir. 1963).

Once plaintiff has established that he is disabled and can no longer perform his usual work, the burden of going forward shifts to the defendant to show that there are other specific jobs which exist in the national economy that plaintiff can perform. *Walden v. Schweiker, supra; Poe v. Harris*, 644 F. 2d 721 (8th Cir. 1981); *Wilkinson v. Schweiker*, 640 F. 2d 743 (5th Cir. 1981); *Wilson v. Califano*, 617 F. 2d 1050 (4th Cir. 1980); *Strickland v. Harris, supra; Rossi v. Califano*, 602 F. 2d 55 (3d Cir. 1979); *Johnson v. Harris, supra; Taylor v. Weinberger*, 512 F. 2d 664 (4th Cir. 1975); *Stark v. Weinberger*, 497 F. 2d 1092 (7th Cir. 1974); *Hernandez v. Weinberger*, 493 F. 2d 1120 (1st Cir. 1974).

The record reveals that prior to his injury, plaintiff was employed as a loader for Beauty Maid Mills. The medical evidence clearly established that he was unable to perform heavy manual labor due to malnourishment and atrophy of muscles, bones and joints directly resulting from the billiary fistula which formed at the wound site. In fact the medical evidence reveals that plaintiff was continuously unable to engage in *any* substantially gainful ac-

tivity for considerably longer than the minimum 12 month period required by law.

Thus we find that the Court of Appeals correctly held that plaintiff, through his medical evidence, established *prima facie* that he was disabled and could not engage in any substantial gainful employment. The burden of going forward then shifted to defendant. However, defendant offered no substantial evidence to the contrary, and therefore failed to rebut plaintiff's *prima facie* showing of disability.

V

[5] The Court of Appeals also found error in Judge Farmer's conclusion of law #2, which reads as follows:

> 2. Under applicable law and regulations, the Petitioner was required to establish his disability through clinical findings and other objective, probative evidence; and opinions of physicians concerning disability may be considered only to the extent that they are supported by specific and complete clinical findings.

It was the opinion of the Court of Appeals that a Medicaid disability benefits claimant could meet his initial burden, and disability could be "medically determined" for purposes of the Social Security Act, even though the physician's opinion was not supported by objective clinical findings.

Although support for the Court of Appeals' position can be found in the decisions of a number of the federal circuits, we feel that further clarification is necessary to place both those decisions and that of the Court of Appeals' into proper perspective.

The pertinent section of the Social Security Act defining disability, 42 U.S.C. § 1382c(a)(3)(C), states:

> "For purposes of this paragraph, a physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities *which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.*" (Emphasis added.)

The regulations promulgated under the Act also indicate that:

"Any medical findings in the evidence must be supported by medically acceptable clinical and laboratory diagnostic techniques." 20 CFR § 416.926(b).

In interpreting an earlier version of the regulations it was said that "the weight to be given such physician's statement depends on the extent to which it is supported by specific and complete clinical findings and is consistent with other evidence as to the severity and probable duration of the individual's impairment or impairments." *Allen v. Weinberger, supra,* at 785; *Giddings v. Richardson,* 480 F. 2d 652, 656 (6th Cir. 1973).

Given the plainly expressed requirements of both the Act and the regulations thereunder, we hold that medical reports and opinions, unsupported by any medically acceptable clinical or laboratory diagnostic data or findings, are insufficient to establish disability under the Act. *Oldham v. Schweiker, supra,* at 1084; *Laffoon v. Califano,* 558 F. 2d 253, 256 (5th Cir. 1977); *Kirkland v. Weinberger,* 480 F. 2d 46, 49 (5th Cir.), *cert. denied,* 414 U.S. 913 (1973); *Sykes v. Finch,* 443 F. 2d 192 (7th Cir. 1971). *See also, Valentine v. Richardson,* 468 F. 2d 588 (10th Cir. 1972).

A beneficial illustration of our holding is found in *Laffoon v. Califano, supra.* In that case, one of the doctors who had treated the plaintiff, Mrs. Laffoon, wrote a letter dated 10 June 1974 which opened with the statement that he had not examined plaintiff since 8 October 1970. The remainder of the letter read: "[H]owever, I treated her from 1958 until 1970 for chronic, obstructive lung disease. She was treated regularly for elevated temperature, coughing and wheezing badly. I feel that she is totally disabled." 558 F. 2d at 256. The court in that instance held that such an unsupported medical report could properly be discounted by the trier of fact. *Id.*

Our holding is not in conflict with the many decisions that hold that for purposes of the Act a medical opinion need not be supported by "objective clinical findings." *Brand v. Secretary of the Dept. of Health, Education and Welfare,* 623 F. 2d 523 (8th Cir. 1980); *Rossi v. Califano, supra; Cutler v. Weinberger,* 516 F. 2d 1282 (2d Cir. 1975); *Stark v. Weinberger, supra. Moore v. Finch,* 418 F. 2d 1224 (4th Cir. 1969), states "[O]bjective evidence is not an indispensable type of proof in evaluation of disability . . . the Act demands only that the infirmity be 'demonstrable by

medically acceptable clinical and laboratory diagnostic techniques.' Objective evidence is not named as a requisite." *Id.* at 1226.

Another decision holding that "objective clinical findings" are not required elaborated: "The Act does require that the impairment be 'demonstrable by medically acceptable clinical and laboratory techniques.' However, a headache, backache or sprain may constitute a disabling impairment even though it may not be corroborated by an x-ray or some other *objective* finding." (Emphasis original.) *Brand*, 623 F. 2d at 526.

20 CFR § 416.913 deals with medical evidence of impairment. 20 CFR § 416.913(b), *Medical Reports*, states:

> Medical reports should include—
>
> (1) Medical history;
>
> (2) Clinical findings (such as the results of physical or mental status examinations);
>
> (3) Laboratory findings (such as blood pressure, x-rays);
>
> (4) Diagnosis (statement of disease or injury based on its signs and symptoms);
>
> (5) Treatment prescribed with response; and prognosis; and
>
> (6) Medical assessment (except in statutory blindness claims).

20 CFR § 416.928 covers symptoms, signs, and laboratory findings as follows:

> Medical findings consist of symptoms, signs, and laboratory findings:
>
> (a) *Symptoms* are your own description of your physical or mental impairment. Your statements alone are not enough to establish that there is a physical or mental impairment.
>
> (b) *Signs* are anatomical, physiological, or psychological abnormalities which can be observed, apart from your statements (symptoms). Signs must be shown by medically acceptable clinical diagnostic techniques. Psychiatric signs are medically demonstrable phenomena which indicated specific abnormalities of behavior, affect, thought, memory, orienta-

tion and contact with reality. They must also be shown by observable facts that can be medically described and evaluated.

(c) *Laboratory findings* are anatomical, physiological, or psychological phenomena which can be shown by the use of a medically acceptable laboratory diagnostic techniques. Some of these diagnostic techniques include chemical tests, electrophysiological studies (electrocardiogram, electroencephalogram, etc.), roentgenological studies (X-rays), and psychological tests.

It is apparent that the decisions holding that medical opinions need not be supported by "objective clinical findings" are equating these findings with "laboratory findings." Clearly the Act and regulations do not require "objective clinical findings" if that phrase is interpreted to mean x-rays and other objective tests. Indeed, it is obvious that some disabilities recognized as disabling under the Act such as chronic pain cannot be established by objective tests and in those circumstances a medical diagnosis must necessarily rely on a patient's history and subjective complaints. *Brand v. Secretary of Dept. of H.E.W., supra.* However, it is equally clear that under the Act disability must be established by acceptable medical evidence, that which is supported by complete and specific clinical findings, and that a conclusory medical opinion devoid of such will not suffice. In the case at bar, the medical reports of plaintiff's physicians, Dr. Meredith and Dr. Chatham, are amply supported by complete and specific clinical and laboratory findings. Their opinions, thus supported, lead unequivocally to the conclusion that plaintiff was totally disabled for a period in excess of 12 months.

VI

We conclude that the Court of Appeals correctly reversed the trial court's order affirming defendant's denial of disability benefits.

Plaintiff, by medically acceptable evidence, supported by the requisite clinical and laboratory findings, established that his injury rendered him totally disabled as defined by 42 U.S.C. 1382c(c)(3)(A). Defendant produced no substantial evidence to contradict plaintiff's evidence and support its denial of benefits.

Further, plaintiff, through his medical evidence established *prima facie* that his disability prevented him from engaging in any substantial gainful employment for a period not less than 12 months. Defendant failed to go forward with evidence that plaintiff, given his age, education and work experience, had the capacity to perform specific jobs existing in the national economy, thus leaving plaintiff's evidence unrebutted.

The decision of the Court of Appeals reversing the judgment of the Superior Court and remanding the cause to that court for entry of judgment reversing the decision of defendant denying benefits, and ordering defendant to approve and allow plaintiff's claim, is

Modified and affirmed.

ERNEST HOYLE, GUARDIAN AD LITEM FOR TOTISHA SHANNETTE MASON AND GERALD ALLEN MASON, JR., MINOR CHILDREN OF GERALD ALLEN HOYLE, DECEASED, EMPLOYEE, PLAINTIFF v. ISENHOUR BRICK & TILE COMPANY, EMPLOYER AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 82A82

(Filed 13 July 1982)

Master and Servant § 60— workers' compensation—using forklift contrary to prior orders in furtherance of employer's business—compensable accident

When there is a rule or a prior order and the employee is faced with the choice of remaining idle in compliance with the rule or order or continuing to further his employer's business, no superior being present, the employer who would reap the benefits of the employee's acts if successfully completed should bear the burden of injury resulting from such acts and under such circumstances, engaging in an activity which is outside the narrow confines of the employee's job description, but which is reasonably related to the accomplishment of the task for which the employee was hired, does not ordinarily constitute a departure from the scope of employment. Therefore, the Industrial Commission erred in determining decedent's accident did not arise out of and in the course of the deceased employee's employment since the evidence disclosed that an employee, who had been previously prohibited from using a forklift, was faced with the choice of abandoning the furtherance of his employer's business, in that he was unable to continue stacking culled bricks, or acting in contravention of a previous order, and there was no superior present to forbid or permit his operation of the forklift. The employee's election to disobey a prior given order did not break the causal connection between his

employment and his fatal injury since the disobedient act was reasonably related to the accomplishment of the task for which he was hired.

Justice MEYER dissenting.

Justices COPELAND and CARLTON join this dissenting opinion.

APPEAL by guardian ad litem Ernest Hoyle on behalf of the minor children of deceased Gerald Allen Hoyle in an action seeking death benefits under G.S. 97-38 and -39. The Deputy Commissioner's award denying benefits was adopted by the full Industrial Commission and affirmed by a split panel of the Court of Appeals, *Vaughn, J.*, with *Wells, J.*, concurring, and *Martin (Harry C.), J.*, dissenting. The appeal is pursuant to G.S. 7A-30(2).

The evidence before the Commission was to the effect that deceased had been employed by Isenhour Brick & Tile as a cull brick stacker. He removed imperfect bricks from a conveyor after which he would "band them up, like a box." A forklift operator would then remove the culls.

Deceased was killed when a forklift he was operating overturned, pinning him underneath it.

The employer had a rule against unauthorized personnel operating forklifts. Supervisory personnel who testified at the hearing explained that the employer had such a rule because of the dangerous propensities of forklift machinery. Deceased was not authorized to operate a forklift. Several employees testified that unauthorized personnel used the forklifts and the supervisors admitted this, although one noted that he did not recall ever finding an unauthorized employee operating a forklift after being warned against the practice.

On two occasions prior to the accident, one occurring several months before and another occurring about two weeks before, deceased was observed by different supervisors using a forklift to move his bricks. On each occasion the supervisor verbally reprimanded deceased, advised him of the rule against operating forklifts without authorization, and warned him that if caught again he would be disciplined, either suspended or terminated. Neither of the supervisors was aware until after the fatal accident that the other had previously caught deceased operating a forklift.

On the night of the accident, the forklift operator who was to have moved deceased's stack of cull bricks was busy helping another employee. The forklift operator, Larry Rollins, testified at the hearing that although "[t]here was not really any limit as to how many culls he [deceased] could stack out there before I moved the culls," on that particular night, [deceased] *"didn't have no more place to put them."* [Emphasis added.] The forklift operator described deceased's cull stacking operation as follows: "He'd band them up, *like a box*, like you stack them culls in there and you band them up. *The box was full* [that night]." [Emphasis added.] When it became necessary to move the stack of culls, Rollins, being otherwise occupied, told deceased he could use the forklift to move the bricks. Rollins admitted he had no authority to let deceased use his forklift, but observed, "No one had ever told me not to let [deceased] use the forklift." No supervisor was present on the night of the accident.

Deceased loaded the stack of cull bricks and moved them away from his work station. He conversed with another forklift operator as they drove along a paved road to an area where bricks were stacked in storage. The forklift operator deposited his load and went back for another. When he returned he found deceased pinned under the overturned forklift, and the stack of cull bricks deceased had been carrying was stacked in an area reserved for good bricks.

The Deputy Commissioner found that it was not deceased's job to operate a forklift; that the employer had a rule, of which deceased was aware, prohibiting the operation of forklifts by unauthorized personnel; that the reason for the rule was the dangerous propensities of forklift machinery; that deceased had been warned on two prior occasions, by different supervisors, not to operate forklifts; that deceased's operation of the forklift on the night of the accident was against his instructions; and that the deceased was not at the place he was employed to work when the accident occurred. The Deputy Commissioner thereupon determined that, "The accident giving rise to this claim did not arise out of and in the course of the deceased employee's employment." The denial of benefits based thereon was upheld by the full Commission.

The Court of Appeals held that deceased's operation of the forklift, after prior warnings and in the face of rules against the

practice, constituted a departure from the job for which deceased had been employed and affirmed the award of the Industrial Commission denying death benefits. Judge Harry C. Martin dissented, asserting that the actions of deceased had not been "so extreme as to break the causal connection between his employment and his death."

Thomas A. McNeely for plaintiff-appellant.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by J. A. Gardner, III, for defendant-appellees.

BRANCH, Chief Justice.

The parties stipulated in instant case that the employee "was injured by accident on June 9, 1978," and that he "died on the same date as a result of those injuries."

Our Workers' Compensation Act affords compensation only for those injuries resulting from accidents "arising out of and in the course of the employment . . . ." G.S. 97-2(6). The issue of whether a particular accident arises out of and in the course of employment is a mixed question of fact and law, and this Court's review is limited on appeal to the question of whether the findings and conclusions are supported by competent evidence. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977); *Cole v. Guilford County*, 259 N.C. 724, 131 S.E. 2d 308 (1963). While often interrelated, the concepts of "arising out of" and "in the course of" employment are distinct elements, both of which must be established before compensation may be allowed. *Gallimore v. Marilyn's Shoes, supra.* The term "arising out of" refers to the origin or cause of the accident, and the term "in the course of" refers to the time, place, and circumstances of the accident. *Gallimore v. Marilyn's Shoes, supra; Matthews v. Carolina Std. Corp.*, 232 N.C. 229, 60 S.E. 2d 93 (1950); *Davis v. Veneer Corp.*, 200 N.C. 263, 156 S.E. 859 (1931).

> "An accident arising 'in the course of' the employment is one which occurs while 'the employee is doing what a man so employed may reasonably do within a time during which he is employed and at a place where he may reasonably be during that time to do that thing'; or one which 'occurs in the course of the employment and as the result of a risk involved

in the employment, or incident to it, or to conditions under which it is required to be performed.' " *Conrad v. Foundry Company,* 198 N.C. 723, 153 S.E. 266.

In *Perry v. Bakeries Co.,* 262 N.C. 272, 136 S.E. 2d 643, Moore, J., speaking for the Court, said:

> " 'The term "arising out of employment," it has been said, is broad and comprehensive and perhaps not capable of precise definition. It must be interpreted in the light of the facts and circumstances of each case, and there must be some causal connection between the injury and the employment.' To be compensable an injury must spring from the employment or have its origin therein. An injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so that there is some causal relation between the injury and the performance of some service of the employment. An accident arises out of and in the course of the employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business." (Citations omitted.)

Clark v. Burton Lines, 272 N.C. 433, 437, 158 S.E. 2d 569, 571-72 (1968). As the last quoted authority suggests, the two tests, although distinct, are interrelated and cannot be applied entirely independently. Rather, they are to be applied together to determine the issue of whether an accident is sufficiently work-related to come under the Act. Since the terms of the Act should be liberally construed in favor of compensation, deficiencies in one factor are sometimes allowed to be made up by strength in the other. *Watkins v. City of Wilmington,* 290 N.C. 276, 225 S.E. 2d 577 (1976); *Lee v. Henderson & Assocs.,* 284 N.C. 126, 200 S.E. 2d 32 (1973); *Kellams v. Metal Products,* 248 N.C. 199, 102 S.E. 2d 841 (1958); *Hardy v. Small,* 246 N.C. 581, 99 S.E. 2d 862 (1957).

Professor Larson, in his treatise on Workers' Compensation Law, addresses the general situation before us and is quoted by both the majority and the dissent in the Court of Appeals in support of their respective positions. In order to place these quotations in context and to get a better understanding of the position Larson posits, we quote the treatise more fully:

It has already been observed that the modern tendency is to bring within the course of employment services outside regular duties performed in good faith to advance the employer's interests, even if this involves doing an unrelated job falling within the province of a co-employee. This, of course, assumes that no prohibition is thereby infringed. But if the unrelated job is positively forbidden, all connection with the course of the claimant's own employment disappears, for he has stepped outside the boundaries defining, not his method of working, but the ultimate work for which he is employed. Decisions on this topic have consistently denied compensation on these facts when the extraneous job was in no sense auxiliary to claimant's own task.

* * *

It frequently happens that an employee will have his work stopped by some clogging, lack of oil, or disrepair of his machine. Quite commonly, also, there will be a company rule forbidding the operator to attempt to deal with the situation, and requiring him to wait until the specialists—whether oilers, electricians, or other repairmen—arrive on the scene. Sometimes the operator decides he can make the repair without the delay involved in calling the experts, and sometimes he gets hurt because he underestimated the expertness required or overestimated his own versatility. Now, the question is: has he departed from the course of his employment? He has attempted another person's job in violation of instructions. Yet the fact remains that he is attempting to get his own work done, although in forbidden fashion. Cases presenting these facts have gone both ways, depending on whether attention was focused on the fact that the job belonged to another or the fact that the action was a method of advancing the employer's work.

* * *

As a matter of compensation theory, it is quite permissible to treat the incidental invasion of another employee's province as merely a forbidden route on the main journey to the ultimate objective, the performance of claimant's work. Realistically, in some circumstances it is quite unfair to the claimant to penalize him for his well-meant short-cut, since in

> the everyday operation of a factory it is not uncommon and is probably often to the interest of the employer for employees to take direct action rather than "going through channels" when confronted with some minor adjustment which technically they are not permitted to undertake. On the other hand, it is equally true that risk of industrial accident may be increased when amateur electricians and repairmen take upon themselves dangerous jobs for which they have no qualifications. Most of the cases, however, seem to be of the former sort.

1A A. Larson, The Law of Workmen's Compensation § 31.14(a) & (b) (1979).

The above quotation from Larson, while instructive is not dispositive of the question before us. It speaks in terms of *unrelated* jobs. The question of whether deceased's operation was or was not related to the job for which he was hired is at the heart of this appeal. Moreover, the statement about forbidden activities is not fully in accord with our case law. Our decision in this case must be guided by the decisions of this Court construing our own Worker's Compensation Act.

Several opinions of this Court have dealt with situations similar to the facts of instant case. While the older cases often viewed acts outside the employee's job description as being outside the scope of the employment, the more recent cases have not viewed minor deviations from the confines of a narrow job description as an absolute bar to the recovery of benefits, even when such acts were contrary to stated rules or to specific instructions of the employer where such acts were reasonably related to the accomplishment of the task for which the employee was hired. We examine these cases, five of which were cited and discussed in the Court of Appeals' opinion in instant case.

In *Teague v. Atlantic Co.*, 213 N.C. 546, 196 S.E. 875 (1938), an employee was killed attempting to ride a conveyor belt intended to convey empty crates from the basement of the employer's plant to the first floor. Stairs were provided for this purpose and generally used by the employees. Deceased employee had been instructed by his foreman not to ride the conveyor. In a Per Curiam opinion, citing no authority, the Court held that deceased had disobeyed his orders and exceeded the scope of his employment

by attempting a hazardous feat for the thrill of it or for his own convenience and affirmed the Industrial Commission's denial of death benefits.

That same year the Court affirmed the Industrial Commission's denial of death benefits to a painter who drowned in the Catawba River. *Morrow v. Highway Commission*, 214 N.C. 835, 199 S.E. 265 (1938). The deceased had dropped his paintbrush from a bridge he was painting. His foreman was present and ordered deceased not to go into the water to retrieve the brush. Deceased jumped in the river and was drowned. In a Per Curiam opinion of less than fifty words, and again citing no authority, the Court affirmed the Industrial Commission's conclusion that the accident did not arise out of the employment.

In *Taylor v. Dixon*, 251 N.C. 304, 111 S.E. 2d 181 (1959), plaintiff was hired to cut down trees in a logging operation. On the day of the accident, he refused to cut trees and announced he was going to drive the tractor instead. Plaintiff was ordered by his employer to get off the tractor, to which he replied, "Old man, I will get down and whip your * * * if you don't hush up. I know what I am doing * * *." *Id.* at 304, 111 S.E. 2d at 182. The employer stated in the hearing that, "He [the injured employee] was employed to run the chain saw — not to operate the tractor * * * I didn't hire him as a tractor driver." *Id.* at 305, 111 S.E. 2d at 182. This Court reversed an award of compensation on the ground that the Industrial Commission erred in failing to find facts concerning whether plaintiff's operation of the tractor in defiance of the orders of his employer to the contrary constituted a departure from the employment sufficient to take plaintiff out of the Act. The Court quoted 1 Larson's Workmen's Compensation Law 463 to the effect that "if . . . the *unrelated job* is *positively forbidden*, all connection with the claimant's own employment disappears, for he has stepped outside the boundaries defining, not his method of working, but the ultimate work for which he is employed." [Emphasis added.] *Id.* at 308, 111 S.E. 2d at 185.

In *Hartley v. Prison Dept.*, 258 N.C. 287, 128 S.E. 2d 598 (1962), plaintiff, a prison guard, was called to relieve another guard in a nearby tower. To get to the tower, plaintiff had to walk 100 yards to a gate, and 100 yards back to a point just on the other side of the fence from where he was when called. In-

stead of walking the 200 yards to use the gate, he tried to climb the fence, fell, and was hurt. It was *against prison rules* for the guards to climb the fence.

Reasoning that the employee's purpose for climbing the fence was to relieve the guard on duty in the next tower, which was the thing he had been ordered to do, the Court noted that, although plaintiff had been negligent to climb the fence, "not even gross negligence is a defense to a compensation claim." *Id.* at 289, 128 S.E. 2d at 600. The Court went on to state, "Only intoxication or injury intentionally inflicted will defeat a claim," *id.*, and observed that even the willful violation of an employer's rule does not defeat compensation, but may result in a ten percent reduction *if* the rule has been approved by the Industrial Commission. G.S. 97-12. The Court then affirmed the award of compensation, stressing that the purpose of the Worker's Compensation Act was "to eliminate the fault of the workman as a basis for denying recovery." *Id.* at 290, 128 S.E. 2d at 600.

The most recent case to deal with facts similar to those in the case *sub judice* was *Hensley v. Carswell Action Committee*, 296 N.C. 527, 251 S.E. 2d 399 (1979). In *Hensley* the deceased was employed to cut weeds around a lake. He was specifically instructed not to go into the water. After finishing the job, he spotted an area he had missed. The supervisor who had ordered deceased not to go into the water was not then present. Against these prior orders, deceased attempted to wade across the lake to cut the weeds he had missed. He drowned.

The *Hensley* Court analyzed *Taylor*, *Morrow*, and *Teague* and characterized them as follows:

> *Taylor* actually deals with procedural rather than substantive matters; *Teague* involved dangerous thrill-seeking completely unrelated to the employment; and *Morrow* involved the performance of an obviously dangerous act in the face of an immediate and specific order not to do that very act.

296 N.C. at 531, 251 S.E. 2d at 401. Concluding that none of those three cases controlled, the Court followed *Hartley, supra*, holding that the deceased's disobedience of his supervisor's order was not such a departure from his employment as to destroy the causal connection between the accident and the employment. The Industrial Commission's award denying compensation was reversed.

In addition to the five cases cited and relied upon by the Court of Appeals in the majority and dissenting opinions filed below, we find four other cases instructive.

Archie v. Lumber Co., 222 N.C. 477, 23 S.E. 2d 834 (1943), does not involve an employee stepping outside the bounds of his job description; yet it does provide the definitive answer to the question of whether prior orders or rules of the employer may constitute an absolute bar to the recovery of compensation. The case involved a deceased employee who had worked as a logger for defendant Lumber Company. Defendant provided its employees with a specially equipped "safety car" which took them to and from their work site along the company's railroad line. The company had a rule against employees riding in the log cars; nevertheless, on occasion employees would ride the log cars to get from the work site. Deceased employee had been specifically instructed not to ride the log cars. Apparently, on the day of the accident, the safety car was a little slow departing the work site to take the employees back to the camp. Deceased attempted to board a log car and was mortally injured.

This Court reversed the Superior Court's reversal of the Industrial Commission's award of benefits despite the deceased's violation of both a rule of his employer and a specific instruction warning him not to ride the log car. The Court held that denial of benefits was inconsistent with the intent of the Act to eliminate fault as a basis for determining compensation in industrial injury cases. The Court noted that the violation of an *approved* safety rule is covered in G.S. 97-12 and that the penalty for violation is a ten percent reduction and not a denial of compensation. In so holding, the Court expressly disapproved cases from other jurisdictions holding to the contrary as not in accord with the "proper interpretation" of the North Carolina Worker's Compensation Act.

In *Riddick v. Cedar Works*, 227 N.C. 647, 43 S.E. 2d 850 (1947), plaintiff was employed as a lumber stacker. He "had been warned to stay away from the saws" in defendant's lumber plant. On the day of the accident, plaintiff had been instructed to do some work in the vicinity of one of the saws. He undertook to help another employee saw a board at the nearby saw and was cut. This Court held that the employee's attempt to help with the

sawing operation, despite warnings to the contrary, did not constitute such a departure from his assigned work task as to defeat his claim for compensation.

In *Howell v. Fuel Co.*, 226 N.C. 730, 40 S.E. 2d 197 (1946), the employee was hired to sweep out coal cars after their contents had been dumped. He swept out one end of a coal car and was told to stand in a specified place of safety while other employees rolled the car forward on the tracks so that the other end of the car could be swept out. Contrary to these instructions, the employee went to the other, unprotected, side of the platform to wait for the car to be moved. When the coal was dumped, the hopper into which it was dumped collapsed. One of the boards from the hopper struck the employee, knocking him off the platform and resulting in injuries which proximately caused his death. The Court upheld the award of compensation reasoning that to hold otherwise would be "to say that an employee must step only where his work compels him to step; go only to the exact spot his duties require him to go. The rule of liberal construction will not permit such a narrow and restricted application of the law." *Id.* at 732, 40 S.E. 2d at 198.

Parsons v. Swift & Co., 234 N.C. 580, 68 S.E. 2d 296 (1951), involves a deceased employee who had been specifically prohibited by company rule from operating a tractor. His job was to haul filler in a wheelbarrow. Upon finding a tractor blocking his path, the employee asked two tractor operators to move it. Both refused. The employee then attempted to move the tractor and was killed when the tractor rolled over crushing him. The Industrial Commission found that the employee was acting in furtherance of his employer's business in seeking to move the tractor and that the deceased employee had moved similar tractors on prior occasions in violation of the company's rule to the contrary. This Court held that the evidence supported the award of compensation and affirmed.

In *Guest v. Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E. 2d 596, 600 (1955), we find the following:

> Basically, whether plaintiff's claim is compensable turns upon whether the employee acts for the benefit of his employer to any appreciable extent or whether the employee acts solely for his own benefit or purpose or that of a third person.

Summarizing the legal principles gleaned from these pertinent cases, we find that thrill seeking which bears no conceivable relation to accomplishing the job for which the employee was hired moves the employee from the scope of his employment. *Teague v. Atlantic Co., supra.* Likewise, disobedience of a direct and specific order by a then present superior breaks the causal relation between the employment and the resulting injury. *Taylor v. Dixon, supra; Morrow v. Highway Commission, supra.* This is patently so; the employee's subjective belief concerning the advisability of his course of action becomes irrelevant since there would be no room for doubt as how best to serve his employer's interest in the face of the employer's direct and immediate order. Conversely, when there is a rule or a prior order and the employee is faced with the choice of remaining idle in compliance with the rule or order or continuing to further his employer's business, no superior being present, the employer who would reap the benefits of the employee's acts if successfully completed should bear the burden of injury resulting from such acts. Under such circumstances, engaging in an activity which is outside the narrow confines of the employee's job description, but which is reasonably related to the accomplishment of the task for which the employee was hired, does not ordinarily constitute a departure from the scope of employment. *Parsons v. Swift & Co., supra; Hensley v. Carswell Action Committee, supra; Hartley v. Prison Department, supra.*

Here all of the evidence discloses that the employee did *not* disobey a direct, immediate, and specific order by a then present superior not to operate the forklift. Rather the evidence shows that employee was faced with the choice of abandoning the furtherance of his employer's business or acting in contravention of a previous order. There was no superior present to forbid or permit his operation of the forklift. We are therefore of the opinion that employee's election to disobey a prior given order did not break the causal connection between his employment and his fatal injury if the disobedient act was reasonably related to the accomplishment of the task for which he was hired. We believe that that evidence disclosed that the employee's action was reasonably related to his employment. The single statement in the record to which defendant-employer points to support a contrary conclusion does not in fact support the employer's position. The authorized

forklift operator testified, "[t]here was not really any limit as to how many culls he [deceased] could stack out there before I move the culls." In the next breath, the witness testified that deceased "didn't have no more place to put the cull bricks" and that "the box was full." When taken in context, the first statement obviously was directed to the forklift operator's job description and does not suggest that the stacking area was unlimited. All the competent evidence tended to show that deceased could not continue the task for which he was hired until the bricks were removed. Thus, the removal of the bricks was reasonably related (indeed necessary) to the accomplishment of the task for which deceased had been hired.

Because of their striking factual similarity, we emphasize the compelling authority in *Hensley v. Carswell Action Committee, supra*, and *Parsons v. Swift & Co., supra*. In both *Hensley* and *Parsons*, this Court held that the deceaseds were acting in the course and scope of their employment when fatally injured. In each case the Court, in finding for the plaintiff, based its decision on the fact that the employee was acting in furtherance of the employer's business, albeit in disobedience of the employer's rule or order.

It is neither the role of the Industrial Commission nor of this Court to enforce the employer's rules or orders by the denial of Worker's Compensation. Enforcement of rules and orders is the responsibility of the employer, who may choose to terminate employment or otherwise discipline disobedient employees. This Court will not do indirectly what the employer failed to do directly.

For the reasons stated, we hold that the Industrial Commission erred in concluding that deceased's injury did not arise out of and in the course of his employment.

This case is reversed and remanded to the Court of Appeals with direction that it be remanded to the Industrial Commission for entry of an award consistent with this opinion.

Reversed and Remanded.

Justice MEYER dissenting.

I must respectfully dissent. The majority pays only lip service to the well established rule that this Court's review is limited on appeal to the question of whether the findings and conclusions are supported by competent evidence. This is not a case where the *only* evidence supports one result, and, where, if that evidence is disbelieved, we are left with a record devoid of *any* competent evidence to support the findings and conclusions. See, for example, *Taylor v. Cone Mills Corporation*, --- N.C. ---, --- S.E. 2d --- (filed this date). I cannot agree with the majority that there is no real conflict in the evidence. There is. The witness Rollins testified:

> I would ordinarily take out the culls and the dump pads with the forklift. I would take out the culls that Pee Wee was stacking there. He stacked culls right outside the building. *There was not really any limit as to how many culls he could stack out there before I moved the culls.*
>
> On this particular night when I went to see John Shaw, I let Pee Wee borrow my forklift to take out the culls he had stacked. *He didn't have no more place to put them.* In answer to your question where were they stacked, like a box. He'd band them up, like a box, like you stack them culls in there and you band them up. *The box was full.* (Emphasis added.)

That the Commission may believe all, part of or none of what a witness says is such elementary law that no citation of authority is required. I find ample evidence to support the Deputy Commissioner's Award denying benefits which was adopted by the Full Commission and affirmed by the Court of Appeals. It is our duty to determine whether the findings and conclusions are supported by the record evidence before us—it is not our duty to assume the role of super fact-finder.

I am greatly concerned that the majority opinion has established the rule that no direct, specific order of prohibition by an authorized supervisor is effective unless that order is given immediately prior to an accident by the authorized supervisor who is present at the time of the accident. It requires little familiarity with present day industrial practices to know that it is totally impractical to have a supervisor present at all times.

Likewise, common sense dictates that an employee will seldom defy a direct order in the presence of the authorized supervisor who gave that order and accompanied it with a threat of termination of employment. It is far more likely to occur when the supervisor is not present. Here, the employer's authorized supervisors twice warned the employee not to use dangerous equipment for which he was not trained. These orders were presumably given for the benefit of the employee and his fellow employees and not solely for the benefit of the employer.

While the result in this case does not shock the conscience, the rule established here is likewise applicable to situations which would pose even greater danger to fellow employees and the public generally. I seriously question whether the result would have been the same had this employee been handling extremely toxic chemical wastes rather than bricks, or that the same result would have obtained had the equipment been a large overhead crane in a crowded industrial plant, or sensitive safety-related equipment in a nuclear-powered electric generation station. The principle is the same. The employer is usually in a better position than the employee to assess the danger of the use of dangerous equipment by untrained personnel to the employee, his fellow employees, and the public in general.

I do not believe that it is in the best interest of the employee, and certainly not the employer, that we leave employers with only the sanction of discharging or disciplining employees who defy direct orders given in the interest of plant safety. While the deterrent effect of loss of benefits might be questionable, we should not simply cast that benefit aside.

If the employee's activity in defying the employer's prohibition against his operation of dangerous equipment leaves him within the course and scope of his employment, the employer has in a real sense and in a substantial way lost the ability to protect his employees and others from the danger of, and himself from liability for such activity. I fear that the majority has placed far too much emphasis on the proposition that, even in defying repeated specific instructions, the employee here was still acting in furtherance of the employer's business. In my view, the fact that the employee is still acting in furtherance of his employer's business should not be the controlling factor. Certainly in the case

before us, and in virtually all cases, the employer would much prefer that the employee obey the supervisor's prohibitory orders than to receive such benefit as might grow out of the violation of those orders.

Unlike the majority, I do not consider this a case of enforcing an employer's rules or orders or doing indirectly what the employer failed to do directly. Nor is it a case where the employer failed to take adequate measures after discovery of the violation of his orders. The evidence here is clear that neither supervisor who ordered the employee not to drive the forklift was aware that the other had done so and therefore the employer could have had no way of knowing that the employee's violations were repeated.

I would vote to affirm the Court of Appeals.

Justices COPELAND and CARLTON join this dissenting opinion.

GREENSBORO-HIGH POINT AIRPORT AUTHORITY v. PEARL TAYLOR IRVIN, CHARLES WATSON IRVIN, JR. AND WIFE, MARY S. IRVIN, JOHN LAFAYETTE IRVIN AND WIFE, NANCY B. IRVIN, DORIS IRVIN EGERTON AND HUSBAND, GEORGE G. EGERTON

No. 19PA82

(Filed 13 July 1982)

1. Eminent Domain § 5.2— date for valuation of condemned property

The date for the valuation of the property in a Ch. 40 condemnation proceeding is the date on which the petition of condemnation is filed, and the Court of Appeals erred in holding that the property should have been valued as of the date of the trial because the condemnor had not paid into court the amount of the commissioners' award pursuant to G.S. 40-19.

2. Eminent Domain § 5.10— failure to pay commissioners' award into court—interest on jury award

Where the condemnor in a Ch. 40 condemnation proceeding voluntarily chose not to pay the amount of the commissioners' award into court and therefore deprived itself of the right to actual possession of the property, the respondents are entitled to interest on the jury award at the legal rate of 8% from the date the commissioners' report was filed to the date the condemnor

paid the amount of the judgment entered on the jury verdict, and the appropriate interest may be added by the trial court upon remand. G.S. 24-1.

Justice CARLTON dissenting.

ON discretionary review of a decision of the Court of Appeals, 54 N.C. App. 355, 283 S.E. 2d 171 (1981). A petition to condemn respondents' property was filed on 1 July 1975. At the trial of the matter in November 1980 respondents' land was valued as of 1 July 1975, the date the proceeding was commenced. The jury fixed the value of the land as of that date at $400,000.00 and judgment was entered on the verdict. Respondents appealed to the Court of Appeals and that court, reversing the trial court and awarding a new trial, held that the property should have been valued as of the date of the trial rather than the date the proceeding was commenced. The condemnor's petition for rehearing was denied by the Court of Appeals on 23 November 1981. The condemnor petitioned this Court for discretionary review pursuant to G.S. § 7A-31. The cause was certified for discretionary review by this Court on 28 January 1982.

Cooke & Cooke, by Arthur O. Cooke and William Owen Cooke, Attorneys for plaintiff-appellant.

Dees, Johnson, Tart, Giles & Tedder, by J. Sam Johnson, Jr., Attorneys for defendant-appellees John L. Irvin and wife, Nancy B. Irvin, Doris Irvin Egerton and husband, George G. Egerton, and Griffin, Deaton & Horsley, by Hugh P. Griffin, Jr. and William F. Horsley, Attorneys for defendant-appellees Charles Watson Irvin, Jr. and Mary S. Irvin.

MEYER, Justice.

[1] The sole question before this Court is whether the Court of Appeals erred in holding under the particular facts of this case that the date for valuation of respondents' property for purposes of determining just compensation is the date of the trial rather than the date on which the proceeding was commenced by the filing of the petition to condemn respondents' property. We conclude that the proper date for the valuation of respondents' property is the date of the filing of the petition of condemnation, reverse the decision of the Court of Appeals and reinstate the judgment of the trial court with instructions for the proper application of interest on the damage award.

This proceeding was brought by the petitioner, Greensboro-High Point Airport Authority (hereinafter the "Authority") under Chapter 40 of the General Statutes to condemn 90.35 acres of land owned by the respondents for airport purposes. More specifically, the purpose for acquiring the land was for cargo handling facilities in connection with the airport's expansion. The Authority filed its petition to condemn the property on 1 July 1975. Respondents answered, raising numerous defenses and contesting both the necessity and the constitutionality of the taking. Following lengthy discovery by both parties, a hearing was held before the Clerk of Superior Court of Guilford County. On 5 August 1976, the Clerk entered an order overruling respondents' defenses and appointing Commissioners to appraise the property. On 24 November 1976, the Commissioners filed their report with the Clerk. In that report the Commissioners determined the value of the land as of 1 July 1975 to be $310,000.00. The report was confirmed by the Clerk and judgment entered 28 February 1977. Respondents appealed from the Judgment of Confirmation to the judge of the Superior Court. Judge Hal Walker affirmed the Judgment of Confirmation on 6 July 1977 and reserved the issue of compensation for later trial by jury. The respondents appealed to the North Carolina Court of Appeals which affirmed the judgment in a decision reported at 36 N.C. App. 662, 245 S.E. 2d 390 (1978). Respondents' petition for discretionary review was denied and their Appeal of Right dismissed by this Court on 29 August 1978 in an order appearing at 295 N.C. 548, 248 S.E. 2d 726 (1978). Respondents then on 4 December 1978 petitioned the United States Supreme Court for a writ of certiorari which was denied by that Court on 20 February 1979 in an order reported at 440 U.S. 912, 59 L.Ed. 2d 460 (1979). During the pendency of these appeals and prior to the trial of the issue of compensation, the Authority did not deposit the amount of the Commissioners' award with the court.

When the matter was returned to the trial division for a determination of just compensation, a controversy arose as to the proper date for valuing respondents' land. Although prior decisions of this Court had consistently held that the value of the landowner's property in a Chapter 40 proceeding should be determined as of the date the condemnation petition is filed, Judge Fetzer Mills on 2 May 1979 entered a pretrial order directing that

the property be valued as of the date petitioner deposited the amount of the Commissioners' award with the court, or, if no deposit were made, as of the date of the trial and judgment in the case. On 24 May 1979 the Authority petitioned the North Carolina Court of Appeals for a writ of certiorari to review Judge Mills' order. This petition was denied on 18 June 1979 by an order entered for the Court by Carlton, J. which instructed the trial court as follows:

> This Court does not, by this order rule on the efficacy of Judge Mills' order of 2 May 1979 in that it is a pretrial order which may be modified by the trial court prior to or at trial. *See Kings Mountain v. Goforth*, 283 N.C. 316 (1973).

Thereafter Judge Harvey Lupton entered a pretrial order on 24 October 1979 to the effect that, if the matter came on to be heard before him, the valuation date would be the date of the filing of the petition, 1 July 1975. Respondents appealed from this order to the Court of Appeals and the appeal was dismissed by that court on 13 December 1979. Respondents filed a Request for Reconsideration, Vacation or Modification which was denied by the Court of Appeals on 18 December 1979. When the matter came before the trial court again, Judge Lupton was no longer the presiding judge, and then-presiding Judge Walker entered a pretrial order dated 3 November 1980 which directed that the property be valued as of 1 July 1975. Consistent with Judge Walker's order, the case was finally tried at the 3 November 1980 Session of Superior Court, Guilford County using the 1 July 1975 valuation date. The jury returned a verdict in the amount of $400,000.00 and judgment on that verdict was entered on 10 November 1980. Upon entry of the judgment petitioner deposited the full amount of the judgment award with the court. On 2 December 1980 a stipulated order was entered by Judge Walker allowing respondents to withdraw the deposit without prejudice to their right to pursue an appeal from the judgment. Respondents appealed to the North Carolina Court of Appeals. On 20 October 1981 the Court of Appeals filed its decision, reversing the trial court's holding as to the 1 July 1975 valuation date and ordering a new trial with the value of the condemned property to be ascertained "as of the date of trial," rather than the date the proceeding was filed.

Evidence of the respondents admitted in the absence of the jury at the 3 November 1980 trial tended to show that the condemned tract had increased substantially in value between 1 July 1975 and November 1980.

The Authority petitioned the Court of Appeals for rehearing and that petition was denied on 23 November 1981. The Authority then petitioned this Court for discretionary review of the Court of Appeals' decision pursuant to G.S. § 7A-31. The cause was certified for discretionary review by this Court on 28 January 1982. It is the ruling of the Court of Appeals that the valuation date should be ascertained "as of the date of trial" rather than the "date of petition" that the petitioner brings before this Court for discretionary review.

The panel below held in effect that the established rule as to the date of valuation—the date the petition is filed—does not apply unless, after the proceeding is begun by the filing of the petition and the Commissioners' award has been made, the condemnor pays into court the amount of the award pursuant to G.S. § 40-19. We cannot agree. G.S. § 40-19 permits or allows the condemnor to pay the amount of the award if it desires to enter and take possession of the land. The statute as it existed at the pertinent time provides in part:

> *If* the said corporation, at the time of the appraisal, shall pay into Court the sum appraised by the commissioners, then and in that event the said corporation may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal.

G.S. § 40-19 (effective 1 October 1971, as amended by 1971 Sess. Laws, ch. 528, s. 37) (emphasis added).[1]

The deposit of the amount of the award by the condemnor is discretionary. G.S. § 40-19 grants the condemnor a right or election to pay the award; it does not require it to do so. Of course, "if" it elects not to exercise its right or option to deposit the funds, no right to enter, take possession and hold the land con-

1. G.S. §§ 40-1 to 40-53 were repealed by 1981 N.C. Sess. Laws, ch. 919, s. 1, effective 1 January 1982. For present provisions as to eminent domain see G.S. Chapter 40A. The new G.S. § 40A-28(d) provides that the condemnor "may" make the deposit.

demned arises. In such event the landowner retains possession and the benefits afforded thereby. The only thing which turns on the making of the deposit is the *right* of possession. Clearly, "if" the Authority had made the deposit the established rule would have applied and the valuation date would have been 1 July 1975, the date the condemnation petition was filed. The decision of the Court of Appeals makes the date for valuing the condemned property dependent on whether the condemnor makes the deposit. Neither the wording of the statute nor the decisions of this Court justifies such an interpretation.

We conclude that the decision of the Court of Appeals is patently in conflict with the prior decisions of this Court concerning the date for valuation of property in condemnation proceedings. While the language of our decisions has differed somewhat, this Court has consistently held that the date for the valuation of the property in a Chapter 40 condemnation proceeding is the date on which the petition is filed.

> *Respondents are entitled to recover* as just compensation for the 29.5 acres of land described in the petition *its value at the time it was taken, to wit, the date of the commencement of the proceeding.* No change in the value of said land after said date, *whether caused by the use for which it is to be condemned or not,* can be considered in determining the amount which respondents shall receive and petitioner shall pay as just compensation for same.

Power Co. v. Hayes, 193 N.C. 104, 107, 136 S.E. 353, 355 (1927) (emphasis added).

> *For compensation purposes the commencement of the proceeding marks the time of the taking.* Consequently, the owner of the land cannot recover for any improvement placed thereon *or for enhancement thereof due to other causes.* The obvious reason for such conclusion is that the first judicial act in the condemnation process is, in contemplation of law, a setting apart of the property for public use. Therefore, if the proceeding is prosecuted to final conclusion the sovereign is deemed to be the owner from the commencement of the proceeding.

State v. Floyd, 204 N.C. 291, 293, 168 S.E. 222, 223 (1933) (emphasis added).

> Ordinarily, 'for the purpose of determining the sum to be paid as compensation for land taken under the right of eminent domain, *the value of the land taken should be ascertained as of the date of the taking, and . . . the land is taken within the meaning of this principle when the proceeding is begun.*'

Charlotte v. Spratt, 263 N.C. 656, 662, 140 S.E. 2d 341, 345 (1965) (emphasis added).

> In a condemnation proceeding under G.S. § 40-11 et seq., ordinarily, 'for the purpose of determining the sum to be paid as compensation for land taken under the right of eminent domain, *the value of the land taken should be ascertained as of the date of the taking, and . . . the land is taken within the meaning of this principle when the proceeding is begun.*'

City of Kings Mountain v. Goforth, 283 N.C. 316, 322, 196 S.E. 2d 231, 236 (1973) (emphasis added).

See Highway Commission v. Black, 239 N.C. 198, 79 S.E. 2d 778 (1953); *Highway Com. v. Hartley*, 218 N.C. 438, 11 S.E. 2d 314 (1940); *Lumber Co. v. Graham County*, 214 N.C. 167, 198 S.E. 843 (1938); *Light Co. v. Rogers*, 207 N.C. 751, 178 S.E. 575 (1935); *Redevelopment Comm. v. Stewart*, 3 N.C. App. 271, 164 S.E. 2d 495 (1968).

The panel below finds justification for its exception to the established rule by referring to the fact that Justice Bobbitt (later Chief Justice) writing for the Court in two decisions prefaced his statement of the rule with the word "ordinarily":

> Ordinarily, 'for the purpose of determining the sum to be paid as compensation for land taken under the right of eminent domain, the value of the land taken should be ascertained as of the date of the taking, and . . . the land is taken within the meaning of this principle when the proceeding is begun.'

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of the date of the taking, and . . . the land is taken within the meaning of this principle when the proceeding is begun.'

City of Kings Mountain v. Goforth, 283 N.C. 316, 322, 196 S.E. 2d 231, 236.

Interpreting these two statements as implying that facts such as the situation presented by the present case might justify imposition of a valuation date other than the date of the filing of the petition, the panel below departed from the general rule. We believe this is a clear misinterpretation of the Court's use of the word "ordinarily." We believe that the Court was referring to exceptions created (1) by those cases where the condemnor takes possession before the proceeding is started wherein the land is valued as of the date of entry because the condemnor might have destroyed improvements and otherwise altered the land prior to the date of the actual filing of the petition, and (2) in all cases of inverse condemnation where the proceeding is brought by the landowner for appropriation of his property. Representative of this latter example is *Hoyle v. City of Charlotte*, 276 N.C. 292, 172 S.E. 2d 1 (1970), also written by Justice Bobbitt, which was an inverse condemnation case brought by a landowner in 1967 for the taking of an air easement over his property. This Court granted a new trial to the respondent, City of Charlotte, because the trial court used the date of the trial (1968) for determining compensation instead of the date the defendant had actually "appropriated" the flight easement (1962). We do not believe that the facts of the case before us justify an exception to the established rule.

We agree with the panel below that *one* of the purposes of the established rule is to prevent the landowner from receiving a windfall when the value of his property is enhanced by the condemnor's project. We believe, however, that the underlying purpose of the rule is much broader. The established rule acts to prevent recovery of *any* appreciation in value after the petition date without regard to whether the increase results from the condemnor's project, the general increase in land values in the neighborhood due to general conditions, or any other reason. It also acts to prevent loss by the landowner resulting from depreciation in value during the same time period without regard to its cause. See *Power Company v. Hayes*, 193 N.C. 104, 136 S.E. 353 (1927), wherein the condemned property had shared in a

general increase in land values totally unrelated to the condemnor's project, and the date of the taking was determined to be the date of the commencement of the proceeding.

Of interest, though not applicable to this case, is the current provision of Chapter 40A dealing with valuation for purposes of determining just compensation which reads as follows:

> § 40A-63. In general.
>
> *The determination of the amount of compensation shall reflect the value of the property immediately prior to the filing of the petition under G.S. 40A-20 or the complaint under G.S. 40A-41* and except as provided in the following sections shall not reflect an increase or decrease due to the condemnation. The day of the filing of a petition or complaint shall be the date of valuation of the interest taken.

(Emphasis added.)

We hold that the trial court was correct in fixing the date for valuation of respondents' property as the date of the filing of the condemnation petition and that the Court of Appeals erred in reversing the trial court and remanding for a new trial.

[2] Because of our holding on the proper date for valuation of respondents' property, the question of interest on the jury award arises. Anticipating this question, the parties have treated it at length in their briefs before this Court.

There are two elements of damages legally cognizable in condemnation actions: (1) compensation for the value of property taken, and (2) compensation for any delay in paying for the property once it is taken. In *DeBruhl v. Highway Commission*, 247 N.C. 671, 102 S.E. 2d 229 (1958), this Court, in an opinion by Justice Parker (later Chief Justice), said:

> Ordinarily, the legal rate of interest, where the condemned property is located, upon the original sum fixed as compensation for the fair market value of the property on the taking date, is considered a fair measure of the amount to compensate the owner for the delay in paying the award, so as to make just compensation. *Miller v. City of Asheville, supra; Seaboard Air Line R. Co. v. United States, supra; In re City of New York*, 179 N.Y. 496, 72 N.E. 522; *State v. Deal*,

supra; 29 C.J.S. Eminent Domain § 176, p. 1055; Orgel on Valuation under Eminent Domain, Second Ed., Vol. I, p. 27; Annotation 36 A.L.R. 2d at page 436; Jahr, Eminent Domain, Sec. 176. See Nichols on Eminent Domain, Third Ed., Vol. 3, Sec. 8.63(3).

247 N.C. at 687, 102 S.E. 2d at 241. *See Power Co. v. Winebarger*, 42 N.C. App. 330, 256 S.E. 2d 723 (1979), reversed on other grounds, 300 N.C. 57, 265 S.E. 2d 227 (1980). *See also Wright v. United States*, 279 F. 2d 517 (1960), where the United States Court of Claims added interest at 4% per annum from the date of the taking in order to compensate for delay in payment. The additional sum awarded for delay in payment of the value of the property taken is not interest *eo nomine*, but interest is a fair means for measuring the amount to be arrived at of such additional sums. *DeBruhl v. Highway Commission*, 247 N.C. at 687, 102 S.E. 2d at 240-41. In the case before us, interest is a necessary element of just compensation and represents the only compensation due for the loss from delay in payment for the taking.

Had the Authority deposited the amount confirmed by the court into the Clerk's office upon the return of the Commissioners' award in order to gain the right to possession of the property, respondents would be entitled to interest at the legal rate on that amount until the money was drawn down by the respondents. The Authority contends that these respondents are not entitled to interest here because (1) the Authority never ousted the respondents who remained in possession of their lands and reaped the benefits of possession, and (2) the Authority never made any deposit and therefore never even acquired the *right* to occupy the land.

The Authority argues that the entitlement to interest is triggered by the condemnor's *taking actual possession* of condemned property prior to completion of the proceeding and the acquisition of title. More correctly stated, it is the *right to take possession* and not the actual possession which triggers the entitlement to interest. It is well settled that the date the condemnor acquires the right to possession is the date from which interest should be paid. *City of Kings Mountain v. Goforth*, 283 N.C. 316, 196 S.E. 2d 231 (1973); *Light Co. v. Briggs*, 268 N.C. 158, 150 S.E. 2d 16 (1968) (per curiam); *Winston-Salem v. Wells*, 249 N.C. 148, 105 S.E. 2d

435 (1958); *see Power Co. v. Winebarger*, 42 N.C. App. 330, 256 S.E. 2d 723 (1979), reversed on other grounds but finding the decision on this point correct, 300 N.C. 57, 265 S.E. 2d 227 (1980).

This was a Chapter 40 proceeding and did not involve a "quick take" procedure. The Authority would have been entitled to immediate possession only upon paying the amount of the Commissioners' award into the office of the clerk. Since it did not elect to do so, the Authority acquired the right of possession at the same time title vested—upon entry of judgment by the trial court awarding damages for the taking and the payment of that amount by the Authority. The Authority contends that because it did not acquire the right to possession until payment of the judgment on the date of its entry, no interest accrued. This would be the case in the ordinary direct condemnation case where the condemnor was enjoined or otherwise legally prohibited from paying the amount of the Commissioners' award into court and taking actual possession of the property. However, in this condemnation proceeding the condemnor *voluntarily chose* not to pay the amount of the Commissioners' award into court and therefore *deprived itself* of the right to actual possession. Here the condemnor *elected* to leave the respondents in possession.[2]

2. The Authority argues that any attempt on its part to have taken possession of the land would have been frustrated by the "threatened" use of a restraining order by the respondents. By order of this Court entered 27 January 1982, a letter from the attorney for two of the respondents was added to the Record on Appeal pursuant to Rule 9(b)(6) of the Rules of Appellate Procedure. This letter requested that the Authority give respondents advance notice of any deposit so that the writer's clients could seek a restraining order to prevent the Authority from removing improvements on the property pending final judgment on appeal. Defendants contend that this letter is significant in light of the case of *Airport Authority v. Irvin*, 2 N.C. App. 341, 163 S.E. 2d 118 (1968), an earlier Chapter 40 proceeding by the Authority against these same respondents to condemn an easement to cut the tops of trees encroaching on the approach zone of the airport. In that case the Authority made the deposit but was nevertheless restrained until all issues (including the necessity and right to take) were fully adjudicated.

Even if this letter should be interpreted as a "threat" when viewed in the context of a prior court action between the same parties, it was certainly no more than a threat. No restraining order was ever issued or sought because the Authority never attempted to take possession. Since the Authority never took possession of the land in question prior to trial and it was therefore unnecessary for the defendants to seek a restraining order, it is impossible to determine whether the Authority's fears in this regard were realistic. Like the panel of the Court of Appeals which heard this case below, we cannot accept plaintiff's argument that deposit of the money into court would have been futile.

The choice of whether to make the deposit and enter into possession was that of the Authority and not that of the landowners. The Authority's failure to pay the amount of the award into the clerk's office should not of itself deprive the respondents of the interest to which they would otherwise ordinarily be entitled. The payment of interest from 24 November 1976, the date the Commissioners' Report was filed, would place the respondents in the same position in which they would have been had the Authority deposited the amount of the Commissioners' award when the Commissioners' Report was filed and respondents had not drawn down the deposit. We hold that respondents are entitled to interest at the legal rate from 24 November 1976, the date the Commissioners' Report was filed, to 10 November 1980, the date the Authority paid the amount of the judgment into court.

G.S. § 24-1, as it existed prior to 1 July 1980, provided in effect that the legal rate of interest on the clerk's judgment was six percent per annum. *See Cochran v. City of Charlotte*, 53 N.C. App. 390, 281 S.E. 2d 179 (1981). In 1979, the Legislature raised the legal rate of interest from six percent to eight percent. 1979 Sess. Laws, ch. 1157. By the terms of the 1979 act the eight percent rate applies to judgments entered 1 July 1980 and thereafter. As the judgment in this case was entered on 10 November 1980, the rate to which the respondents are entitled is eight percent.

While *DeBruhl* held that, as a matter of law, the landowners were entitled to have the jury award them interest at the legal rate from the date of taking as an additional sum for delay in payment, we do not believe that that method is the only method of awarding the interest amount. It is standard procedure in this State for the trial judge himself to add interest based on the jury's verdict. As the amount to be added is the same whether awarded by the jury or added by the trial judge, in order to avoid further delay, we hold that the appropriate interest may be added by the trial court on remand.

The decision of the Court of Appeals is reversed and the judgment of that court reversing the trial court and awarding a new trial is vacated. The case is remanded to the Court of Appeals for further remand to the Superior Court, Guilford County for reinstatement of the judgment of the trial court with the addition of appropriate interest by the trial court.

Reversed and remanded.

Justice CARLTON dissenting.

For the reasons given by Judge Arnold in the Court of Appeals' opinion, 54 N.C. App. 355, 283 S.E. 2d 171 (1981), I dissent. As Judge Arnold noted, the position taken by the majority is "patently unfair" to these landowners.

BRENDA H. DEESE, WIDOW; BRACY DEESE, GUARDIAN OF KATIE LYNN DEESE, STEPHEN HAYWOOD DEESE, AND CHRISTOPHER WAYNE DEESE, MINOR CHILDREN; BRACY DEESE, ADMINISTRATOR OF THE ESTATE OF CHARLES W. DEESE, DECEASED, EMPLOYEE, PLAINTIFFS v. SOUTHEASTERN LAWN AND TREE EXPERT COMPANY, EMPLOYER, FIDELITY AND CASUALTY COMPANY OF NEW YORK, CARRIER, DEFENDANTS

No. 16PA82

(Filed 13 July 1982)

Master and Servant § 79— workers' compensation—determination of death benefits

G.S. 97-38 does not require a *reapportionment* of the *entire* amount of payable death benefits among the *remaining* dependent children in equal shares as each child reaches the age of 18, *after* the expiration of the initial compensation period of 400 weeks. A careful reading of G.S. 97-38 convinces the Court that our legislature intended *to enlarge the period* during which a dependent child of a deceased employee may continue to receive *his or her fixed* share of benefits, beyond the normal cut-off of 400 weeks to the time the child attains majority, and it did not also intend to provide a means for increasing the amount of the dependent's individual share in conjunction with that special extension.

Justice MITCHELL dissenting.

Justices EXUM and CARLTON join in this dissenting opinion.

APPEAL by plaintiffs pursuant to G.S. 7A-31 for discretionary review of the decision of the Court of Appeals (*Judge Webb*, with *Judges Hedrick* and *Arnold* concurring) reported at 53 N.C. App. 607, 281 S.E. 2d 462 (1981). The Court of Appeals affirmed the opinion and award of the Industrial Commission entered on 15 August 1980 regarding the distribution of compensation benefits

to the widow and dependent minor children of the deceased employee.

This appeal arises from a proceeding held before the Industrial Commission to determine the amount and duration of death benefits payable to the dependent survivors of an employee under the Workers' Compensation Act. The essential facts underlying the resulting legal controversy are summarized in the Court of Appeals' opinion as follows:

> After a hearing, Commissioner Robert S. Brown found that on 28 October 1978, Charles W. Deese died as a result of an injury from an accident arising out of and in the course of his employment; that he had a wife and three minor children at the time of his death; that his weekly wages at the time of his death were $265.44; that the parties were subject to the Workers' Compensation Act; and that his widow and three minor children were entitled to total compensation of $176.97 per week. Commissioner Brown awarded compensation of $44.25 per week for 400 weeks to the decedent's widow and $44.25 per week to each of his minor children until he or she reached 18 years of age. Bracy Deese, guardian for the three minor children, appealed to the Full Commission which affirmed Commissioner Brown's award.

53 N.C. App. at 607-08, 281 S.E. 2d at 463.

On plaintiffs' further appeal, the Court of Appeals upheld the opinion and award of the Commission which, in pertinent part, stated that: "there is nothing in the statute [G.S. 97-38] which calls for there to be an increase or decrease in the weekly benefit rate based on an increase or decrease in the number of whole dependents." Record at 14. In our Court, plaintiffs argue again for an interpretation of G.S. 97-38 whereby compensation would be paid "following the initial 400 weeks, at the rate of $176.97 per week [the entire amount] for such additional time until such time as all of the minor children of the deceased shall have attained the age of 18 years . . . ." Plaintiffs' Brief at 6.

Roberts, Cogburn & Williams, by James W. Williams and Isaac N. Northup, Jr., for plaintiff-appellants.

Vanwinkle, Buck, Wall, Starnes and Davis, by Phillip J. Smith, for defendant-appellees.

COPELAND, Justice

In this appeal, we are called upon to review the opinion and award of the Industrial Commission for the existence of legal error (see G.S. 97-86) in that agency's interpretation and application of G.S. 97-38. The statute in question governs the payment and allocation of compensation benefits in cases where the employee has died as the result of a work-related injury. *See* G.S. 97-29. Put as simply as possible, the sole issue is whether G.S. 97-38 requires a *reapportionment* of the *entire* amount of payable death benefits among the *remaining* dependent children in equal shares as each child reaches the age of eighteen, *after* the expiration of the initial compensation period of 400 weeks.[1] A careful and commonsense reading of G.S. 97-38 convinces us that our legislature merely intended *to enlarge the period* during which a dependent child of a deceased employee may continue to receive *his or her fixed share* of benefits, beyond the normal cut-off of 400 weeks to the time the child attains majority, and it did not also intend to provide a means for increasing the amount of the dependent's individual share in conjunction with that special extension. We, therefore, affirm the decision of the Court of Appeals.

This Court has interpreted the statutory provisions of North Carolina's workers' compensation law on many occasions. In every instance, we have been wisely guided by several sound rules of statutory construction which bear repeating at the outset here. First, the Workers' Compensation Act should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions. *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976); *Petty v. Transport, Inc.*, 276 N.C. 417, 173 S.E. 2d 321 (1970). Second, such liberality should not, however, extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of "judicial legislation." *Andrews v. Nu-Woods, Inc.*, 299 N.C. 723, 726, 264 S.E. 2d 99, 101 (1980) ("[j]udges must interpret and apply statutes as they are written"); *Davis v. Granite Corporation*, 259 N.C. 672,

1. The same issue is raised in another workers' compensation case decided by our Court today: *Chinault v. Pike Electrical Contractors*, 306 N.C. 286, 293 S.E. 2d 147 (1982).

675, 131 S.E. 2d 335, 337 (1963) (a statute must be interpreted according to its "definite and sensible" meaning); *Gilmore v. Board of Education*, 222 N.C. 358, 366, 23 S.E. 2d 292, 297 (1942) ("[i]t is ours to construe the laws and not to make them"). Third, it is not reasonable to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation; consequently, the judiciary should avoid "ingrafting upon a law something that has been omitted, which [it] believes ought to have been embraced." *Shealy v. Associated Transport*, 252 N.C. 738, 741, 114 S.E. 2d 702, 705 (1960); *Rice v. Panel Co.*, 199 N.C. 154, 157, 154 S.E. 69, 70 (1930). Fourth, in all cases of doubt, the intent of the legislature regarding the operation or application of a particular provision is to be discerned from a consideration of the Act as a whole — its language, purposes and spirit. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972); *Morris v. Chevrolet Co.*, 217 N.C. 428, 8 S.E. 2d 484 (1940). Fifth, and finally, the Industrial Commission's legal interpretation of a particular provision is persuasive, although not binding, and should be accorded some weight on appeal and not idly cast aside, since that administrative body hears and decides all questions arising under the Act in the first instance. *Shealy v. Associated Transport, supra*, 252 N.C. at 742, 114 S.E. 2d at 705; *Rice v. Panel Co., supra; see Hanks v. Utilities Co.*, 210 N.C. 312, 186 S.E. 252 (1936). *See generally* G.S. 97-86, 97-91. With these principles firmly in mind, we proceed to examine the statute in issue.

In pertinent part, G.S. 97-38 states the following:

> If death results proximately from the accident and within two years thereafter, or while total disability still continues and within six years after the accident, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty-six and two-thirds percent (66 2/3%) of the average weekly wages of the deceased employee at the time of the accident . . . to the person or persons entitled thereto as follows:
>
> (1) Persons wholly dependent for support upon the earnings of the deceased employee at the time of the acci-

> dent shall be entitled to receive the entire compensation payable share and share alike to the exclusion of all other persons. If there be only one person wholly dependent, then that person shall receive the entire compensation payable.
>
> . . . .
>
> . . . Compensation payments due on account of death shall be paid for a period of 400 weeks from the date of the death of the employee; provided, however, after said 400-week period in case of a widow or widower who is unable to support herself or himself because of physical or mental disability as of the date of death of the employee, compensation payments shall continue during her or his lifetime or until remarriage and compensation payments due a dependent child shall be continued until such child reaches the age of 18.

The thrust of plaintiffs' claim in this case is that the general provision in G.S. 97-38 for the continuation of "compensation payments" to a disabled spouse or minor child beyond the 400-week period is amplified by the specific provision of subsection (1) for dependents of the deceased employee to receive "the *entire* compensation payable" (emphasis added), and that, when these provisions are properly read together, it is manifest that the legislature intended for the total compensation award (66⅔% of the deceased's average weekly wage) to be paid so long as there are any beneficiaries eligible to take it. According to plaintiffs' theory of the statute then, when a member of the post-400 week beneficiary group becomes ineligible to receive further death benefits, his or her share is put back into the compensation "pot," and the entire award is redistributed equally among the remaining eligible beneficiaries. We disagree.

To us, the plain terms of G.S. 97-38 express a clear legislative intent that the employer and its insurance carrier pay the *full amount* of the specified compensation *for 400 weeks* (approximately 7.7 years), or the commuted present value of that sum, if the deceased employee is survived by dependents or next of kin. G.S. 97-38(1)—(3), 97-40. That is the overall, governing aim of the statute, and we are compelled thereby to conclude that, if there is a decrease in the dependent beneficiary pool *during* the 400 weeks following the employee's death, there must be a corre-

sponding reapportionment of the full award payable for that set period among the remaining eligible members of the pool. *See* G.S. 97-38(1), quoted *supra*. *See generally* 99 C.J.S. Workmen's Compensation § 324(e) (1958). That, we hold, is the only situation in which there will be an increase in the amount of the individual shares paid to the dependents still partaking of the compensation fund. For purposes of this case, it suffices to say that the underlying logic of the statute evinces no reason for decreasing the employer's or carrier's *400-week obligation* based merely upon a decrease in the number of persons to whom such payments must be made and that the result we reach is certainly consistent with the tenor of prior decisions indicating that the rights and liabilities arising under G.S. 97-38 attach in a final sense at the time of the employee's death so that the award then determined is not thereafter extinguished *on the payor's end* until it has been paid in full. *See Hill v. Cahoon*, 252 N.C. 295, 113 S.E. 2d 569 (1960); *Queen v. Fibre Co.*, 203 N.C. 94, 164 S.E. 752 (1932); *Brooks v. Clement Co.*, 201 N.C. 768, 161 S.E. 403 (1931). We are not, however, likewise persuaded that a necessary corollary of the statute's primary goal is the broader theory contended for by plaintiffs whereby the employer's or carrier's obligation to a *particular dependent beyond the 400 weeks* is effectively increased due to an event which terminates the similar extended right of some other person to continue receiving his or her equal share of the death benefits after such time.

The legislative history of G.S. 97-38 is significant in this respect. Prior to 1975, workers' compensation death benefits were awarded in an appointed sum for a flat period under the statute. Benefits were not paid to anyone upon any basis beyond the stated term. The General Assembly created an exception to that rule in 1974 by ratifying an amendment to G.S. 97-38 entitled "An Act to Amend the Workmen's Compensation Act Regarding the *Duration* of Benefits." 1973 Sess. Laws, ch. 1308, § 4 (emphasis added). That amendment added language authorizing the continuation of compensation payments beyond 400 weeks to the deceased employee's spouse or child for so long as he or she continued to be "dependent" in a factual or legal sense.

On the face of it, the 1974 amendment to G.S. 97-38 was enacted as a simple means to accomplish a limited end, *i.e.*, the expansion of coverage for two distinct classes of dependents. *See*

also Caldwell v. Realty Co., 32 N.C. App. 676, 681, 233 S.E. 2d 594, 597, *discretionary review denied*, 292 N.C. 728, 235 S.E. 2d 782 (1977). The organization of the amended version of G.S. 97-38 also strongly suggests that the portion dealing with the extended rights of a dependent spouse or child was meant to stand upon its own footing. Consequently, we believe that the specific provisions of subsections (1)—(3) are substantively separate therefrom for the most part. When the statute is so read, the legislature's failure to use the word "entire" to qualify or quantify the amount of compensation to be paid these specially covered dependents is important, and we must give meaningful effect thereto in our construction of the statute.

The 1974 amendment does not plainly say, as it so easily could have with a few more strokes of the pen, that a dependent spouse or child is entitled to receive the entire amount of all compensation due from the employer or carrier on account of the employee's death. Instead, the amendment only says that the compensation payments *due the dependent* shall continue to be paid. There is no indication that that which is due a dependent during the period of extended coverage may vary from that which was due during the initial 400 weeks of coverage. In short, the omission of an explicit and clear mandate concerning the entitlement of the designated dependents to receive, and the obligation of the employer or carrier to pay, the *full* award beyond the initial period, as opposed to the dependents' previously determined shares thereof, is critical, and we shall not overlook it or attempt to fill its void by means of this judicial opinion. We hold that G.S. 97-38 does not permit a reapportionment of the entire compensation award among eligible dependents *after* 400 weeks have elapsed.

Our interpretation of the statute as it is written accords completely with its overriding policy of providing death benefits, *at a fixed rate for a fixed period*, to the *individual* dependents of an employee who has met with an untimely and unexpected demise. It should also be noted that it was never contemplated that the Workers' Compensation Act would provide full compensation in the event of injury or death or that it would be the equivalent of general accident, health or life insurance. *See Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865 (1963); *Kellams v. Metal Products*, 248 N.C. 199, 102 S.E. 2d 841 (1958). Instead, this legislation

was enacted to afford certain and reasonable relief against peculiar hardship. *Kellams v. Metal Products, supra.* Yet plaintiffs complain that the amount of total death benefits payable by the employer or carrier will, although based upon the same average weekly wage, vary greatly from case to case depending on the number and ages of the employee's wholly dependent survivors. The "inequity" that results from this so-called anomaly is inherent in the variety of life itself, and its origins do not strictly spring from the operation of G.S. 97-38. In any event, this is a matter for the legislature to consider and correct, if it be so inclined.

In closing, we mention that we have reviewed cases from other jurisdictions regarding reapportionment of workers' compensation benefits. *See generally* 81 Am. Jur. 2d Workmen's Compensation § 218 (1976 and 1981 Supp.); 99 C.J.S. Workmen's Compensation § 324(e) (1958 and 1981 Supp.). An in-depth analysis of these authorities, which are based upon unique and materially different statutes, would be fruitless and unavailing to our construction of North Carolina's own compensation law, and we shall not engage in lengthy citation here. *See Shealy v. Associated Transport*, 252 N.C. 738, 114 S.E. 2d 702 (1960); *Hill v. Cahoon*, 252 N.C. 295, 113 S.E. 2d 569 (1960); *Rice v. Panel Co.*, 199 N.C. 154, 154 S.E. 69 (1930).

For the reasons stated, the decision of the Court of Appeals and the award of the Industrial Commission are affirmed.

Affirmed.

Justice MITCHELL dissenting.

The interpretation of G.S. 97-38 applied by the majority in the present case will clearly cause the amount of total death benefits payable to workers' dependents to vary wildly from case to case upon no basis other than the number and ages of worker's wholly dependent survivors. Unlike the majority, I do not believe that such results are "inherent in the variety of life itself, and . . . do not strictly spring from the operation of G.S. 97-38."

A comparison of two hypothetical situations involving the death of the same worker is sufficient to reveal the inequitable results which will certainly arise from the application of the ma-

jority's interpretation of the statute. If the worker in the hypothetical case made $270 per week immediately prior to his death, the "total compensation award" or maximum yearly compensation available to his dependents would be 66⅔ percent of this amount or $180 per week without regard to the number of persons wholly dependent upon him at the time of his death. G.S. 97-29; G.S. 97-38. If the hypothetical worker happened to be a widower survived only by one wholly dependent person, a small child one year of age, the weekly benefit of $180 would be paid to that child alone until he reached 18 years of age. When the child reached the age of 18 years, the compensation paid at $180 per week for 17 years would amount to a total of $159,120. This would be true regardless of the manner in which we resolve the issues before us today.

If the same hypothetical worker was a widower and happened to be survived by three wholly dependent minor children whose ages were one year, five years and ten years respectively, a far different result would be required under the interpretation of the statute employed by the majority. Under the majority's interpretation of G.S. 97-38 the "total compensation award" or maximum weekly compensation of $180 per week would be divided equally with each child receiving $60 per week until he reached 18 years of age. The one year old child would receive $60 per week for 17 years for a total of $53,040. The five year old child would receive $60 per week for 13 years for a total of $40,560. The ten year old child would receive $60 per week for 8 years or a total of $24,960. The total amount paid the three minor children would be $118,560 or $40,560 less than the $159,120 received by the sole surviving minor child in the first hypothetical situation.

In my view, such inequities are created primarily by the majority's interpretation of G.S. 97-38 and are not "inherent in the variety of life itself." It is frequently said that variety is the spice of life. Assuming this to be the case, the dish served by the majority is too heavily spiced to suit my taste.

I believe that a proper construction of the statute would allow the dependents of the deceased worker in the second hypothetical situation to receive $180 per week until the youngest of the three children reached 18 years of age with the $180 being divided each week among those still eligible to receive a share. G.S. 97-38(1) provides that:

> Persons wholly dependent for support upon the earnings of the deceased employee at the time of the accident shall be entitled to receive the *entire compensation payable* share and share alike to the exclusion of all other persons. If there be only one person wholly dependent, then that person shall receive the *entire compensation payable*.

(Emphasis added.) The general provision of G.S. 97-38 providing for the continuation of "compensation payments" to a disabled spouse or minor child beyond the 400 week period is, in my view, amplified and extended by the specific provisions of subsection (1) commanding that dependents of the deceased worker receive the "entire compensation payable." When these provisions are read together, it is my view that they are entirely consistent and harmonious and manifest a legislative intent that the term "entire compensation payable" be construed as referring to the required total compensation award of 66⅔ percent of the average weekly wage earned by the deceased immediately prior to his death. Further, I find that the manifest legislative intent was that this total compensation award or "entire compensation payable" be paid so long as there are beneficiaries eligible to take. *See generally* 81 Am. Jur. 2d *Workmen's Compensation* § 218 (1976 and 1981 Supp.); 99 C.J.S. *Workmen's Compensation* § 324(e) (1958 and 1981 Supp.). When a member of the post-400 week beneficiary group becomes ineligible to receive further benefits, that portion of the "entire compensation payable" previously distributed to him should be distributed to the remaining eligible beneficiaries.

I would point out that the interpretation of the statute for which I argue would not remove the inequities "inherent in the variety of life itself." If a worker dies leaving three small children, each of them would still receive less total compensation than he would have received had he been the sole surviving wholly dependent minor child of the same worker. This type of inequity faces every child who has brothers or sisters and is truly "inherent in the variety of life itself."

The interpretation I suggest would, however, prevent the harsh and inequitable results which will arise as a result of the majority's interpretation of the statute. The opinion of the majority compounds and exacerbates the inequities "inherent in the variety of life itself." It will in many cases cause a worker's minor

dependent children who have brothers and sisters to receive not only less individually than a sole dependent child of the same worker would have received, but also less as a class than such sole dependent child would have received individually. I do not believe that the General Assembly intended or the language of the statute requires any such result.

Even if it is conceded *arguendo* that the statute in question lends itself as easily to the interpretation applied by the majority as to the interpretation for which I argue, the plaintiffs here should prevail under established rules of statutory construction applicable to the Worker's Compensation Act. In seeking to discover the legislative intent behind the Act, this Court must consider the language of the Act, the spirit of the Act, and what the Act seeks to accomplish. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). Additionally, the Worker's Compensation Act should be liberally construed, whenever appropriate, so that benefits will not be denied upon mere technicalities or strained and narrow interpretations of its provisions. *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976); *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). In my view, these rules mandate that G.S. 97-38 be interpreted to provide for a reapportionment of the *entire* amount of the total compensation award among the remaining dependent minor children in equal shares as each child reaches the age of 18, after the expiration of the initial compensation period of 400 weeks.

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

Justices EXUM and CARLTON join in this dissenting opinion.

SHARON B. CHINAULT, WIDOW; SHARON B. CHINAULT, GUARDIAN FOR AMY R. CHINAULT, STEP-DAUGHTER, AND HEATHER D. CHINAULT, DAUGHTER; SANDRA W. CHINAULT, GUARDIAN FOR LORI LEIGH CHINAULT, DAUGHTER; JERRY S. CHINAULT, DECEASED EMPLOYEE, PLAINTIFFS v. FLOYD S. PIKE ELECTRICAL CONTRACTORS, EMPLOYER; UNITED STATES FIDELITY AND GUARANTY CO., CARRIER, DEFENDANTS

No. 17PA82

(Filed 13 July 1982)

APPEAL by plaintiffs pursuant to G.S. 7A-31 seeking discretionary review of the decision of the Court of Appeals (*Judge Webb*, with *Judges Hedrick* and *Hill* concurring) reported at 53 N.C. App. 604, 281 S.E. 2d 460 (1981). The Court of Appeals affirmed the opinion and award of the Industrial Commission entered on 5 June 1980 regarding the distribution of compensation benefits to the widow and dependent minor children of the deceased employee.

The pertinent facts of this workers' compensation dispute are summarized in the Court of Appeals' opinion as follows:

> Deputy Commissioner Ben E. Roney made findings of fact based on stipulations that Jerry S. Chinault died on 25 August 1978 as a result of an injury received in an accident arising out of and in the course of employment with Floyd S. Pike Electrical Contractors; that he had an average weekly wage of $460.00; and that he was survived by a widow, two daughters, and one stepdaughter, all of whom were wholly dependent on him. His two daughters and his stepdaughter were under 18 years of age. The parties stipulated the defendant Pike had more than four employees on 25 August 1978 and that they are bound by and subject to the provisions of the Workers' Compensation Act. Deputy Commissioner Roney made an award of $42.00 per week for 400 weeks to the widow and each of the three minor children, with each of the minor children's award of $42.00 per week to continue until the minor reached 18 years of age.

53 N.C. App. at 604-05, 281 S.E. 2d at 461.

The legal issue which subsequently arose on plaintiffs' appeal was whether G.S. 97-38 required reapportionment of the *entire*

award, even after 400 weeks, based upon a decrease in the number of eligible dependents. The Court of Appeals upheld the Industrial Commission's conclusion that "compensation payments due a dependant child beyond the 400-week period is the [same] share which said dependent child is entitled to receive during the 400-week period." Record at 4. In our Court, plaintiffs seek a modification of the Commission's opinion and award to provide that:

> the entire compensation payable in the amount of $168.00 per week be shared equally by the widow and the three children at $42.00 per week for 400 weeks beginning August 25, 1980; that at the end of the 400-week period the compensation of $168.00 per week be shared equally by the three children until Amy reaches the age of 18 on September 5, 1989; that when Amy reaches 18 the compensation of $168.00 per week be shared equally by Lori Leigh and Heather until Lori Leigh reaches the age of 18 on May 14, 1992; that when Lori Leigh reaches 18 Heather be entitled to receive the compensation of $168.00 per week until she reaches the age of 18 on April 26, 1997.

Plaintiffs' Brief at 14.

Faw, Folger, Sharpe & White, by Cama C. Merritt, for plaintiff-appellants.

Hutchins, Tyndall, Doughton & Moore, by Richard Tyndall, for defendant-appellees.

COPELAND, Justice.

This case was consolidated for oral argument with the case of *Deese v. Lawn and Tree Expert Co.*, No. 16PA82 on our docket. Both cases have similar factual settings and raise identical legal issues about the correct interpretation and application of G.S. 97-38. We have this day filed an opinion in the *Deese* case which fully addresses and decides this statutory question in our workers' compensation law. Our reasoning and holding in *Deese*, --- N.C. ---, --- S.E. 2d --- (1982), necessarily governs the outcome in the instant case, and we consequently affirm the decision of the Court of Appeals without further ado.[1]

1. We have thoroughly reviewed and considered the various authorities cited by the parties in their briefs in our more expansive and dispositive discussion in the companion *Deese* case, *supra*.

Affirmed.

Justice MITCHELL dissenting.

I dissent and vote to reverse the Court of Appeals for the reasons set forth in my dissent in the case of *Deese v. Lawn and Tree Expert Co.*, filed this date and bearing our Docket No. 16PA82.

Justices EXUM and CARLTON join in this dissenting opinion.

STATE OF NORTH CAROLINA v. BERNARD REID McKINNON

No. 138A81

(Filed 13 July 1982)

1. **Searches and Seizures § 23— warrant to search automobile—information contained in warrant not stale**

In a prosecution for armed robbery, first degree rape and first degree sexual offense, the trial court properly admitted evidence taken from defendant's automobile pursuant to a search warrant even though the search of the car was conducted two weeks after the crimes were committed where, from the information contained in the warrant, it was reasonable for the issuing magistrate to conclude that probable cause existed that some of the stolen items remained in the automobile and since the affidavit noted that the automobile had not been operational since a short time after the commission of the crime.

2. **Rape and Allied Offenses § 6— first degree rape—instruction concerning type of gun used—no change from theory alleged in indictment**

In a prosecution for first degree rape where the indictment charged that defendant raped and committed a sexual offense upon the victim "with the use of deadly weapons, to wit: a rifle, a shotgun and a pistol," a statement in the instructions that the deadly weapon element of these offenses would be met if the victim reasonably believed a fake gun to be a dangerous or deadly weapon did not change the theory alleged in the indictment since the evidence was plenary that at least three weapons were employed in the commission of the crimes. G.S. § 14-27.2(a)(2)(a) and G.S. § 14-27.4(a)(2)(a) (1981).

3. **Rape and Allied Offenses § 5— first degree rape and first degree sexual offense—sufficiency of evidence that defendant aided and abetted**

In a prosecution for first degree rape and first degree sexual offense, the evidence was sufficient to prove that defendant aided and abetted a codefendant in the commission of both crimes where the evidence tended to show that

defendant was present at the scene of the crimes committed by codefendant and that he actively aided, encouraged and participated in the robbery of all the victims, the stripping of their clothes and the removal of two girls to an area separate from the male victims, and that defendant and codefendant were in close proximity to one another while one of the victims was being sexually assaulted, that both defendants ordered the girls to remove their clothes and both had firearms in their possession.

4. **Rape and Allied Offenses § 6— first degree rape and first degree sexual offense—failure to repeat elements of offenses in final mandate—no error**

It was not error for the trial court to fail to set forth anew all the elements of the underlying offenses of rape and sexual offense in the final mandate after the trial court fully and completely instructed the jury with respect to each of the elements of the offenses of first degree rape and first degree sexual offense as well as the theory of aiding and abetting.

5. **Rape and Allied Offenses § 6.1— first degree rape and first degree sexual offense—failure to submit lesser offenses—no error**

In a prosecution for first degree rape and first degree sexual offense where the evidence indicated that defendant and a codefendant each raped separate victims, if the defendant was guilty of the crimes committed against the victim his codefendant raped, he was guilty as an aider and abettor, and, therefore, was guilty of first degree offenses or nothing at all. Further, as to those offenses to which the defendant was the actual perpetrator, he was not entitled to have the lesser degrees of the offenses submitted to the jury as possible alternative verdicts since the evidence was positive that defendant had a deadly or dangerous weapon in his possession at the time he ordered the victim to perform a sex act and there was no evidence present from which a jury could find that the sexual assaults took place without the use of a weapon or weapons.

BEFORE *Clark, Judge*, at the 25 May 1981 Criminal Session of Superior Court, CUMBERLAND County.

On indictments proper in form defendant was tried and convicted of five counts of armed robbery, two counts of first degree rape and two counts of first degree sexual offense. For each of the armed robbery convictions defendant was sentenced to a minimum of fifteen years and a maximum of twenty years in the state prison as a regular youthful offender. For each of the convictions of first degree rape and first degree sexual offense, defendant was sentenced to a minimum and maximum term of life imprisonment as a regular youthful offender. The court ordered that the life sentences imposed for first degree sexual offenses would begin at the expiration of the fifteen to twenty year sentence imposed for the armed robbery of Linda Marquette, indictment number 80CRS63956. Defendant appealed the life

sentences to this Court as a matter of right. We allowed his motion to bypass the Court of Appeals in the armed robbery cases on 30 December 1981.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Dennis P. Myers, for the State.

Adam Stein, Appellate Defender, and Marc D. Towler, Assistant Appellant Defender, for the defendant.

CARLTON, Justice.

I.

Evidence for the State tended to show that on the evening of 15 December 1980, Jimmy and David Blevins, Roy Allen, Linda Marquette and Angela Graham drove to the Clay Pits, a local swimming hole and gathering place for young people. They arrived in Graham's car at approximately 9:00 p.m. and drank beer and smoked marijuana. A car, with its headlights shining on the Graham car, drove up. It pulled up beside the Graham car and stayed a few minutes. Then the car backed up, its lights were turned out and it left. Shortly thereafter, according to the testimony of the Blevins, Allen, Marquette and Graham, three black males wearing toboggans approached the group, surrounded the car and ordered the occupants to "freeze." Two carried shotguns or rifles while another had a pistol. The three men ordered the group to lie on the ground and keep their heads down. The car was searched and various items were taken. The billfolds were removed from the pants of the men. One of them remarked that they were getting revenge for the way whites had treated blacks in the past. Graham was ordered to raise the hood of her car.

The group was then ordered to strip. They did so and their clothes were thrown into the water. They were again forced to lie down and one of the assailants, who was carrying a shotgun, stood over them. The girls were ordered to move away from the boys and to lie on the ground. One of the men put a shotgun against Graham's face. He forced her to get on her knees and perform oral sex. He then forced her to lie down and raped her. Another of the assailants forced Linda Marquette to perform oral sex and intercourse with him. The girls were then allowed to re-

join the group and were instructed to count backwards from one hundred. They heard the men run away. Numerous items had been taken, including a K-Mart battery, an FM converter, pocketbooks, wallets, money, watches and two six-packs of Budweiser beer. The victims made their way to a nearby house and called the police.

None of the five victims were able to identify defendant as one of the participants in the crimes. Angela Graham testified that defendant was not the person who raped her. She also testified that the man who raped Linda Marquette had a handgun in his pocket.

Additional testimony for the State came from Ivey McCoy (McCoy), who testified pursuant to a plea bargain. He stated that he, Andrew Rich, Angelo McCoy (Angelo) and defendant left McCoy's house in defendant's automobile around 8:00 to 8:30 p.m. on 15 December 1980. They stopped at the Clay Pits at around 9:00 p.m., saw Graham's car there and decided to rob the occupants. They returned to McCoy's house and picked up a .25 automatic pistol, a .22 rifle and a .16 gauge shotgun. They returned to the Clay Pits some ten or fifteen minutes later. They parked the car on the highway and McCoy, Rich and defendant walked down to the Clay Pits. Angelo remained in the car. They announced a hold-up and ordered the group out of the car. Rich told them to lie on the ground. McCoy searched them and took the men's wallets from their pockets and the women's purses from the car. McCoy took the wallets back to defendant's car and returned with a knife to cut the battery wires. Defendant then took the battery to his car.

Defendant and Rich then told everyone to remove their clothes. Rich and defendant gave the guns to McCoy and Rich forced Angela Graham to perform oral sex with him while defendant forced Linda Marquette to perform oral sex also. Marquette was then forced to have intercourse. McCoy testified that he then returned to the car.

McCoy and Angelo then left and returned the guns to McCoy's house and burned the wallets and purses. They left defendant's car at a ball park and returned to the McCoy house around 11:00 p.m. Around midnight, defendant and Rich returned to the house and defendant was boasting of his sexual conquest.

Defendant told McCoy that McCoy had left him with a fake gun. McCoy testified that he had never seen the fake gun.

Other facts pertinent to this opinion are noted below.

II.

[1] These crimes were committed on 15 December 1980. Two weeks later, on 29 December 1980, law enforcement officers obtained a warrant to search defendant's vehicle. The warrant was served on defendant's grandmother and a search of the car revealed several items, including a K-Mart battery. Prior to trial, defendant moved to suppress evidence obtained pursuant to the search warrant on the ground that insufficient probable cause existed for its issuance. Conceding that the underlying affidavit may have shown probable cause to believe that the items were located in defendant's car on 15 December 1980, defendant contends that there is nothing in the underlying affidavit to establish probable cause that the items would be located in the car some two weeks after the robbery. In other words, defendant contends that the information provided in the affidavit before the magistrate suffers from staleness.

It is a basic proposition of constitutional law that in order for a search warrant to be valid it must be based on probable cause. U.S. Const. amend. IV; *accord*, G.S. §§ 15A-243 to -245 (1978). As stated by our case law:

> probable cause means a reasonable ground to believe that the proposed search will reveal the presence, upon the premises to be searched, of the objects sought and that those objects will aid in the apprehension or conviction of the offender. (Citation omitted.) Thus, the affidavit upon which a search warrant is issued is sufficient if it "supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender."

State v. Riddick, 291 N.C. 399, 406, 230 S.E. 2d 506, 511 (1976) (quoting *State v. Vestal*, 278 N.C. 561, 576, 180 S.E. 2d 755, 765 (1971), *cert. denied*, 414 U.S. 874 (1973)); *accord, State v. Jones*, 299 N.C. 298, 261 S.E. 2d 860 (1980).

The application for a search warrant must contain, *inter alia*, a statement that there is probable cause to believe that the items subject to seizure may be found in a designated place. G.S. § 15A-244(2). The statement must be supported by one or more affidavits setting forth with particularity the facts and circumstances establishing probable cause to believe that the items are in that place or in the possession of the individuals to be searched. G.S. § 15A-244(3). Information other than that contained in the affidavit may not be considered by the issuing official in determining probable cause. G.S. § 15A-245.

> The affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant; but the affidavit in such case must contain some of the underlying circumstances from which the affiant's informer concluded that the articles sought were where the informer claimed they were, and some of the underlying circumstances from which the affiant concluded that the informer, whose identity need not be disclosed, was credible and his information reliable. (Citations omitted.)
>
> Whether the affidavit is sufficient to show probable cause must be determined by the issuing magistrate rather than the affiant. This is constitutionally required by the Fourth Amendment. (Citation omitted.)

State v. Campbell, 282 N.C. 125, 129, 191 S.E. 2d 752, 755-56 (1972).

Whether probable cause exists for the issuance of a search warrant depends upon a practical assessment of the relevant circumstances. *State v. Phifer*, 297 N.C. 216, 254 S.E. 2d 586 (1979); *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971). Each case is to be decided on its own facts. "[R]eviewing courts are to pay deference to judicial determinations of probable cause (citation omitted), and 'the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.' " *State v. Louchheim*, 296 N.C. 314, 324, 250 S.E. 2d 630, 636 (quoting *United States v. Ventresca*, 380 U.S. 102, 109, 85 S.Ct. 741, 746, 13 L.Ed. 2d 684, 689 (1965)), *cert. denied*, 444 U.S. 836 (1979).

As defendant correctly notes, probable cause cannot be shown by affidavits which are purely conclusory. An affidavit

which merely states the affiant's belief that probable cause exists without detailing any of the underlying circumstances is insufficient. A recital of some of the underlying circumstances in the affidavit is necessary if the magistrate is to perform his proper function. *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752. The issuing officer "must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion . . . ." *Giordenello v. United States*, 357 U.S. 480, 486, 78 S.Ct. 1245, 1250, 2 L.Ed. 2d 1503, 1509 (1958).

In the application for the search warrant here, the officer swore to the following facts:

> The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: That on 15 December 1980, Angela Graham, Linda Marquette, Jimmy Blevins, David Blevins and Roy Allen stated to this officer that they were at the Clay Pits off 301s and that an old model car, light in color, with one headlight out came to the Clay Pits and turned around, that the vehicle left and about ten to fifteen minutes later, after the described vehicle left, they were approached by three black males armed with firearms, that they were forc[e]d out of the car, that they were robbed of personal property, that a FM Converter and K-Mart battery were taken from Angela's car, that they were made to take their clothing off, that Angela Graham and Linda Marquette were forced at gunpoint to perform oral sex on two of the black males, that these same two black males then raped the girls. On 17 December 1980, Angela Graham looked through a motor vehicle identification book and stated to this officer that the car that came to the clay pits on 15 December 1980 had the same rear features as a 1972 Pontiac. On 27 December 1980, Ivey Dwight McCoy and Bernard Reid McKinnon were arrested on these charges. Ivey McCoy gave a sworn statement to the fact that on 15 December 1980 he went with Bernard McKinnon and Andrew Rich to the clay pits, in Bernard McKinnon's white/gold Pontiac. That they saw the victims there and left and went to his father's house and got guns and came back and robbed the victims and Bernard McKinnon and Andrew Rich forced the girls to perform oral sex on them and then raped them, that he (Ivey McCoy)

had taken the items they stole from the victims and placed them in Bernard McKinnon's car. On 28 December 1980 Det Sgt E E Wiggs went to Rt 12, Box 717, Fayetteville, North Carolina and observed above described vehicle in the yard of this residence. He talked with Mrs Annie D McKinnon and Mrs Barbara McKinnon, Great Grandmother and Mother of Bernard McKinnon. Mrs Annie McKinnon advised that the car was the property of Bernard McKinnon, that he had registered i[t] in the name of Larry Dixon, his uncle, in order to obtain cheaper insurance rates due to a bad driving record. That the car was locked and they didn't know where the keys to it were, that the motor had blown up and it had not been operational since before Christmas. It is believed that some of the items taken during the robbery of the victims are still in the car. I therefore pray that a Search Warrant be issued.

Defendant contends that the foregoing suffers from staleness in that the only statement indicating that the items would be in the defendant's car some two weeks after commission of the crime was the mere conclusory allegation that, "It is believed that some of the items taken during the robbery of the victims are still in the car."

We disagree. A practical assessment of the information before the magistrate could lead a reasonably prudent magistrate to conclude that the information was credible and that the proposed search of the automobile would reveal the presence of the objects sought and that those objects would aid in the apprehension or conviction of the defendant.

> Common sense is the ultimate criterion in determining the degree of evaporation of probable cause. *United States v. Brinklow*, 560 F. 2d 1003 (10th Cir. 1977), *cert. denied*, 434 U.S. 1047 (197[8]); *State v. Louchheim, supra.* "The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock. . . ." (Citations omitted.) "The significance of the length of time between the point probable cause arose and when the warrant issued depends largely upon the property's nature, and should be contemplated in view of the practical consideration of everyday life." *United States v. Brinklow*, supra (citations omitted).

State v. Jones, 299 N.C. at 305, 261 S.E. 2d at 865. Applying the foregoing, we hold that the search warrant was properly issued and the evidence properly admitted. While the items sought could have been disposed of by defendant between the commission of the crimes and the time of his arrest, we are unwilling to say, as a matter of law, that it was unreasonable for the issuing magistrate to conclude that probable cause existed that some of the stolen items remained in the automobile. The affidavit noted that the vehicle had not been operational since before Christmas, that the car was locked and location of the keys unknown, all indicating that the vehicle had not been entered since a short time after the commission of the crimes.

This assignment of error is overruled.

III.

[2] Defendant next contends that the trial court erred in instructing the jury that it could convict defendant of first degree rape and first degree sexual offense upon Linda Marquette on a theory not charged in the indictment. The indictment charged that defendant raped and committed a sexual offense upon Linda Marquette "with the use of deadly weapons, to wit: a rifle, a shotgun and a pistol." The trial court originally instructed the jury in the same words used in the indictment. Later, the trial court instructed the jury that

> if the State proves in this case beyond a reasonable doubt that in the commission of the offenses of first degree rape or first degree sexual offense upon Linda Marquette that the Defendant displayed or employed either a gun which was a deadly weapon, or that he employed or displayed a fake gun, and that Linda Marquette reasonably believed that the fake gun was a dangerous or deadly weapon, then this element of the offenses would be established.

Defendant contends that reference to the fake gun amounted to a charge on a theory not alleged in the indictment. Reference to the fake gun resulted from the testimony of the witness McCoy who testified that defendant had made reference to his being left at the scene with a fake gun. McCoy also testified that he had never seen the fake gun and did not know whether it existed.

We first note that defendant does not challenge the trial court's instructions as being an incorrect statement of the law. His contention is that the trial court's instruction allowed him to be convicted on a theory not alleged in the indictment.

First, we disagree that defendant was tried on a theory different from that alleged in the indictment. The evidence was plenary that at least three weapons were employed in the commission of these crimes. A statement that the deadly weapon element of these offenses would be met if the victim reasonably believed a fake gun to be a dangerous or deadly weapon did not change the theory alleged in the indictment. *See* G.S. §§ 14-27.2 (a)(2)(a), -27.4(a)(2)(a) (1981). Such was a correct statement of the law; the jury was merely instructed that the State's theory as to the element of a dangerous weapon could be met if the victim reasonably believed the item used to be the dangerous or deadly weapon of the type alleged in the indictment.

This assignment of error is overruled.

IV.

Defendant next contends that the trial court improperly expressed its opinion on defendant's guilt when it gave the instruction quoted in the preceding section. The instruction was given after the jury returned and requested to hear again the testimony and statements of Linda Marquette and Ivey McCoy. Again conceding that the instruction was not a misstatement of the law, defendant contends that its timing was such that it constituted an expression of judicial opinion that defendant was guilty of these offenses.

Defendant's argument is patently without merit. We find it inconceivable that the trial court's added and correct instructions to the jury could possibly have been interpreted by the jury as an expression of the court's opinion concerning defendant's guilt.

V.

[3] Defendant next contends that the trial court erred in denying his motions to dismiss the charges of first degree rape and first degree sexual offense upon Angela Graham in that there was insufficient evidence that he aided and abetted Andrew Rich in the commission of these crimes. Noting that the State's evidence

consisted of testimony indicating that he engaged in sexual activity only with Linda Marquette, defendant argues that there was no evidence that he participated with Andrew Rich in any sexual activity with Angela Graham. Defendant contends that the record is devoid of any evidence indicating that he aided and abetted Rich in any manner.

This Court has recently addressed a similar argument in *State v. Barnette*, 304 N.C. 447, 284 S.E. 2d 298 (1981), and we find that case controlling here. There, we reiterated the well-established rule in this jurisdiction that in reviewing the denial of a motion to dismiss, we must examine the evidence adduced at trial in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime. Evidence is "substantial" if a reasonable person would consider it sufficient to support the conclusion that the essential element exists. We stated:

> Put another way, we must examine the evidence to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981); *see Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). First degree rape is defined as vaginal intercourse by force and against the will of the victim when the perpetrator employs or displays a deadly weapon or an article which the victim reasonably believes is a deadly weapon, inflicts serious bodily injury, or is aided or abetted in the commission of the offense by one or more persons. G.S. § 14-27.2(a) (1981). An aider or abettor is a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates or encourages another to commit the offense. (Citations omitted.) Even though not actually present during the commission of the crime, a person may be an aider or abettor if he shares the criminal intent of the perpetrator and if, during the commission of the crime, he is in a position to render any necessary aid to the perpetrator. (Citations omitted.)

Id. at 458, 284 S.E. 2d at 305. Here, the trial court submitted the first degree rape and first degree sexual offense charges to the jury on the theory that defendant aided and abetted Andrew Rich

in the crimes committed against Graham. Evidence for the State was plenary that defendant was not only present at the scene of the crimes committed by Andrew Rich but that he was actively aiding, encouraging and participating in the robbery of all the victims, the stripping of their clothes and the removal of the girls to an area separate from the male victims where the sex crimes took place. The evidence indicates that defendant and Rich were in close proximity to one another while Angela Graham was being sexually assaulted. Both defendants ordered the girls to remove their clothes and both had firearms in their possession. McCoy testified that Rich and defendant had the firearms "drawed on *them.*" (Emphasis added.) Clearly, defendant was an active participant in the crimes committed against Graham by Rich. Thus, there is sufficient evidence that defendant and Rich shared the community of unlawful purpose necessary for aiding and abetting. *See State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939 (1972). The trial court properly denied defendant's motions to dismiss.

VI.

[4] Defendant next contends that the trial court erred because, in its final mandate, it did not set forth all of the elements of the underlying offenses of first degree rape and first degree sexual offense. In the final mandate, the trial court instructed the jury that if it found beyond a reasonable doubt that Rich committed the first degree rape and first degree sexual offense upon Angela Graham and that defendant was present at the time the crimes were committed, was armed, had held his gun on others who were present and had engaged himself in the rape and sexual offense upon Linda Marquette after having participated in the robbery of all the victims and that in so doing the defendant knowingly advised, encouraged or aided Andrew Rich to commit the first degree rape and first degree sexual offense, then defendant could be found guilty of the first degree rape and the first degree sexual offense committed against Angela Graham.

Our review of the trial court's instruction leads us to conclude tht defendant's contention is without merit. Prior to giving its final mandate, the trial court fully and completely instructed the jury with respect to each of the elements of the offenses of first degree rape and first degree sexual offense as well as the

theory of aiding and abetting. We reject defendant's contention that it was error for the trial court to fail to set forth anew all the elements of the underlying offenses of rape and sexual offense in the final mandate. It is well established in this jurisdiction that a charge is to be construed as a whole and if, when so construed, it is sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed, any exception to the charge will not be sustained even though the instruction could have been more aptly worded. *E.g., State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978). Here, the trial court had at length explained the underlying elements of the crimes of rape and sexual offense just prior to the final mandate. We find there is no reasonable cause to believe that the jury was misled or misinformed by failure of the trial court to repeat these elements. *See also State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091 (1976).

VII.

[5] Finally, defendant contends that the trial court erred in failing to submit the lesser included offenses of second degree rape and second degree sexual offense. He contends that the testimony of Ivey McCoy indicated that defendant handed his weapon to McCoy as they began their sexual assaults on Angela Graham and Linda Marquette and, hence, the essential element of use of a deadly weapon is missing.

We find no merit to defendant's contention. We first note that defendant could be convicted of the rape and sexual offense committed upon Graham only if he aided and abetted Rich, the actual perpetrator. If defendant was guilty of the crimes committed against Graham, he was guilty as an aider and abettor. Thus, he was guilty of first degree offenses or nothing at all. *See State v. Barnette*, 304 N.C. 447, 284 S.E. 2d 298. Failure to instruct on second degree rape and second degree sexual offense, as to the crimes committed against Graham, was entirely proper. We turn to a consideration of the offenses committed against Marquette.

As to these offenses, defendant was charged as the actual perpetrator and not as an aider and abettor and was entitled to have all lesser degrees of offenses which were supported by the evidence submitted to the jury as possible alternative verdicts, *State v. Drumgold*, 297 N.C. 267, 254 S.E. 2d 531 (1979). However,

the trial court is not required to submit lesser degrees of a crime to the jury "when the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element of the charged crime." *State v. Harvey*, 281 N.C. 1, 13-14, 187 S.E. 2d 706, 714 (1972); *accord*, *State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980); *State v. Drumgold*, 297 N.C. 267, 254 S.E. 2d 531.

Here, the evidence is positive that the defendant had a deadly or dangerous weapon in his possession at the time he ordered Marquette to perform the sex act and thereby gained her submission and there is no evidence present from which a jury could find that the sexual assaults took place without the use of a weapon or weapons. *See State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189. Linda Marquette testified that the person who forced her to perform fellatio had a gun in his hand. The testimony of the witness McCoy indicated that both Rich and the defendant gave him their guns when they began committing the sex acts with Graham and Marquette and that he remained in the vicinity with the guns throughout the oral sex acts and until defendant and Rich began raping the victims. From this evidence, we do not believe there is a reasonable inference for the jury that the resistance of these victims was overcome by any means other than the use or threatened use of deadly and dangerous weapons, weapons which were displayed by defendant, McCoy and Rich throughout this incident.

In making this argument defendant relies on *State v. Drumgold*, 297 N.C. 267, 254 S.E. 2d 531. There, however, the defendant presented evidence through several witnesses that he did not have a gun in his possession on the day the alleged rape occurred, a contention in clear contrast to the theory of the State's case and the evidence it presented. Here, however, there is absolutely no evidence giving rise to a reasonable inference to dispute the State's contention that defendant had in his possession a dangerous weapon at or near the time these offenses took place. Thus, *Drumgold* is not controlling. *See State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189. This assignment of error is overruled.

We conclude that this defendant had a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. LARRY JUNIOUS BOOKER

No. 64A81

(Filed 13 July 1982)

1. **Criminal Law §§ 26.8, 126.2— inability of jury to reach verdict—note from jury not implied acquittal of first-degree murder—no double jeopardy upon retrial**

Where possible verdicts of guilty of first-degree murder, guilty of second-degree murder and not guilty were submitted to the jury at defendant's first trial, and the first trial ended in a mistrial because the jury could not agree upon a verdict, a note from the foreman of the jury to the trial judge stating that the jury was deadlocked seven to five in favor of a verdict of guilty of second-degree murder did not constitute an implied acquittal of defendant of first-degree murder so as to prohibit the retrial of defendant on that charge under double jeopardy principles, since a final verdict is required before there can be an implied acquittal. Furthermore, the Supreme Court will not adopt a rule requiring the trial court to determine whether the jury had voted unanimously for acquittal on any of the included offenses when the jury indicates to the court that it cannot reach a unanimous verdict. Fifth Amendment to the U.S. Constitution; Art. I, § 19 of the N.C. Constitution.

2. **Criminal Law § 75.2— confession—statement by officer—no improper inducement**

An interrogating officer's statement that defendant "would feel better if he got it off his chest" did not constitute an improper inducement which rendered defendant's confession inadmissible, since an improper inducement engendering hope must relate to the defendant's escape from the criminal charge against him, and the officer's statement referred to a purely collateral advantage which was entirely disconnected from the possible punishment or treatment defendant might receive.

3. **Criminal Law § 75.3— confession—confronting defendant with evidence—no improper inducement**

Defendant was not improperly induced to confess by being confronted with the results of a ballistics test which tended to show that the fatal shots were fired from a pistol in his possession during the time frame of the killing where all the evidence tended to show that defendant was seated in a hallway outside an office where a police officer received a telephone call and that defendant overheard the officer repeat the information received by him concerning the ballistics test since (1) there was no confrontation as such, and (2) even had defendant been confronted with such *bona fide* evidence, this circumstance would not have rendered the subsequent confession inadmissible absent intimidation, coercion or other inducement to confess.

4. **Criminal Law § 75.2— confession—length of time of questioning—absence of deprivation or abuse**

Defendant's confession was not rendered involuntary by the length of time he was questioned absent some deprivation or abuse where defendant

was questioned by two police officers and was in custody for approximately five and one-half hours before he confessed, but defendant was not continuously questioned during such time, and the record shows that defendant remained alone in police headquarters for about one and one-half hours while the officers were making independent investigations concerning the case.

5. Criminal Law § 76.5— voluntariness of confession—conflicting evidence—necessity for findings of fact

The trial court in a prosecution for first-degree murder and armed robbery erred in failing to make findings of fact resolving the conflicting voir dire testimony as to whether interrogating officers threatened defendant with the gas chamber; whether officers told defendant that if he confessed they would tell the district attorney and the judge that defendant had cooperated and things would be lighter on him; whether police officers yelled at defendant during the interrogation and told him to stop telling lies; whether officers, in permitting defendant to talk with his mother, instructed defendant and his mother not to discuss the matter under investigation; whether defendant was told by officers when he requested food that he could eat and could see his family members only if he would confess; and whether officers instructed him on what to say during the recording of his confession.

APPEAL of right from *McLelland, Judge*, at the 12 January 1981 session of ALAMANCE Superior Court.

Defendant was charged in separate bills of indictment, proper in form, with the first-degree murder and the armed robbery of Louis Henry Shoe.

Prior to trial defendant moved to suppress his confession on the ground that it was not voluntarily made. The motion to suppress was heard by Judge Godwin who after hearing evidence found facts and denied the defendant's motion to suppress.

The case before us is the second trial on the charges of first-degree murder and armed robbery. The first trial ended in a mistrial because the jury could not agree upon a verdict. The case then came on for retrial before Judge McLelland, and defendant moved to dismiss the charge of first-degree murder on the grounds that the jury in the first trial had impliedly acquitted him and the State was foreclosed from retrying him on the first-degree murder charge by reason of the double jeopardy provisions of the United States and North Carolina constitutions. The trial judge denied this motion, and defendant thereupon moved to stay the proceedings and for a continuance pending appeal of the denial of his motion to dismiss. Defendant's motions to stay and continue were denied.

The jury returned verdicts of guilty of first-degree murder and of guilty of armed robbery. The trial judge arrested judgment on the armed robbery conviction and sentenced defendant to life imprisonment on the charge of first-degree murder. Defendant appealed to this Court pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Thomas F. Moffitt, Assistant Attorney General, for the State.

Gregory Davis and William T. Wilson, Jr., for defendant appellant.

BRANCH, Chief Justice.

[1] Defendant assigns as error the denial of his motion to dismiss the charge of murder in the first degree. He argues that his retrial on a charge of murder in the first degree would violate his constitutional right, guaranteed by the Fifth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution, to be free from being twice placed in jeopardy for the same criminal offense.

At defendant's first trial the possible verdicts of guilty of first-degree murder, guilty of second-degree murder, and not guilty were submitted to the jury. Defendant asserts that during the first trial the foreman of the jury sent a note to the trial judge which stated that the jury was deadlocked seven to five in favor of a verdict of guilty of second-degree murder. It is defendant's position that this note indicated that the jury had implicitly found the defendant not guilty of first-degree murder. We do not agree.

The general rule in North Carolina is that an order of mistrial will not support a plea of former jeopardy. When a jury has declared its inability to reach a verdict, the action of the trial judge in declaring a mistrial is reviewable only in case of gross abuse of discretion and the burden is on the defendant to show such abuse. *State v. Battle*, 279 N.C. 484, 183 S.E. 2d 641 (1971). *Accord State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981); *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978). There is nothing in this record to show any abuse of discretion on the part of the trial judge. The record merely reflects that in the first trial a mistrial was declared because the jury was unable to reach a verdict and does not disclose that defendant opposed the declaration of a mistrial.

Defendant urges us to adopt the rule enunciated by the New Mexico court in *State v. Castrillo*, 90 N.M. 608, 611, 566 P. 2d 1146, 1149 (1977), as follows:

> Henceforth, when a jury announces its inability to reach verdict in cases involving included offenses, the trial court will be required to submit verdict forms to the jury to determine if it has unanimously voted for acquittal on any of the included offenses. The jury may then be polled with regard to any verdict thus returned.

We reject this request. We are of the opinion that the better reasoned rule is the majority rule which requires a *final verdict* before there can be an implied acquittal. *State v. Cousin*, 292 N.C. 461, 233 S.E. 2d 554 (1977). *See also, Price v. Georgia*, 398 U.S. 323, 26 L.Ed. 2d 300, 90 S.Ct. 1757 (1970); *Green v. United States*, 355 U.S. 184, 2 L.Ed. 2d 199, 78 S.Ct. 221 (1957); *Walters v. State*, 255 Ark. 904, 503 S.W. 2d 895, *cert. denied*, 419 U.S. 833, 42 L.Ed. 2d 59, 95 S.Ct. 59 (1974); *People v. Hall*, 25 Ill. App. 3d 992, 324 N.E. 2d 50 (1975); *People v. Hickey*, 103 Mich. App. 350, 303 N.W. 2d 19 (1981).

The case of *People v. Hickey, supra*, so well states the rationale of these decisions that we deem it proper to quote therefrom the following:

> Defendant's conviction followed a second trial on the charge of first-degree murder, the first trial having ended in a mistrial due to a hung jury. At the first trial, the jury was instructed that it could return one of four possible verdicts: guilty of first-degree murder, guilty of second-degree murder, guilty of voluntary manslaughter, or not guilty. When the jury indicated to the court that it could not reach a unanimous verdict, defense counsel requested that the trial court inquire as to whether the jury had reached a decision concerning defendant's guilt or innocence on any of the charges submitted to it. The trial court refused to make such an inquiry.
>
> Defendant contends that his second trial on the charge of murder was barred by art 1, § 15 of the Michigan Constitution, and by the Fifth Amendment to the United States Constitution, which provide that a person may not be placed

twice in jeopardy for the same offense. Defendant argues that the trial court's failure to inquire as to the status of the jury's deliberations on the various possible verdicts submitted to it prevented the court from discovering whether the jury had decided that defendant was innocent of all charges except manslaughter. Defendant urges the adoption of the rule announced in *State v Castrillo*, 90 NM 608; 566 P 2d 1146 (1977), where it was held that where a jury announced its inability to reach a verdict, and the trial court failed to determine whether the jury had unanimously voted for acquittal on any of the included offenses, jeopardy attached as to all charges except the charge of voluntary manslaughter, the least of the included offenses. The New Mexico court held that there is no plain and obvious reason to declare a mistrial as to any included offense upon which the jury has reached a unanimous agreement of acquittal. Consequently, the Court ruled that when a jury announces its inability to reach a verdict in a case involving included offenses, the trial court is required to submit verdict forms to the jury to determine if it has unanimously voted for acquittal on any of the included offenses, and the jury may then be polled with regard to any verdict thus returned.

Other jurisdictions have examined defendant's argument and rejected it. See, *Walters v State*, 255 Ark 904; 503 SW 2d 895 (1974), *cert den* 419 US 833; 95 SCt 59; 42 LEd 2d 59 (1974), *People v Griffin*, 66 Cal 2d 459; 58 Cal Rptr 107; 426 P 2d 507 (1967), *People v Doolittle*, 23 Cal App 3d 14; 99 Cal Rptr 810 (1972), *People v Hall*, 25 Ill App 3d 992; 324 NE 2d 50 (1975), *State v Hutter*, 145 Neb 798; 18 NW 2d 203 (1945). *We conclude that polling the jury on the various possible verdicts submitted to it would constitute an unwarranted and unwise intrusion into the province of the jury.* As was noted by the California Supreme Court in *Griffin, supra, it must be recognized as a practical matter that jury votes on included offenses may be the result of a temporary compromise in an effort to reach unanimity. A jury should not be precluded from reconsidering a previous vote on any issue, and the weight of final adjudication should not be given to any jury action that is not returned in a final verdict.*

103 Mich. App. at 351-53, 303 N.W. 2d at 20-21. (Emphasis added.)

In *State v. Alston, supra*, defendant was charged with kidnapping, armed robbery, and assault with a deadly weapon with intent to kill inflicting serious injury. The jury was unable to reach a verdict and sent a note to the trial judge that "due to lack of sufficient evidence, the jury cannot come to the agreement that this defendant . . . is in fact the man that committed these crimes." *Id.* at 583, 243 S.E. 2d at 359. A mistrial was declared, and we held that the written memorandum to the trial judge did not constitute an acquittal. Defendant's attempt to distinguish *Alston* from instant case on the ground that there was no indication in *Alston* as to what charge the jury was considering is fruitless. The jury's inability to agree was as to the *identity* of the person who committed the crime and therefore necessarily involved all charges.

In the case before us for decision, the jury did not return a final verdict and therefore there was no implied acquittal.

For reasons stated defendant's assignment of error on this point is overruled.

Defendant further argues that the trial judge erred by denying his motion to stay his retrial pending appeal of the denial of his motion to dismiss, or, in the alternative, to continue the retrial pending appeal. This assignment of error is rendered moot by our decision that defendant was not subjected to double jeopardy.

By his next assignment of error, defendant contends that Judge Godwin erred by denying his motion to suppress his inculpatory in-custody statement to police officers. He argues that the statement was not voluntarily made and was therefore inadmissible into evidence.

No principle is more firmly embedded in the law of this State than the often quoted statement from *State v. Roberts*, 12 N.C. (1 Dev.) 259, 260 (1826), that "a confession cannot be received in evidence where the defendant has been influenced by any threat or promise; . . . a confession obtained by the slightest emotions of hope or fear ought to be rejected." *Accord State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975); *State v. Fuqua*, 269 N.C. 223, 152 S.E. 2d 68 (1967); *State v. Woodruff*, 259 N.C. 333, 130 S.E. 2d 641 (1963); *State v. Stevenson*, 212 N.C. 648, 194 S.E. 81 (1937); *State*

v. Livingston, 202 N.C. 809, 164 S.E. 337 (1932); *State v. Drake*, 113 N.C. 625, 18 S.E. 166 (1893); *State v. Whitfield*, 70 N.C. 356 (1874).

When a defendant properly objects to the admission of the confession or moves to suppress same, the trial judge should conduct a preliminary inquiry to determine whether the confession is voluntary. *State v. Pruitt*, supra; *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968); *State v. Conyers*, 267 N.C. 618, 148 S.E. 2d 569 (1966). In making this determination, the trial judge must find facts; and when the facts are supported by competent evidence, they are conclusive on the appellate courts. However, the conclusions of law drawn from the findings of fact are reviewable by the appellate courts. *State v. Hines*, 266 N.C. 1, 145 S.E. 2d 363 (1965); *State v. Barnes*, 264 N.C. 517, 142 S.E. 2d 344 (1965). Of course, if the evidence is not in conflict, the trial judge's findings are binding on the appellate courts. In instant case defendant testified to some matters tending to show coercion and improper inducement to cause him to confess which were controverted by the State's evidence. He also offered uncontroverted evidence which he contends supports his position that the confession was involuntary. We first address the matters which are not in conflict.

[2] Defendant testified that during his interrogation by the police officers he was told that he "would feel better if he got it off his chest."

This Court has long recognized that the inducement to confess whether it be a promise, a threat, or mere advice must relate to the prisoner's *escape* from the criminal charge against him. *State v. Hardee*, 83 N.C. 619 (1880). In *Hardee* this court quoted with approval from 1 Taylor Ev., § 803, the following:

> "Passing now," says the author, "to the nature of the inducement, it may be laid down as a general rule that in order to exclude a confession, the inducement, whether it assume the shape of a promise, a threat, or a mere advice, must have some reference to the prisoner's escape from the criminal charge against him. So a promise of some merely collateral benefit or boon, as for instance a promise to give the prisoner some spirits or to strike off his handcuffs or to let him see his wife, will not be deemed such an inducement as

will authorize the rejection of a confession made in consequence." 1 Taylor Ev., § 803.

That a collateral inducement, having no relation to the offence, is an insufficient reason for rejecting a confession given in response, is concurred in by other elementary writers and sustained by adjudicated cases. 1 Arch. Cr. Pl., 127; 1 Whar. Cr. Law, § 686; 1 Greenl. Ev., § 229; *State v. Wentworth*, 37 N.H., 196; *Commonwealth v. Howe*, 2 Allen, (Mass.) 158.

83 N.C. at 623-24.

In *State v. Pruitt, supra*, the Court made it clear that an "Improper inducement engendering hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage." 286 N.C. at 458, 212 S.E. 2d at 102. *See also State v. Pressley*, 266 N.C. 663, 147 S.E. 2d 33 (1966).

Here the statement of the interrogating officer was not related to defendant's escape from the charges against him but referred to a purely collateral advantage which was entirely disconnected from the possible punishment or treatment defendant might receive. Such a statement would not come within the rule of *Roberts* or its progeny.

[3] Defendant also avers that he was improperly induced to confess because police officers confronted him with the results of a ballistics test which tended to show that the fatal shots were fired from a pistol in his possession during the time frame of the killing.

All the evidence tends to show that the defendant was seated in a hallway outside an office where a police officer received a telephone call. Defendant overheard the officer repeat the information received by him concerning the ballistics test. Thus there was no confrontation as such. Even had defendant been confronted with this *bona fide* evidence, this circumstance would not have rendered the subsequent confession inadmissible absent intimidation, coercion, or other inducement to confess. This Court has considered several cases in which the accused was confronted with evidence against him in which the Court held that the confrontation did not render an ensuing confession inadmissible absent trickery, coercion, or other improper inducements. *State v.*

Mitchell, 265 N.C. 584, 144 S.E. 2d 646 (1965) (defendant charged with larceny was confronted with the fact that the jacket he was wearing was one of the items reported stolen); *State v. Smith*, 213 N.C. 299, 195 S.E. 819 (1938) (a person accused of rape was confronted with the fact that the description given police of the assailant contained the description of a coat which matched coat owned by accused); *State v. Myers*, 202 N.C. 351, 162 S.E. 764 (1932) (accused charged with murder was confronted with the murder weapon and keys to a stolen automobile which were found in his home). *See also, State v. Anderson*, 208 N.C. 771, 182 S.E. 643 (1935). Our examination of these cases leads us to conclude that it is not the disclosure of the evidence to an accused but an impermissible use of such evidence which may be a circumstance affecting the admissibility of a confession.

Here there is not a vestige of evidence tending to show that the overheard telephone conversation amounted to an act of coercion, threat, or inducement on the part of the police which was designed to extort a confession from defendant.

[4] We next consider the effect of the interrogation of defendant by two police officers on the day the crimes were committed within the five and a half hour time frame between the time defendant was picked up and the time he made an inculpatory statement. Defendant argues that when considered with the totality of the circumstances this prolonged interrogation was an operative factor in rendering his confession inadmissible.

It is true that interrogation by law enforcement officers may be so prolonged under some circumstances as to render a confession involuntary. Circumstances to be considered are whether the interrogation is accompanied by deprivation, abuse, or a relentless and overbearing use of multiple interrogators. *State v. Morgan*, 299 N.C. 191, 261 S.E. 2d 827 (1980).

Here defendant was questioned by two police officers and was in custody for a period of about five and one-half hours before he confessed. He was not continuously questioned during this period of time. The record shows that defendant remained alone in the police headquarters for about one and one-half hours while the officers were making independent investigations concerning the case. Therefore, absent deprivation or abuse, we find nothing amounting to a violation of defendant's constitutional

rights in the *length* of time he was questioned. Further, we are not convinced that any one or the totality of defendant's contentions regarding the uncontroverted evidence above discussed amount to such violation of defendant's due process rights as would render defendant's confession inadmissible. However, there remains the question of whether the totality of the evidence, including both the uncontroverted evidence and the evidence in conflict, amounted to such coercion, actual or psychological, as would render defendant's confession involuntary. It appears that the able trial judge who was considering a motion to suppress evidence resulting from a search and a motion to suppress defendant's confession at the same time inadvertently failed to find facts so as to resolve conflicts in pertinent evidence concerning circumstances surrounding defendant's interrogation and his resulting confession.

[5] Defendant testified on voir dire that during his interrogation by Detective Ingle and Lieutenant Garner he was threatened, promises were made to him, and he was deprived of certain conveniences. Defendant testified that the police threatened him with the gas chamber; the police denied making any threats and specifically denied threatening defendant with the gas chamber or the death penalty. Defendant stated that the police told him that if he confessed they would tell the district attorney and the judge that defendant had cooperated and things would be lighter on him; the police denied making any promises to defendant and specifically denied telling him that things would go easier on him if he confessed. The officers further denied that they offered to intercede on defendant's behalf with the district attorney and the judge if defendant cooperated. Defendant maintained that the police yelled at him during the interrogation and told him to stop telling lies; the police denied yelling at defendant or accusing him of lying. Defendant testified that he was allowed to talk with his mother but only in the presence of a police officer, and they were instructed not to discuss the matter under investigation; the police admitted that defendant was allowed to speak with his mother while an officer was present, but denied that anyone had told them not to discuss the case. Defendant stated that when he requested food he was told that he could eat and could see his family members if he would confess; the police denied depriving defendant of food during the investigation. Defendant maintained

that during the recording of his statement, the police officers questioning him instructed him on what to say; the police officers denied this claim.

The only language in the trial judge's order which addressed this conflicting evidence states that:

> He [defendant] was fully advised of, understood, and waived his aforesaid constitutional rights to remain silent and to legal counsel and . . . he freely, voluntarily, intelligently and intentionally confessed to law enforcement officers that he had robbed and murdered Louis Henry Shoe.

This language is a conclusion of law rather than a finding of fact.

In *State v. Conyers, supra*, Justice Bobbitt (later Chief Justice) speaking for the Court in considering the admissibility of a confession stated:

> At the conclusion of the preliminary hearing, the trial judge made this entry: "Let the records show that the Court finds the statement and admissions to Officer Munn and Officer Watkins were made freely and voluntarily by the defendant without reward or hope of reward, or inducement, or any coercion from said officers."
>
> While under earlier decisions this ruling would have been sufficient, it is insufficient under the rule established in *S. v. Barnes, supra*, and referred to with approval in *S. v. Hines, supra*, and in *S. v. Walker, supra*. The court did not make findings of fact. The statements in the court's ruling are conclusions. Indeed, the ruling here falls short of the ruling held insufficient in *S. v. Barnes, supra*. The following statement of Higgins, J., in *S. v. Barnes, supra*, is applicable here: "Judge Bundy did not resolve the conflicts by findings of fact. This was the exclusive function of the trial court. Absent findings of fact, this Court is unable to say whether Judge Bundy committed error in admitting the contested confession. We may, it seems, no longer rely on the presumption of regularity in such matters."

267 N.C. at 621-22, 148 S.E. 2d at 572.

The court's failure to find facts resolving the conflicting voir dire testimony was prejudicial error requiring remand to the su-

perior court for proper findings and a determination upon such findings of whether the inculpatory statement made to police officers by defendant during his custodial interrogation was voluntarily and understandingly made.

Where there is prejudicial error in the trial court involving an issue or matter not fully determined by that court, the reviewing court may remand the cause to the trial court for appropriate proceedings to determine the issue or matter without ordering a new trial. *United States v. Wade*, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967); *State v. Tart*, 199 N.C. 699, 155 S.E. 609 (1930); *State v. Byrd*, 35 N.C. App. 42, 240 S.E. 2d 494 (1978); *State v. Ingram*, 20 N.C. App. 35, 200 S.E. 2d 417 (1973).

We have exercised our authority under Appellate Rule 2 to suspend the Rules of Appellate Procedure to review this entire record, including errors not raised by defendant or raised but not argued in defendant's brief. We find no other prejudicial error. Therefore, since the trial court may determine the question of voluntariness, and having found no other prejudicial error, we do not deem it necessary to order a new trial.

This cause is remanded to the Superior Court of Alamance County where a judge presiding over a criminal session will conduct a hearing, after due notice and with defendant and his counsel present, to determine whether the statement allegedly made by defendant to Lieutenant Garner and Detective Ingle was made voluntarily and understandingly. If the presiding judge determines that the statement was not voluntarily and understandingly made, he will make his findings of fact and conclusions and enter an order vacating the judgment appealed from, setting aside the verdict, and granting defendant a new trial. If the presiding judge makes a determination based upon competent evidence that the statement of defendant was made voluntarily and understandingly, he will make his findings of fact and conclusions of law, and thereupon order commitment to issue in accordance with the judgment appealed from and entered on 19 January 1981.

No error in the trial except on the issue of whether defendant's custodial statement was voluntary.

Remanded with instructions.

DENNIE J. TAYLOR, EMPLOYEE, PLAINTIFF v. CONE MILLS CORPORATION, EMPLOYER AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 191A82

(Filed 13 July 1982)

Master and Servant § 68— occupational disease—byssinosis—coverage under Session Laws for disablement prior to 1 July 1963

The Commission and the Court of Appeals erred in finding as fact and concluding as law that the respiratory surfaces of the lungs are not "external contact surfaces" of the body within the meaning of the version of G.S. 97-53(13) in effect at the time plaintiff became disabled on 5 January 1963, and plaintiff was entitled to compensation for his disability resulting from byssinosis.

ON appeal as a matter of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 56 N.C. App. 291, 289 S.E. 2d 60 (1982), one judge dissenting, affirming the opinion of the North Carolina Industrial Commission filed 31 March 1981 denying a claim by plaintiff under the North Carolina Workers' Compensation Act.

We reverse and hold that compensation is allowable for disabling byssinosis contracted prior to 1 July 1963 under the definition of occupational diseases contained in the Workers' Compensation Act in effect prior to that date.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Henry N. Patterson, Jr., Michael K. Curtis and Jonatha R. Harkavy, for plaintiff-appellant.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., for defendant-appellees.

CARLTON, Justice.

I.

On 7 April 1975 plaintiff filed a claim with the North Carolina Industrial Commission seeking compensation for permanent and total disability caused by byssinosis allegedly contracted during his employment by defendant Cone Mills Corporation (Cone Mills) at the White Oak Plant. Plaintiff alleged that he began experiencing periods of temporary partial disability in 1959 and became

totally and permanently disabled in January of 1963. It was stipulated that the parties were subject to and were covered by the provisions of the North Carolina Workers' Compensation Act at the time plaintiff allegedly contracted byssinosis and that an employer-employee relationship existed between Cone Mills and plaintiff from 1949 to 4 January 1963.

At the hearing before Deputy Commissioner Ben E. Roney, Jr., plaintiff presented evidence of his work history, which showed that he had worked at a cotton mill not owned by Cone Mills for brief periods of time between 1929 and 1938, that he worked at another cotton mill from 1938 to 1944 and that he worked for defendant Cone Mills from 1949 to January 1963, when he became disabled. During the intervening periods of time he was employed outside the textile industry. Medical evidence showed that plaintiff had been disabled for work since 1963 by byssinosis. Dr. Leo J. Heaphy, whose testimony was received in the form of a deposition, stated that at the time plaintiff retired from employment with Cone Mills he was suffering from "Byssinosis, Stage III . . . (chronic obstructive lung disease—pulmonary emphysema and chronic bronchitis—due to longterm exposure to cotton trash dust). The [plaintiff] was totally and permanently disabled at the time of his retirement." Dr. Kaye H. Kilburn also testified by deposition and discussed the pathology of the reaction caused by prolonged exposure to cotton dust. He also stated that the entire respiratory surface of the lungs is an "external contact surface" because it is in constant contact with the external environment and is responsive to environmental materials.[1]

Defendants presented no evidence.

Based on the evidence admitted at the hearing Deputy Commissioner Roney made extensive findings of fact in which he re-

1. Under G.S. 97-53(13), as it existed at the time plaintiff became disabled, the following occupational diseases were made compensable:

(13) Infection or inflammation of the skin or eyes or other external contact surfaces or oral or nasal cavities due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases, or vapors, and any other materials or substances.

Law of March 26, 1935, ch. 123, 1935 N.C. Public Laws 130 (1935), as amended by Law of June 12, 1957, ch. 1396, s. 6, 1957 N.C. Sess. Laws 1589 (1957).

counted plaintiff's work history and the various medical problems suffered by plaintiff as a result of conditions in the workplace. He also found the following facts:

> 10. Claimant experienced long-term exposure to respirable cotton trash dust while working for defendant employer from 1949 through October 1962. He developed severe chronic obstructive pulmonary disease as a result of this exposure. He is suffering from byssinosis. Claimant also suffers from cor pulmonale and arteriosclerotic heart disease with intermittent angina pectoris.
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> 11. Claimant experienced permanent injury to the lungs resulting from long-term exposure to cotton trash dust.
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> 12. Byssinosis is a disease proven to be due to causes and conditions peculiar to and characteristic of employment in cotton textile mills. The precise identity of the offending agent is unknown. Cotton goods that have been dyed or washed or otherwise treated have lost their capacity to produce any kind of ill effect.
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> 13. The pathology of byssinosis is essentially that of chronic bronchitis; i.e., inflammation of the small airways that conduct air to and from the alveoli. Mucous production and white blood cell recruitment occurs when respirable cotton trash dust falls onto the cells of the airways. Mediators are released, causing narrowing of the airways. An asthmatic like response results. Increase in body temperature and decrease in the capacity of the lungs to exchange gas are acute responses to exposure to respirable cotton trash dust.
>
> 14. The lungs are essential internal organs of respiration. They are two in number, placed one on each side of the chest and separated from each other by the heart and other contents of the mediastinum.
>
> 15. The respiratory surfaces of the lungs are not external contact surfaces of the body.
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> 16. Claimant became incapacitated on 5 January 1963 from earning the wages he was receiving at the time thereof in the same or any other employment because of severe fixed small and large airways obstructive and restrictive ven-

tilatory impairment. This incapacity to earn wages results from permanent injury to the lungs.

17. Claimant's average weekly wages were $60.21.

Deputy Commissioner Roney then concluded as a matter of law that the Workers' Compensation Act as it existed on 5 January 1963, the date of plaintiff's disability, did not provide for payment of compensation for disability occasioned by byssinosis. He concluded as a matter of law that the respiratory surfaces of the lungs were not external contact surfaces of the body but that the lungs were essential internal organs of respiration and, thus, plaintiff's disease was not an occupational disease as that term was defined by G.S. 97-53(13) in 1963. Implicit in his conclusion was his belief that the 1963 version of the Act embraced coverage for infection or inflammation of only external bodily surfaces as a result of irritants in the workplace. Nonetheless, the Commissioner then concluded that plaintiff was entitled to compensation for permanent injury to important organs of the body occasioned by byssinosis that might reasonably be presumed to have caused the diminution of his future earning capacity, and awarded plaintiff $7,000, citing Chapter 1305 of the 1979 North Carolina Session Laws.[2]

Both plaintiff and defendants appealed to the full Commission. The Commission found the facts to be the same as those

2. That chapter provided:

AN ACT TO PROVIDE THAT BYSSINOSIS, KNOWN AS "BROWN LUNG DISEASE", SHALL BE DEEMED AN OCCUPATIONAL DISEASE WITHIN THE MEANING OF G.S. 97-53(13) FOR PURPOSES OF WORKMEN'S COMPENSATION CLAIMS REGARDLESS OF THE DATE THE DISEASE ORIGINATED.

The General Assembly of North Carolina enacts:

Section 1. Claims for "brown lung disease", which can be proved under G.S. 97-53(13) shall be compensable regardless of the employee's date of last injurious exposure.

Sec. 2. This act is effective upon ratification.

Sec. 3. This act will expire April 30, 1981; however, this provision does not apply to any claims filed prior to April 30, 1981.

In the General Assembly read three times and ratified, this the 25th day of June, 1980.

Law of June 25, 1980, Ch. 1350, 1979 N.C. Sess. Laws 217 (1980).

found by the deputy commissioner and concluded, as did Deputy Commissioner Roney, that the lungs are not "external contact surfaces" and that plaintiff was not entitled to compensation under G.S. 97-53(13) as it existed on the date he became permanently disabled. The Commission, however, did not agree that plaintiff's diminution of future earning capacity was made compensable by Chapter 1305 of the 1979 Session Laws and denied his claim *in toto*. Commissioner Vance dissented.

Plaintiff appealed to the Court of Appeals. The Court of Appeals affirmed in an opinion by Judge Wells, in which Judge Robert M. Martin concurred. Citing the pre-1963 version of G.S. 97-53(13),[3] that court noted that the dispositive question on plaintiff's claim for disability due to byssinosis was whether byssinosis manifests itself as an irritation of "other external contact surfaces" of the human body. Although Judge Wells quoted several pages of the extensive medical testimony of Dr. Kilburn which included the opinion that byssinosis was an inflammation of an "external contact surface," Judge Wells concluded that such terms were not technical in nature and should therefore be construed in accordance with their common and ordinary meaning. So construing the word "external," the Court of Appeals held that ordinary usage of the word would lead to the conclusion that its reference here was to a part of the body outwardly situated or relating to the outside or outer part of the body, *i.e.*, that "external" refers to or modifies "surfaces." Since the lungs are internal organs of the body, the Court of Appeals reasoned that the Legislature did not intend coverage for byssinosis under the statute in effect on the date of plaintiff's last injurious exposure and the date of his disability. The court cited the 1 July 1963 amendment of G.S. 97-53(13) to include "internal organs" in support of its interpretation of the prior version of the statute. The Court of Appeals also held that Chapter 1305 of the 1979 Session Laws[4] had no application to plaintiff's claim.

Judge Webb dissented. He disagreed that the words "external contact surface" had no technical meaning. Relying on the expert medical testimony, he stated that the respiratory surface of the lung was an external contact surface and, therefore, that the

3. G.S. 97-53(13) is set out in full in note 1 *supra*.

4. See note 2 *supra* for the text of that act.

pre-1963 version of G.S. 97-53(13) allowed recovery for disability caused by byssinosis.

We agree with Judge Webb and reverse.

II.

Defendants do not challenge the Commission's finding and conclusion that plaintiff became permanently disabled on 5 January 1963 as a result of byssinosis developed from exposure to cotton dust while plaintiff was employed by defendant from 1949 through 1962. The question dispositive of this appeal, therefore, is whether the Court of Appeals erred in affirming the Industrial Commission's conclusion of law that the pertinent section of the Workers' Compensation Act in effect on 5 January 1963 did not provide for payment of compensation for disability occasioned by byssinosis.

In enumerating diseases and conditions deemed to be occupational diseases within the meaning of the Workers' Compensation Act, G.S. 97-53(13) as written prior to 1 July 1963 included, "Infection or inflammation of . . . *other external contact surfaces* due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors, and any other materials or substances." (Emphasis added.)[5]

5. G.S. 97-53(13) has since been twice amended. Effective 1 July 1963 the statute was amended to provide:

> (13) Infection or inflammation of the skin, eyes, or other external contact surfaces or oral or nasal cavities 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.
>
> The provisions of this subsection shall not apply to cases of occupational diseases not included in said subsection prior to [July 1, 1963,] unless the last exposure in an occupation subject to the hazards of such disease occurred on or after [July 1, 1963].

Law of June 18, 1963, Ch. 965, s. 1, 1963 N.C. Sess. Laws 1224 (1963). This language was stricken out by a 1971 amendment. The 1971 amendment remains the current language of subsection 13 and provides:

> (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.

G.S. § 97-53(13) (1979).

The Commission found, and no one disputes, that plaintiff experienced permanent injury to his lungs by reason of the effects of byssinosis. However, the Commission concluded, and the Court of Appeals agreed, that the respiratory surfaces of the lungs are not "external contact surfaces" of the body within the meaning of the quoted statute and, thus, that plaintiff's disability was not compensable. In so holding, the Commission and the Court of Appeals erred.

Whether a given illness falls within the general definition of an occupational disease set out in G.S. 97-53(13) is a mixed question of fact and law. *Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 640, 256 S.E. 2d 692, 695 (1979); *accord, Taylor v. J. P. Stevens & Co.*, 300 N.C. 94, 104, 265 S.E. 2d 144, 150 (1980). Mixed questions of law and fact are fully reviewable on appeal. *Brown v. Charlotte-Mecklenburg Board of Education*, 269 N.C. 667, 153 S.E. 2d 335 (1967). Findings of fact made by the Commission are conclusive on appeal when supported by competent evidence, even when there is a conflict in the evidence; however, an exception to a finding of fact not supported by competent evidence must be sustained. *Morse v. Curtis*, 276 N.C. 371, 172 S.E. 2d 495 (1970).

In *Wood*, this Court set out the approach to be followed by the Commission in determining whether a particular illness falls within the definition provided by G.S. 97-53(13):

> The Commission must determine first the nature of the disease from which the plaintiff is suffering—that is, its characteristics, symptoms and manifestations. Ordinarily, such findings will be based on expert medical testimony. Having made appropriate findings of fact, the next question the Commission must answer is whether or not the illness plaintiff has contracted falls within the definition set out in the statute. This latter judgment requires a conclusion of law.

297 N.C. at 640, 256 S.E. 2d at 695-96. Of particular importance to the instant case, this Court added the following statement:

> [W]hile the construction of a statute is ultimately a question of law for the courts, expert opinion testimony as to the meaning of technical terms used in a statute is clearly competent. (Citations omitted.) "Expert testimony may be received as an aid to proper interpretation if the statute or rule (a)

used technical terms not generally understood . . . ; or (b) is ambiguous or indefinite." *Hillman v. Northern Wasco County People's Utility District*, 213 Or. 264, 297, 323 P. 2d 664, 680 (1958).

Id. at 642, 256 S.E. 2d at 696.

Applying the foregoing to the record before us, we first consider the extensive testimony of Dr. Kaye H. Kilburn, a recognized authority on the causes and characteristics of byssinosis. Indeed, Dr. Kilburn's testimony was so impressive to the Court of Appeals that the majority opinion quoted several pages of it. 56 N.C. App. at 295-301, 289 S.E. 2d at 63-66. Of primary importance to the question before us is the following pointed testimony elicited from Dr. Kilburn:

> I have been asked if I have an opinion on whether byssinosis is also an inflammation of the external contact surface. I think it truly has to be considered, as we have for many years in the study of lung disease, that *the entire respiratory surface of the lung is an external contact surface.* That is what all our air pollution legislation is based on. There is solid experimental and epidemiologic evidence that though we have something in the neighborhood of one-half to two square meters of body surface which is skin, we have in the neighborhood of 180 square meters or roughly the size of a tennis court of body surface, which is lung, and both are in the same intimate contact with the air which we walk around in and beathe [sic]. But one is 100 times as extensive as the other, so that plus the fact the lung is sort of one thin cell thick and the skin is many cells thick.
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> So, in terms of being responsive to environmental materials, whether they be natural or manmade, *the lung is an external contact surface* which is responsive to this material, whatever it be, that we get in this mixture which we breathe and call air.

(Emphasis added.)

While apparently believing all other medical testimony presented, the Commission and the Court of Appeals disregarded the testimony quoted above as irrelevant to whether plaintiff's disease fell within the meaning of "external contact surfaces" as

used in G.S. 97-53(13) as it read on 5 January 1963. The Court of Appeals reasoned that the words, "external contact surface," were not technical and should therefore be construed in accordance with their common and ordinary meaning. The court then reasoned in essence that the word "external" indicated a legislative intent that only irritation or inflammation of external bodily organs was embraced by G.S. 97-53(13). In other words, the Court of Appeals interpreted "external" as modifying "surfaces." Rejecting plaintiff's contention and evidence that the respiratory surfaces of the lungs should be considered as "external contact surfaces" as contemplated by the statute, the Court of Appeals concluded,

> Despite Dr. Kilburn's stimulating and enlightened testimony, we reject plaintiff's argument that Dr. Kilburn's present opinion, based upon the impressive research carried out by him and other experts in the study of byssinosis during the past ten to fifteen years, should be engrafted upon the legislative intent as that intent was manifested when the statute in question was enacted.

56 N.C. App. at 302, 289 S.E. 2d at 66.

The Court of Appeals first erred in considering the term "external contact surfaces" as an ordinary and non-technical one. Clearly, such a phrase, when employed in the context of defining parts of the human anatomy, is technical in nature and its meaning can be ascertained only by reference to expert medical testimony. While such words have a meaning generally understood in ordinary usage, we believe the use of those words in a statute defining compensable occupational diseases clearly calls for the aid of medical experts in deciding which parts of the human anatomy fall within that term. Expert medical testimony was essential for the proper interpretation of "external contact surfaces" and Dr. Kilburn's testimony was particularly important because it was uncontroverted even by lay testimony. Under these circumstances, neither the Commission nor the Court of Appeals is free to interpret such technically used terms as it chooses.

Additionally, the Court of Appeals and the Industrial Commission erred in interpreting "external" as modifying "surfaces." When the phrase "external contact surfaces" is interpreted as it

was by the Court of Appeals to refer to external parts of the body, the word "contact" has no meaning whatsoever. When the word "external" is read as modifying "contact," the term clearly refers to a surface of the body which is in contact with the outer or external environment. Such a reading gives due regard to each word used by the Legislature and more fully accomplishes compensation for damage done by "oils, cutting compounds, chemical dust, liquids, fumes, gases, or vapors and any other materials or substances." By its list of irritants we think the Legislature evinced a clear intent that the respiratory surfaces of the lungs be considered "external contact surfaces."

We hold, therefore, that the Court of Appeals erred in affirming the finding and conclusion of the Commission that the respiratory surfaces of the lungs are not external contact surfaces of the body as contemplated by G.S. 97-53(13) as it existed in January of 1963. There is no competent evidence in the record to support such a finding of fact and, consequently, there is no competent finding of fact to support such a conclusion of law. In so holding, we do not quarrel with defendant's contention that it is well established in this jurisdiction that the Commission may accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the witness. Here, it is crystal clear that neither the Commission nor the Court of Appeals chose to disbelieve Dr. Kilburn. Indeed, each relied extensively on his testimony. The error of each was in assuming that the key words, "external contact surface," had no medical meaning or significance and that Dr. Kilburn's testimony should therefore be ignored, leaving the findings and conclusions devoid of *any* competent evidence in the record. Additionally, that the air surrounding us, and any impurities it may contain, is in constant contact with the respiratory surfaces of the lung is an established medical fact which is beyond dispute. Under our interpretation of "external contact surfaces" the respiratory surfaces of the lung are included in the coverage of the statute.

Nor do we find, as argued by defendant, that our holding here is inconsistent with our holding in *Taylor v. J. P. Stevens & Company*, 300 N.C. 94, 265 S.E. 2d 144. There, we referred to the lungs as "internal organs." Clearly, lungs are internal organs, but the terms "internal organs" and "external contact surfaces" are not mutually exclusive terms, as understood by the medical pro-

fession and as evidenced by Dr. Kilburn's testimony. Here, Dr. Kilburn's uncontroverted testimony showed that byssinosis is an irritation or inflammation of the respiratory surfaces of the lungs, which themselves are internal organs, and that the respiratory surface of the lungs is an "external contact surface" as that term was used in the version of G.S. 97-53(13) in effect at the time plaintiff in this case became disabled.

In light of our holding, it is unnecessary for us to reach the second question addressed by the Court of Appeals, whether the effect of Chapter 1305 of the 1979 Session Laws is to allow coverage for employees last injuriously exposed and disabled from byssinosis prior to 1 July 1963 even if compensation would not otherwise be payable under the Workers' Compensation Act. We express no opinion on the court's treatment of this issue.

In summary, we hold that the Commission and the Court of Appeals erred in finding as fact and concluding as law that the respiratory surfaces of the lungs are not "external contact surfaces" of the body within the meaning of the version of G.S. 97-53(13) in effect at the time plaintiff became disabled, 5 January 1963. Accordingly, the decision of the Court of Appeals is reversed. The case is remanded to that court with instructions to remand to the Industrial Commission for entry of an order compensating plaintiff for his disability resulting from byssinosis.

Reversed and remanded.

LELA J. TEACHY, ADMINISTRATRIX OF THE ESTATE OF JAMES EVERETTE TEACHY, JR., PLAINTIFF v. COBLE DAIRIES, INC., A NORTH CAROLINA CORPORATION AND EDWIN DEAN HOLMES, ORIGINAL DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. DEPARTMENT OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA, THIRD-PARTY DEFENDANT

No. 90PA82

(Filed 13 July 1982)

1. Appeal and Error § 6.3— subject matter jurisdiction—denial of motion to dismiss—no immediate appeal

The denial of a motion under G.S. 1A-1, Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction is an interlocutory order from which no immediate appeal may be taken.

2. Rules of Civil Procedure § 14— State as third-party defendant—interpretation of Rule 14(c)

The term "third-party plaintiff" in the 1975 enactment of G.S. 1A-1, Rule 14(c) should be read "third party" or "third-party defendant," and the 1981 amendment thereto did not alter Rule 14(c) substantively but merely reiterated the intention of the legislature that the State be subject to tort claims as a third-party defendant in the State courts.

3. Rules of Civil Procedure § 14; State § 4— joinder of State as third-party defendant in State courts

The State may be joined as a third-party defendant, whether in an action for contribution or for indemnification, in a tort action brought in the courts of North Carolina. G.S. 1A-1, Rule 14(c); G.S. 1B-1(h).

4. State § 4— actions against State as third-party defendant—sufficiency of pleading

Actions brought against the State as a third-party defendant in the State courts need not conform to the pleading requirements of the Industrial Commission, but the third-party plaintiff must prove the same elements as required in cases heard before the Industrial Commission. Therefore, the trial court did not err in denying a motion to dismiss a third-party complaint against the State because it did not comply with the requisites for the affidavit required by G.S. 143-297 in cases heard before the Industrial Commission.

ON discretionary review of the decision of the North Carolina Court of Appeals, reported at 54 N.C. App. 688, 284 S.E. 2d 332 (1981), dismissing the third-party defendant's appeal from the denial by the trial court, *Judge F. Gordon Battle*, of the third-party defendant's motion to dismiss the third-party complaint.

Taylor, Warren, Kerr & Walker, by John H. Kerr III, for Third-Party Plaintiff-Appellees.

Rufus L. Edmisten, Attorney General, by Ralf F. Haskell, Assistant Attorney General for Third-Party Defendant-Appellant.

MITCHELL, Justice.

The plaintiff, administratrix of the estate of James Everette Teachy, Jr., brought an action in the Superior Court of Wayne County against Coble Dairies, Inc. and Edward Dean Holmes for the wrongful death of her intestate. The death allegedly resulted from the collision of an automobile driven by the decedent with a truck owned by the defendant Coble Dairies, Inc. and operated by the defendant Holmes. The defendants filed answers denying

their negligence and alleging contributory negligence. The defendants also filed a third-party complaint against the Department of Transportation of the State of North Carolina alleging negligence in the maintenance of a traffic light at the intersection where the collision occurred.

The third-party defendant, the Department of Transportation of the State of North Carolina, filed a bifold motion to dismiss the third-party complaint consisting of a motion to dismiss for failure to state a claim upon which relief could be granted and a motion to dismiss for lack of jurisdiction based upon the doctrine of sovereign immunity. The trial court denied both. The Court of Appeals refused to review the denial of either motion on grounds that the denial of such motions is not immediately appealable. For the reasons stated herein, we consider those questions rejected by the Court of Appeals and hold that the doctrine of sovereign immunity does not prevent the State from being joined as a third-party defendant to a tort action brought in the courts of North Carolina.

The denial of a motion to dismiss for failure to state a claim upon which relief can be granted, made pursuant to Rule 12(b)(6), Rules of Civil Procedure, G.S. 1A-1, is an interlocutory order from which no immediate appeal may be taken. *State v. School*, 299 N.C. 351, 261 S.E. 2d 908, *appeal dismissed*, 449 U.S. 807, 66 L.Ed. 2d 11, 101 S.Ct. 55 (1980). The Court of Appeals correctly refused to review the trial court's denial of the motion of the State as third-party defendant to dismiss on this ground.

The Court of Appeals further held that the denial of a motion to dismiss on grounds of sovereign immunity is not immediately appealable. This decision was based on the conclusion that the denial of a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction is not immediately appealable and the *sub silentio* determination that sovereign immunity is a matter of subject matter jurisdiction. This decision by the Court of Appeals squarely conflicts with its decisions in *Stahl-Rider, Inc. v. State*, 48 N.C. App. 380, 269 S.E. 2d 217 (1980) and *Sides v. Hospital*, 22 N.C. App. 117, 205 S.E. 2d 784 (1974), *modified*, 287 N.C. 14, 213 S.E. 2d 297 (1975).

[1] In holding that the denial of a motion under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction is not immediately

appealable, the Court of Appeals relied on *Shaver v. Construction Co.*, 54 N.C. App. 486, 283 S.E. 2d 526 (1981), wherein it interpreted G.S. 1-277. That statute provides for immediate appeal of certain orders and determinations of trial judges. An order granting a motion to dismiss for lack of subject matter jurisdiction is immediately appealable under G.S. 1-277(a), because it determines or discontinues the action. G.S. 1-277(b) permits the immediate appeal of a ruling, whether granting or denying a motion to dismiss under Rule 12(b)(2), as to the court's jurisdiction over the defendant's person or property. The *Shaver* opinion acknowledged that, while G.S. 1-277(b) permits the immediate appeal of an order denying a motion made pursuant to Rule 12(b)(2) to dismiss for lack of jurisdiction over the person, that statute does not apply to orders denying motions made pursuant to Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction. The Court of Appeals held that such orders, the same as other orders not determinative of an action, are interlocutory and therefore not immediately appealable. Under the principle of *inclusio unius est exclusio alterius*, the reasoning of the Court of Appeals on this point is sound. The contrary holding in *Eller v. Coca-Cola Co.*, 53 N.C. App. 500, 281 S.E. 2d 81 (1981) and *Kilby v. Dowdle*, 4 N.C. App. 450, 166 S.E. 2d 875 (1969) should be disregarded.

The application of the foregoing rule to the instant case is not so unassailable, however. Courts have differed as to whether sovereign immunity is a matter of personal or subject matter jurisdiction. The very ambiguity in the couching of the motion to dismiss is indicative of this confusion. A viable argument may be propounded that the State, as a party, is claiming by the doctrine of sovereign immunity that the particular forum of the State courts has no jurisdiction over the State's person. *See Stahl-Rider, Inc. v. State*, 48 N.C. App. 380, 269 S.E. 2d 217 (1980); *Sides v. Hospital*, 22 N.C. App. 117, 205 S.E. 2d 784 (1974), *modified*, 287 N.C. 14, 213 S.E. 2d 297 (1975). On the other hand, the doctrine may be characterized as an objection that the State courts have no jurisdiction to hear the particular subject matter of tort claims against the State. *See Petition of Petrol Shipping Corp.*, 360 F. 2d 103 (2d Cir.) *cert. denied*, 385 U.S. 931, 17 L.Ed. 2d 213, 87 S.Ct. 291 (1966); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1351 (1969). Although the federal courts have tended to minimize the importance of the designation of a sovereign

immunity defense as either a Rule 12(b)(1) motion regarding subject matter jurisdiction or a Rule 12(b)(2) motion regarding jurisdiction over the person, the distinction becomes crucial in North Carolina because G.S. 1-277(b) allows the immediate appeal of a denial of a Rule 12(b)(2) motion but not the immediate appeal of a denial of a Rule 12(b)(1) motion. The determination of this issue is not essential to this Court's authority to decide the instant case, however, because the case is before us on discretionary review under G.S. 7A-31, and we elect to exercise our supervisory authority to determine the underlying issues. *See Consumers Power Co. v. Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974) (exercise of supervisory jurisdiction when appeal did not lie). Moreover, our decision on the merits should abate the recurrence of such attempted immediate appeals. Therefore, we do not determine whether sovereign immunity is a question of subject matter jurisdiction or whether the denial of a motion to dismiss on grounds of sovereign immunity is immediately appealable.

Sovereign immunity, as Justice Miller once observed, is a principle which "has never been discussed or the reasons for it given, but . . . has always been treated as an established doctrine." *United States v. Lee*, 106 U.S. 196, 207, 27 L.Ed. 171, 177, 1 S.Ct. 240, 250 (1882). The concept of sovereign immunity, extant in the English common law, made its way into the common law of colonial North Carolina and remains in force in this State. G.S. 4-1; *Bruton v. Enterprises, Inc.*, 273 N.C. 399, 160 S.E. 2d 482 (1968). Anomalously, the rationale underlying English sovereign immunity — that the King can do no wrong — was implicitly rejected by the abolition of the monarchy in this country. Comment, *Sovereign Immunity: A Modern Rationale in Light of the 1976 Amendments to the Administrative Procedure Act*, 1981 DUKE L.J. 116, 118.

The perceived pervasiveness of the principle is evidenced by the repeated characterization of sovereign immunity as "an established principle of jurisprudence in all civilized nations." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529, 15 L.E. 991, 992 (1857), *quoted in Carpenter v. Railroad*, 184 N.C. 400, 402, 114 S.E. 693, 694 (1922). This Court continued to endorse the doctrine in such language until relatively recently. *See Schloss v. Highway Commission*, 230 N.C. 489, 53 S.E. 2d 517 (1949).

Meanwhile, the oft-criticized principle was abrogated in part by legislative enactments. Congress passed the Federal Tort Claims Act in 1946. 60 Stat. 842 (1946), 28 U.S.C. §§ 2671-2680, 1346(b), 1402(b), 2402, 2411 (1948). A year later, the United Kingdom abolished such immunity. English Crown Proceeding Act of 1947, 10-11 Geo. VI, c. 44. In North Carolina, the doctrine was initially eroded by piecemeal legislation. *See A Survey of Statutory Changes - Torts: Tort Claims Against the State*, 29 N.C.L. REV. 416, 417 (1951). Special statutes were passed to allow certain tort claims against the State to be heard by the State Board of Education, by various other agencies, and later by the Industrial Commission. *Id.* Finally, the 1951 General Assembly established permanent means for resolving tort claims against the State through the Tort Claims Act. 1951 N.C. Sess. Laws 1059 (current version at G.S. 143-291 *et seq.*).

The effect of the Tort Claims Act was twofold. First, the State partially waived its sovereign immunity by consenting to direct suits brought as a result of negligent acts committed by its employees in the course of their employment. Second, the Act provided that the forum for such direct actions would be the Industrial Commission, rather than the State courts. The Act was silent as to the issue in the instant case: whether the State may be brought into the State courts as a third-party defendant.

Rule 14 of the Rules of Civil Procedure, G.S. § 1A-1, encompasses third-party practice. Rule 14(a) permits a defendant in the State courts to sue a person not a party to the action who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant. The original defendant, as the third-party plaintiff, initiates the action by serving a third-party complaint and summons upon the intended person, the third-party defendant. Rule 14(b) permits a plaintiff who has been served with a counterclaim to use the same means to bring in a third-party defendant to the counterclaim.

In 1975, the General Assembly amended Rule 14 to add subsection (c). 1975 N.C. Sess. Laws 587. As enacted, and as in effect at the time of the filing of the third-party complaint herein, Rule 14(c) provided:

> (c) Rule applicable to State of North Carolina.—Notwithstanding the provisions of the Tort Claims Act, the State of

> North Carolina may be made a third-party plaintiff under subsection (a) or a third-party defendant under subsection (b) in any tort action. In such cases, the same rules governing liability and the limits of liability of the State and its agencies shall apply as is provided for in the Tort Claims Act.

In addition to adding subsection (c) to Rule 14, the General Assembly in the same legislative act amended the Uniform Contribution among Tort-Feasors Act, G.S. 1B-1(h), to provide:

> (h) The provisions of this Article shall apply to tort claims against the State. However, in such cases, the same rules governing liability and the limits of liability shall apply to the State and its agencies as in cases heard before the Industrial Commission. The State's share in such cases shall not exceed the pro rata share based upon the maximum amount of liability under the Tort Claims Act.

1975 N.C. Sess. Laws 587.

As originally enacted, Rule 14(c) allowed the State to be a third-party plaintiff under Rule 14(a). By its terms, however, Rule 14(a) permits *defendants* to become third-party plaintiffs. The State cannot be the original defendant in a direct tort action brought in the State courts; therefore it would seem that the State could not satisfy Rule 14(a)'s express requisites for becoming a third-party plaintiff. This portion of the original rule, were it interpreted strictly and literally, would be nugatory.

The General Assembly attempted to clarify the matter in 1981 with "AN ACT TO MAKE CLEAR THAT THE STATE MAY BE EITHER A THIRD-PARTY PLAINTIFF OR DEFENDANT IN CERTAIN ACTIONS." 1981 N.C. Sess. Laws 810. The amendment substitutes "third party" in place of "third-party plaintiff" in the first sentence of Rule 14(c). Although the caption of the 1981 enactment indicates that the State can be a third-party plaintiff under Rule 14(a), the essence of the amendment evidences the legislature's intent to allow the State to be sued as a third-party defendant in the State courts.

We find this also to have been the legislature's initial intention in enacting Rule 14(c). Although the 1981 amendment has no retroactive effect, it does indicate the current legislative intent and sheds considerable light upon the rationale behind the 1975

enactment. That the 1981 amendment is a clarification rather than an alteration is apparent from its title: "AN ACT TO MAKE CLEAR . . . ." To interpret the original language of Rule 14(c), inconsistently with the 1981 amendment, as barring actions against the State as a third-party defendant in the State courts would vitiate the 1975 enactment of meaning. Its very preamble, "Notwithstanding the provisions of the Tort Claims Act . . .", implies that that Act, and its conferral of jurisdiction on the Industrial Commission for tort claims against the State, is being supplemented. Moreover, in the very same legislative enactment, the General Assembly amended the Uniform Contribution among Tort-Feasors Act to allow the State to be sued for contribution. Its language that "the same rules governing liability and the limits of liability shall apply to the State and its agencies as in cases heard before the Industrial Commission" strongly suggests that those cases are to be heard somewhere other than in the Industrial Commission.

[2] To find that the abrogation of sovereign immunity impels such a strict construction as to thwart the obvious legislative intent and to render meaningless an act of the General Assembly would be anomalous, aberrant, and abhorrent. *See State v. Fearing*, 304 N.C. 471, 483, 284 S.E. 2d 487, 494 (1981) (Huskins, J., dissenting); *In Re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978); *Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 241 S.E. 2d 324 (1978). Therefore, we construe the original language of Rule 14(c) as containing a clerical error. *See State v. Daniels*, 244 N.C. 671, 94 S.E. 2d 799 (1956); *Murphy v. Webb*, 156 N.C. 402, 72 S.E. 460 (1911). The term "third-party plaintiff" in the 1975 enactment should be read "third party" or "third-party defendant." We accordingly interpret the 1981 amendment as not altering Rule 14(c) substantively, but instead as reiterating the intention of the legislature that the State be subject to tort claims as a third-party defendant in the State courts.

The third-party complaint in the instant case is composed of two claims for relief: one claim for contribution from the State as a joint tort-feasor and one claim for indemnification by the State as the primarily and actively negligent party. G.S. 1B-1(h) allows the State to be sued for contribution as a joint tort-feasor. The State strenuously argues that under the doctrine of *expressio*

unius est exclusio alterius, G.S. 1B-1(h) does not permit the State to be sued for indemnification.

[3] Irrespective of whether G.S. Chapter 1B codifies the right to indemnification as it does the right to contribution, there exists in North Carolina a common law right to indemnification of a passively negligent tort-feasor from an actively negligent tort-feasor. *Edwards v. Hamill*, 262 N.C. 528, 138 S.E. 2d 151 (1964). The right to indemnification arises out of a tort claim, the State's immunity to which was abrogated by the Tort Claims Act. 1951 N.C. Sess. Laws 1059 (current version at G.S. 143-291 *et seq.*). The only controversy is whether the State courts are the proper forum for such actions. We recognize that actions for indemnification, as well as actions for contribution, are generally brought by means of a third-party complaint. Rule 14(c) does not limit the nature or character of third-party actions permissible against the State. We therefore hold that the State may be joined as a third-party defendant, whether in an action for contribution or in an action for indemnification, in the State courts.

As previously acknowledged herein, the Court of Appeals correctly determined that the denial of a motion to dismiss under Rule 12(b)(6) is interlocutory and thus not immediately appealable. Due to our determination that the State may be sued as a third-party defendant in the State courts, interests of the administration of justice would be best served by our present consideration of the State's claim that the third-party complaint failed to state a claim for relief in that it did not comply with the requisites for the affidavit required in cases heard before the Industrial Commission. We therefore elect, pursuant to our supervisory authority and the provisions of G.S. 7A-31, to review that decision. *See Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E. 2d 593 (1982).

[4] G.S. 143-297 provides that in all claims brought before the Industrial Commission under the Tort Claims Act an affidavit must be filed setting forth, *inter alia*, "the name of the department, institution or agency of the State against which the claim is asserted, and the name of the State employee upon whose alleged negligence the claim is based." Rule 14(c) and G.S. 1B-1(h) provide that the same rules governing liability and the limits of liability of the State and its agencies shall apply in cases heard before the State courts as in cases heard before the Industrial Commission.

The requirement of an affidavit delineated in G.S. 143-297 is not a rule governing liability or the limits of liability of the State and its agencies. Rather, it is a procedural rule. Uniformity of pleadings without regard to the identity of particular parties is a necessity in the State courts. Therefore, actions brought against the State as a third-party defendant in the State courts need not conform to the pleading requirements of the Industrial Commission. The third-party plaintiff must, however, prove the same elements as required in cases heard before the Industrial Commission. G.S. 1B-1(h); Rule 14(c). Thus, the trial court did not err in denying the State's motion, made pursuant to Rule 12(b)(6), to dismiss for failure to state a claim upon which relief could be granted.

For the reasons enunciated herein, we find the trial court did not err in denying the State's motions to dismiss the third-party complaint. The Opinion of the Court of Appeals dismissing the appeal is vacated and the cause remanded to the Court of Appeals for further remand to the Wayne Superior Court to proceed with trial.

Vacated and remanded.

WAKE COUNTY, EX REL. EVELYN CARRINGTON v. DANIEL TOWNES

No. 128A81

(Filed 13 July 1982)

Bastards § 10; Constitutional Law § 40 — civil paternity suit by State — indigent defendant — no per se right to appointed counsel — trial judge determines what fairness requires

There is no *per se* constitutional right to appointed counsel for an indigent defendant in a civil paternity suit, by whomever instituted under G.S. 49-14, because the necessary menace to personal liberty is clearly absent at that legal stage. However, when an indigent defendant moves for the appointment of counsel in a certain civil paternity suit, the trial judge shall determine in the first instance what true fairness requires in light of all the circumstances. When such a motion is made, the trial judge should proceed with an evaluation of the vital interest at stake on both sides and a determination of the degree of actual complexity involved in the given case and the corresponding nature of the defendant's peculiar problems, if any, in presenting his own defense without appointed legal assistance. Therefore, where the record clearly shows

that the trial judge did not respond to defendant's motion for counsel in the manner described, the cause should be remanded to the court for further proceedings.

APPEAL by plaintiff, pursuant to G.S. 7A-30(2), of the decision of the Court of Appeals (*Judge Becton*, with *Judge Whichard* concurring, and *Judge Robert Martin* dissenting) reported at 53 N.C. App. 649, 281 S.E. 2d 765 (1981). The Court of Appeals reversed the order entered *nunc pro tunc* by *Bullock, Judge*, on 15 July 1980 in a Civil Session of District Court, WAKE County.

The undisputed procedural facts of this case are competently set forth in the Court of Appeals' opinion, which we quote:

> Wake County (County), through its Department of Social Services' Child Support Enforcement Agency, initiated this action on 4 February 1980 in order to obtain a civil adjudication that the defendant, Daniel Townes, is the father of Cory Daniel Carrington and to obtain an order directing defendant to make support payments for the child. The child is the illegitimate son of Evelyn Carrington, and Ms. Carrington is a recipient of Aid to Families with Dependent Children (AFDC) funds. Based on Ms. Carrington's allegations that the defendant is the father of the child, the County, pursuant to statute, filed this action to establish paternity.
>
> Upon being served with the Complaint, the defendant, who is indigent, contacted East Central Community Legal Services (Legal Services) for assistance. Legal Services told defendant that federal regulations (45 CFR 1601) and office policies prohibit Legal Services from representing individuals Legal Services believes have a right to court-appointed counsel. Legal Services, however, did agree to make a limited appearance for the purpose of ensuring that defendant received appointed counsel. At a preliminary hearing on 16 April 1980, defendant filed an affidavit of indigency and a motion seeking appointment of counsel claiming that such an appointment was required by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Section 19 of the North Carolina Constitution. The trial court concluded in its order that "neither the due process clause of the United States Constitution nor Article I, Sec-

> tion 19 of the North Carolina Constitution guarantees an indigent defendant the right to court-appointed counsel in civil paternity actions. . . ."

53 N.C. App. at 649-50, 281 S.E. 2d at 766.

Defendant immediately appealed (*in forma pauperis*) from the denial of his motion for the appointment of counsel pursuant to G.S. 1-277(a). The Court of Appeals subsequently reversed the trial court's order in a split decision and held that "an indigent defendant has a right to appointed counsel in paternity suits instituted by the State" based upon federal and state constitutional guarantees of due process. 53 N.C. App. at 650, 281 S.E. 2d at 766-67. The plaintiff County now appeals to this Court for reinstatement of the trial court's original order.

Assistant Wake County Attorney, Shelley T. Eason, for plaintiff-appellant.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Clifton H. Duke, amicus curiae for plaintiff-appellant.

East Central Community Legal Services, by Gregory C. Malhoit and M. Travis Payne, for defendant-appellee.

North Carolina Civil Liberties Union, by Stanley Sprague, amicus curiae for defendant-appellee.

COPELAND, Justice.

The dispositive issue, which is also one of first impression in our Court, is whether constitutional due process *guarantees* the provision of appointed legal counsel to an indigent defendant in a *civil* paternity suit instituted by a county on behalf of its department of social services' child support enforcement agency. We conclude that indigent defendants do not have an absolute constitutional right to appointed counsel in this legal setting and that due process affords only a *qualified* entitlement to appointed counsel as determined by the trial court on a case-by-case basis. In so holding, we direct and confine our constitutional analysis to the narrow issue precisely raised upon this limited record.

We begin with the general recognition that the strict distinctions formerly drawn between criminal and civil actions are no longer valid and that due process *presumptively* requires the ap-

pointment of legal counsel to represent an indigent defendant *if* his *actual* imprisonment, or comparable confinement, is a likely result in the *present* proceeding concerned.[1] *Lassiter v. Department of Social Services*, 452 U.S. 18, 26-27, 101 S.Ct. 2153, 2159, 68 L.Ed. 2d 640, 649 (1981); *see Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed. 2d 383 (1979); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656 (1973); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972); *In Re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967). This essential guarantee of fundamental fairness means quite simply that an indigent person cannot be sent to jail, in any later proceeding to enforce the support order, unless he had the benefit of legal assistance and advocacy at the proceeding in which paternity was determined.

The entire thrust of a civil action under G.S. 49-14 is the determination of whether or not the defendant is the natural father of the illegitimate child in question. Even if he is found to be so, the defendant will not be imprisoned on that basis at the conclusion of the hearing. As we have stated many times, the mere begetting of a child, standing alone, is not a crime in this State. *Bell v. Martin*, 299 N.C. 715, 722, 264 S.E. 2d 101, 106 (1980); *State v. Ellis*, 262 N.C. 446, 449, 137 S.E. 2d 840, 843 (1964). It is true that a related threat of actual imprisonment, based *partially* upon a prior determination of paternity, *may* arise in *subsequent* criminal or civil enforcement proceedings if such becomes necessary to secure a defendant-father's support obligation to his child. *State v. McCoy*, 304 N.C. 363, 283 S.E. 2d 788 (1981); *State v. Green*, 277 N.C. 188, 176 S.E. 2d 756 (1970); *see, e.g., Mastin v. Fellerhoff*, 526 F. Supp. 969 (S.D. Ohio 1981); *Young v. Whitworth*, 522 F. Supp. 759 (S.D. Ohio 1981). However, it is plain that this uncertain "web of possibilities" concerning future sanctions or ramifications does not constitute an immediate threat of imprisonment in the initial civil paternity action itself, especially since the defendant may, in fact, prevail there on the critical issue of

1. This across-the-board due process right is primarily founded upon the Fourteenth Amendment to the United States Constitution. Our Court has previously noted that the Law of the Land Clause in Art. I, § 19, of the North Carolina Constitution encompasses concepts similar to, and not broader than, federal due process. *See Jolly v. Wright*, 300 N.C. 83, at n. 2, 92-93, 265 S.E. 2d 135, 142 (1980); *Horton v. Gulledge*, 277 N.C. 353, 359, 177 S.E. 2d 885, 889 (1970).

fatherhood. *State v. Walker*, 87 Wash. 2d 443, 446, 553 P. 2d 1093, 1095 (1976); *see also In Interest of J.A.K.*, 624 S.W. 2d 355, 357 (Tex. Ct. App. 1981). Thus, there is no *per se* constitutional right to appointed counsel for an indigent defendant in a civil paternity suit, by whomever instituted under G.S. 49-14, because the necessary menace to personal liberty is clearly absent at that legal stage. *Nordgren v. Mitchell*, 524 F. Supp. 242 (D. Utah 1981); *State v. Walker, supra.*

Our conclusion that there is no *absolute* due process right to counsel in *all* civil paternity suits against indigents does not, however, foreclose further constitutional inquiry into the matter. This is made clear in a recent decision of the United States Supreme Court concerning a due process claim for appointed counsel in an analogous civil setting: *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed. 2d 640 (1981).

In *Lassiter, supra*, the parental rights of an indigent mother to her son were terminated at a civil proceeding at which she was not afforded legal representation. The Supreme Court carefully examined its precedents regarding appointed counsel and emphasized anew the controlling elements in the due process equation, which had been set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976): the interests of the individual at stake, the interests of the government, and the overall risk that the procedures utilized in the particular proceeding will result in an erroneous decision. Against that background, the Court concluded that the indigent mother's constitutional claim had to be evaluated by balancing the foregoing elements and then setting "their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." 452 U.S. at 27, 101 S.Ct. at 2159, 68 L.Ed. 2d at 649. The Court proceeded to weigh the case before it as follows:

> The dispositive question, which must now be addressed, is whether the three *Eldridge* factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption and thus to lead to the conclusion that the Due Process Clause requires the appointment of counsel when a State seeks to terminate an in-

digent's parental status. To summarize the above discussion of the *Eldridge* factors: the parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounselled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.

If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the *Eldridge* factors will not always be so distributed, and since "due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed," *Gagnon v. Scarpelli, supra*, 411 U.S. at 788, 36 L.Ed. 2d 656, 93 S.Ct. 1756, 71 Ohio Ops 2d 279, neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in *Gagnon v. Scarpelli*, and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review. See, e.g., *Wood v. Georgia*, --- U.S. ---, 67 L.Ed. 2d 220, 101 S.Ct. 1097.

Id. at 31-32, 101 S.Ct. at 2161-62, 68 L.Ed. 2d at 652. The Court finally determined that, considering all of the pertinent circumstances depicted in the record, the trial judge had not deprived the indigent mother of due process by failing to appoint counsel for her in the termination hearing.[2]

2. It should be noted that the *Lassiter* case originated in North Carolina and that our General Assembly has since enacted specific legislation providing for the appointment of counsel to represent indigent persons in parental rights termination proceedings. G.S. 7A-289.27 and 7A-451(a)(15).

In summary, the constitutional import of *Lassiter* is that, in any action where an actual threat to personal liberty is lacking, but the interests of both sides thereto are nonetheless fundamentally compelling, the merits of a due process claim by an indigent party for appointed counsel are best determined by the trial court on a case-by-case basis. *See In Re Clark*, 303 N.C. 592, 601, 281 S.E. 2d 47, 53-54 (1981). Our Court has already adopted this approach in the context of nonsupport civil contempt cases. In *Jolly v. Wright*, 300 N.C. 83, 93, 265 S.E. 2d 135, 143 (1980), we stated:

> Since the nature of nonsupport civil contempt cases usually is not complex, due process does not require that counsel be automatically appointed for indigents in such cases; rather, the minimum requirements of due process are satisfied by evaluating the necessity of counsel on a case-by-case basis. *Gagnon v. Scarpelli, supra*, 411 U.S. at 790. We thus hold that due process requires appointment of counsel for indigents in nonsupport civil contempt proceedings only in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness.

We believe that a similar rule is appropriate in civil paternity cases.

It is obvious that the private interests of an indigent defendant in a civil paternity suit, whereby he is threatened with the imposition of the legal status and attendant obligations of a parent with respect to an illegitimate child, are substantial in social, family and economic terms. *See Little v. Streater*, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed. 2d 627 (1981). Accordingly, our law provides two important safeguards for innocent defendants in these actions: (1) the requirement that paternity be proved beyond a reasonable doubt, G.S. 49-14(b), and (2) the availability of court-ordered blood grouping tests upon the request of any party, G.S. 8-50.1. On the other hand, the administrative and pecuniary interests of a local department of social services, which is seeking reasonable and rightful support for an illegitimate child from a putative father, are also quite forceful, and the department's efforts in this regard should not be hindered by additional legalities, which are not already expressly required by statute, unless such are patently necessary to ensure constitutional equity on both sides of a paternity suit.

All things considered, we cannot say, as a matter of law, that representation by legal counsel is invariably an essential component of fairness in all such proceedings. As we have already said, there is but one factual issue in a paternity action, *i.e.*, whether the defendant is the father of the child, and, practically speaking, this is not an especially complex matter. *See Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980). The crux of most cases is credibility: simply deciding who to believe. Blood grouping tests can be helpful in this search for the truth. In any event, the number of witnesses at the hearing will be relatively few, since not many persons besides the mother and the defendant will be competent to testify specifically about the point in issue. Moreover, we perceive that the defendant will usually have at least some familiarity with the lay witnesses involved and what the nature of their testimony will be. [It would be a rare exception and certainly not the rule for the mother of an illegitimate child to "name" a total stranger as his or her father.] With the possible exception of expert witnesses, the defendant would not ordinarily experience overwhelming difficulty in conducting an informal, but sufficiently effective, cross-examination of the witnesses against him. We thus believe that, with appropriate guidance from the trial court as to how he may proceed and what he may request, an indigent defendant could generally present his own defense to the "charge" of paternity well enough without the aid of appointed counsel, although the unique circumstances of a particular case could indicate otherwise.

Consequently, we hold that the trial judge shall determine, in the first instance, what true fairness requires, in light of all of the circumstances, when an indigent makes a motion for the appointment of counsel in a certain civil paternity suit. *Accord Nordgren v. Mitchell*, 524 F. Supp. 242, 245 (D. Utah 1981): "it is clear that the decision as to whether due process requires appointment of counsel in a paternity action is vested in the state trial court, subject to appeal."[3] When such a motion is made, the trial court

3. In its majority opinion below, the Court of Appeals referred to the authorities of several jurisdictions which have taken a broader view and adopted a *per se* standard for the appointment of counsel to indigents in paternity suits. 53 N.C. App. at 662, 281 S.E. 2d at 773. *See generally* Annot., 4 A.L.R. 4th 363 (1981). Those authorities are neither instructive nor persuasive here because they are based upon the individual constitutions or statutes of other states and not upon the

should proceed with an evaluation of the vital interests at stake on both sides and a determination of the degree of actual complexity involved in the given case and the corresponding nature of defendant's peculiar problems, if any, in presenting his own defense without appointed legal assistance. The judge must then weigh the foregoing factors against the overall and strong presumption that the defendant is not entitled to the appointment of counsel in a proceeding which does not present an immediate threat to personal liberty. *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed. 2d 640 (1981); *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976).

The record in the instant case clearly shows that the trial judge did not respond to defendant's motion for counsel in the manner which we have just described. The judge correctly concluded, in his order denying the motion, that the indigent defendant was not *guaranteed* the right to court-appointed counsel. Record at 26. However, the record is devoid of any indication that proper individual consideration was given to the minimum requirements of fundamental fairness regarding this particular defendant in this particular paternity action. Specifically, the judge should have made some findings and conclusions concerning the following assertions in defendant's motion:

> The Defendant faces the possibility of an adjudication of paternity and an order of child support in this matter which significantly affects the Defendant's interests. In addition, the Defendant wishes to assert numerous defenses in this matter including a denial of the ultimate issue of the paternity of Corey Daniel Carrington. Defendant is unemployed and unable to afford counsel to present these defenses and the Defendant lacks the education and training to adequately prepare and present his own case. Record at 16-17.

In short, the incomplete state of the record precludes our final review of the ultimate question on appeal, that is, whether the

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Fourteenth Amendment to the United States Constitution, as it has been authoritatively interpreted in the recent decision of *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed. 2d 640 (1981). *Nordgren v. Mitchell, supra*, 524 F. Supp. at 243. If a more expansive *per se* right to appointed legal counsel is to be given in this kind of civil case in North Carolina, the General Assembly, not this Court, must bestow it. *E.g.*, G.S. 7A-451.

trial judge erred in denying defendant's motion for appointed counsel in *this* case.

For the reasons stated herein, the decision of the Court of Appeals is modified, and the cause shall be remanded to the trial court for further proceedings not inconsistent with this opinion.

Modified and remanded.

STATE OF NORTH CAROLINA v. RICKY RENARD DOBBINS

No. 79A82

(Filed 13 July 1982)

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

The trial court did not abuse its discretion in the denial of defendant's motion for a change of venue based upon pretrial newspaper publicity where the newspaper articles contained only factual accounts regarding the commission of the crimes and the pretrial proceedings; there was no indication that the prospective jurors saw the newspaper articles or that they formed opinions based upon the articles; and there was no showing that defendant exhausted his peremptory challenges or had to accept jurors who were prejudiced by pretrial publicity.

2. Criminal Law § 66.1— identification of defendant—opportunity for observation

The trial court's findings of fact were sufficient to show that a reasonably credible identification of defendant by a rape and robbery victim was possible where the court found that the victim observed her assailant and exchanged words with him for several seconds at a distance of 10 feet in a well lighted kitchen; that although he thereafter placed a covering over his face, the victim was in his presence and close to him for approximately 40 minutes; the victim heard her assailant talk, was able to observe his height and body structure, and closely observed his clothing; the victim described her assailant, and defendant met that description; the victim selected defendant's photograph from a series of photographs and positively identified defendant in a line-up; and police recovered from defendant's house several items of clothing similar to those worn by the assailant.

3. Searches and Seizures § 39— search under warrant—inventory and return not sworn to by officer—suppression of seized items not required

Failure of the officer who executed a search warrant to swear to the inventory of seized items and the return as required by G.S. 15A-257 did not constitute a substantial violation of the statutes relating to search warrants so as to require suppression of the seized evidence under G.S. 15A-974(2).

4. Criminal Law § 43.4— rape and sexual offense—photographs of victim not excessive

In a prosecution for first-degree rape and first-degree sexual offense, the admission of two photographs of the victim's genitalia to illustrate testimony concerning the victim's injuries was not prejudicial to defendant where the photographs showed different viewpoints.

APPEAL by defendant from judgments entered by *Mills, Judge*, at the 28 September 1981 Criminal Session of Superior Court, IREDELL County.

Upon pleas of not guilty, defendant was tried on bills of indictment charging him with (1) first-degree rape, (2) first-degree sexual offense, (3) armed robbery and (4) first-degree burglary. Ms. Katherine Bowlin was the victim of the alleged offenses and the cases were consolidated for trial.

Evidence presented by the state tended to show that:

At about 11:15 p.m. on 1 June 1981, Ms. Bowlin returned to her home from work. She lived alone. After taking a bath and putting on her pajamas, she went to her lighted kitchen where she saw a black male pushing open her locked backdoor. The face of the intruder, later identified by her as defendant, was uncovered at the time. After viewing and exchanging words with the intruder for several seconds, Ms. Bowlin turned and ran towards her front door. Defendant ran after her and caught her from behind. By that time he had covered his face with a ski mask-type of toboggan.

Holding a knife to Ms. Bowlin's throat, defendant forced her into the bathroom where he severely beat her, raped her and forced a bottle into her vagina. Defendant tied her up, took $70.00 from her purse and left. Ms. Bowlin then freed herself and called for help. She was taken to a hospital and treated for multiple injuries including a fractured rib and lacerations of her vagina so severe that they required surgery under general anesthesia to repair.

Other evidence pertinent to the questions presented on appeal is summarized in the opinion.

Defendant offered no evidence.

The jury found defendant guilty as charged. On the rape and sexual offense counts, the court entered judgments imposing two life sentences, the sentence in the sexual offense case to begin at the expiration of the sentence in the rape case. On the armed robbery and burglary counts, the court entered judgments imposing prison sentences of 50 years in each case, these sentences to run concurrently and to begin at the expiration of the sentence imposed in the sexual offense case.

Defendant appealed and we allowed his motion to bypass the Court of Appeals in the armed robbery and burglary cases.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General W. A. Raney, Jr., for the state.

Steven G. Tate for defendant-appellant.

BRITT, Justice.

[1] By his first assignment of error defendant contends that the trial court erred in denying his pretrial motion for a change of venue. This assignment has no merit.

G.S. 15A-957 provides that "[i]f, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either" transfer the case to another county as specified by the statute or order a special venire as provided by G.S. 15A-958.

The burden is on the defendant to show the prejudice which allegedly prevents his getting a fair trial. *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976); *State v. Faircloth*, 297 N.C. 100, 253 S.E. 2d 890, *cert. denied*, 444 U.S. 874 (1979); *State v. See*, 301 N.C. 388, 271 S.E. 2d 282 (1980). A motion for change of venue based upon prejudice against the defendant is addressed to the sound discretion of the trial judge and his decision will not be disturbed on appeal unless the defendant can show an abuse of discretion. *State v. Boykin, supra; State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated*, 429 U.S. 809 (1976). This court has also held that the defendant must show a gross abuse of discretion. *See State v. Matthews*, 295 N.C. 265, 245 S.E. 2d 727 (1978), *cert. denied*, 439 U.S. 1128 (1979).

In the case at hand defendant alleges that the several newspaper articles written about the crimes created great prejudice against him. The articles complained of appeared on seven dates in June 1981 and on 28 July 1981. We have reviewed the articles and conclude that at most they basically report the facts of the crime; only the last three articles mention defendant by name. This court has held consistently that factual news accounts regarding the commission of a crime and the pretrial proceedings alone are not sufficient to establish prejudice against the defendant. *See State v. Alford, supra; State v. Harrill,* 289 N.C. 186, 221 S.E. 2d 325, *death sentence vacated,* 428 U.S. 904 (1976); *State v. Oliver,* 302 N.C. 28, 274 S.E. 2d 183 (1981).

This court has further held that when a defendant alleges prejudice on the basis of pretrial publicity and does not show that he exhausted his preemptory challenges, or that there were jurors who were objectionable or had prior knowledge of the case, defendant has failed to carry his burden of establishing the prejudicial effect of the pretrial publicity. *See State v. Harrill, supra; State v. Harding,* 291 N.C. 223, 230 S.E. 2d 397 (1976).

In the instant case defendant failed to show any prejudice by potential or actual jurors. There is no indication that the prospective jurors had seen the newspaper articles or that they had formed opinions based on the articles. There is no showing that defendant exhausted his peremptory challenges or had to accept jurors who were prejudiced by pretrial publicity. We hold that defendant has failed to show that the trial judge abused his discretion in denying the motion for change of venue.

By his second assignment of error defendant contends that the trial court committed reversible error in denying his motion to suppress evidence relating to his identification. We find no merit in this assignment.

[2] The record discloses that shortly after Ms. Bowlin began testifying and before she gave testimony identifying defendant as her assailant, defendant objected and the court conducted a voir dire hearing in the absence of the jury. At the hearing the court heard testimony regarding Ms. Bowlin's opportunity to observe the intruder at the time he entered her kitchen, her observations of him and her hearing him talk during the approximately 40 minutes he was in her presence, her viewing of numerous photo-

graphs at the police station, and her viewing of defendant and pointing him out as her assailant while he was in a line-up with five other black males of comparable age and build. Following the hearing, the court made findings of fact and concluded that:

> [T]he pretrial identification procedure involving the Defendant was not so unnecessarily suggestive and conducive to irreparably mistaken identification as to violate the Defendant's rights to due process of law; and the Court further finds that, based on clear and convincing evidence, the in-Court identification of the Defendant is of independent origin, based solely upon what the witness saw at the time of the breaking in of her home on June 1, 1981, and is not tainted by any pretrial identification procedure so unnecessarily suggestive and conducive to irreparably mistaken identification as to constitute a denial of due process of law.

Since defendant did not except to any finding of fact, it is presumed that they are supported by the evidence and the facts found by the trial court are conclusive on appeal. *Phillips v. Alston*, 257 N.C. 255, 125 S.E. 2d 580 (1962); *Tinkham v. Hall*, 47 N.C. App. 651, 267 S.E. 2d 588 (1980). The question presented is whether the findings support the court's conclusions of law. *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968). However, defendant argues that the evidence failed to show that a reasonably credible identification by the witness was possible, as mandated by *Simmons v. United States*, 390 U.S. 377 (1968).

Defendant relies primarily on the decision of this court in *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967). In that case the defendant was charged with breaking and entering a storehouse. The only evidence tending to identify the defendant as one of the perpetrators of the offense was the testimony of a witness identifying defendant in a line-up as one of the persons he had observed at the scene of the crime. The state's uncontradicted evidence further tended to show that the observation occurred at night, although the area surrounding the building in question was well lighted; that the witness was never closer than 286 feet from a man he saw running along the side of the building; that the witness had never seen the man prior to that time; that he saw this man run once in each direction, stop at the front of the building, "peep" around it and look in the witness' direction; and that the witness could not describe the color of the

man's hair or eyes, nor the color of his clothes, except that his clothes were dark. This court held that the uncontradicted testimony as to the physical facts disclose that the witness' observation of the defendant was insufficient to permit a reasonable possibility of the subsequent identification of the defendant with that degree of certainty which would justify the submission of the question of defendant's guilt to the jury.

The facts in the case at hand are easily distinguished from those in *Miller*. Here, Ms. Bowlin observed her assailant and exchanged words with him for several seconds at a distance of 10 feet in a well lighted kitchen; that although he thereafter placed a covering over his face, Ms. Bowlin was in his presence and close to him for approximately 40 minutes; that she heard him talk and was able to observe his height and body structure; that she closely observed his clothing; that she described her assailant soon after the crimes as being a black male, approximately 21 years old, of medium build and between 5 feet 6 inches and 5 feet 10 inches tall; that according to a line-up report admitted into evidence, defendant is a black male, 22 years old, 5 feet 9 inches tall, weighing 170 pounds; that she selected defendant's photograph from a series of photographs; that she positively identified defendant in a line-up; and that police recovered from defendant's house several items of clothing similar to those worn by Ms. Bowlin's assailant.

We hold that the trial court's findings of fact were more than sufficient to show that a reasonably credible identification of defendant by Ms. Bowlin was possible.

[3] By his third assignment of error defendant contends that the trial court erred in denying his motion to suppress "the results of a search" of his residence. There is no merit in this assignment.

On 10 June 1981 Sergeant Brown of the Statesville Police Department applied for a search warrant to authorize police to search the residence of defendant. Sergeant Brown alleged that he had probable cause to believe that certain specifically described items of clothing, a knife and certain stolen property were located in said residence. A magistrate issued a search warrant and police entered and searched the premises. Thereafter Sergeant Brown prepared and signed an inventory of property

seized pursuant to the search.[1] The inventory recites that a copy was left with a Mrs. Jeter, the owner of the place searched. On 11 June 1981 Sergeant Brown signed a "return" of the search warrant.

Defendant argues that under *Mapp v. Ohio*, 367 U.S. 643 (1961), evidence seized illegally and unlawfully shall not be allowed in the trial of a defendant when rights are violated; that G.S. Chapter 15A sets forth the procedure for obtaining, serving and returning a search warrant; that G.S. 15A-257 requires that the return of service be signed and *sworn to* by the serving officer; and that the return in this case was not sworn to by the officer.

G.S. 15A-257 provides as follows:

> An officer who has executed a search warrant must, without unnecessary delay, return to the clerk of the issuing court the warrant together with a written inventory of items seized. The inventory, if any, and return must be signed and sworn to by the officer who executed the warrant.

The state admits that the return was not "sworn to" but argues that this omission is not sufficient to render inadmissible evidence obtained as a result of the search.

G.S. 15A-974 sets forth guidance for the trial courts in ruling on motions to suppress evidence. This statute provides:

> Upon timely motion, evidence must be suppressed if:
>
> (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or
>
> (2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:
>
> a. The importance of the particular interest violated;

1. The inventory included certain clothing meeting the description of clothing given by Ms. Bowlin of that worn by her assailant. It also included a "Linoleum" knife.

b. The extent of the deviation from lawful conduct;

c. The extent to which the violation was willful;

d. The extent to which exclusion will tend to deter future violations of this Chapter.

Defendant has cited no authority, and our research discloses none, for his contention that his *constitutional* rights were violated by reason of the serving officer's omission. That being true, we address only the question of whether the omission was a *substantial* violation of the statutes relating to search warrants.

While it appears that this court has not spoken directly on the question of substantial violation of the statutes relating to search warrants, several decisions of the Court of Appeals are helpful. In *State v. Fruitt,* 35 N.C. App. 177, 241 S.E. 2d 125 (1978), the court held that failure to read the warrant before entering an outbuilding and failure to leave a copy of the warrant and inventory of items seized at the premises "did not amount to a 'substantial' violation of G.S. Chapter 15A within the meaning of G.S. 15A-974(a)." In *State v. Hansen,* 27 N.C. App. 459, 219 S.E. 2d 641 (1975), *cert. denied,* 289 N.C. 453, 223 S.E. 2d 161 (1976), the arresting officer never filed the warrant with the clerk of the superior court as required by G.S. 15A-25(d); the court found this to be a mere technicality which "does no harm to defendant's constitutional rights to due process and notice."

It would appear that the primary purpose of the requirement in G.S. 15A-257 that the return be sworn to by the officer who executed the warrant is to better insure the accuracy of the inventory of the property seized. This requirement has little, if anything, to do with protecting persons from unreasonable searches and seizures since the search and seizure already will have taken place.

We conclude that in the context of this case, there was not a substantial violation of the statute.

[4] By his fourth and final assignment of error defendant contends that the trial court erred in admitting certain photographs into evidence. We find no merit in this assignment.

The state introduced two photographs to illustrate testimony of Dr. Philip Mason regarding Ms. Bowlin's injuries. Both

photographs were of the victim's genitalia and tended to show the severity of her injuries. Defendant does not argue that the photographs were not relevant; he merely argues that the introduction of more than one was unnecessary and was prejudicial to him.

In *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *rev'd on other grounds*, 403 U.S. 948 (1971), this court said:

> The fact that a photograph depicts a horrible, gruesome and revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render the photograph incompetent in evidence, when properly authenticated as a correct portrayal of conditions observed by and related by the witness who uses the photograph to illustrate his testimony. *State v. Porth*, 269 N.C. 329, 153 S.E. 2d 10; *State v. Rogers*, 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104; *State v. Gardner*, 228 N.C. 567, 46 S.E. 2d 824; Stansbury, North Carolina Evidence, 2d Ed., § 34. For a collection of authorities to the same effect from other jurisdictions, see Annot., 73 A.L.R. 2d 769.

275 N.C. at 311. Quoted with approval in *State v. Jenkins*, 300 N.C. 578, 268 S.E. 2d 458 (1980).

This court has held that the introduction of two or more photographs which are clearly relevant is not excessive, particularly when the photographs show different viewpoints as was true in this case. *See State v. Gibbons*, 303 N.C. 484, 279 S.E. 2d 574 (1981); *State v. Young*, 291 N.C. 562, 231 S.E. 2d 577 (1977).

We hold that introduction of the two photographs complained of was not excessive.

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

No error.

STATE OF NORTH CAROLINA v. STEVEN DOUGLAS SCHNEIDER

No. 24A82

(Filed 13 July 1982)

1. **Criminal Law § 75— confession—properly admissible**

Failure to advise a defendant of the nature of the charge about which he is being questioned does not render his confession inadmissible. Neither is a defendant's statement inadmissible on grounds that it was written by an officer and merely signed by the defendant. Therefore, where the record is devoid of threats, promises, or other inducements proffered to obtain the defendant's statements, and where the record does not indicate, suggest, or even hint that the conduct of any law enforcement officer was anything but exemplary, the defendant's confessions were properly admitted as evidence.

2. **Criminal Law § 91.1— denial of motion for continuance on ground defendant should have neurological examination**

The trial court did not err in failing to grant defendant's motion for continuance made after the jury was selected but prior to impanelment where the reason for the motion was that defendant should have a neurological examination but where defendant had been determined by psychiatric evaluation to be capable of proceeding with trial and defense counsel neither disputed this finding nor argued that the defendant's capacity would be improved by a continuance.

3. **Criminal Law § 134.2— denial of postponement of sentencing—no prejudicial error**

Where defendant was convicted of a first-degree sexual offense and first-degree burglary, and where defendant could not have received a shorter sentence, he was not prejudiced by the failure to postpone sentencing for a pre-sentence diagnostic study, neurological examination, and a full scale plenary hearing.

APPEAL by the defendant from judgments imposed by *Judge Henry L. Stevens, III,* presiding at the 23 September 1981 Criminal Session of Superior Court, JONES County.

The defendant was charged in bills of indictment, proper in form, with first-degree sexual offense and first-degree burglary. He entered pleas of not guilty and was tried before a jury which found him guilty of each offense as charged. From the judgment sentencing him to life imprisonment for the commission of first-degree sexual offense in violation of G.S. 14-27.4, the defendant appeals to this Court as of right pursuant to G.S. 7A-27. From the judgment sentencing him to imprisonment for 20 years to 30 years for the commission of first-degree burglary in violation of

G.S. 14-51, the defendant appeals to this Court on allowance of his motion to bypass the Court of Appeals, entered 19 February 1982.

Rufus L. Edmisten, Attorney General, by William W. Melvin, Deputy Attorney General and William B. Ray, Assistant Attorney General for the State.

John T. Carter, Jr., Attorney for defendant-appellant.

MITCHELL, Justice.

The defendant contends that the trial court erred in admitting into evidence his confession to the crimes charged and in refusing to continue the trial or postpone sentencing. After careful review of the record and briefs, we find the defendant received a fair trial free from prejudicial error.

The State's evidence tended to show that, on the evening of 26 June 1981, Mrs. Elizabeth Philyaw was home with her two children at their rural residence near Comfort, North Carolina. After putting the children to bed, she retired to her bedroom around midnight. For some inexplicable reason, she felt anxious. She picked up a glass rabbit from her bedside table and continued to grasp it until she fell asleep.

Suddenly she awoke. She sensed a presence in her bedroom. Reaching out, she touched a face. Upon feeling a moustache, she said, "Linwood, you scared me. That's not funny." She realized as she felt his clean-shaven chin that the man was not her husband.

"Who are you? What are you doing in my house?" she shouted.

The man then made a comment indicating he was going to have sexual intercourse with her. He spoke with a sharp northern accent. She cringed. As she drew back, she felt the glass rabbit beneath her. She swung it at him as hard as she could and hit him on the head.

"Don't do that!" He spoke rapidly. "It makes me angry. I have got a knife and I will kill your children and I will kill you."

She went limp, dropping the rabbit. "Please don't hurt my babies," she begged. Turning to her right, she noticed in his hand a long shiny knife similar to those she knew people used for hog

killings. "I will do anything you want if you won't hurt my babies."

The man then forced Mrs. Philyaw to perform fellatio. As he backed away, she leaned to her right and spat as hard as she could. He made her roll over on her stomach. Fearing she had angered him, she tried to decide which window to try to use for escape. She then realized that he had left the room. After waiting a few moments, she ran to the front door.

She unlocked the door and ran out across an open field to her neighbor's house. She awakened her neighbor Clifton "Click" Philyaw, his wife Florence, and their son Craig. Craig took down a twelve-gauge shotgun from the gun rack and ran outside. He heard a car crank. A part-time mechanic, he recognized it as having a four cylinder engine. He got in his pickup truck and shouted for his father. They pursued taillights down the road toward Trenton.

The car they were following had one taillight brighter than the other. They kept in sight. When it passed another car, they also passed and swung in behind it. The car was a red Datsun B-210 with black stripes and was occupied by a white male. Click Philyaw copied the car's license number, VYZ-586, on the truck's fogged-up windshield. He later copied the license number on a Sugar Mountain guest parking ticket.

After the men left, Elizabeth Philyaw put on one of Florence Philyaw's housecoats. As she dressed, she realized she had a hair in her mouth. She removed the hair and put it on the kitchen counter.

Agent Larry W. Smith of the North Carolina State Bureau of Investigation investigated the crime. He took from the crime scene bloody sheets and pillowcases, the glass rabbit, and the hair Mrs. Philyaw found in her mouth. He ascertained by means of the Department of Motor Vehicles that the license number VYZ-586 was assigned to a Datsun registered to the defendant, Steven Douglas Schneider of 2 Edith Drive, Jacksonville.

On the afternoon of 27 June 1981, Agent Smith visited the defendant at his residence. He observed a red Datsun B-210, license number VYZ-586, in the driveway. He asked the defendant about the car and the defendant admitted that the car had been

in the Trenton area the night before. In response to further questioning the defendant stated that he knew nothing about a burglary on Highway 41 and that he had not received any injuries to his head.

Agent Smith asked the defendant to pull back the hair over his forehead. Agent Smith then realized the defendant was wearing a hairpiece.

Later that evening, the defendant came to the Onslow County Sheriff's Department. At Agent Smith's request, he removed his hairpiece. He had a fresh cut and bump on top of his head.

Agent Smith then advised the defendant of his constitutional rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). The defendant stated that he would answer questions without an attorney present. Agent Smith asked several questions regarding the time the defendant arrived in Trenton the preceding morning. His fourth question was, "Mr. Schneider, explain to me what you were doing on Highway 41 at 1:30 in the morning." The defendant was silent, so he repeated the question. The defendant stated: "I'm guilty." Agent Smith asked him what he was guilty of, and the defendant replied that he had broken into a house on Highway 41. He gave further details indicating it was the Philyaw residence. He also admitted he made the victim perform fellatio upon him. Agent Smith informed the defendant that he was under arrest for first-degree sexual offense. The interview ended at 7:15 p.m.

Agent Smith took the defendant to Onslow County Memorial Hospital. With the defendant's consent, a blood sample was taken from his arm.

The defendant was transported to the Jones County Sheriff's Department at approximately 9:30 or 10:00 p.m. After being allowed to eat fried chicken and french fries, the defendant was once again advised of his constitutional rights. He signed a rights waiver form. When asked for a written statement, the defendant replied that he could not write, but stated that he did not object to Agent Smith writing down his answers. The defendant repeated his story and signed the statement as transcribed by Agent Smith. The statement, which substantially comported with the defendant's previous oral confession, was signed at 12:26 a.m. on 28 June 1981.

At trial, the defendant's written confession was introduced and Agent Smith testified as to the substance of the defendant's oral confession. Scientific evidence was admitted which indicated that the hair found in Mrs. Philyaw's mouth was microscopically consistent with the defendant's pubic hair. Further evidence indicated that the blood found on the sheets, pillowcases, and glass rabbit was consistent with that of the defendant and inconsistent with that of Mrs. Philyaw.

The defendant presented no evidence.

[1] The defendant first assigns as error the denial of his motion to suppress his confessions and the subsequent introduction of these confessions into evidence at his trial. The standard for judging the admissibility of a defendant's confession is whether it was given voluntarily and understandingly. *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975). Voluntariness is to be determined from consideration of all circumstances surrounding the confession. *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968). The defendant generally objects that the totality of the circumstances surrounding his confession indicates oppression or coercion and specifically characterizes as suspect two actions of Agent Smith.

With regard to the defendant's contentions concerning the two specific actions of Agent Smith, we hold both such practices to be constitutionally valid. Failure to advise a defendant of the nature of the charge about which he was being questioned does not render his confession inadmissible. *State v. Carter*, 296 N.C. 344, 250 S.E. 2d 263, *cert. denied*, 441 U.S. 964, 60 L.Ed. 2d 1070, 99 S.Ct. 2413 (1979). Neither is a defendant's statement inadmissible on grounds that it was written by an officer and merely signed by the defendant. Although this was not the most accurate and objectively neutral method of transcribing the defendant's statement, the defendant was provided adequate opportunity and in fact did thoroughly cross-examine Agent Smith in regard to the accuracy of the transcription.

In regard to the defendant's general objection, we also find no reversible error. The size of the room and number of officers present involved circumstances closely analogous to those in *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981). Further facts surrounding the confession and supporting a finding of its voluntariness have previously been set forth in this opinion. It suffices

to say that the record is devoid of threats, promises, or other inducements proffered to obtain the defendant's statements, and nowhere does the record indicate, suggest, or even hint that the conduct of any law enforcement officer was anything but exemplary. The defendant's confessions were properly admitted as evidence.

[2] The defendant next assigns as error the refusal of the trial court to grant his motion for continuance made after the jury was selected. The decision whether to grant a motion for continuance is a matter within the sound discretion of the trial judge and, absent an abuse of such discretion, will not be disturbed on appeal. *State v. Tolley*, 290 N.C. 349, 226 S.E. 2d 353 (1976). Prior to impanelment of the jury, defense counsel moved for a continuance, stating that his client should have a neurological examination. Counsel contended that the defendant had suffered from severe headaches and insomnia for approximately three weeks preceding the trial. Counsel argued that, according to a Dr. Sonic of the Neuse Mental Health Clinic in New Bern, the original psychiatric evaluation of the defendant at Dorothea Dix Hospital should have included a neurological examination. Yet defense counsel further stated that Dr. Sonic had told him that such a neurological examination would not likely reveal any tumor, malignant or benign. The defendant had been determined by psychiatric evaluation to be capable of proceeding with trial. Defense counsel neither disputed this finding nor argued that the defendant's capacity would be improved by a continuance. Defense counsel admitted that the defendant was capable of communication with his attorney and did not argue that this capability would be facilitated by a neurological examination. The sole basis for the motion, in the words of the defense attorney, was that "this is a stone that needs to be turned before we proceeded further in this case." In view of these circumstances, we find no abuse of discretion in the denial of the defendant's motion to continue.

The defendant's third assignment of error is that the trial court erred in refusing to dismiss or reduce the charges at the close of the State's evidence and at the close of all evidence on grounds of insufficiency of the State's evidence to prove the defendant's guilt beyond a reasonable doubt. The defendant concedes in his brief that if this Court finds the defendant's state-

ment to be admissible as voluntarily and understandingly given, then the evidence would be sufficient to carry the case to the jury. For the reasons previously enunciated, we so find.

[3] The defendant's final assignment of error is that the trial court denied the defendant a postponement of sentencing. The defendant contends that he was entitled to a pre-sentence diagnostic study, neurological examination, and a full-scale plenary hearing. As applicable to this case, the law mandated life imprisonment upon conviction of first-degree sexual offense. The sentence imposed for the first-degree burglary ran concurrently with the sentence for the first-degree sex offense. Because the defendant could not have received a shorter sentence, he was not prejudiced by the failure to postpone sentencing. Additionally, the record is devoid of any evidence tending to indicate that a postponement of sentencing for further examinations would have revealed anything not already disclosed by the previous psychiatric evaluation of the defendant. As previously indicated, the evidence was to the contrary.

For the reasons enunciated herein, we find the defendant to have had a fair trial, free from prejudicial error.

No error.

WILLIE GODLEY, EMPLOYEE-PLAINTIFF v. COUNTY OF PITT AND/OR TOWN OF WINTERVILLE, EMPLOYER; U.S. FIRE INSURANCE AND/OR GREAT AMERICAN INSURANCE, CARRIER-DEFENDANTS

No. 87PA82

(Filed 13 July 1982)

Estoppel § 4.6; Master and Servant § 51— workers' compensation—CETA employee—estoppel to deny coverage

If a CETA employee would not otherwise be protected by workers' compensation insurance for a work-related injury, a State governmental unit which hired the CETA employee and paid workers' compensation premiums for the employee, and the insurance carrier which accepted payment of those premiums, will be estopped from denying coverage of the CETA employee's work-related accident.

APPEAL by defendants Town of Winterville (employer) and Great American Insurance Company (carrier) pursuant to G.S. 7A-31 for discretionary review of the decision of the Court of Appeals (*Judge Arnold*, with *Judges Vaughn* and *Webb* concurring) reported at 54 N.C. App. 324, 283 S.E. 2d 430 (1981). The Court of Appeals reversed the opinion and award entered by the North Carolina Industrial Commission on 14 November 1980, ruling that the County of Pitt and U.S. Fire Insurance were liable for the payment of compensation benefits to the injured employee.

The essential facts of this controversy are adequately summarized in the Court of Appeals' opinion, which we quote:

> This case arises under the Workers' Compensation Act, G.S. 97-1 *et seq.*, from injuries suffered by the plaintiff in an admittedly compensable, work-related accident on 10 January 1979. At issue before the Commission was a dispute as to which of two alleged employers of the plaintiff was in fact his employer and therefore obligated to compensate the plaintiff for his injuries.
>
> The defendants agreed, pending the outcome of this action, that appellant insurer, carrier for Pitt County, would compensate the plaintiff fully and that appellee insurer, carrier for the Town of Winterville, would reimburse appellant if plaintiff were found to have been the town's employee at the time of the accident.
>
> The facts are not disputed by the parties.
>
> Defendant Pitt County (County) hired plaintiff pursuant to a contract with the Community Employment Training (CETA) program of the federal government and assigned him to work for defendant Town of Winterville (Town). Plaintiff's work was supervised by Town employees and his duties and hours were determined by the Town. Time sheets were kept by the Town on which plaintiff's hours were recorded and these were turned over to the County. County paid the plaintiff from CETA funds and maintained his payroll records. Town kept no records on the plaintiff other than his time sheets and could not fire the plaintiff without the County's approval.

> Pursuant to a condition imposed by the federal government for receipt of CETA funds, County paid workers' compensation insurance premiums covering plaintiff and other CETA employees. County was reimbursed by CETA for these expenditures. Town did not pay premiums to its insurance carrier with respect to plaintiff.
>
> The hearing officer found that the County and its insurance carrier were estopped to deny that the County was plaintiff's employer since the County had paid insurance premiums based on inclusion of the plaintiff under its workers' compensation policy and its insurer had accepted these premiums. In . . . reliance upon this finding, the Commission held as a matter of law that the County was plaintiff's employer and was obligated to compensate plaintiff for his injuries. On appeal, the Full Commission affirmed.

54 N.C. App. at 324-25, 283 S.E. 2d at 431.

The Court of Appeals subsequently reversed the decision of the Industrial Commission and held that: (1) the Commission had erroneously concluded that the County and its insurance carrier were estopped from denying liability on the theory that the requisite employment relationship between the injured employee and the County did not exist, and (2) the Commission's findings of fact were insufficient to support its conclusion of law that this necessary relationship with the County existed on the date of the employee's accident. The Town and its insurance carrier appeal to our Court for reinstatement of the Commission's original opinion and award in this matter.

Teague, Campbell, Conely & Dennis, by C. Woodrow Teague and George W. Dennis, III, for defendant-appellants.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Daniel F. McLawhorn, amicus curiae for defendant-appellants.

Young, Moore, Henderson & Alvis, by B. T. Henderson, II and William F. Lipscomb, for defendant-appellees.

COPELAND, Justice.

Appellate review of opinions and awards of the Industrial Commission is strictly limited to the discovery and correction of

legal errors. G.S. 97-86; *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676 (1980); *Byers v. Highway Comm.*, 275 N.C. 229, 166 S.E. 2d 649 (1969). The dispositive issue here is whether the Commission erred as a matter of law in concluding that Pitt County and its insurance carrier, U.S. Fire Insurance, were estopped from denying coverage of the employee's work-related accident under the particular facts of this case. We affirm the Commission's conclusion in this regard and reverse the contrary decision of the Court of Appeals.

In its broadest and simplest sense, the doctrine of estoppel is a means of preventing a party from asserting a legal claim or defense which is contrary to or inconsistent with his prior actions or conduct. *See generally* Dobbs, Handbook on the Law of Remedies § 2.3, at 41-44 (1973). The underlying theme of estoppel is that it is unfair and unjust to permit one to pursue an advantage or right which has not been promoted or enforced prior to the institution of some lawsuit. *See McNeely v. Walters*, 211 N.C. 112, 189 S.E. 114 (1937). In particular, "[t]he rule is grounded in the premise that it offends every principle of equity and morality to permit a party to enjoy the benefits of a transaction and at the same time deny its terms or qualifications." *Thompson v. Soles*, 299 N.C. 484, 487, 263 S.E. 2d 599, 602 (1980).

An estoppel can arise in any legal setting, and our appellate courts have prudently and repeatedly applied the doctrine in workers' compensation cases to thwart an insurance carrier's subsequent attempt to avoid coverage of a work-related injury, howbeit upon a legitimate ground, when the carrier has previously and routinely accepted the payment of insurance premiums pertaining to the injured individual. *Aldridge v. Motor Co.*, 262 N.C. 248, 136 S.E. 2d 591 (1964); *Pearson v. Pearson, Inc.*, 222 N.C. 69, 21 S.E. 2d 879 (1942); *Garrett v. Garrett & Garrett Farms*, 39 N.C. App. 210, 249 S.E. 2d 808 (1978), *discretionary review denied*, 296 N.C. 736, 254 S.E. 2d 178 (1979); *see Moore v. Electric Co.*, 264 N.C. 667, 142 S.E. 2d 659 (1965); *Greene v. Spivey*, 236 N.C. 435, 73 S.E. 2d 488 (1952); *Britt v. Construction Co.*, 35 N.C. App. 23, 240 S.E. 2d 479 (1978); *Allred v. Woodyards, Inc.*, 32 N.C. App. 516, 232 S.E. 2d 879 (1977). This rule is plainly consistent with the overall rationale of the remedial doctrine of estoppel, and it is so well established in our jurisdiction that it requires no explanation or elaboration here. Yet the Court of Appeals de-

clined to hold in the instant case that Pitt County and U.S. Fire Insurance, the undisputed payor and payee of the compensation premiums for the injured employee, were estopped to deny coverage due to its belief that estoppel in workers' compensation cases is of the classic form, that is, "equitable" estoppel, which would require a showing of detrimental reliance by the Town of Winterville and Great American Insurance before the doctrine could operate in their favor. 54 N.C. App. at 326, 283 S.E. 2d at 431-32; *see generally Bourne v. Lay & Co.*, 264 N.C. 33, 140 S.E. 2d 769 (1965); 5 Strong's N.C. Index 3d, Estoppel §§ 4.5-4.6 (1977). We are not so persuaded in this case.

None of the workers' compensation cases, which have previously applied estoppel against an insurance carrier based upon its receipt and acceptance of the required premiums (*supra*), have expressly denominated the estoppel so used as "equitable" or mentioned the necessity for detrimental reliance by, or the accrual of some harm to, the party who seeks to benefit from the doctrine's application. It seems certain, as a matter of common sense, that such detriment or prejudice would perforce exist in all of these cases, in any event, since some other provision for coverage surely would have been made if the party to be estopped had not paid or accepted the premiums. *See Aldridge v. Motor Co.*, *supra*, 262 N.C. at 252-53, 136 S.E. 2d at 594. Perhaps then, the prior pertinent decisions have omitted an express reference to detrimental reliance in such circumstances because the nature of the situation dictates that it be conclusively presumed. *See* 1C Larson, Workers' Compensation Law § 46.40, at 8-223 to 227 (1980 and Supp. 1981). *But see* 7B Appleman, Insurance Law and Practice § 4659 (Berdal ed. 1979).

We need not specifically decide this issue of estoppel theory with respect to *all* workers' compensation cases today, however. It suffices to say that we believe that the unique situation involving compensation coverage of federally paid CETA employees in this State would be best governed in every instance by a straightforward rule of "quasi" estoppel, which does not require detrimental reliance *per se* by anyone, but is directly grounded instead upon a party's acquiescence or acceptance of payment or benefits, by virtue of which that party is thereafter prevented from maintaining a position inconsistent with those acts. 31 C.J.S. Estoppel § 107 (1964); 28 Am. Jur. 2d Estoppel and Waiver § 59

(1966); *see Corbett v. Corbett*, 249 N.C. 585, 107 S.E. 2d 105 (1959); *Cook v. Sink*, 190 N.C. 620, 130 S.E. 714 (1925); *Redevelopment Comm. v. Hannaford*, 29 N.C. App. 1, 222 S.E. 2d 752 (1976). In so holding, we endorse the sound reasoning expounded by the Attorney General in his *amicus* brief at pages 6-8:

> [Quasi estoppel is] the only acceptable rule which may be fashioned to accommodate many CETA workers and other workers similarly situated. In several CETA programs workers are assigned to job sites not controlled by the agency which holds the CETA subgrant. That agency must select the participants and provide for the benefits assured participants by the subgrant and Federal law. See, 29 USC § 823(d)(6) and 20 CFR § 676.27(a). Since the subgrantee does not supervise the participants, the logical result of the Court of Appeals decision will require separate workmen's compensation coverage at each site supervised by an entity other than the subgrantee. While compliance with that result is not impossible, the administrative complications of the subgrantee and insurance carriers will be staggering. Under the rule proposed herein, a single carrier would provide the coverage regardless of the site or supervisor. Premiums would continue to be determined from the payroll records rather than some new system yet to be devised.
>
> It would also avoid the second complication which is implicit in the principles of equity. Should the Court of Appeals' opinion be upheld, the carrier will have collected premiums for workers it never covered while the liability for injuries will pass to carriers which did not collect the premiums or agree to cover the participants. Thus, the carrier will be enriched unjustly as a result of the repudiation of its contracted burdens. The subgrantee will ultimately be the party injured. All CETA expenses must provide the services for which the monies were paid. Since the premiums will not have provided the coverage contracted, the subgrantee will have failed to fulfill its contractual obligations to provide workmen's compensation insurance from the appropriate service and to expend CETA funds for the purpose the funds were provided. Accordingly, it will be necessary for the Department of Natural Resources and Community Development to recoup all such premiums from the subgrantee.

> The rule proposed allows the subgrantees to continue to meet their obligations and will find they have done so in the past. It will work no inequity against carriers such as United States Fire Insurance and will prevent inequities resulting to subgrantees such as the County of Pitt and carriers such as Great American Insurance. It will also allow the CETA programs to operate as they do presently. Otherwise, it may be necessary to curtail certain services now available to entities which have no workmen's compensation insurance. CETA participants may now be assigned to volunteer groups and other similar entities which have no coverage. The carrier providing coverage has the ability to set the premiums according to the work sites regardless of location or site supervision.

In sum, we uphold the Industrial Commision's conclusion that the facts of this case warranted the application of an estoppel against Pitt County and U.S. Fire Insurance, who respectively paid and received the compensation premiums for the employee, in the favor of the Town of Winterville and Great American Insurance, who respectively did not pay or receive any such premiums and were not aware of any need for doing so. We emphasize that out decision is largely limited to these peculiar facts about the coverage of CETA employees under the provisions of our workers' compensation law. We express no opinion regarding *who* (the Town or the County) this CETA employee was actually working for on the date of his accident. We only say here that, if a CETA employee would not otherwise be protected by workers' compensation insurance for a work-related injury, the state governmental unit which hired him and paid the required premiums shall be estopped to deny liability therefor, as will its insurance carrier which accepted payment of those premiums. This is a rule upon which all parties concerned in the administration of the CETA program can steadfastly rely and best arrange their affairs.

The decision of the Court of Appeals is, therefore, reversed, and the opinion and award of the Industrial Commission is reinstated for the reasons given.

Reversed.

CHARLES HENRY BOLICK v. AMERICAN BARMAG CORPORATION

No 175A81

(Filed 13 July 1982)

1. **Limitation of Actions § 4.1; Sales § 22— products liability claim—six-year statute of repose—condition precedent**

For products liability claims to which the six-year statute of repose of G.S. 1-50(6) applies, the plaintiff must prove the condition precedent that the cause of action was brought no "more than six years after the date of initial purchase [of the product] for use or consumption" and must also meet the time limitation of the applicable procedural statute of limitations.

2. **Limitation of Actions § 4.1; Sales § 22; Statutes § 8.1— products liability—six-year statute of repose—no retrospective application**

Because it is a substantive change in the conditions precedent to a cause of action, the legislature did not intend that G.S. 1-50(6) be retrospectively applied to causes of action that had accrued before its effective date of 1 October 1979. Therefore, the statute was inapplicable to plaintiff's cause of action which accrued at the time he was injured on 3 June 1977, and plaintiff has no standing to challenge the constitutionality of the statute on its face.

JUDGE Arthur Lee Lane granted defendant's motion for summary judgment at the 14 July 1980 Session of CATAWBA Superior Court. The Court of Appeals, with a divided panel, reversed the trial court.[1] Defendant appeals pursuant to G.S. 7A-30(2).

Tate, Young, Morphis, Bogle & Bach by Thomas C. Morphis; and Edwin G. Farthing for plaintiff appellee.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William E. Poe and Irvin W. Hankins III for defendant appellant.

Bailey, Dixon, Wooten, McDonald & Fountain by J. Ruffin Bailey and Gary S. Parsons, for American Insurance Association, amicus curiae.

Jones, Hewson & Woolard by Hunter M. Jones and Harry C. Hewson, amicus curiae.

Harris and Bumgardner by Seth H. Langson, for North Carolina Academy of Trial Lawyers, amicus curiae.

1. 54 N.C. App. 589, 284 S.E. 2d 188 (1981).

Smith, Moore, Smith, Schell & Hunter by Girard H. Davidson, Jr. and Alan William Duncan; and Perry C. Henson, for North Carolina Association of Defense Attorneys, amicus curiae.

Kennedy, Covington, Lobdell & Hickman by Charles V. Tompkins, Jr. and Wayne Huckel, for The Motor Vehicle Manufacturers Association of the United States, Inc., amicus curiae.

Mark J. Nuzzaco for National Machine Tool Builders' Association, amicus curiae.

EXUM, Justice.

Plaintiff filed complaint on 10 October 1979 seeking damages for injuries sustained when his hand was caught in the gears of a yarn crimping machine owned by his employer, Mill Yarns, Inc. of Hickory. This Barmag False-Twist Crimping machine was purchased from defendant on 6 April 1971, and plaintiff was injured on 3 June 1977. Plaintiff alleged that defendant had negligently designed, manufactured and installed the machine and had breached warranties of merchantability and fitness.

Defendant responded with a motion to dismiss and for summary judgment under Rules 12(b)(6) and 56 of the North Carolina Rules of Civil Procedure. Defendant confirmed in its motion and supporting affidavit that it had sold plaintiff's employer the machine on 6 April 1971, and that plaintiff had been injured by it. Defendant argued in its motion that plaintiff's action was barred by G.S. 1-50(6). General Statute 1-50(6) was one section of the Products Liability Act which became effective on 1 October 1979, although it was not to affect litigation pending on that date. Products Liability Act, ch. 654, §§ 2, 7, 8, 1979 N.C. Sess. Laws 687, 689, 690. The trial court granted the motion and dismissed plaintiff's complaint with prejudice. The Court of Appeals reversed, holding that G.S. 1-50(6) is unconstitutional on its face.

This appeal presents two questions. First, whether G.S. 1-50(6) is applicable to plaintiff's action. Second, if it is not applicable to his action, whether plaintiff has standing to challenge its constitutionality. We hold that the statute is not applicable to plaintiff's action; thus he has no standing to attack its constitutionality.

General Statute 1-50(6) provides:

> No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

This statute is similar to many others enacted throughout the nation to set an outside limit for bringing products liability actions for personal injury.[2] Statutes such as G.S. 1-50(6) have been denominated "statutes of repose" by commentators and practitioners because "they set a fixed limit after the time of the product's manufacture, sale or delivery beyond which the product seller will not be held liable." McNeill Smith, "Statutes of Limitations and Statutes of Repose," Paper Presented at the American Bar Assoc. Section of Litigation 30 (August 4, 1980) (unpublished manuscript). *See also* Restatement (Second) of Torts § 899, comment g (1979). Although the term "statute of repose" has traditionally been used to encompass statutes of limitation,[3] in recent years it has been used to distinguish ordinary statutes of limitation from those that begin "to run at a time unrelated to the traditional accrual of the cause of action." McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 584 (1981). Such statutes are intended to be "a substantive definition of rights as distinguished

2. *See, e.g.*, Ala. Code § 6-5-502 (Cum. Supp. 1981); Conn. Gen. Stat. Ann. § 52-577a (West Cum. Supp. 1981); Ga. Code Ann. § 105-106(b)(2) (Cum. Supp. 1981); Ill. Ann. Stat. ch. 83, ¶22.2(b) (Smith-Hurd Supp. 1966-1980); Ky. Rev. Stat. Ann. § 411.310(1) (Baldwin 1981) (creates rebuttable presumption product not defective if injury occurred more than 5 years after sale to first consumer or 8 years after manufacture); Or. Rev. Stat. § 30.905(1) (1981); Tenn. Code Ann. § 29-28-103 (1980); Utah Code Ann. § 78-15-3 (1977). *See* Stevenson, *Products Liability and the Virginia Statute of Limitations—A Call for the Legislative Rescue Squad*, 16 U. Rich. L. Rev. 323, 333 n. 32 (1982), for additional statutes and particular time limitations.

3. Ordinary statutes of limitation have been labeled statutes of repose in previous cases. For example, in *Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E. 2d 508, 514 (1957), a statute of limitation was defined in this manner: "The statute of limitations begins to run from the time the cause of action accrues. . . . Statutes of limitation are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all." *See also Brown v. Morisey*, 124 N.C. 292, 296, 32 S.E. 687, 689 (1899) (Clark, J., concurring).

from a procedural limitation on the remedy used to enforce rights." Stevenson, *Products Liability and the Virginia Statute of Limitations—A Call for the Legislative Rescue Squad,* 16 U. Rich. L. Rev. 323, 334 n. 38 (1982).

Our Court of Appeals recognized the substantive aspect of a statute similar to G.S. 1-50(6) in *Smith v. American Radiator & Standard Sanitary Corp.*, 38 N.C. App. 457, 248 S.E. 2d 462 (1978), *disc. rev. denied,* 296 N.C. 586, 254 S.E. 2d 33 (1979). The statute at issue was G.S. 1-50(5), which stated at that time: "No action to recover damages for an injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought . . . more than six (6) years after the performance or furnishing of such services and construction." *Id.* at 460, 248 S.E. 2d at 464-65. Judge Parker, writing for the court, analyzed the statute in this manner:

> Statutes similar to, and in many cases identical with, our statute G.S. 1-50(5) have been adopted in a large number of jurisdictions. *See,* Comment, *Limitation of Action Statutes for Architects and Builders—Blueprint for Non-action,* 18 Cath. U. L. Rev. 361 (1969). Because of their unique manner of limiting actions, these statutes have been referred to as 'hybrid' statutes of limitations, having potentially both a substantive and a procedural effect. On the one hand, the date of injury is not a factor used in computing the running of the time limitation. The statute thus acquires its substantive quality by barring a right of action even before injury has occurred if the injury occurs subsequent to the prescribed time period. On the other hand, the statute's operation is similar to that of an ordinary statute of limitations as to events occurring before the expiration of the prescribed time period. Whether in such case the statute is to be interpreted as replacing entirely the statute of limitation which would otherwise be applicable or is to be interpreted as operating in conjunction with such other statute, is the principal question presented by this appeal. Courts of other States which have confronted this problem have held that the two statutes should be interpreted as operating in conjunction with each other.

. . . .

> Following the interpretation placed upon the statute by the Supreme Courts of New Jersey and Virginia, we hold that G.S. 1-50(5) is to be interpreted in conjunction with G.S. 1-52(5) [a three-year statute of limitations for personal injuries running from the time the action accrued] so that both statutes may be given effect. So interpreted, G.S. 1-50(5) provides an outside limit of six years 'after the performance or furnishing of such services and construction' of improvements to real property for the bringing of an action coming within the terms of that statute. Within that outside limit, G.S. 1-52(5) continues to operate and G.S. 1-50(5) does not serve to extend the time for bringing an action otherwise barred by the three year statute. In the present case, plaintiff's action against the appellant, Industrial Maintenance and Mechanical Service, Inc., was commenced more than three years after his action accrued, and the action as against this defendant is barred by G.S. 1-52(5).

Id. at 461-64, 248 S.E. 2d at 465-67.

Both plaintiff and defendant cite this language in *Smith* and argue its applicability to the statute at issue here. Thus, both parties recognize the substantive nature of the statute. We believe the Court of Appeals in *Smith*, as well as the parties and the Court of Appeals in the instant case,[4] are correct in assessing statutes such as these, running from a time other than the accrual of the action, to be substantive, rather than procedural, limitations on a personal injury action.

This view is consistent with this Court's interpretation of similar statutes in the past. Generally, a statute of limitations has been recognized as a procedural bar to a plaintiff's action, which "does not begin to run until after the cause of action has accrued and the plaintiff has a right to maintain a suit." *Raftery v. W. C.*

4. The Court of Appeals in the instant case, 54 N.C. App. at 594-95, 284 S.E. 2d at 192, stated:

> Because G.S. 1-50(6) attempts to bar absolutely claims arising out of defects or failures in relation to products after a period measured from a date *other than* the date of accrual of those claims, it does not constitute a statute of limitation. Rather, it would, as a matter of substantive law, abolish certain claims recognized prior to its enactment. [Emphasis original.]

Vick Construction Co., 291 N.C. 180, 193, 230 S.E. 2d 405, 412 (1976) (Branch, J., concurring). It also has been long recognized that certain time limitations may operate, not as procedural bars after an action has accrued, but as conditions precedent to the action itself. For example, in *Taylor v. Cranberry Iron and Coal Co.*, 94 N.C. 525, 526 (1886), the Court construed the applicable wrongful death statute containing the requirement that an action for damages "be brought within *one year after* such death," to establish a condition precedent to the maintenance of the action. (Emphasis original.) *See also Graves v. Welborn*, 260 N.C. 688, 691, 133 S.E. 2d 761, 764 (1963). The same construction was applied to a Workmen's Compensation statute in *McCrater v. Stone & Webster Engineering Corp.*, 248 N.C. 707, 104 S.E. 2d 858 (1958). The Court there quoted from 34 Am. Jur., *Limitation of Actions*, § 7 (1941), in distinguishing between time limitations that are procedural and those that are substantive:

> 'A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right.'

248 N.C. at 709, 104 S.E. 2d at 860. The rule that a statute creating a right of action may set a time limitation as a condition of that action also was applied to our old usury statute. *See Roberts v. Life Insurance Co. of Virginia*, 118 N.C. 429, 435, 24 S.E. 780, 781 (1896).

The legislature may require a particular time limitation as a condition precedent to the accrual of the action, even if it does not do so in the same statute which creates the liability. "[T]he fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. The same

conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right." *Davis v. Mills*, 194 U.S. 451, 454 (1904). *See also Herm v. Stafford*, 663 F. 2d 669, 681 n. 17 (6th Cir. 1981). Because the establishment of a time limitation as a condition precedent to a cause of action generally has been a legislatively-imposed requirement, this Court stated that: "It is for the Legislature, not for this Court, to impose, as a condition precedent to liability for personal injury, that the injury must occur within a specified time after the wrongdoing which is alleged to have been the proximate cause." *Raftery v. W. C. Vick Construction Corp., supra*, 291 N.C. at 190-91, 230 S.E. 2d at 411. That the legislature has the authority to establish a condition precedent to what originally was a common law cause of action is beyond question. "[T]he General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter." *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E. 2d 231, 234 (1956). We believe the legislature has created just such a condition precedent in G.S. 1-50(6).

[1] For injuries to which G.S. 1-50(6) is applicable, therefore, the plaintiff must prove the condition precedent that the cause of action is brought no "more than six years after the date of initial purchase [of the product] for use or consumption." A plaintiff must also meet the time limitation of the applicable procedural statute of limitations. Other states have similarly construed statutes of repose to be substantive provisions and not merely procedural modifications of a remedy. *See, e.g., Kline v. J. I. Case Co.*, 520 F. Supp. 564 (N.D. Ill. 1981) (products liability statute); *Burmaster v. Gravity Drainage Dist. No. 2*, 366 So. 2d 1381, 1387-88 (La. 1978) (improvement to immovable property statute); *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A. 2d 662, 667 (1972) (improvement to real property statute). *But see Regents of the University of California v. Hartford Acc. & Indem. Co.*, 147 Cal. Rptr. 486, 495-96, 581 P. 2d 197, 206-07 (1978) (improvement to real property statute of repose viewed as procedural bar and not substantive one).

[2] Because it is a substantive change in the conditions precedent to a cause of action, we conclude that the legislature did not intend that G.S. 1-50(6) be retrospectively applied to causes of action that had accrued before its effective date of 1 October 1979. An accrued cause of action is a property interest. *Mizell v. Atlantic Coast Line R.R. Co.*, 181 N.C. 36, 106 S.E. 133 (1921); 16 C.J.S. *Const. Law* § 254 (1956). When a statute would have the effect of destroying a vested right if it were applied retroactively, it will be viewed as operating prospectively only. *Smith v. Mercer*, 276 N.C. 329, 172 S.E. 2d 489 (1970). "A statute is not rendered unconstitutionally retroactive merely because it operates on facts which were in existence prior to its enactment. The proper question for consideration is whether the act as applied will interfere with rights which had vested or liabilities which had accrued at the time it took effect." *Booker v. Duke Medical Center*, 297 N.C. 458, 467, 256 S.E. 2d 189, 195 (1979). *See also Wood v. J. P. Stevens Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979); *Lester Bros., Inc. v. Pope Realty and Ins. Co.*, 250 N.C. 565, 109 S.E. 2d 263 (1959); *Bank of Pinehurst v. Derby*, 218 N.C. 653, 12 S.E. 2d 260 (1940).

Applying this test to the instant case, we note that under *Raftery v. W. C. Vick Construction Co., supra*, 291 N.C. at 189, 230 S.E. 2d at 409, plaintiff's cause of action accrued at the time he was injured—3 June 1977. Under the applicable statutes of limitations, G.S. 1-52(1)[5] and (5), he had three years from this date within which to bring his action for personal injuries. Thus, although he had not filed his claim by the effective date of G.S. 1-50(6), 1 October 1979, his claim was still viable. If we assume, *arguendo*, that G.S. 1-50(6) is constitutional on its face it would, if applied retroactively to plaintiff's claim, destroy plaintiff's cause of action which had vested before its effective date. We conclude, therefore, that G.S. 1-50(6) is not applicable to plaintiff's action.[6]

5. See *Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982), for the proposition that G.S. 25-2-725(1), the Uniform Commercial Code statute of limitations for actions on sales contracts, does not apply to *personal injury* actions based on breach of express or implied warranties. *Bernick* holds that the applicable procedural statute of limitations is the three-year period for contract actions found in G.S. 1-52(1).

6. This is consistent with the approach taken in other jurisdictions. *See, e.g., Kline v. J. I. Case Co., supra*, 520 F. Supp. at 566 (Ill. Rev. Stat. ch. 83, § 22.2(g)

Because G.S. 1-50(6) is not applicable to plaintiff, he has no standing to challenge its constitutionality on its face. A person who is not personally injured by a legislative action may not attack its constitutional validity. *Nicholson v. State Education Assistance Authority*, 275 N.C. 439, 447, 168 S.E. 2d 401, 406 (1969); *City of Greensboro v. Wall*, 247 N.C. 516, 519-522, 101 S.E. 2d 413, 416-417 (1958). Therefore, we do not reach the issue decided by the Court of Appeals, *i.e.*, the constitutionality of G.S. 1-50(6).

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

Modified and affirmed.

STATE OF NORTH CAROLINA v. DUDLEY G. McGRAW

No. 44PA82

(Filed 13 July 1982)

ON review upon the State's petition for discretionary review filed pursuant to G.S. § 7A-31. Defendant was convicted of felonious manufacture of marijuana and was sentenced to a term of five years. The Court of Appeals reversed defendant's conviction in an opinion reported pursuant to Rule 30(e) of the North Carolina Rules of Appellate Procedure. We allowed the State's petition for discretionary review by order dated 30 March 1982.

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

Wayne Eads, Attorney for Defendant-Appellee.

PER CURIAM.

We conclude that our order granting discretionary review was improvidently allowed. However, for the correct statement of

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made applicable to causes of action accruing *after* effective date of products liability statute); *Hunter v. School Dist. of Gale-Ettrick-Trempealeau*, 97 Wis. 2d 435, 293 N.W. 2d 515 (1980).

the rules for appellate review of a trial court's ruling on a motion to dismiss for evidentiary insufficiency, see *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

JOE M. SNIPES v. IDA M. SNIPES (WIDOW); VERNON P. DAVIS AND WIFE, BARBARA S. DAVIS

No. 99A82

(Filed 13 July 1982)

APPEAL by defendants as of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals (*Judge Harry C. Martin*, with *Judge Clark* concurring, and *Judge Hedrick* dissenting) reported at 55 N.C. App. 498, 286 S.E. 2d 591 (1982), affirming the judgment granting plaintiff's motion for a directed verdict at the close of all the evidence and denying defendants' motions for directed verdicts on their counterclaims by *Bailey, Judge*, filed 9 December 1980 in Superior Court, CHATHAM County.

Barber, Holmes & McLaurin, by Edward S. Holmes, for plaintiff-appellee.

Gunn & Messick, by Paul S. Messick, Jr., for defendant-appellants.

PER CURIAM.

The facts are fully and accurately stated in the Court of Appeals' opinion. We hereby adopt the reasoning stated by the Court of Appeals and affirm its decision in all respects.

Affirmed.

STATE OF NORTH CAROLINA v. DENNIS HANNAH

No. 108A82

(Filed 13 July 1982)

APPEAL pursuant to G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals, 55 N.C. App. 583, 286 S.E. 2d 363 (1982), which found no error in the entry of judgment by *Judge Robert M. Burroughs* at the 1 April 1981 Session of Superior Court, GASTON County, upon the defendant's conviction for felonious larceny and felonious breaking or entering.

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General and John F. Maddrey, Associate Attorney, for the State.

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

PER CURIAM.

The sole issue presented to this Court is whether the trial court erred in failing to instruct the jury on the lesser included offense of misdemeanor breaking or entering. The Court of Appeals found no error in the trial. Having carefully reviewed the majority opinion of the Court of Appeals, the dissent, the briefs and authorities on this issue, we conclude that the result reached and the legal principles applied by the Court of Appeals are correct. Consequently, the majority opinion of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. ROSCOE MORRISON

No. 153A82

(Filed 13 July 1982)

APPEAL by defendant pursuant to G.S. 7A-30(2) of the decision of the Court of Appeals (*Judge Harry C. Martin*, with *Judge Arnold* concurring, and *Judge Wells* dissenting) reported per Rule 30(e) at 56 N.C. App. 257 (filed 16 February 1982). The Court of Appeals found no error in the entry of judgment upon defendant's misdemeanor conviction for simple assault by *Clark, Judge*, at the 10 March 1981 Criminal Session of Superior Court, CUMBERLAND County.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

Assistant Public Defender Staples Hughes for the defendant-appellant.

PER CURIAM.

We hold that the argument made by the district attorney was error. However, because the trial judge forcefully sustained defendant's objection and gave an appropriate curative instruction and because of the strength of the State's case and the lack of any real defense proffered by defendant, we are satisfied that the error was not prejudicial. We, therefore, affirm the decision of the Court of Appeals.

Affirmed.

In re Greene

IN THE MATTER OF: JUDGE GEORGE R. GREENE, DISTRICT COURT JUDGE, TENTH JUDICIAL DISTRICT	))))	ORDER

Nos. 322P82, 338P82, 361P82

(Filed 22 July 1982)

THE issues presented by these three cases are before the Supreme Court of North Carolina as a result of three separate petitions filed by assistants to the District Attorney, Tenth Prosecutorial District, each such petition being denominated a "Petition for Writ of Mandamus." In support of the allegations contained in these petitions, assistants to the District Attorney have submitted affidavits and other documents. District Court *Judge George R. Greene*, the respondent, has responded to the petitions and disputes many of the allegations contained therein. Included with his response in each case are affidavits in support of the allegations and assertions contained in his response.

Our Case No. 322P82 arose upon a Petition for Writ of Mandamus filed with this Court by Assistant District Attorney Karen P. Davidson asking that this Court issue a Writ of Mandamus requiring Judge Greene to strike judgments of "Not Guilty" entered by him in seven criminal cases on 13 May 1982. In each of these cases the defendants were alleged to have violated § 16-41 of the Code of the Town of Cary by operating a motor vehicle more than 25 miles per hour in a particular marked school zone. When the case of the first of these defendants was called for trial, the defendant's attorney argued that § 16-41 of the Town Code had been superseded by § 16-86. The petitioner contends that Judge Greene stated that § 16-86 was more specific than § 16-41 and, as a matter of law, must apply to the area in question. Section 16-86, we are told, sets the speed limit along the road in question at 45 miles per hour in areas not otherwise posted.

The petitioner contends that in the remaining cases each defendant was called before the bench in turn. In each case the defendant or his attorney informed Judge Greene that the individual was charged with a violation of the posted school zone speed limit of 25 miles per hour in the same zone in question. The petitioner further contends that, upon receiving this information,

Judge Greene stated that the cases were dismissed without giving the State an opportunity to offer evidence and without the State waiving its opportunity to offer evidence.

The petitioner contends that, on the following day, 14 May 1982, the petitioner, acting on behalf of the State and upon the belief that the cases had been dismissed by Judge Greene, attempted to enter formal notice of appeal pursuant to G.S. 15A-1432. The petitioner was informed by a Deputy Clerk of Court that judgments of not guilty had been entered by Judge Greene in each of the cases and, therefore, the State had no right to appeal.

The petitioner contends that the allegations present the questions of whether a judge may return a not guilty verdict upon a defendant's motion to dismiss and whether a District Court judge has authority to enter a judgment of not guilty on his own motion when the State has neither offered evidence nor formally waived its right to offer evidence.

In his response to Case No. 322P82, the respondent, Judge Greene, asserts that the District Attorney's office is not acting in good faith and is attempting to embarrass him. Although it is not contested that the first defendant in the criminal cases giving rise to this petition made a motion to dismiss in response to which Judge Greene entered a judgment of not guilty, most of the other allegations of both the petitioner and the respondent are strongly contested. Each has filed affidavits and other documents purporting to substantiate certain allegations made. We note that the vigor with which the parties contest the facts in this case (our Case No. 322P82) has apparently led attorneys representing Judge Greene to cause some of the District Attorney's telephone conversations to be recorded, as a transcript of a recording of a conversation purported to have taken place between the District Attorney for the Tenth Prosecutorial District and the father of a defendant in one of the criminal cases, apparently made without the District Attorney's knowledge, is included in the materials filed on behalf of the respondent Judge Greene.

In the second matter before us, our Case No. 338P82, Assistant District Attorney Mary H. Dombalis filed a petition for Writ of Mandamus alleging that one Michael Covington was convicted of carrying a deadly weapon, a .25 caliber pistol, on the North

Carolina State University campus in violation of G.S. 14-269.2. The defendant appeared in District Court and entered a plea of guilty as charged on 3 June 1982 and was found guilty by Judge Greene. Judge Greene originally ordered that the gun in question be destroyed but later struck that order and entered an order that the weapon be returned to the defendant. The petitioner herein, the Assistant District Attorney, brought to Judge Greene's attention the mandate of G.S. 14-269.1 regarding the lawful disposition of weapons. The respondent, Judge Greene, indicated that he did not view G.S. 14-269.1, requiring the destruction or other lawful disposition of deadly weapons, as applying to cases involving violations of G.S. 14-269.2. However, Judge Greene struck his order that the weapon be returned to the defendant and stated that he would allow the State to appeal to the Superior Court. The petitioner relies upon *State v. Cox*, 216 N.C. 424, 5 S.E. 2d 125 (1939), and contends that there is no authority in law for the State to appeal such a ruling and that Judge Greene does not have authority to confer a right of appeal upon a party who does not otherwise have such right as a matter of law. The petitioner argues that a Writ of Mandamus compelling the trial court to order the weapon in question disposed of is the only effective method of appeal open to the State.

In the third case brought before us by these petitions (our Case No. 361P82), Assistant District Attorney Mary H. Dombalis petitions this Court to issue a Writ of Mandamus to correct the judicial actions of the respondent Judge Greene in allegedly acquitting a criminal defendant without affording the State the opportunity to present evidence or be heard. The petitioner alleges that a defendant, Walter Glenn Weaver, appeared in District Court for operating a motor vehicle while his license was revoked and for failing to display a current inspection sticker. The petitioner alleges that the docket was extremely heavy and that the respondent, Judge Greene, began calling defendants to the bench who had indicated at the call of the calendar that they wished to plead guilty. While he was doing this the petitioner turned her attention to the cases involving pleas of not guilty but continued to try to remain attentive to what was going on at the bench. The defendant indicated his wish to plead guilty and stated that his license had been revoked for driving under the influence and that he had been allowed a limited driving privilege by another judge.

He also told Judge Greene that his driving privilege allowed him to drive during the time that he was stopped but only to and from work. The defendant admitted that on the occasion in question he was not driving to or from work. The petitioner asserts that Judge Greene then stated that he did not draft limited privileges in this way and told the defendant to take a seat in the courtroom. The petitioner alleges that Judge Greene called the defendant back before him after approximately one hour and said, "not guilty." He told the defendant he could leave, returned the form containing his limited driving privilege and told the defendant that he would not have to pay the court costs. The petitioner asserts that all of this took place so quickly that she was unable to say anything on behalf of the State.

The petitioner alleges that she then approached the courtroom clerk to see the citation. She alleges that the citation had been marked to indicate that the defendant's plea was "not guilty." The verdict was also marked "not guilty." In support of this petition, the petitioner filed an affidavit of a law enforcement officer who had spoken to the defendant in the traffic case in question, Walter Glenn Weaver, and who indicated that Weaver had stated that he had never withdrawn his guilty plea and never entered a plea of not guilty.

The petitioner, relying upon the authority of *State v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135 (1971) and *State v. Barbour*, 243 N.C. 265, 90 S.E. 2d 388 (1955) contends that Judge Greene should have given the defendant an opportunity to withdraw his plea of guilty and to stand trial, if he had any doubts as to the defendant's guilt. Had Judge Greene done this, the petitioner contends that he would have then been required to allow the State to offer evidence and to be heard. Instead, the petitioner contends that Judge Greene entered a plea of not guilty and a verdict of not guilty without noticed to the State or giving the State the opportunity to be heard, when the defendant was attempting to plead guilty and the State had no reason to believe the plea would not be accepted. The petitioner points out, among other things, that such action, if found to have occurred, would violate Canon 3(A)(4), North Carolina Code of Judicial Conduct, 283 N.C. 771, 772 (1973).

The respondent, Judge Greene, contests the allegations of fact of this petition (our Case No. 361P82) as well as the allega-

tions of fact of the other two petitions for writs of mandamus. He asserts that the defendant changed his plea after Judge Greene advised him that he should change it from guilty to not guilty. Judge Greene further asserts that the judgment was not entered for more than an hour after the defendant changed the plea, in order that Judge Greene might have time to consider an appropriate judgment. Judge Greene does not contend that evidence was ever offered for the State but asserts the State was given the opportunity to offer evidence. The respondent, Judge Greene, again asserts that the petitions were filed for the purpose of casting aspersions upon his ethics and to embarrass him and not for proper purposes. In support of this assertion, the respondent again calls to our attention the document purporting to be a transcript of a telephone conversation of the District Attorney which he asserts was recorded without the District Attorney's knowledge.

As previously indicated, the allegations of the petitioners and the respondent are, for the most part, strongly contested in each of these cases. The parties' allegations are supported by affidavits and other documentation including affidavits of various members of the bar, various court functionaries and criminal defendants. This Court, unlike a trial court, is ill-equipped to resolve disputed questions of fact. Unlike trial courts and other lawfully constituted fact-finding bodies, we do not hear live testimony of sworn witnesses and are required to rely exclusively upon written records in the performance of the great majority of our functions.

We note that certain of the petitioners' allegations in the three separate petitions before us, if read together as though they were parts of one petition, may be construed as indicating that the petitioners believe that Judge Greene has engaged in a continuing course of conduct prejudicial to the administration of justice and has wilfully and persistently failed to perform required duties within the meaning of G.S. 7A-376 (Grounds for censure or removal). If, for example, a trial judge intentionally entered orders, verdicts or judgments which did not accurately reflect the disposition of a case, and did this for the purpose of insulating himself from appellate review, such conduct would be covered by the terms of that statute. If the petitions here are viewed as separate parts of one complaint, it is possible to inter-

pret them as indicating an underlying complaint of such conduct or similar conduct. However, should this in fact be the intended thrust of the petitioner's allegations and assertions, The Judicial Standards Commission, not this Court, would seem to be a more appropriate forum to consider such complaints initially. G.S. 7A-375. Further, we emphasize that this Court has not formed and does not express here any opinion as to whether any such complaint, if ever made against the respondent, would have merit.

Not having the benefit of either an agreed-upon statement of facts or of facts found by a lower court or other entity lawfully authorized to find facts subject to our review, this Court will not consider further, at this time and upon the record before us, the strongly contested allegations and assertions as to the facts and matters sought to be presented by these petitions and the responses. The petitions for writs of mandamus in our case Nos. 322P82, 338P82 and 361P82, therefore, are denied.

This order shall be printed in the official reports of decisions of this Court.

Done by the Court in Conference this 22nd day of July, 1982.

MITCHELL, J.
For the Court

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

BUTCHER v. NATIONWIDE LIFE INS. CO.

No. 280P82.

Case below: 56 N.C. App. 776.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 13 July 1982.

COLEMAN v. CITY OF WINSTON-SALEM

No. 341P82.

Case below: 57 N.C. App. 137.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 13 July 1982.

CON CO v. WILSON ACRES APTS.

No. 292P82.

Case below: 56 N.C. App. 661.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 13 July 1982.

CONNER v. ROYAL GLOBE INSUR. CO.

No. 173P82.

Case below: 56 N.C. App. 1.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982.

EARP v. EARP

No. 328P82.

Case below: 57 N.C. App. 194.

Petition by defendant for discretionary review under G.S. 7A-31 dismissed 19 July 1982.

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

E. I. DUPONT DE NEMOURS & CO. v. MOORE

No. 348P82.

Case below: 57 N.C. App. 84.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 13 July 1982.

FERGUSON v. FERGUSON

No. 93P82.

Case below: 55 N.C. App. 341.

Petition by defendants for discretionary review under G.S. 7A-31 denied 13 July 1982.

FORCE v. SANDERSON

No. 240P82.

Case below: 56 N.C. App. 423.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 13 July 1982.

FOREMAN v. BELL

No. 262P82.

Case below: 56 N.C. App. 625.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 13 July 1982.

GOODMAN v. GOODMAN

No. 317P82.

Case below: 57 N.C. App. 371.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 13 July 1982.

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

HARRIS v. HENRY'S AUTO PARTS

No. 276P82.

Case below: 57 N.C. App. 90.

Petition by defendants for discretionary review under G.S. 7A-31 denied 13 July 1982.

HARRIS v. HODGES

No. 357P82.

Case below: 57 N.C. App. 360.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 13 July 1982.

HENDERSON v. HENDERSON

No. 100PA82.

Case below: 55 N.C. App. 506.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 13 July 1982.

HOCKADAY v. MORSE

No. 336P82.

Case below: 57 N.C. App. 109.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982.

IN RE BEARD

No. 380P82.

Case below: 57 N.C. App. 600.

Petition by Cruse for discretionary review under G.S. 7A-31 denied 13 July 1982.

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

IN RE SMITH

No. 307P82.

Case below: 56 N.C. App. 142.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 13 July 1982.

KAPLAN SCHOOL SUPPLY v. HENRY WURST, INC.

No. 271P82.

Case below: 56 N.C. App. 567.

Petition by defendants and third-party plaintiffs for discretionary review under G.S. 7A-31 denied 13 July 1982.

LUCAS v. BURLINGTON INDUSTRIES

No. 366PA82.

Case below: 57 N.C. App. 366.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 13 July 1982.

McLEAN v. ROADWAY EXPRESS

No. 212PA82.

Case below: 56 N.C. App. 451.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals allowed 13 July 1982.

MORROW v. KINGS DEPARTMENT STORES

No. 320P82.

Case below: 57 N.C. App. 13.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 13 July 1982.

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

PEELE v. BOARD OF EDUCATION

No. 256P82.

Case below: 56 N.C. App. 555.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 13 July 1982.

PROPST CONSTRUCTION CO. v. DEPT. OF TRANSPORTATION

No. 291PA82.

Case below: 56 N.C. App. 759.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 13 July 1982.

PURDY v. BROWN

No. 243PA82.

Case below: 56 N.C. App. 792.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 13 July 1982.

REIDY v. MACAULEY

No. 342P82.

Case below: 57 N.C. App. 184.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 13 July 1982.

RHOADS v. BRYANT

No. 261P82.

Case below: 56 N.C. App. 635.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 13 July 1982.

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

ROBERTS v. DURHAM COUNTY HOSPITAL CORP.

No. 273PA82.

Case below: 56 N.C. App. 533.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 13 July 1982. Motion of defendants to dismiss appeal for lack of substantial constitutional question denied 13 July 1982.

SELBY v. TAYLOR

No. 321P82.

Case below: 57 N.C. App. 119.

Petition by defendants for discretionary review under G.S. 7A-31 denied 13 July 1982.

SHEPHERD v. OLIVER

No. 330P82.

Case below: 57 N.C. App. 188.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982.

SIMMONS v. C. W. MYERS TRADING POST

No. 281PA82.

Case below: 56 N.C. App. 549.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 13 July 1982.

SMITH v. DICKINSON

No. 279P82.

Case below: 56 N.C. App. 814.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 13 July 1982.

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

STATE v. DOWNES

No. 346P82.

Case below: 57 N.C. App. 102.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 13 July 1982.

STATE v. DUNLAP

No. 344P82.

Case below: 57 N.C. App. 175.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 13 July 1982.

STATE v. GRAY

No. 266P82.

Case below: 56 N.C. App. 667.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982.

STATE v. HANDY

No. 332P82.

Case below: 57 N.C. App 215.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982.

STATE v. HARRISON

No. 209P82.

Case below: 56 N.C. App. 368.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982.

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

STATE v. HINNANT

No. 362P82.

Case below: 57 N.C. App. 600.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982.

STATE v. HOYLE

No. 299P82.

Case below: 57 N.C. App. 288.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982.

STATE v. HUFF

No. 265P82.

Case below: 56 N.C. App. 721.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982.

STATE v. JACKSON

No. 349P82.

Case below: 56 N.C. App. 607.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 13 July 1982.

STATE v. JACKSON & MARSHALL

No. 324P82.

Case below: 57 N.C. App. 71.

Petition by defendant Jackson for discretionary review under G.S. 7A-31 denied 13 July 1982.

STATE v. LAY

No. 287P82.

Case below: 56 N.C. App. 796.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 13 July 1982.

STATE v. LITTLE

No. 290A82.

Case below: 56 N.C. App. 765.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 13 July 1982.

STATE v. LOVE

No. 283P82.

Case below: 56 N.C. App. 814.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 13 July 1982.

STATE v. LUCAS

No. 428P82.

Case below: 56 N.C. App. 815.

Petition by defendant for discretionary review under G.S. 7A-31 denied 26 July 1982.

STATE v. MOORE

No. 184P82.

Case below: 56 N.C. App. 258.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 13 July 1982.

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

STATE v. PEVIA

No. 316P82.

Case below: 56 N.C. App. 384.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 13 July 1982.

STATE v. ROMERO

No. 145P82.

Case below: 56 N.C. App. 48.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982.

STATE v. RUSH

No. 311P82.

Case below: 56 N.C. App. 787.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 13 July 1982.

STATE v. SURGEON

No. 239P82.

Case below: 56 N.C. App. 632.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982.

STATE v. WATSON

No. 213P82.

Case below: 51 N.C. App. 248.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 13 July 1982.

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

STATE v. WELLS

No. 225P82.

Case below: 54 N.C. App. 192.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 13 July 1982.

STATE v. WHITE

No. 286P82.

Case below: 54 N.C. App. 451.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 13 July 1982.

STATE ex rel. UTILITIES COMMISSION v.
PUBLIC SERVICE COMPANY

No. 216PA82.

Case below: 56 N.C. App. 448.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals allowed 13 July 1982.

STONE v. MARTIN

No. 232P82.

Case below: 56 N.C. App. 473.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982.

SULLIVAN v. SMITH

No. 263P82.

Case below: 56 N.C. App. 525.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982.

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

WHITENER v. WHITENER

No. 260P82.

Case below: 56 N.C. App. 599.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 13 July 1982.

WRIGHT v. O'NEAL MOTORS

No. 305P82.

Case below: 57 N.C. App. 49.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 July 1982.

PETITION TO REHEAR

LOVE v. MOORE

No. 158A81.

Case below: 305 N.C. 575.

Petition by Insurance Company to rehear denied 13 July 1982.

IN THE MATTER OF CONNIE MARIE MOORE AND DONNIE LEE MOORE, MINORS

No. 5PA82

(Filed 13 July 1982)

1. **Parent and Child § 1— termination of parental rights—statute not unconstitutionally vague**

The provisions of G.S. 7A-289.32(2) and (3), and G.S. 7A-278(4) are not unconstitutionally vague since people of common intelligence need not guess at their meaning and differ as to their application.

2. **Parent and Child § 1— petition for return of children—record not revealing counsel provided—question of due process not reached**

The Court did not reach the question of whether due process requires that counsel be provided indigents when they petition for return of children since respondent failed to show that she did not have counsel, and the record is just as susceptible to interpretation that respondent had counsel as that she did not.

3. **Parent and Child § 1— termination of parental rights—showing children quite "neglected"**

In a proceeding to terminate parental rights, the evidence showing that the children were "neglected" as that term is defined by G.S. 7A-517(21) was overwhelming where the evidence showed that the children did not "receive proper care, supervision, or discipline from" their parents, that they were not provided "necessary medical care," and that they lived "in an environment injurious to" their welfare.

4. **Parent and Child § 1— termination of parental rights—willfully leaving children in foster care for more than two years**

In a proceeding to terminate parental rights, the trial court properly found that respondent willfully left the children in foster care for more than two years and substantial progress was not made to the court's satisfaction in correcting the conditions which led to the removal of the children where the evidence showed that the respondent left the children in foster care for more than four years, and that during three of those years she did not visit or communicate with them or make any serious effort to do so.

5. **Parent and Child § 1— termination of parental rights—failure to pay a reasonable portion of the cost of children's care**

In a proceeding to terminate parental rights, the trial court properly found that respondent had failed for a period of six months to pay a reasonable portion of the cost of her children's care where the evidence was uncontradicted that the children were in the custody of DSS for a period of more than 36 months and that the respondent paid no part of the cost of their care during that period of time.

Justice MITCHELL concurring.

Justice MEYER joins in this concurring opinion.

Justice CARLTON dissenting.

ON certiorari to review order of *Yeattes, Judge*, entered 25 November 1980 in District Court, GUILFORD County.

This cause consists of two proceedings instituted in the district court in January 1980 to terminate the parental rights of Bruce Kelly Moore and Lillie Ruth Moore in two of their minor children, twins Connie and Donnie Moore. It appears that from the outset the two proceedings have been treated as one and they are so treated here.

On 7 February 1980 the father, Bruce Moore, executed a document releasing the children for adoption. Mrs. Moore timely filed an answer in which she opposed the relief sought by petitioner, the Guilford County Department of Social Services.[1] She also moved for a trial by jury and moved pursuant to G.S. 1A-1, Rule 12(b), that the proceedings be dismissed for failure to state a claim for relief. These motions were denied.

Following a lengthy hearing beginning on 24 September 1980 the court made findings of fact to which there is no exception. The facts, as found by the court and established by the record, are summarized in pertinent part as follows:

Connie and Donnie Moore were born on 27 July 1968. In December 1973 Mrs. Moore signed a dependency petition requesting that DSS take custody of the twins because their father was in jail and she was about to enter L. Richardson Hospital for psychiatric treatment. While she was hospitalized and immediately thereafter, employees of DSS counseled with her about leaving her husband, arranged for her to receive Supplemental Security Income benefits, and helped her locate an apartment.

The Moores reconciled in January 1974 and in February thereafter the court ordered the children returned to them. Both before and after the children were returned to their parents, a

1. Hereinafter the Guilford County Department of Social Services may be referred to as petitioner or DSS and Mrs. Moore may be referred to as respondent.

social worker stressed the importance of the family's not living with relatives, having separate rooms for the children, and family stability. Following the return of the children, the Moores continued to have contact with the DSS. At Mrs. Moore's request, a social worker arranged for the twins to have their preschool inoculations and to be enrolled in first grade.

When Connie began school she was reported as being disruptive in class, using vulgar language, hitting other children, and acting out sexual intercourse. She complained of vaginal pain. After her parents did not respond to attempts by school personnel to confer with them, on 15 November 1974 the principal went to the Moores' home and took them to the school for a conference. A social worker took Mrs. Moore and the children to a health clinic where Connie was treated for a vaginal inflammation. On the same day the DSS filed a petition alleging that both children were neglected.

A hearing was held pursuant to the petition in December and the parents were represented by counsel. Custody of the children was placed with the DSS, with Donnie to remain in the home under DSS supervision. Although Donnie was reported as sleeping a lot when he began school, there were no reports of disruptive behavior by him or of specific instances of neglect.

Mr. Moore's hostile behavior toward the female social worker then on the case caused DSS to assign another social worker, Richard Gainer, to the case. Mr. Gainer took over on 1 April 1975. After familiarizing himself with the Moore's records with DSS, Mr. Gainer went to the home for his first visit. Upon arrival he discovered that the Moores were facing eviction and that Mr. Moore was in hiding because he expected to be arrested for failing to comply with a court order to pay a sum of money. Mr. Moore was quite hostile and was drinking heavily at that time.

In April of 1975 Donnie was placed in a foster home. From that time until February of 1976 he lived in four foster homes. From 20 February 1976 to 24 July 1979 he lived in one foster home. The foster parents in this last home requested Donnie's removal rather abruptly when they began having serious marital problems. Between July of 1979 and September of 1980 he was in two foster homes. Altogether, he had been in six foster homes at the time of the termination hearing.

Between December of 1974 and the termination hearing in September 1980 Connie had been in either seven or nine foster homes. During this period Connie was also placed in North Carolina Memorial Hospital for psychiatric treatment and in Thompson Children's Home. Between May of 1980, when she left Thompson, and the termination hearing in September, she had been in two homes.

Mr. and Mrs. Moore continued to have economic and marital difficulties after the children were removed from their home. They moved frequently and applied to DSS for help in finding housing and for money. In December 1975 they filed a motion with the court seeking to have custody of the children returned to them. The court found that they were "still unfit" to have the children and dismissed the motion.

Since 1975 the Moores have had 16 different addresses in or near seven different cities or towns. Mrs. Moore left her husband in 1977 and after a two year separation, obtained a divorce on 8 October 1979.

Between December 1974 and September 1980 Mrs. Moore paid 11 visits to Connie and nine visits to Donnie. For a period of three years, July 1976 to July 1979, there were no visits nor any other communication with the children.

Mr. Gainer had some contact with Mrs. Moore in June and August of 1977 but did not try to involve her in Connie's therapy which was then in process. In September 1978 Mr. Moore telephoned Mr. Gainer and attempted to arrange a visit with the children, with his fiancee present. Mr. Gainer would not allow a visit in the presence of the fiancee and Mr. Moore did not visit. In May 1979 Mrs. Moore telephoned DSS indicating that she was living in the mountains, expected to get a divorce soon thereafter, wanted to see her children but had no way of getting to Greensboro.

In July of 1979 Mrs. Moore visited with Connie at the DSS office in Greensboro. Since Donnie had just been moved from his foster home of three years, Mr. Gainer thought it wise that he not see his mother at that time and scheduled an appointment for Mrs. Moore sometime later. Mrs. Moore had no way to get to Greensboro from the mountains for that visit and did not keep the appointment.

Mrs. Moore did not visit with either of the children again until after she received notice of the termination petition in February 1980. Mrs. Moore never gave either of the children a Christmas, Easter or birthday present while they were in foster care until after the termination petition was filed.

Meanwhile, DSS reached a decision to seek termination of the Moore's parental rights and to try to place the twins for adoption. The termination petition was filed on 17 January 1980. As stated above, Mr. Moore voluntarily released the children for adoption.

When Mrs. Moore received notice of the termination petition in February 1980, she employed a cab to drive her to Winston-Salem where she could get a bus to Greensboro. She lived with friends until she found a place in the country where she could have a garden and which she thought would be suitable for the children. She resumed counseling at Guilford County Mental Health Center and kept her appointments. She had some visits with the children. She also enrolled at Guilford Technical Institute for purpose of learning to read and doing basic arithmetic. She did not apply to DSS for financial or other aid.

Approximately six months after the termination petition was filed, on 2 July 1980, Mrs. Moore asked the social worker what amount of money she should pay for the children's support. Fifteen dollars per week was suggested although Mrs. Moore offered to pay $40 per week. Nothing was ever paid. DSS paid Thompson Children's Home $28,883.96 for Connie's care. Foster parents are paid $142.50 per month and the children receive Medicaid. DSS furnishes their clothing. Mrs. Moore testified at the termination hearing that she could not afford to pay anything for the children's support because her automobile insurance premium was unexpectedly high. Mrs. Moore owns a 1971 Cadillac, and another car, plus a pickup truck which she rents out for $50 per week. She also receives $218 per month in social security benefits. Her automobile insurance is $800 per year.

Mrs. Moore dropped out of the program at Guilford Technical Institute because she could not get to school on account of "gas problems." Further, although in February 1980 Mrs. Moore went to DSS and stated that she was then in a position to take care of the children and that she was going to move in with a brother in

Ashe County who had agreed to take both of the children, she later wondered if the brother was willing to have children with discipline problems and did not know if she could handle Connie's problems.

Donnie has been provided with counseling sessions with a psychiatrist due to the fact that he began "acting out" and being defiant. His behavior has improved considerably since 31 March 1980. Donnie does not want to return to his mother. His school performance has improved in his current foster placement and his work is much more stabilized and acceptable.

Although much improved, Connie still has some behavior problems and is slow academically. She is in a special education class.

Based on its findings of fact the trial court concluded as a matter of law that (1) Mrs. Moore has neglected the children; (2) she has wilfully left the children in foster care for more than two years and substantial progress has not been made to the court's satisfaction in correcting the conditions which led to the removal of the children; and (3) the children have been placed in the custody of the DSS and Mrs. Moore has failed for a period of six months to pay a reasonable portion of the costs of their care. The court ordered that the parental rights of Mrs. Moore be terminated and that the children remain in the custody of the DSS until such time as they can be placed for adoption.

Mrs. Moore appealed to the Court of Appeals and the record on appeal was duly served and filed in that court. Briefs were filed and the cause was heard on 1 September 1981. The Court of Appeals concluded that because the notice of appeal had not been filed within 10 days after entry of Judge Yeattes' order as G.S. 1-279(c) and Appellate Rule 3(c) require, the appeal must be dismissed for lack of appellate jurisdiction.

Mrs. Moore petitioned this court for discretionary review under G.S. 7A-31. This court treated the petition as one for a writ of certiorari to review the order of the trial court and allowed the petition on 12 January 1982.

Judith G. Behar for appellant.

Margaret A. Dudley, Deputy County Attorney, for Guilford County Department of Social Services—appellee.

BRITT, Justice.

I.

The Court of Appeals properly dismissed respondent's appeal because of her failure to give timely notice of appeal.

The record on appeal reveals that while Judge Yeattes did not enter his formal written order until 25 November 1980, he announced his decision in open court on 25 September 1980 immediately after the hearing. G.S. 1-279(c) and Appellate Rule 3(c) provide that if oral notice of appeal is not given at trial, notice of appeal must be filed and served within 10 days after "entry" of the order or judgment. G.S. 1A-1, Rule 58, provides that "where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing."

It appears that respondent did not give oral notice of appeal at trial but filed and served her notice of appeal on 8 October 1980, 13 days after the "entry" of the order. Nevertheless, since we have allowed Mrs. Moore's petition for a writ of certiorari and have considered the appeal on its merits, the question of validity of the notice of appeal has become moot.

II.

Respondent contends that the trial court erred in denying her motion to dismiss the petition to terminate her parental rights. She argues that the petition does not state a claim for relief for the reason that the "termination statutes" are unconstitutionally vague and do not provide for due process in light of the interests at stake. We find no merit in this contention.

[1] G.S. 7A-289.32 sets forth six separate grounds upon which a termination of parental rights order can be based. Portions of the statute pertinent to the case at hand are as follows:

> *Grounds for terminating parental rights.*—The court may terminate the parental rights upon a finding of one or more of the following:

(1) . . .

(2) The parent has abused or neglected the child. The child shall be deemed to be abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 110-117(1)(a), (b), or (c), or a neglected child within the meaning of G.S. 7A-278(4).

(3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

(4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

* * *

G.S. 7A-278(4) referred to in subsection (2) of the quoted statute was repealed by Chapter 815 of the 1979 Session Laws. The substance of former G.S. 7A-278(4) now appears as G.S. 7A-517(21) [1981 Replacement] as follows:

(21) Neglected Juvenile.—A juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

This court in *In Re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981), upheld the constitutionality of subsection (4) quoted above. *See also In Re Biggers, Two Minor Children*, 50 N.C. App. 332, 274 S.E. 2d 236 (1981). We reaffirm our holding in *Clark*.

On the question of vagueness of a statute, this court in *In Re Burrus*, 275 N.C. 517, 531, 169 S.E. 2d 879 (1969), *aff'd*, 403 U.S. 528 (1971), an opinion authored by Justice Huskins, said:

> It is settled law that a statute may be void for vagueness and uncertainty. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." 16 Am. Jur. 2d, Constitutional Law § 552; *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.ed. 2d 285; 82 S.Ct. 275; *State v. Hales*, 256 N.C. 27, 122 S.E. 2d 768. Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met. *United States v. Petrillo*, 332 U.S. 1, 91 L.ed. 1877, 67 S.Ct. 1538.

275 N.C. at 531.

Further, in the case of *In Re Biggers, supra*, we find:

> A statute must be examined in the light of the circumstances in each case, and respondent has the burden of showing that the statute provides inadequate warning as to the conduct it governs or is incapable of uniform judicial administration. *State v. Covington*, 34 N.C. App. 457, 238 S.E. 2d 794, *rev. denied*, 294 N.C. 184, 241 S.E. 2d 519 (1977).

50 N.C. App. at 340.

Applying the standard set forth in *Burrus* and *Biggers*, and cases cited therein, we hold that the provisions of G.S. 7A-289.32(2) and (3), and G.S. 7A-278(4) quoted above are not un-

constitutionally vague. People of common intelligence need not guess at their meaning and differ as to their application.

[2] With respect to respondent's due process contention, she argues that while she and her husband were provided counsel when the decision to remove the children for neglect was first made in 1974, "the record does not show that they were represented or advised that they could be represented" when they petitioned the court in 1975 to return the children.

We do not reach the question of whether due process requires that counsel be provided indigents when they petition for a return of children. The presumption is in favor of the correctness of the proceedings in the trial court, *London v. London*, 271 N.C. 568, 157 S.E. 2d 90 (1967); *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967), and the burden is on the appellant to show error. *Gregory v. Lynch, supra.* Respondent has failed to show that she did not have counsel. Furthermore, the record is just as susceptible to interpretation that respondent had counsel as that she did not. Although the court order from the 19 December 1975 hearing did not reflect the presence of counsel for the parents, Richard Gainer testified that the Moore's attorney had the proceedings continued from the 12th to the 19th (R pp 16a, 50).

III.

Respondent states her next contention as follows: "The trial court erred in denying respondent's motion to dismiss at the close of the state's evidence and at the close of all of the evidence when there was clear, cogent and convincing evidence that respondent had made substantial progress in correcting the conditions that had led to the children's removal for neglect, that she had not failed to pay a reasonable portion of the cost of their care, that petitioner had not diligently encouraged the respondent to strengthen her parental relationship to the children, and that respondent had not wilfully left her children in foster care for more than two years." Her final contention is that the trial court's conclusions of law are erroneous in that they are not supported by clear, cogent and convincing evidence. We find no merit in these contentions.

G.S. 7A-289.30(e) provides, *inter alia*, that in an adjudicatory hearing on a petition to terminate parental rights the court shall

find the facts and "all findings of fact shall be based on clear, cogent, and convincing evidence." It will be noted that the trial court is authorized to terminate parental rights "upon a finding of *one or more*" of the six grounds listed in G.S. 7A-289.32.

In the case at hand the trial court based its order terminating respondent's rights on three of the grounds set forth in the statute, (2), (3) and (4). The court concluded as a matter of law (a) that respondent had neglected the children; (b) that she had wilfully left the children in foster care for more than two years and substantial progress had not been made to the court's satisfaction in correcting the conditions which led to the removal of the children; and (c) the children had been placed in the custody of the DSS and respondent had failed for a period of six months to pay a reasonable portion of the costs of their care.

If either of the three grounds aforesaid is supported by findings of fact based on clear, cogent and convincing evidence, the order appealed from should be affirmed. We have set forth above a lengthy summary of the findings of fact and other facts established by the record. Since respondent did not except to any of the findings, they are presumed to be correct and supported by evidence. *Nationwide Homes of Raleigh, Inc. v. First Citizens Bank & Trust Co.*, 267 N.C. 528, 148 S.E. 2d 693 (1966); *Keeter v. Lake Lure*, 264 N.C. 252, 141 S.E. 2d 634 (1965). Nevertheless, we have reviewed the evidence and conclude that the findings are supported by clear, cogent and convincing evidence and the findings support all three of the conclusions of law.

[3] With respect to the first ground upon which the court based its termination order, evidence showing that the children were "neglected" as that term is defined by G.S. 7A-517(21) was overwhelming. In fact, practically all of the evidence tended to show that when the children were in respondent's charge they did not "receive proper care, supervision, or discipline from" their parents, that they were not provided "necessary medical care," and that they lived "in an environment injurious to" their welfare. The evidence was abundant that after the children were retaken by petitioner, respondent made very little effort to visit or even contact them for approximately three years. In fact, between July 1976 and July 1979 she did not visit them at all, or even send them a Christmas present. It is true that after the ter-

mination petition was filed, she began visiting the children and gave them gifts. Certainly the evidence showing neglect of the children was clear, cogent and convincing.

[4] The second ground for the court's termination order was that respondent wilfully left the children in foster care for more than two years and substantial progress was not made to the court's satisfaction in correcting the conditions which led to the removal of the children. As stated above, the evidence is abundant that respondent left the children in foster care for more than four years, and that during three of those years she did not visit or communicate with them or make any serious effort to do so. After the petition to terminate parental rights was filed, she made arrangements to visit the children and manifested some efforts to arrange a place for the children to live with her; however, even then she was not certain that she could take care of the children, particularly Connie. We think the evidence supporting the trial court's second ground for termination was clear, cogent and convincing.

[5] As to the third ground for termination, the undisputed evidence showed that the children were placed in the custody of petitioner in 1975 or 1976, that they continued in the custody of DSS until the petition was filed on 17 January 1980 (considerably more than 36 months), and that the respondent paid no part of the costs of their care during that period of time. Not only was this ground proven by clear, cogent and convincing evidence, there was no evidence to the contrary.

IV.

The county departments of social services have no greater responsibility than that imposed on them by our statutes relating to neglected children. In the case at hand we are convinced that petitioner has gone the "extra mile" in trying to stabilize respondent's home so that there would be a reasonable chance that a resumption of her parental responsibilities over Connie and Donnie would be successful. When the termination procedure was instituted, the children were 12-1/2 years old and their physical and emotional problems continued to be legion. Donnie had been in six different foster homes and Connie had been in seven or nine in addition to having been in a hospital for psychiatric treatment.

Having concluded that respondent would not be able to establish a stable home for the children, and that the children desperately need more stability in their home lives during the remainder of their minority, petitioner seeks to have respondent's parental rights terminated with the hope that the children might be adopted by people who will provide their needs. Respondent's plea seems to be "give me another chance, it *might* succeed."

The children are now 14, a very crucial period in their development to adulthood. The trial court concluded, in effect, that the course pursued by petitioner is in the best interest of the children and we find no reason to disturb that decision.

The decision of the Court of Appeals dismissing the appeal is vacated. The order of the trial court is

Affirmed.[2]

Justice MITCHELL concurring.

I share Justice Carlton's view that, when neglect is to be used as a statutory ground for terminating parental rights, a finding of neglect must be based on conduct reasonably close in time to the filing of the petition to terminate. I disagree with the majority view on this point only.

I concur in the opinion of the majority as it relates to the two remaining statutory grounds for termination of parental rights relied upon by the trial court. As either of these two grounds is adequate standing alone to support the judgment of the trial court, I also concur in the result reached by the majority.

Justice MEYER joins in this concurring opinion.

Justice CARLTON dissenting.

Believing that the majority has cavalierly applied our termination of parental rights statutes to the facts disclosed by the

2. We are advertent to the amendments to G.S. 7A-289 enacted by Chapter 1131 of the 1981 Session Laws (1982 Adjourned Session) ratified 11 June 1982. However, we conclude that said amendments do not relate to the questions presented by this appeal.

record before us, as fully discussed below, I dissent. This is a disturbing decision. The majority condones a horrible example of excessive governmental intrusion into the affairs of family. That this poor and pitiful family needs help from the state, there can be no doubt. Such help need not, and ought not, result in *extinguishing forever* the nourishing biological bond which exists between mother and children.

There are few losses, if any, more grievous than the abrogation of parental rights. No relationship is more precious in this life, nor treasured more highly, than that of parent and child. The law should treat that relationship with no less esteem. Applying the prevailing law in this jurisdiction to the record before us, the majority has failed to do so here. I fear that this decision creates a dangerous precedent for the future.

I.

I strongly disagree with the majority's conclusion that the trial court had clear, cogent and convincing evidence before it, as required by G.S. 7A-289.30(e) (1981), to support its findings and conclusions that Mrs. Moore (1) had neglected her children as contemplated by G.S. 7A-289.32(2) (1981), (2) had willfully left the children in foster care for more than two years and substantial progress had not been made to the court's satisfaction in correcting the conditions which led to the removal of the children as contemplated by G.S. 7A-289.32(3) (1981), and (3) had failed for a period of six months, while the children were placed in the custody of the DSS, to pay a reasonable portion of the cost of their care as contemplated by G.S. 7A-289.32(4) (1981). I discuss below each of these statutory grounds for termination of parental rights and my reasons for disagreeing that each of them exists.

A.

Turning first to the conclusion that these children were neglected as contemplated by G.S. 7A-289.32(2) (1981), I agree with the majority that we must look to G.S. 7A-517(21) (1981) for a definition of "neglect." The latter statute defines a neglected child as one who does not receive "proper care, supervision, or discipline from his parent, . . . ; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment

injurious to his welfare. . . ." I must also agree with the majority that in the very early years of these children's lives Mrs. Moore did not provide adequate care, supervision, or discipline and that the children lived "in an environment injurious" to their welfare. My reading of the record, however, indicates that this resulted from the abusive conduct of Mr. Moore and not from intentional neglect by Mrs. Moore.

My disagreement with the majority holding concerning this ground for termination of parental rights is with its *application* to this case. I believe that the plain language of the statute compels the conclusion that when neglect is to be used as a statutory ground for terminating parental rights, the court trying the termination matter must find that neglect on the basis of the parent's conduct just prior to the filing of the petition to terminate. I do not believe that the statute lends itself to the construction that one trial court's finding of neglect which led to the taking of the child *years before* can be relied on by the trial court trying the termination matter as a ground for termination. The two proceedings were for very distinct purposes. The former was simply to remove physical custody from the Moores. This proceeding is to eliminate forever Mrs. Moore's rights as a mother. The trial court here must have relied on the prior finding of neglect. Obviously, the trial court here could not find that a mother who had not had custody of her children for several years had neglected them, as neglect is defined by the statute.

In enunciating this statutory ground for terminating parental rights, I cannot imagine that our Legislature envisioned the ground to have unlimited application *in terms of time.* Here, the record discloses that the action for termination of parental rights was instituted in January of 1980. The last time Mrs. Moore had custody of Connie was in December of 1974. The last time Mrs. Moore had custody of Donnie was in April of 1975. In other words, for five years prior to the institution of this action, Mrs. Moore did not have custody of Connie and, for nearly five years, she did not have custody of Donnie. Clearly, Mrs. Moore could not "neglect" children, as contemplated by the statute, when they were not in her custody. In finding that the evidence was "overwhelming" that the children had been neglected, the majority refers only to evidence concerning the conduct of Mrs. Moore after custody had been granted to the DSS. The majority opinion

refers to the mother's failure to visit during the period custody was in the DSS and to her failure to send Christmas presents. Such evidence, I contend, has absolutely nothing to do with whether Mrs. Moore was neglectful to her children in the statutory context of providing proper care, supervision, discipline or necessary medical care. It most certainly has nothing to do with whether the children, at some point in time, may have lived in an environment injurious to their welfare.

In other words, reliance on this statutory ground for terminating parental rights requires, in my opinion, that the alleged neglect of the parent must have occurred within a reasonable period prior to the filing of the petition to terminate. To interpret the statute otherwise would be patently unjust. For example, a parent who might be neglectful as contemplated by the statute, to a one-year-old child resulting from that parent's alcoholism, might well be reformed and be capable of becoming a model parent several years later. In such a case, it would be surely unjust to allow that parent's parental rights to be terminated some four or five years later on the basis of his or her prior conduct. In this example, if the DSS had received custody of the child at the time the parent was neglectful due to his or her alcoholism and had not instituted an action for termination of parental rights due to the resulting neglect within a reasonable time after receiving custody, then I do not believe that this statutory ground should have any application whatsoever to a later proceeding to terminate parental rights. Should the petitioning party, in this example, believe that a parent's rights to parenthood should be terminated at such a late date, some other standard or ground for termination must be found.

So it is here. While there may have been evidence of neglect on the part of Mrs. Moore many years prior to the institution of this action, I cannot agree with the majority that there is any evidence, much less clear, cogent and convincing evidence, that Mrs. Moore was neglectful of these children during a reasonable time prior to institution of the action. For that reason, I would hold that this statutory ground was improperly applied by the trial court.

I would also add that any other interpretation of this statutory ground would, in my opinion, present a serious constitu-

tional problem. I do not believe that this statutory ground would survive a constitutional attack for failing to provide due process to a parent unless a reasonable time frame for its application is applied by the courts.

In summary, I would hold that this statutory ground had no application in this action for the reasons stated above and, should the trial court order be allowed to stand, another statutory ground supported by findings and conclusions based on clear, cogent and convincing evidence must be found.

B.

The next ground relied on by the trial court for terminating Mrs. Moore's parental rights was that she had willfully left the children in foster care for more than two years and that substantial progress had not been made to the court's satisfaction in correcting the conditions which led to the removal of the children. G.S. 7A-289.32(3) (1981). Relying primarily on the fact that Mrs. Moore did not visit with her children for some three years while they were in foster care, the majority finds clear, cogent and convincing evidence to support this ground. Again, I believe the majority has applied an improper time frame to a ground for termination of parental rights. The majority acknowledges that, several months prior to the hearing, Mrs. Moore employed a cab to drive her to Winston-Salem where she could get a bus to Greensboro. There, she lived with friends until she found a place in the country where she could have a garden and which she thought was suitable for her children. She resumed counselling at Guilford County Mental Health Center and kept her appointments. She also visited with the children. She enrolled at Guilford Technical Institute to learn reading and basic arithmetic. The record also discloses that Mrs. Moore had taken other steps to correct the conditions that led to her children's removal for neglect. Other evidence in the record indicates that Mrs. Moore had taken other steps to improve her situation to properly raise her children. I am unable, therefore, to agree with the majority that no "substantial progress" had been made within two years in correcting the conditions leading to the removal of the children for neglect. Certainly, the evidence to support this ground is not clear, cogent and convincing.

I assume that the majority would answer this argument by noting that most of the progress made by Mrs. Moore which I referred to above occurred after the petition for termination was filed. This raises the question of what two-year period is referred to in G.S. 7A-289.32(3). The statute clearly, in my view, refers to the two years leading up to *the time of the hearing.* To interpret the statute otherwise would mean that the trial court must ignore evidence of substantial progress made by a parent during the sometimes lengthy period between the filing of the petition and the hearing, a manifest injustice. My view is buttressed by the enactment in 1979 of G.S. 7A-657 (1981). That statute now requires trial courts to review custodial removal orders within six months from entry and annually thereafter. This legislation clearly contemplates that progress may be made by a parent during the period immediately preceding a hearing.

The facts of this case highlight the necessity for interpreting the statute as I have above. Nowhere in this record do I find that the DSS presented Mrs. Moore with a plan of care for her children. This mother was given no specific directives as to what would be required of her to have custody of her children restored. I find no evidence that the DSS ever explained to Mrs. Moore that she might lose all her parental rights forever. The first she knew of this possibility, I assume, was when the petition was served on her. Surely, fundamental fairness and due process require that she be able *from that time to the time of the hearing* to show her ability to improve her situation for motherhood.

I also disagree with the majority that Mrs. Moore "willfully" left the children in foster care for more than two consecutive years. I consider the word "willfully" an extremely important one as used in this ground for termination of parental rights. This Court has had numerous occasions to consider the meaning of willfulness as used in statutes such as this. The word "imports knowledge and a stubborn resistance." *Mauney v. Mauney,* 268 N.C. 254, 150 S.E. 2d 391 (1966). One does not willfully fail to do something which it is not within his power to do. *Lamm v. Lamm,* 229 N.C. 248, 49 S.E. 2d 403 (1948). *See also, Matter of Dinsmore,* 36 N.C. App. 720, 245 S.E. 2d 386 (1978). Here, the record discloses that Mrs. Moore was unable, on numerous occasions, to comply with suggestions for improving the family situation due to the resistance of Mr. Moore. Indeed, a reading of this record com-

pels the conclusion that most of the problems in this family during these children's early years resulted from Mr. Moore's heavy drinking, his hostile and abusive actions directed at Mrs. Moore and the children, and the resulting intimidation suffered by Mrs. Moore. I glean from the record that Mrs. Moore was generally responsive to the DSS recommendations but was prevented from pursuing many of them due to Mr. Moore's hostile behavior toward the DSS workers. The majority opinion acknowledges that on one occasion Mrs. Moore telephoned the DSS indicating that she was living in the mountains, expected to get a divorce soon and wanted to see her children, but had no way of getting to Greensboro. The record is abundantly clear that Mrs. Moore was poor and illiterate and, in my view, simply unable to comply with various DSS recommendations. From such evidence, I am unable to find the "willfulness" required by the statute. Surely such evidence does not disclose "a stubborn resistance" or the ability to do all that she was expected to do.

In summary, I do not believe that Mrs. Moore acted "willfully" in leaving her children in foster care as contemplated by the statute and, even if she did, I do not believe that there is clear, cogent and convincing evidence in the record to support the trial court conclusion that she had made no substantial progress in correcting the conditions leading to the removal of the children during the two-year period *prior to the hearing.*

C.

The third ground relied on by the trial court for terminating Mrs. Moore's parental rights was that the children had been placed in the custody of DSS and that she had failed for a period of six months to pay a reasonable portion of the cost of their care. G.S. 7A-289.32(4) (1981). The majority's conclusion that this ground was proven by clear, cogent and convincing evidence and that there was no evidence to the contrary is clearly erroneous. As the majority notes in its statement of facts, Mrs. Moore testified at the termination hearing that she could not afford to pay anything for the children's support.

Moreover, I think that the majority opinion completely ignores the specific language of G.S. 7A-289.32(4) (1981) and this Court's recent decision in *In re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981). The statute specifically provides that, as a ground for ter-

minating parental rights, the child must have been placed in the custody of a child caring agency and the parent, "for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child." About this statute, this Court recently stated in *Clark*:

> A parent's ability to pay is the controlling characteristic of what is a "reasonable portion" of cost of foster care for the child which the parent must pay. A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay. What is within a parent's "ability" to pay or what is within the "means" of a parent to pay is a difficult standard which requires great flexibility in its application. G.S. 7A-289.32(4) requires a parent to pay a *reasonable* portion of the child's foster care cost. The requirement applies irrespective of a parent's wealth or poverty. . . . *The burden of DSS on the merits of the petition is a heavy one. The statute requires that all findings of fact be based on clear, cogent and convincing evidence.* G.S. 7A-289.30(e).

303 N.C. at 604, 281 S.E. 2d at 55 (emphasis added).

Here, I find no clear, cogent and convincing evidence concerning this mother's ability to pay during the six months immediately preceding the filing of the petition. There are no findings concerning her ability to pay in order to determine what is a "reasonable portion" of the cost of foster care. Moreover, I find nothing in the record to indicate that the DSS ever asked Mrs. Moore for support prior to filing the papers for termination, nor was there ever any agreement for her to pay. In my view, the DSS did not carry the heavy burden required by this Court's decision in *Clark*. Indeed, I find little in the record to support any conclusion that this mother could afford to pay any portion of the children's foster care.

II.

I must also disagree with the majority's closing conclusion that the trial court's decision was in the best interest of the children. From the record before us, I see absolutely nothing to be gained on behalf of these children by terminating their mother's parental rights. I find nothing in this record to indicate

that the DSS had taken any steps to find adoptive parents for these children. Indeed, nothing appears to indicate that Connie and Donnie, now fourteen years of age and obviously still suffering from some emotional problems, are adoptable. I doubt that they are adoptable and suspect they will remain in foster care until they attain majority, regardless of the disposition of this case.

On oral argument, I asked counsel for the DSS why, in light of my belief that the children were probably not adoptable, did the DSS initiate these proceedings. I quote the pertinent parts of her reply:

> Because, starting three years ago . . . Guilford County began a concentrated effort to review the status of every child in foster care regardless of age, and we did begin with the younger children, with the objective in mind that we would take every effort possible to place children for adoption regardless of their age. Guilford County, through its Social Services Board, has expended great funds to contract with agencies, particularly one in . . . Minnesota, who specialize in hard to place children. We believe that every child who is in our care regardless of age has a responsibility from us to get every reasonable effort to get that child adopted. And we have had success in placing hard to place children and old children and minority children. . . . The specific answer to your question is that the administrators at the DSS and the appointed board have decided that we will make concentrated effort to make sure that children do not grow up in foster care and do not fall through the administrative cracks in the foster care process.

Counsel then went on to explain that no steps toward determining adoptability are taken until parental rights have been terminated. She also noted that the county had experienced situations in which adoptive parents of older children allowed visitation from natural parents. She then noted that the county was still "experimenting" with different approaches.

I commend Guilford County for attempting new approaches to a most difficult problem and for taking steps to ensure that foster children do not fall through the "administrative cracks." Counsel was most articulate in presenting the county's case. The county's approach may well be the wisest in most cases, particularly those which are uncontested.

I cannot agree, however, that this approach comports either with our statute or fundamental fairness in a contested case involving older children such as this. When a parent of an older child resists the termination efforts, as here, I believe the county has the burden to show that the child is adoptable before termination should be allowed. G.S. 7A-289.22(2) expressly requires a recognition of "*the need to protect all children from the unnecessary severance of a relationship with biological parents.*" (Emphasis added.)

The strong ties resulting from the biological relationship of parent and child has been traditionally recognized by the courts. The United States Supreme Court has spoken on this issue more than once. The rights to conceive and raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942), and "[r]ights far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953).

"It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944). Moreover, the integrity of the family unit has found protection in the due process clause of the fourteenth amendment, the equal protection clause of the fourteenth amendment, and the ninth amendment. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972). No greater emotional attachment exists than that resulting from the biological relationship of parent and child. *See Smith v. Organ. of Foster Families for E. & Reform*, 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed. 2d 14 (1977).

To conclude, as has the majority, that a child's best interests will be served by termination of parental rights is not only unsupportable from a record which discloses no better potential situation for the child than now exists, such a conclusion completely ignores the vital familial interests at stake for both parent and child. When the county prevails in termination of parental rights, it does not merely infringe on a fundamental liberty, it ends it

forever. "Few forms of state action are both so severe and so irreversible." *Santosky v. Kramer*, --- U.S. ---, ---, 102 S.Ct. 1388, 1397, 71 L.Ed. 2d 599, 610 (1982). When the serious results of such proceedings are properly viewed, I believe that this Court should insist on the most strict interpretation of our statutes.

As the United States Supreme Court recently stated in *Santosky:*

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

--- U.S. at ---, 102 S.Ct. at 1394, 71 L.Ed. 2d at 606.

Here, I do not believe that the majority has recognized the "critical need for procedural protections" to protect this family, nor has it provided this parent with "fundamentally fair procedures." I have explained above my belief that the three statutory grounds were improperly utilized by the trial court and my belief that a finding of adoptability of children of this age is essential prior to termination of parental rights. We must remember that the purpose of these proceedings is not to *punish* the parent; it is to *protect* the children's best interests. Given the record before us, I see no protection for the children by terminating the parental rights of this mother. I do see, however, the most serious form of punishment to this mother.

From this record, this Court can only assume that Connie and Donnie will continue to reside in foster homes even if the trial court's order is allowed to stand. While I agree that Mrs. Moore is not yet ready to assume physical custody of her children, all parties (society as well) will be better served if the county attempts to help Mrs. Moore strengthen her ability as a parent.

III.

Finally, I wish to make it clear that I agree with the implementation of legislation that allows, in appropriate cases and with adequate procedural safeguards, termination of parental rights. By this dissent, I do not attack the legitimacy of the *ends* sought; rather, I would treat more seriously the *means* used to achieve those ends than does the majority. On the facts disclosed by this record, I do not believe the ends sought justify the means employed.

I vote to reverse.

WACHOVIA BANK & TRUST COMPANY, N.A., EXECUTOR AND TRUSTEE UNDER THE WILL OF WILLIAM ELMO BAKER v. MIKE RUBISH

No. 54A81

(Filed 3 August 1982)

1. Estoppel § 4.7— failure to give written notice of intent to extend option on lease—insufficient evidence of equitable estoppel—theory of promissory estoppel for jury

In an action stemming from a 1960 lease of undeveloped land which was entered into by defendant and the deceased for whom plaintiff bank is executor of his estate, the trial court erred in submitting the theory of equitable estoppel as an issue for the jury's consideration in determining whether defendant properly exercised an option to extend the lease. However, there was evidence from which the jury could find that the bank was estopped to demand written notice, as provided for under the terms of the lease, upon the theory of promissory estoppel since there was evidence from which the jury could find that deceased had waived two breaches of the condition of written notice, and defendant had relied on the promise implied from these waivers that no written notice would thereafter be required.

2. Evidence § 11.8— Dead Man's Act—stipulations—waiver by plaintiff of right to rely upon

In an action stemming from a lease entered into between defendant and deceased for whom plaintiff is executor of his estate, the Dead Man's Act, G.S. 8-51, would have precluded defendant from testifying on "personal transaction[s]" he had with deceased unless plaintiff first "opened the door" by offering evidence about a particular transaction. Plaintiff did "open the door" when it, as deceased's personal representative, joined in a stipulation stating: "The lease was extended for two (2) additional terms of five (5) years each by the defendant, Mike Rubish, by giving notice to the parties of the first part."

Due to this stipulation, defendant should have been allowed to testify to the sort of notice—oral or written—which deceased had accepted from him in order to exercise an option to extend the lease in the past.

3. Frauds, Statute of § 1— exclusion of testimony improper

In an action stemming from a lease for an initial period of ten years but with options to extend that period for six additional five-year periods, the trial court erred in excluding the testimony of several witnesses that the owner of the property had said defendant had a "40-year lease" on the ground that it was barred by the statute of frauds since the statements, standing alone, do not show a modification of the existing lease based on an exchange of new consideration between the maker of the statements and the defendant.

Justices MITCHELL and MARTIN took no part in the consideration or decision of this case.

PLAINTIFF'S action for summary ejectment and damages resulted in a jury verdict for defendant at the 7 January 1980 Civil Session of Durham District Court. *Judge LaBarre* in accord with the verdict entered judgment dismissing the action with prejudice on 14 January 1980. The Court of Appeals found no error.[1] The Supreme Court granted discretionary review on 4 June 1981.

Newsom, Graham, Hedrick, Murray, Bryson & Kennon by James M. Tatum, Jr.; Robert B. Glenn, Jr., attorneys for plaintiff appellant.

Claude V. Jones, attorney for defendant appellee.

EXUM, Justice.

Plaintiff, holder of legal title as trustee, seeks by this summary ejectment action to regain possession of premises currently possessed by defendant as lessee. Plaintiff asserts that defendant failed to give timely written notice of his intent to exercise his option to extend the lease; thus his refusal to surrender possession after the expiration of the last extension is an impermissible holding over. Defendant answers that the requirement of written notice had been waived by plaintiff's predecessor in interest, that plaintiff had actual oral notice of his intent to renew, and that plaintiff failed to notify him that written notice was required to

1. Reported at 50 N.C. App. 662, 275 S.E. 2d 494 (1981).

be directed to Wachovia. Thus, he alleges, plaintiff is estopped from asserting the requirement of written notice.

The most significant question raised by this appeal is whether there was sufficient evidence of estoppel to justify submission of the case to the jury. Additional questions are whether the jury was properly instructed and whether the trial court erred in several evidentiary rulings.

Defendant, a former football player at the University of North Carolina at Chapel Hill and a professional golfer, entered into a lease with Mr. and Mrs. William E. Baker on 12 February 1960 of some 19.03 acres of undeveloped land on the Durham-Chapel Hill Boulevard in Durham County, adjacent to what is now South Square Mall. Mr. Baker was an avid sportsman and agreed to lease the property to defendant for development as a recreational complex. Defendant's attorney drew the lease according to defendant's and Mr. Baker's wishes. The lease limited defendant's use of the property as follows:

> [A]s a part of the consideration moving to [Baker] to execute this lease [defendant] will erect on said premises a modern clubhouse, containing a golf shop, for the sale of golfing equipment and apparel, a lounge, a grille or luncheonette, and a one-unit dwelling apartment, and, in addition thereto, will erect an eighteen-hole miniature golf course, a golf driving range, a nine-hole par three golf course, and a play area for children, provided however that it is not contemplated that all of the above-referred to improvements shall be constructed or erected within a maximum prescribed period of time, but only as the necessities of the business . . . shall require.

The period of the lease was ten years, until 30 April 1969, but it granted defendant an option to extend the period for six additional five-year periods. Rent was $4,000 for the first year, $5,000 for the second, and $6,000 for the third and all subsequent years through the first four additional periods. For the fifth and sixth additional periods, the parties agreed to renegotiate the rent.

The lease provided that defendant could extend for the additional periods by giving Mr. and Mrs. Baker "written notice of his

intention to do so not later than ninety (90) days prior to the expiration of the then current term of this lease." Plaintiff and defendant stipulated that the lease was extended for two additional periods upon notice[2] by defendant to the Bakers. The first extension ran from 1 May 1969 to 30 April 1974; and the second, from 1 May 1974 to 30 April 1979.

Mr. Baker died on 9 June 1976, and Wachovia Bank and Trust Company qualified under his will as executor and trustee of his estate. Ms. Jean Holleman was assigned responsibility for the estate. Under Mr. Baker's will, a trust was established to provide income for Mrs. Baker. The trust's only remaining asset is the property leased to defendant. From Ms. Holleman's examination of the lease after Mr. Baker's death, she determined that the lease was in the middle of its second additional term. She found no writing from defendant to Mr. Baker purporting to extend the lease, although she was able to find among Mr. Baker's personal files various correspondence about the property between the two men, tax returns and ledger books recording rental payments.

In August 1976 Ms. Holleman met with defendant to discuss directing his future rental payments to Wachovia's trust department. She testified that at "my initial meeting with Mr. Rubish, he advised me that it looked like he was going to continue his business and that was his plan at that time." In an internal memorandum about an August 1977 meeting with defendant, Ms. Holleman wrote: "I was very pleased with the way our meeting with Rubish progressed. In my opinion, he went from one extreme to the other. He first stated that he would never give up his business for any reason and would fight to keep it with every means available to him. When we concluded our meeting I felt that he was quite anxious to join with us on a sale of the property at a price of $1,100,000.00 or above." In this and other discussions about a possible sale of the property[3] and appropriate division of the proceeds, she concluded that defendant considered his lease to run for forty years. She stated in her deposition that every

2. The stipulation, quoted *infra*, does not specify whether the notice referred to was oral or written. It is, as we later demonstrate, ambiguous on this point.

3. The parties were also negotiating and ultimately litigated the appropriate distribution of proceeds from a condemnation of a portion of the land by the N.C. Department of Transportation.

time defendant "referred to the lease, I think he always stated that it ran until 1999." She explained to defendant that the lease would effectively terminate in 1989 because the upward rental adjustment to be required at that time would make it financially unrealistic for him to continue his operations. In May 1979, after infrequent contact with defendant since August 1977, Ms. Holleman wrote defendant that his lease had terminated. The basis for this action, she testified, was defendant's failure to give notice of his intention to extend the lease as required by its terms. She claimed defendant never gave oral or written notice of his intent to extend the lease. Plaintiff accepted no rental payments after the purported termination of the lease on 30 April 1979 without first asserting that such payments would not affect its right to terminate.

Plaintiff offered expert testimony that the fair market value of the property on 1 May 1979 at its highest and best use was $1,150,000[4] and its fair market annual rental value was $50,000. Its most profitable use would be as a free standing commercial establishment such as a discount store, and not in its present use as a golfing complex.

Defendant testified that he has constructed on the property a nine-hole, par three golf course, a golf driving range, two eighteen-hole miniature golf courses, and a clubhouse with golf shop and grill. Almost all of these improvements were made before Mr. Baker's death and were intended to have a forty-year life. A corporation in which defendant apparently is the sole stockholder owns "Mike Rubish's Golf City," and defendant personally manages the property.

Defendant admitted that he had not given written notice[5] of renewal of the lease to Wachovia before 1 May 1979. When he

4. Although defendant, under the lease, had the right of first refusal on any sale of the property, there were several other potential buyers who had expressed an interest in purchasing the property. Defendant testified that he would have acquiesced in a sale to a third party if a fair division of the proceeds were agreed upon, because Ms. Holleman had explained that such a sale might be necessary to obtain liquid assets sufficient for Mrs. Baker's expenses.

5. On direct examination of defendant the following occurred:

Q. Was any written notice given to—

MR. GLENN: Objection, Your Honor.

received the letter of termination he was "dumbfounded" and "panicky." Defendant admitted that he wrote a letter purporting to extend his lease, predated it, and sent it to Mrs. Baker. He later informed his attorney that he had not written such a letter, and told him "to file an amendment to the Answer filed in the action to eliminate any defense based on the allegation that I had written a letter to Mrs. Baker in December of 1978." He said he fabricated the letter because he thought it was the best way to fight eviction. He then admitted what he had done was wrong and apologized to the court.

With regard to the negotiations between defendant and Wachovia, he stated:

> The first time I went to see Mrs. Holleman after she became Executor of the estate we discussed the lease and I told her that I was satisfied with it because I thought it was very reasonable and that it was made for my benefit because we knew it might not be a very lucrative profession. I told Mrs. Holleman that I was interested in staying as a manager and supervisor of Golf City, that I enjoyed my work and I had worked so hard to build that place as it is today as a

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Q. —Mr. Baker?

MR. GLENN: I asked to be heard.

COURT: All right, ladies and gentlemen, if you would.

[The jury was excused, the objection sustained, and evidence taken for the record.]

Direct examination of Mr. Rubish continued:

Q. Mr. Rubish, did you ever give notice of renewal of this lease either to Mrs. Baker or to the bank or to anyone else before May 1st, 1979?

MR. GLENN: Objection.

COURT: Sustained as to "anyone else." You may answer as to the other portion of the question. That is, you may answer, Mr. Rubish, as to whether or not you gave notice to the Bank or to Mrs. Baker.

A. No, sir.

Standing alone, the last question and answer appear to be an admission by defendant that he never gave any sort of notice, oral or written, to Mrs. Baker or Wachovia. When read in context, however, it is clear that defendant is testifying only that he never gave *written* notice to plaintiff before 1 May 1979.

first class recreational park. I also felt that it was an asset to the community.

Later on, in our second conference, Mrs. Holleman indicated to me that Mrs. Baker was in trouble financially with the taxes. I felt that with my close relationship with Mr. Baker and Mrs. Baker in the past, that I was willing to give up my place and help her out if we could negotiate selling because I thought that this might help me find another location. I was trying to help Mrs. Baker if I could and that's the reason why I was considering selling.

I tried to negotiate. I would have been willing to sell my place if we could have divided the money on a satisfactory basis. In my opinion the Executor never made any extra effort to contact me. They waited two years to make any attempt to negotiate with me. I tried and I went to a lot of Mr. Baker's friends and tried to persuade and tried to get some information. I tried every way I possibly could but I felt like I was bucking a wall.

Other witnesses testified on Mr. Baker's close relationship with defendant and his interest in the property. They also testified to defendant's community activities and his good reputation in the community.

Additional testimony by defendant and some of his witnesses was not admitted by the trial court based on its interpretation of the Dead Man's Act, G.S. 8-51, and the Statute of Frauds.

The jury found Wachovia had waived the requirement of written notice and judgment was entered in defendant's favor. The jury did not reach the question whether Wachovia was estopped to assert the written notice requirement. The issues submitted and the jury's answers were:

1. Did the plaintiff waive the requirement that defendant give written notice of his intention to renew the lease 90 days prior to the termination of the lease?

ANSWER: YES.

2. Is the plaintiff estopped from requiring the defendant to give written notice of his intention to renew the lease 90 days prior to the termination of the lease?

ANSWER:

3. Does the defendant under the lease agreement dated February 12, 1960, wrongfully hold over and wrongfully withhold possession of the property from the plaintiff?

ANSWER:

4. If so, what damages is the plaintiff entitled to recover of the defendant?

ANSWER:

The trial court instructed on the waiver issue that "[w]aiver is the intentional surrender of a known right or privilege," and that "intention may be expressed or implied from acts or conduct naturally and justly leading the other party to believe that a right has been intentionally foregone." In applying these concepts to defendant's evidence, he stated that "defendant has offered evidence which he alleges tends to show that through a course of dealing over the years with the plaintiff Bank that the plaintiff Bank has waived the requirement that the defendant give written notice of his intent to renew the lease, and that no such written notice was required in the past."

I.

The primary questions for decision are whether there is evidence to support defendant's assertion of waiver or estoppel, or both, and whether the jury was properly instructed on these issues. We conclude there is evidence from which a jury could find Wachovia was estopped to require written notice but that the jury was not properly instructed nor were the issues correctly formulated.

In determining the sufficiency of the evidence in a civil case, the evidence must be interpreted most favorably to the party with the burden of proof. If there is enough evidence of each element of the claim so that "reasonable men may form divergent opinions of its import, the issue is for the jury." *State Auto. Mutual Ins. Co. v. Smith Dry Cleaners, Inc.*, 285 N.C. 583, 587, 206 S.E. 2d 210, 213 (1974). Defendant bore the burden of establishing his affirmative defenses. *Peek v. Wachovia Bank & Trust Co.*, 242 N.C. 1, 12, 86 S.E. 2d 745, 753 (1955). Thus, defendant was re-

quired to offer evidence that Wachovia had waived or was estopped to demand written notice.

The giving of notice to extend a lease in accordance with the terms of the lease is a condition precedent to extension of the lease. *Kearney v. Hare*, 265 N.C. 570, 574, 144 S.E. 2d 636, 639 (1965). Such notice, however, is for the benefit of the lessor and may be waived by him. *Coulter v. Capitol Finance Co.*, 266 N.C. 214, 146 S.E. 2d 97 (1966); *Kearney v. Hare, supra.* The meaning of "waiver" in this context is at best elusive. *See* 5 W. Jaeger, Williston on Contracts §§ 678-79 (3d ed. 1961); 31 C.J.S., *Estoppel* § 61 (1964). " 'Waiver,' has been defined as 'an intentional relinquishment of a known right.' [Citations omitted.] A person *sui juris* may waive practically any right he has unless forbidden by law or public policy. The term, therefore, covers every conceivable right—those relating to procedure and remedy as well as those connected with the substantial subject of contracts. Sometimes they [waivers] partake of the nature of estoppel and sometimes of contract. . . . No rule of universal application can be devised to determine whether a waiver does or does not need a consideration to support it. It is plain, then, that in the *nature* and *occasion* of the particular waiver must lie the answer as to whether or not it requires such consideration." *Clement v. Clement*, 230 N.C. 636, 639-40, 55 S.E. 2d 459, 461 (1949) (emphases original).

In the context of a landlord-tenant relationship, whether consideration need support waiver of notice depends upon whether the waiver occurs after notice is due and failure to give notice has occurred or before notice becomes due. A lessor, as well as other parties to a contract, may waive the *breach, i.e.*, failure to give notice when due, of a lease or other contractual provision or condition. Such a waiver is valid even if not supported by consideration or estoppel when:

> (1) The waiving party is the innocent, or nonbreaching party, and
>
> (2) The breach does not involve total repudiation of the contract so that the nonbreaching party continues to receive some of the bargained-for consideration. . . . and
>
> (3) The innocent party is aware of the breach, and

(4) The innocent party intentionally waives his right to excuse or repudiate his own performance by continuing to perform or accept the partial performance of the breaching party.

Wheeler v. Wheeler, 299 N.C. 633, 639, 263 S.E. 2d 763, 766-67 (1980) (principles applied to separation agreement).

Thus, in *Coulter v. Capitol Finance Co., supra*, 266 N.C. at 218, 146 S.E. 2d at 100, the Court held that when "a lessee remains in possession without giving the prescribed notice, the lessor has an election to treat him as a trespasser or to waive the notice and treat him as holding by virtue of an extension of the lease. Acceptance by the lessor of the rent which the lease provides shall be paid during the extended term is a waiver of such notice by the lessor, nothing else appearing. [Citations omitted.] This is especially true where, as here, the lease provides that, in event of an extension of the term, the rent shall be increased." *See also First-Citizens Bank & Trust Co. v. Frazelle*, 226 N.C. 724, 40 S.E. 2d 367 (1946).

Parties may also waive the performance of a condition of a contract before time for performance is due. *Lenoir Mem. Hospital, Inc. v. Stancil*, 263 N.C. 630, 139 S.E. 2d 901 (1965). If the waiver is of a formal, as opposed to a substantial, right or privilege, then no consideration is needed to support it.[6] *Id.* at 634, 139 S.E. 2d at 903. However, an *agreement* to waive a substantial right or privilege, thus altering the terms of the original contract, must be supported by additional consideration, or an estoppel must be shown. *Wheeler v. Wheeler, supra*, 299 N.C. at 637, 263 S.E. 2d at 765. *But see* Restatement (Second) of

6. The right to renew a lease has been treated as a substantial, rather than a formal right. The right to renew is lost if the lease sets forth a time before which notice must be given of an intent to renew, and notice is not given, unless there is a waiver of the notice provisions. *See, e.g., Merchants Oil Co. v. Mecklenburg County*, 212 N.C. 642, 194 S.E. 114 (1937). The rationale for this rule is the principle that "time is of the essence of an option, and that the giving of notice, as stipulated, is a condition precedent to the vesting of the renewal right. Thus a privilege of renewal upon written notice given at a certain time prior to the expiration of the lease is held to be an obligation of which time is of the essence, is valid, and must be strictly construed." 3 G. Thompson, Thompson on Real Property § 1122 (Rep. 1980) (footnotes omitted). *See also Elm & Greene Streets Realty Co. v. Demetrelis*, 213 N.C. 52, 194 S.E. 897 (1938); *Eureka Lumber Co. v. Whitley*, 163 N.C. 47, 79 S.E. 268 (1913).

Contracts § 89 (1981) (modification of executory contract needs no consideration if fair and equitable in light of unanticipated circumstances or if allowed by statute or if detrimental reliance). "[A] waiver of a legal right, which right is to be, or may be asserted in the future, where the waiver for want of essential elements of that principle, cannot operate as an estoppel, requires a consideration as much as an agreement by any other name." *Clement v. Clement, supra*, 230 N.C. at 640, 55 S.E. 2d at 461. *See also*, J. Calamari & J. Perillo, Contracts § 11-36 (1977).

The use of "estoppel" as a ground for "waiver" sometimes leads to confusion as to exactly what must be proved by the party asserting the estoppel. This is illustrated in the instant case by the defendant's pleading and the trial court's instructions on estoppel.[7] In order to prove a waiver by estoppel defendant need not prove all elements of an *equitable* estoppel, for which proof of actual misrepresentation is essential; neither need he prove consideration to support the waiver. Rather, he need only prove an express or implied promise by Wachovia or Mr. Baker to waive the notice provision and defendant's detrimental reliance on that promise.

An older case from a sister state, quoted in 3A A. Corbin, A Comprehensive Treatise on the Rules of Contract Law, *Waiver and Estoppel* § 752 n. 4 (1960), offers a lucid explanation of waiver by estoppel.

> It is stated that to constitute a waiver there must be either a contract supported by consideration or the necessary elements of estoppel. [Citations omitted.] If the 'estoppel' of this alternative means the ordinary equitable estoppel, a necessary element of which is the misstatement of an existing fact, this court has not so held. . . . A waiver may, as appears in some cases, have also the elements of equitable estoppel. A waiver may be supported by consideration. But it will appear from the decisions of this court that, to constitute a waiver where there is no consideration, there must be a promise or permission, express or implied in fact, supported only by action in reliance thereon, to excuse performance in

7. Defendant alleged Wachovia was equitably estopped from dispossessing defendant of his leasehold interest. The trial court set forth the elements of equitable estoppel in its instructions on the estoppel issue.

> the future of a condition or of an obligation not due at the time, when the promise is made, or to give up a defense not yet arisen, which would otherwise prevent recovery on an obligation. Though there is often said to be in such case an estoppel and the case said to be distinguishable from a waiver, there is not a true estoppel, for there is no misrepresentation of an existing fact. It may be called 'a promissory estoppel.' [Citations omitted.] We think that this distinction will harmonize many decisions and will clarify what appears to be some confusion of definition and expression.

Colbath v. H. B. Stebbins Lumber Co., 127 Me. 406, 414-15, 144 A. 1, 5 (1929). *See also*, 5 W. Jaeger, Williston on Contracts, *supra*, §§ 678, 679, 689-92; Restatement (Second) of Contracts §§ 89(c), 90 (1981).

These principles are reflected in our own cases, even though they may not have been quite so clearly expounded. For example, in *Kearney v. Hare*, *supra*, 265 N.C. at 575, 144 S.E. 2d at 640, the Court found that the lessor had waived the requirement of further notice from the lessee of his intent to extend the lease. The Court noted:

> This is not the case of a landowner accepting a payment for the use of his land after the original term expired and when the tenant has already lost his right to extend the lease and the lessor has acquired a right to be paid for the use of the land during the holding over. Here, the lessor requested the tenant to pay the second year's rent before the lessor was entitled thereto and while the tenant still had the right to give the notice specified in the lease. By requesting and accepting payment of rent for the second year under those circumstances, the lessor lulled the tenant into the belief that the extension of the term through the second year was an accomplished fact and so cannot, after the expiration of the time for giving notice, be heard to say that this condition precedent to extension has not been met.

Although the advance payment of the rent might have constituted consideration to support an implied agreement to waive notice, the Court apparently viewed the situation as one in which the lessor was simply estopped to demand notice. The estoppel

arose because of lessor's implied promise not to demand written notice after requesting advance rental payments and the lessee's reliance on that promise in not giving written notice.

[1] In the instant case there is no evidence of new consideration to support a change in the lease's notice requirement. Neither is there evidence that Wachovia waived written notice after the time that notice was due. The evidence is that Wachovia consistently asserted it had a right to terminate since shortly after the purported termination date. Indeed, as a fiduciary Wachovia may have breached its duty to Mrs. Baker if it had waived defendant's breach of the notice provision. *See Merchants Oil Co. v. Mecklenburg County*, 212 N.C. 642, 645, 194 S.E. 114, 116 (1937). Nor is there sufficient evidence to support a finding that Wachovia's actions since Mr. Baker's death estopped it from asserting the written notice requirement. Although there is evidence that Wachovia fully expected defendant to extend his lease, there is no evidence that Ms. Holleman or some other representative told defendant that he did not need to give written notice. Merely negotiating with defendant was not enough reasonably to convey the impression that the lease would be extended without written notice. Thus, the actions of Wachovia are not enough to support a finding of waiver or estoppel.

There is, however, evidence from which the jury could find that Wachovia was estopped to demand written notice upon the theory of promissory, as opposed to equitable, estoppel. The theory rests on the proposition that Mr. Baker had waived two breaches of the condition of written notice, and defendant had relied on the promise implied from these waivers that no written notice would be thereafter required. Thus, Mr. Baker, had he lived, would be estopped from asserting the requirement of written notice without informing defendant that written notice would be required, and Wachovia stands in the shoes of Mr. Baker.

With regard to the evidentiary support for this theory, the record is clear that some sort of notice was given to Mr. Baker in the past. The parties stipulated: "The lease was extended for two (2) additional terms of five (5) years each by the defendant, Mike Rubish, by giving notice to the parties of the first part." The stipulation is patently ambiguous, however, on whether the notice given was oral or written. By asserting that written notice is

presently required, Wachovia must mean that it was given in the past. Defendant, on the other hand, must mean that only oral notice had been given in the past and one standing in the shoes of Mr. Baker could require no more. By joining in this ambiguous stipulation, Wachovia has opened the door to testimony by defendant, some of which was improperly excluded, on the nature of the notice defendant gave to Mr. Baker.[8] In addition, however, to the testimony improperly excluded at trial, defendant offered evidence to the effect that no written notice was found among the papers which Mr. Baker maintained relating to the lease; that Mr. Baker and defendant enjoyed a close friendship; and that Mr. Baker's interest in defendant's golf complex transcended economic considerations.[9]

Thus, there is evidence from which a jury could reasonably infer that Mr. Baker had not insisted on written notice but had accepted only oral notice as sufficient to extend the lease. If such a finding were made, the following legal propositions obtain: If Mr. Baker were alive, he would be estopped by his prior conduct and by defendant's reliance on it to demand written notice; for, in the words of *Kearney v. Hare, supra*, 265 N.C. at 575, 144 S.E. 2d at 640, Mr. Baker would have "lulled" defendant into believing written notice was not necessary. *See* J. Calamari & J. Perillo, The Law of Contracts § 11-36 (1977). Because Wachovia, as executor and trustee of Mr. Baker's will, stands in Mr. Baker's shoes, it can assert no better right than Mr. Baker could have asserted to a written notice requirement. *See Hayes v. Ricard*, 244 N.C. 313, 324, 93 S.E. 2d 540, 549 (1956); *First-Citizens Bank & Trust Co. v. Frazelle, supra*, 226 N.C. at 728, 40 S.E. 2d at 370 (1945); *Redevelopment Comm. of Greenville v. Hannaford*, 29 N.C. App. 1, 4, 222 S.E. 2d 752, 754 (1976). Thus Wachovia, without some clear statement to defendant that it expected written notice to be given before notice was due, could demand only that defendant give it oral notice of his intention to extend the lease for an additional term. Wachovia would be estopped to demand more.

8. This aspect of the case is fully discussed in Part II of this opinion.

9. Mr. Baker was an avid sportsman, even providing for the disposition of his sporting equipment, trophies, and mementos in his will. According to Mrs. Baker and other witnesses, he visited the property frequently to watch the progress of defendant's golf complex. Mr. Baker and defendant were personal friends, and Mr. Baker was proud of the way defendant was developing the recreational facilities.

Evidence that defendant gave oral notice to Wachovia of the kind Mr. Baker had accepted may be found in defendant's statement to Ms. Holleman in their initial meeting that "he was going to continue his business and that was his plan at that time," reinforced by the implied assertion in his frequent statements in negotiations that his lease continued until 1999.

In conclusion, there is no evidence to support the first issue as the jury was instructed on it. There is evidence to support submission of an estoppel issue on the theory we have outlined. There is also evidence that Wachovia received oral notice of defendant's intention to extend the lease. On retrial the issues submitted should be (1) whether Wachovia is estopped to demand written notice and (2) if so, whether Wachovia received oral notice. Defendant must bear the burden of proof on both issues in order to prevail.

II.

[2] The second question, raised by defendant's cross-assignments of error under Rule 10(d) of the Rules of Appellate Procedure, is whether the trial court erred in its rulings on the admissibility of certain testimony. Plaintiff asserted that some of defendant's evidence was barred by the Dead Man's Act and the Statute of Frauds. Portions of the evidence offered by defendant were improperly excluded on those grounds.

The Dead Man's Act, G.S. 8-51, provides in pertinent part:

> Upon the trial of an action, . . . a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf . . . .

Defendant is precluded by the Act from testifying on "personal transaction[s]" he had with Mr. Baker unless plaintiff first "opens the door" by offering evidence about a particular transaction. *See Peek v. Shook*, 233 N.C. 259, 261, 63 S.E. 2d 542, 543 (1951);[10] *Bunn v. Todd*, 107 N.C. 266, 11 S.E. 1043 (1890); 1 Stansbury's N.C. Evidence §§ 66-75 (Brandis 2d Rev. 1982). We believe plaintiff did "open the door" when it, as Mr. Baker's personal representative, joined in an ambiguous stipulation, quoted *infra* in Part I of this opinion, on the character of the notice given by defendant to Mr. Baker for previous extensions. The plaintiff having thus "opened the door," it is for the court to decide what testimony favorable to defendant may be admitted. *Herring v. Ipock*, 187 N.C. 459, 463, 121 S.E. 758, 760 (1924); *Cheatham v. Bobbitt*, 118 N.C. 343, 348, 24 S.E. 13, 14 (1896). Defendant's testimony must be confined to the same transactions referred to in the stipulation. *Herring v. Ipock, supra*, 187 N.C. at 463, 121 S.E. at 760. Thus, defendant's testimony admissible under this exception to the Dead Man's Act is that which goes to the sort of notice—oral or written—Mr. Baker had accepted from him in the past. Defendant's testimony that he had not given written notice for previous extensions of the lease should have been admitted to the extent it bore directly on the nature of the notice which he had actually given in the past and Mr. Baker's response to it. Defendant could not, however, offer testimony explaining that he had not given written notice in the past because Mr. Baker had told him before the first notice was due that it was not necessary. The stipulation opens the door only to testimony on the form of notice actually given to Mr. Baker and its efficacy in extending the lease, not to testimony that Mr. Baker expressly agreed initially to accept less than written notice. Were it not for the Dead Man's Act, it appears defendant could offer proof of promissory estoppel based on express promises by Mr. Baker that written notice was not required. Because of the Act's application, however, defendant must prove his case if at all by way of an implied promise which the jury may find from the course of conduct between defendant and Mr. Baker relative to the notice requirement.

10. *Peek v. Shook, supra*, contains a definitive exegesis of the Dead Man's Act.

In addition, the testimony of Helen Cuffori, William Boone and Mike May regarding their conversations with Mr. Baker should not have been excluded on the basis of the Dead Man's Act because they were not witnesses with a pecuniary or legal interest. *Rape v. Lyerly*, 287 N.C. 601, 621-23, 215 S.E. 2d 737, 750 (1975); *Peek v. Shook, supra*, 233 N.C. at 261, 63 S.E. 2d at 543. Plaintiff has conceded this point in its reply brief.

[3] Defendant argues error in the trial court's exclusion of portions of the testimony of Mike May, Helen Cuffori, and William Boone on the ground that it was barred by the Statute of Frauds. The excluded testimony consisted primarily of statements by Mr. Baker to the effect that defendant had a "forty-year lease." At trial, defendant argued that these statements were offered to prove Mr. Baker's waiver of the notice requirement, while plaintiff argued they tended to show an oral modification of the lease.

These statements, standing alone, do not show a modification of the existing lease based on an exchange of new consideration between Mr. Baker and defendant. At most they show Mr. Baker impliedly promised to forego the notice requirement altogether. Such a promise is enforceable only if it induced detrimental reliance by defendant. Restatement (Second) of Contracts § 90 (1981). Furthermore, "[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires." Restatement (Second) of Contracts § 139 (1981). This view is consistent with that found in cases in which this Court has recognized exceptions to the Statute of Frauds. For example, in *Faw v. Whittington*, 72 N.C. 321, 323 (1875), Justice Bynum wrote: "It cannot be denied that there may be a parol waiver or renunciation of many rights touching land, which are often secured by the written contract . . . ." *See also Scott v. Jordan*, 235 N.C. 244, 69 S.E. 2d 557 (1952) (executory contract to sell or convey real property may be abandoned by an oral agreement); *Bell v. Brown*, 227 N.C. 319, 42 S.E. 2d 92 (1947).

Although neither the Dead Man's Act nor the Statute of Frauds renders this testimony inadmissible, the testimony, stand-

ing alone, falls far short of showing that Mr. Baker had waived by estoppel the lease's notice requirements altogether. His statements, if he made them, that defendant had a forty-year lease are consistent with a layman's understanding of the terms of the lease as written, for defendant did have a lease which could be extended, upon his option, for as long as forty years. Furthermore, defendant's proffered testimony that Mr. Baker had promised to waive even oral notice in the future was properly excluded on the ground of the Dead Man's Act, since the stipulation opened the door only wide enough to permit defendant to testify as to the form of notice given to and accepted by Mr. Baker for the previous extensions. It did not open the door wide enough to permit defendant to testify that Mr. Baker had, in effect, waived by estoppel all future notice, oral as well as written.

The testimony of the witnesses May, Cuffori and Boone that Mr. Baker said defendant had a forty-year lease was properly excluded because, standing alone, its probative value was "so slight as not reasonably to warrant the inference of the fact in issue or furnish more than materials for a mere conjecture." *Brown v. Kinsey*, 81 N.C. 245, 250 (1879). To admit it, therefore, would serve only to confuse the issues for the jury. *Pettiford v. Mayo*, 117 N.C. 27, 23 S.E. 252 (1895); 1 Stansbury's N.C. Evidence § 77 (Brandis 2d Rev. 1982).

Additional assignments of error which were not briefed and argued by the parties before this Court are deemed abandoned under Rule 28(b)(3) of the Rules of Appellate Procedure.

For the reasons given, the decision of the Court of Appeals finding no error in the trial below is reversed and the case is remanded for a new trial to be conducted in a manner not inconsistent with this opinion.

Reversed and remanded for new trial.

Justices MITCHELL and MARTIN took no part in the consideration or decision of this case.

WILLIAM M. BERNICK v. CRAIG JURDEN, COOPER OF CANADA, LTD., COOPER INTERNATIONAL, INC. AND WAKE FOREST ICE HOCKEY CLUB

No. 36A81

(Filed 13 July 1982)

1. Appeal and Error § 6.2— summary judgment for fewer than all defendants—appeal not premature

Where plaintiff alleged that the conduct of all four defendants caused his injuries, he had a right to have the issue of liability as to all defendants tried by the same jury, and the trial court's order allowing summary judgment for fewer than all the defendants affected a substantial right of plaintiff and was immediately appealable because of the possibility of inconsistent verdicts in separate trials.

2. Courts § 21.6; Uniform Commercial Code § 3— breach of warranty action—which law applies

Although a mouthguard may have been purchased in Massachusetts and manufactured in Canada, its use in a hockey game in North Carolina wherein plaintiff suffered injuries is a "transaction bearing an appropriate relation to this State" within the meaning of G.S. 25-1-105 so that the law of this State governs the trial of plaintiff's claims for breach of warranties of the mouthguard.

3. Limitation of Actions § 4.6; Sales § 14.1; Uniform Commercial Code § 25—products liability—breach of warranties—applicable statute of limitations

The statute of limitations of G.S. 25-2-725 did not apply to an action to recover damages for injuries received in a hockey game allegedly caused by breach of express and implied warranties of a mouthguard. Furthermore, since G.S. 1-50(6) makes substantive changes in the law of products liability, it did not apply to a claim arising before 1 October 1979. Rather, the time of accrual of plaintiff's claims for breach of warranties of the allegedly defective mouthguard was governed by former G.S. 1-15(b), and the period from accrual within which to bring the action was three years as provided in G.S. 1-52(1).

4. Sales § 5; Uniform Commercial Code § 11— express warranty of mouthguard—third-party beneficiary—inferred reliance

Plaintiff hockey player's claim for breach of an express warranty that a mouthguard provided the "maximum protection to the lips and teeth" was not barred on the ground that plaintiff did not rely on or read the express warranty since (1) plaintiff's mother was the purchaser of the mouthguard and plaintiff as a third-party beneficiary of any express warranty made to his mother gets the benefit of the same warranty which she received as purchaser, and (2) reliance may be inferred considering the family purpose of the mother's purchase. G.S. 25-2-318; Official Comment 2 to G.S. 25-2-318.

5. Sales § 8; Uniform Commercial Code § 12— implied warranty—privity not required

Under our developing case law, plaintiff hockey player's claim for breach of implied warranty of a mouthguard was not barred by lack of privity. Fur-

thermore, privity was not required in view of the legislative abolition of the privity requirement in products liability actions against a manufacturer for breach of implied warranty as of 1 October 1979. G.S. 99-2(b).

6. **Sales § 17; Uniform Commercial Code § 11 – injury to hockey player – breach of warranty of mouthguard – summary judgment inappropriate**

In an action to recover for injuries received by plaintiff hockey player when he was struck by a hockey stick and his mouthguard manufactured and sold by defendants shattered, summary judgment was not appropriate for defendants on plaintiff's claims for breach of expressed and implied warranties on the ground that the injuries to plaintiff were not foreseeable and that any warranties made, including a warranty of "maximum protection," do not insure against injury from a criminal assault with a hockey stick, since (1) it was not established that the blow amounted to a criminal assault, and (2) the existence and scope of any warranty as well as the nature and foreseeability of the blow from the hockey stick presented questions for the finder of fact.

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

ON discretionary review of the Court of Appeals' dismissal of plaintiff's appeal from the trial court's entry of summary judgment in favor of defendants Cooper of Canada, Ltd. and Cooper International, Inc. at the 31 October 1980 Session of Superior Court, FORSYTH County.

Smith, Moore, Smith, Schell & Hunter, by McNeill Smith and Ben F. Tennille, Attorneys for Plaintiff-Appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by W. F. Maready, Ralph Stockton and Grover G. Wilson, Attorneys for Appellees Cooper of Canada, Ltd. and Cooper International, Inc.

MEYER, Justice.

The major issue in this case is whether the trial court erred in granting summary judgment in favor of the defendants Cooper of Canada, Ltd. and Cooper International, Inc. In order to decide this issue, we must first determine whether plaintiff's appeal is premature. Then, we must answer several other questions: (1) which jurisdiction's law applies to plaintiff's warranty claims, (2) what is the applicable statute of limitations to plaintiff's warranty claims, (3) whether reliance must be alleged on the express warranty claim, (4) whether privity is required on the implied warranty claim, and (5) whether the defendants Cooper have established the lack of a genuine issue as to any material fact remaining on plaintiff's claims. For the reasons stated herein, we hold that the trial court erred in granting summary judgment.

In COUNTS ONE and TWO of his complaint filed 14 December 1979 and amended 8 February 1980, plaintiff alleged that while playing hockey for Georgia Tech against the Wake Forest Ice Hockey Club on the evening of 16 February 1979 in the Triad Arena in Greensboro, North Carolina, he was struck in the face, between his lips and nose, by a hockey stick swung by Craig Jurden, a player and team member of the Wake Forest Ice Hockey Club. Plaintiff's mouthguard was shattered, his upper jaw fractured, three of his teeth totally knocked out and a part of a fourth tooth broken off. Jurden was given a ten-minute major penalty which put him out of the game. The plaintiff alleged that defendant Jurden's conduct in striking him was reckless and negligent, and in the alternative, intentional and willful, and the proximate cause of his injuries.

In COUNT THREE of the complaint, the plaintiff alleged that the mouthguard he was wearing was manufactured by defendant Cooper of Canada, Ltd., a corporation having its principal office in Toronto, Ontario, Canada, and sold by its subsidiary, defendant Cooper International, Inc., a corporation having its principal office in Lewiston, New York. Plaintiff also alleged, *inter alia*, that these defendants knew when the mouthguard was made and sold that it was intended to be offered for sale and sold to and used by persons in the United States, including North Carolina; that plaintiff was using the mouthguard in a manner reasonably foreseeable by the defendants; that the defendants had expressly warranted to the plaintiff that the mouthguard would give "maximum protection to the lips and teeth"; that defendants breached this express warranty; and that the mouthguard crumbled and disintegrated and failed in its function, causing plaintiff's injuries.

In COUNT FOUR, the plaintiff further alleged that these defendants had breached an implied warranty that the mouthguard was reasonably fit and safe for use in hockey games; that plaintiff relied on this implied warranty in purchasing the mouthpiece and that its breach caused or contributed to his injuries.

COUNT FIVE alleged that in the sale of the mouthguard the defendants had placed on the market a defective product, which was unfit for its intended use, knowing that it would be used without inspection for its susceptibility to crumbling and disintegration, thereby proximately causing plaintiff's injuries.

In an amendment to the complaint, plaintiff added as an additional defendant the Wake Forest Ice Hockey Club, alleging that defendant Jurden's actions and negligence are imputed to the Club and further that the Club was negligent in its training and supervision of defendant Jurden.

In answer, defendants Jurden and the Wake Forest Ice Hockey Club denied the essential allegations of the complaint and moved that it be dismissed for failure to state a claim. Rule 12(b)(6). They further alleged assumption of the risk and contributory negligence by the plaintiff. In addition to these averments, defendants Cooper of Canada, Ltd. and Cooper International, Inc. alleged misapplication of the product in bar of plaintiff's recovery and prayed for indemnity against defendants Jurden and the Wake Forest Ice Hockey Club.

Plaintiff Bernick's forty-seven interrogatories to the Cooper defendants were filed 10 April 1980, and the answers thereto were filed 29 May 1980. There also appears in the record a "Summary of Evidence Presented at Plaintiff's Deposition."

Defendants Cooper then amended their answer to allege that the plaintiff's claims for breach of warranty accrued more than four years preceding the commencement of the action and were therefore barred "by G.S. 25-2-725, laches and other applicable statutes of limitation," and moved for summary judgment. Their motion was allowed and summary judgment for these defendants was entered 16 October 1980. The plaintiff excepted to the judgment and gave notice of appeal.

By order entered 18 March 1981 the Court of Appeals dismissed the plaintiff's appeal. This Court allowed plaintiff's petition for discretionary review on 5 May 1981.

This appeal does not involve the defendants Craig Jurden and the Wake Forest Ice Hockey Club as the only claims before us are those against the Cooper defendants.

I

[1] The threshold issue that this Court must decide is whether plaintiff's appeal in this case is premature. Since summary judgment was allowed for fewer than all the defendants and the judgment did not contain a certification pursuant to G.S. § 1A-1, Rule

54(b), that there was "no just reason for delay," plaintiff's appeal is premature unless the order allowing summary judgment affected a substantial right. G.S. §§ 1-277, 7A-27(d); *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1950). As stated by the Court in *Bailey v. Gooding*, 301 N.C. 205, 210, 270 S.E. 2d 431, 434 (1980), "The 'substantial right' test for appealability is more easily stated than applied." *See Green v. Power Company*, 305 N.C. ---, --- S.E. 2d --- (No. 78A81, filed 5 May 1982); *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). "It 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 is sought was entered." *Waters v. Personnel*, 294 N.C. at 208, 240 S.E. 2d at 343. Having considered the matters suggested in *Waters*, we hold that because of the possibility of inconsistent verdicts in separate trials, the order allowing summary judgment for fewer than all the defendants in the case before us affects a substantial right. Plaintiff Bernick alleged in his complaint that the conduct of the defendants Jurden and the hockey club and that of the defendants Cooper caused his injuries. He has a right to have the issue of liability as to all parties tried by the same jury. In a separate trial against the defendants Jurden and the hockey club, the jury could find that the blow by Jurden's hockey stick was not intentional, negligent, or was not the cause of plaintiff's injury and damages. Then, if summary judgment in favor of the Cooper defendants were reversed on appeal, at the ensuing trial the second jury could find that plaintiff's injuries were the result of Jurden's or the hockey club's negligent, intentional, or even malicious conduct, and either not foreseeable by or not within the scope of any warranties made by the Cooper defendants. Thus, the plaintiff's right to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries is indeed a substantial right. Plaintiff's appeal is not premature, and the Court of Appeals erred in dismissing it.

II

The remaining issue for review is whether the trial court erred in granting the defendants Cooper's motion for summary judgment. We hold that it did.[1]

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 a judgment as a matter of law."

> An issue is genuine if it 'may be maintained by substantial evidence.' *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E. 2d 897, 901 (1972). *See also Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972).
>
> . . . [A] fact is material if it would constitute or would irrevocably establish any material element of a claim or defense. *See* M. Louis, A Survey of Decisions Under the New North Carolina Rules of Civil Procedure, 50 N.C. L. Rev. 729, 736 (1972).

City of Thomasville v. Lease-Afex, Inc., 300 N.C. 651, 654, 268 S.E. 2d 190, 193 (1980).

In order to prevail on their summary judgment motion, defendants must carry the burden of establishing the lack of a genuine issue as to any material fact and their entitlement to judgment as a matter of law. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

Defendants may meet their burden by (1) proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party (2) cannot produce evidence to support an essential element of his or her

1. Because of our decision on this issue, we need not decide whether the plaintiff can raise the question of whether summary judgment was premature based on his one Assignment of Error and Exception: "The Court erred in granting defendants' motion for summary judgment on the grounds that genuine issues of material fact remain to be determined on plaintiff's claims and plaintiff's breach of warranty claims were not barred by the statute of limitations. EXCEPTION NO. 1 (R p 29)"

claim, or (3) cannot surmount an affirmative defense which would bar the claim. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981).

> If the moving party meets this burden, the nonmoving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not so doing. *Moore v. Fieldcrest, supra; Zimmerman v. Hogg & Allen, supra.*
>
> If the moving party fails in his showing, summary judgment is not proper regardless of whether the opponent responds. *See generally* McIntosh, *supra.*

City of Thomasville v. Lease-Afex, Inc., 300 N.C. 651, 654, 268 S.E. 2d 190, 193.

Plaintiff alleged liability on the part of the defendants Cooper in three separate counts. In determining whether there exists a genuine issue as to a material fact, we consider first COUNT THREE and COUNT FOUR, wherein plaintiff alleged breaches of express and implied warranties.

(1)

[2] A preliminary question which arises on the warranty claims is whether North Carolina law applies. Under the law of Massachusetts, where the mouthguard was purchased, the requirement of privity of contract in warranty actions, express and implied, against a manufacturer of goods has been statutorily abolished. Mass. Gen. Laws, Ann. ch. 106, § 2-318. As of 16 February 1979, the date on which the plaintiff was injured, our Legislature had not yet made such an abolition. See section II(4) of this opinion, *supra.* The plaintiff argues that the law of Massachusetts applies. The defendants argue that where the pleadings are silent on this point North Carolina law applies and further, that regardless of choice of substantive law on the warranty claims, North Carolina will apply its own statute of limitations.

In 1965, the Legislature adopted the Uniform Commercial Code (hereinafter the UCC). 1965 N.C. Sess. Laws, ch. 700. Among the stated purposes and policies underlying the UCC are the simplification, clarification and modernization of the laws govern-

ing commercial transactions and the creation of uniformity of the law among the various jurisdictions. G.S. § 25-1-102.

G.S. § 25-1-105 governs the territorial application of the UCC. It provides that in the absence of the parties' agreement as to whether the law of this State or of another state or nation shall govern their rights and duties, the laws of this State apply to "transactions bearing an appropriate relation to this State." The North Carolina Comment which follows G.S. § 25-1-105 points out that this section is one of the most important preliminary sections of the UCC and "[i]t is believed that it modifies our conflict of laws rules." Indeed, it does.

As pointed out in the Comment, our courts have traditionally applied rigid conflict of laws rules. Generally, in an action for damages for injury sustained by reason of the failure of a product, the North Carolina rule has been that if the claim is based on breach of warranty, the substantive law of the place the contract was made applies, while if the claim is based on negligence, the law of the state where the injury occurred applies. *See Murray v. Aircraft Corporation*, 259 N.C. 638, 131 S.E. 2d 367 (1963). When the place of performance of the contract differs from the place where the contract was made, the traditional rule is that matters of performance and damages for nonperformance are governed by the law of the place of performance. *See Transportation, Inc. v. Strick Corp.*, 283 N.C. 423, 196 S.E. 2d 711 (1973).[2]

The provisions of G.S. § 25-1-105 were intended to change the rigid conflict of laws rules. The old rules must give way to the requirements of the Code. In determining which jurisdiction's law is applicable to actions based on breach of warranty, we no longer look only to where the contract was made or where it was intended to be performed. Rather, we look to whether the transaction bears an appropriate relation to the State.

2. In *Transportation, Inc.*, since the parties did not contend that any law other than that of the state of contracting governed in the action for breach of warranty, the Court applied that law although the contract was to be performed in another state. In a later appeal of *Transportation, Inc.*, the defendant argued that the substantive law of the place of performance controls the questions of breach of implied warranty and the measure of damages therefor. This contention was rejected, the Court ruling that its decision on the prior appeal constituted the law of the case. 286 N.C. 235, 210 S.E. 2d 181 (1974).

We hold that although the mouthguard may have been purchased in Massachusetts and manufactured in Canada, its use in the hockey game in North Carolina wherein the plaintiff suffered his injuries is a "transaction bearing an appropriate relation to this State" within the meaning of G.S. § 25-1-105 so that the law of this State governs the trial of his claims for breach of warranties. The plaintiff did not suffer the damages from any breach of warranty for which he seeks recovery until the hockey game in North Carolina. We do not deem it an undue burden on the defendants Cooper that liability for alleged damage caused by their product is governed by a place other than that where it was manufactured or purchased. Defendants Cooper are corporations conducting business on a multi-national scale and clearly should foresee the use of their products in any state within this nation. Plaintiff suffered his injury in this State and brought his action in its courts; the substantive as well as the procedural laws of this State govern his claim.

Our holding today is in line with other cases wherein the issue of "appropriate relation" has been discussed. *See*, for example, *Bilancia v. General Motors Corp.*, 538 F. 2d 621 (4th Cir. 1976). (The law of the place of the accident, Virginia, has such an appropriate relation to make it controlling.) *Aldon Industries, Inc. v. Don Myers & Associates, Inc.*, 517 F. 2d 188 (5th Cir. 1975) (applying Florida law where injury occurred solely in Florida); *Whitaker v. Harvell-Kilgore Corporation*, 418 F. 2d 1010, *reh. denied*, 424 F. 2d 549 (5th Cir. 1969) (applying Georgia UCC; place of injury); *Teel v. American Steel Foundries*, 529 F. Supp. 337 (E.D. Mo. 1981) (fact that plaintiffs are Missouri residents and the subject matter of the contract was primarily situated in Missouri provides appropriate relation); *Tucker v. Capital Machine, Inc.*, 307 F. Supp. 291 (M.D. Pa. 1969) (law of place with "more interest in the problem" applies); *Stephan v. Sears, Roebuck & Co.*, 266 A. 2d 855 (N.H. 1970) (fact that injury giving rise to the cause of action occurred in New Hampshire gives the state an appropriate and significant relation to the transaction). *See also* Annot., 76 A.L.R. 2d 130 (1961). *See generally* 3 Bender's U.C.C. Service, Duesenberg & King, Sales and Bulk Transfers § 4.07[2] (1980). Some courts continue to apply the "place of sale" rule, but without discussing the application of UCC § 1-105 or "appropriate relation." *Begley v. Ford Motor Company*, 476 F. 2d 1276 (2d Cir.

1973) (law of place of sale governs breach of warranty, assuming breach of warranty action is a contract action); *Stubblefield v. Johnson-Fagg, Inc.*, 379 F. 2d 270 (10th Cir. 1967) (applying law of the place where the sale occurred); *Handy v. Uniroyal, Inc.*, 327 F. Supp. 596 (Del. D. 1971) (applying Delaware law, place where sale occurs).

We believe the better rule is that a transaction causing personal injury to a plaintiff in this State has "an appropriate relation" to this State within the meaning of G.S. § 25-1-105. Thus, the law of this State should apply. We conclude that based on North Carolina law, the trial court erred in granting defendants Cooper's motion for summary judgment as to plaintiff's warranty claims.

(2)

[3] One of the defenses raised by the defendants Cooper to plaintiff's warranty claims is that they are barred by G.S. § 25-2-725, the UCC statute of limitations. The plaintiff assigned as error the court's granting of summary judgment on this ground. The plaintiff argues, *inter alia*, that his warranty claims are not barred because G.S. § 1-50(6) is the applicable statute of limitations and on the facts in this case, does not bar his claims. We find that neither G.S. § 25-2-725 nor G.S. § 1-50(6) is the applicable statute of limitations in this case.

The UCC statute of limitations in G.S. § 25-2-725 provides that "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." Section 2-725(2) explains that a cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach, and that a breach of warranty occurs (and thus an *action* for breach of warranty *accrues*) when tender of delivery is made.[3] However, where bodily injury to the person

3. "Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery." G.S. § 25-2-503(1). In the context of a retail purchase as in this case, "tender of delivery" occurs upon sale. *See Weinstein v. Gen. Motors*, 51 A.D. 2d 335, 381 N.Y.S. 2d 283 (1976); *Patterson v. Her Magesty Industries, Inc.*, 450 F. Supp. 425 (E.D. Pa. 1978).

G.S. § 25-2-725(2) provides an exception to this rule. "[W]here a warranty explicitly extends to future performance of the goods and discovery of the breach

or a defect in property is an essential element of the cause of action, there is a more specific statute of limitations and repose applicable to a non-privity plaintiff's claims. G.S. § 1-15(b), as it existed on the date of plaintiff's injury, provided:

> Except where otherwise provided by statute, a cause of action, other than one for wrongful death or one for malpractice arising out of the performance of or failure to perform professional services, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief.

1971 Sess. Laws, ch. 1157, *as amended by* 1975 Sess. Laws, ch. 977. This section has since been repealed, effective 1 October 1979. 1979 Sess. Laws, ch. 654.

Although the UCC statute defines accrual of a cause of action for breach of warranty as the date of tender of delivery, G.S. § 1-15(b) provided that when bodily injury or a defect in property was an essential element of the cause of action, it was "deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs," *provided* that accrual would not occur more than ten years "from the last act of the defendant giving rise to the claim for relief." As stated by Justice Lake in *Raftery v. Construction Co.*, 291 N.C. 180, 188-89, 230 S.E. 2d 405, 409-10 (1976):

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must await the time of such performance the cause of action accrues when the breach is or should have been discovered." Although the plaintiff's brief contains the statement that "[t]here was such a warranty here," it contains no citation of authority nor argument to support this contention. *See* Rule 28(b), North Carolina Rules of Appellate Procedure. Even if G.S. § 25-2-725 were the applicable statute of limitations in this case, it could not be seriously contended that the exception applies. There is no *explicit* warranty of future performance. *See Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F. Supp. 765 (E.D. N.Y. 1978) ("Such a warranty must expressly refer to the future . . . ."); *Beckmeier v. Ristokrat Clay Products Company*, 36 Ill. App. 3d 411, 343 N.E. 2d 530 (1976).

> The purpose of G.S. 1-15(b) was to give relief to injured persons from the harsh results flowing from [the previously established rule of law that the right of action for breach of warranty accrues upon sale and delivery or installation, etc. despite the fact that the injury is not discoverable at that point]. By the enactment of this statute in 1971, the Legislature provided that a cause of action, having as an essential element bodily injury or a defect in property, 'which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin' is deemed to have accrued at the time of the injury, was discovered or ought reasonably to have been discovered by the claimant. Thus, the purpose of this statute was to enlarge, not to restrict the time within which an action for damages could be brought.

Yet, as recognized in *Raftery*, the statute did place as an outer limit or cap on this "relief" provided by the Legislature, ten years from "the last act of the defendant giving rise to the claim for relief."[4]

The plaintiff argues that G.S. § 1-50(6) is the applicable statute of limitations in this case. That statute was enacted in 1979 with Chapter 99B, the Products Liability statute. 1979 N.C. Sess. Laws, ch. 654. It provides:

> No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

G.S. § 1-50(6) was enacted with Chapter 99B to cover those actions to which that chapter applies.[5] Although labeled a statute of limitations, G.S. § 1-50(6) is more properly referred to as a statute

4. Although *Raftery* held that G.S. § 1-15(b) did not apply where injury is apparent as soon as it occurred when the suit is for personal injury based on *negligence* against a defendant not in privity, the claims here that the defendants argue are barred are based on *warranty*.

5. Chapter 99B applies to "any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging or labeling of any product."

of repose in that it places a cap or outer limit on the time period within which a products liability action may be brought irrespective of when the claim accrues. *See* McGovern, the Variety, Policy and Constitutionality of Product Liability Statutes of Repose, 30 Am. U. L. Rev. 579 (1981); Comment, Limiting Liability: Products Liability and a Statute of Repose, 32 Baylor L. Rev. (1980). Indeed, commentators have called G.S. § 1-50(6) a statute of repose. McGovern, *supra*, 30 Am. U. L. Rev. at 580 n. 3; Comment, Alabama's Products Liability Statute of Repose, 11 Cum. L. Rev. 163, 167 n. 24 (1980). G.S. § 1-50(6), like Chapter 99B, became effective on 1 October 1979. Thus, as a prerequisite to maintaining any "action for the recovery of damages for personal injury . . . " arising from that date on, the plaintiff's action must arise, if at all, within "six years after the date of initial purchase for use or consumption."

Here, however, the plaintiff alleges that the injury occurred (and thus the cause of action arose) on 16 February 1979, prior to the effective date of G.S. § 1-50(6). Since G.S. § 1-50(6) makes substantive changes in the law of products liability, it does not apply to claims arising before 1 October 1979. *See Bolick v. American Barmag*, --- N.C. ---, --- S.E. 2d ---, filed this date; *Smith v. Mercer*, 276 N.C. 329, 172 S.E. 2d 489 (1970). Thus, the applicable statute in this case is G.S. § 1-15(b) (now repealed), effective on 16 February 1979 when plaintiff's claim accrued. While G.S. § 1-15(b) changed the time of accrual, it made no provision for the period allowed from accrual within which to bring an action. G.S. § 1-52(1) provides the period, three years. Plaintiff filed his complaint on 14 December 1979, within ten months of the date on which his cause of action arose. In addition, the defendant's answers to the plaintiff's interrogatories establish that the mouthguard was first designed in 1970. Thus, the last act of the defendants Cooper giving rise to the plaintiff's cause of action under any theory alleged clearly occurred within less than ten years "from the last act . . . . " Entry of summary judgment for the defendants on the basis of the statute of limitations was error.

(3)

[4] Another basis on which the defendants contend that summary judgment was proper on Bernick's *express* warranty claim

is that he did not rely upon any express warranty. We do not agree.

First, we point out that the plaintiff's mother was the purchaser of the mouthguard. Plaintiff as a third-party beneficiary of any express warranty made to his mother gets the benefit of the same warranty which she received as purchaser. G.S. § 25-2-318;[6] Official Comment 2 to G.S. § 25-2-318. Thus, it is of no importance that plaintiff Bernick did not rely on or even read the advertising label. Secondly, as pointed out in *Kinlaw v. Long Mfg.*, the element of reliance can often be inferred from allegations of mere purchase or use if the natural tendency of the representations made is such as to induce such purchase or use. 298 N.C. 494, 500 n. 7, 259 S.E. 2d 552, 557 n. 7 (1979). Here, the defendants Cooper promoted their product through hockey catalog advertisements and parent guides. Without a doubt, the natural tendency of a representation of "maximum protection to the lips and teeth" is such as to induce the purchase of a hockey mouthguard by a mother for her son's use while playing. Considering the family purpose of the mother's purchase, reliance may be inferred in this case.

(4)

[5] Regarding *implied* warranty, defendants contend that plaintiff's claim for breach thereof is barred by lack of privity. For the reasons stated below, we do not agree.

First, we observe that the UCC is neutral on the requirement of privity, or a contractual relationship, when the defendant is not the plaintiff's immediate seller. Official Comment 3 to G.S. § 25-2-318.[7] Whether there exists such a requirement is not governed by the UCC, but by developing case law. As stated by the Court in *Kinlaw*, "Our jurisdiction's allegiance to the principle of privity has, at best, wavered." 298 N.C. at 497, 259 S.E. 2d at

6. "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."

7. "[T]he section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain."

555. The Court in *Kinlaw* went on to hold that where a plaintiff alleges an express warranty running directly to him, breach of that warranty, and damages caused by the breach, the absence of an allegation of privity between plaintiff and the warrantor in the sale of the warranted item is not fatal to the claim. The rationale of *Kinlaw* applies with equal force to the case before us. "The privity bound procedure whereby the purchaser claims against the retailer, the retailer against the distributor, and the distributor, in turn, against the manufacturer, *see Tedder v. Bottling Co., supra*, 270 N.C. at 305, 154 S.E. 2d at 339, is unnecessarily expensive and wasteful." 298 N.C. at 500-501, 295 S.E. 2d at 557.

> The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to regroup his loss . . . . Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious.

298 N.C. at 501, 259 S.E. 2d at 557, *quoting with approval, Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 248-49, 147 N.E. 2d 612, 615-16 (1958) (citations omitted).

In addition, we deem it appropriate that privity is not required in view of the Legislative abolition of the privity requirement in products liability actions against a manufacturer for breach of implied warranty as of 1 October 1979. G.S. § 99B-2(b);[8] 1979 Sess. Laws, ch. 654.

8. G.S. 99B-2(b) provides: "A claimant who is a buyer, as defined in the Uniform Commercial Code, of the product involved, or who is a member of a guest

(5)

[6] Defendants argue as further grounds to support the granting of summary judgment in their favor that the injury here was not foreseeable and that any warranties made, including a warranty of "maximum protection" do not insure against injury from a criminal assault with a hockey stick. We do not agree. First, it has not been established that the blow amounted to a criminal assault. Furthermore, as argued by the plaintiff, the existence and scope of any warranty is a question for the finder of fact as is the nature and foreseeability of the blow from the hockey stick. *See Young & Cooper, Inc. v. Vestring*, 214 Kan. 311, 521 P. 2d 281 (1974); *Huebert v. Federal Pacific Electric Company*, 208 Kan. 720, 494 P. 2d 1210 (1972); *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979); *Langford v. Shu*, 258 N.C. 135, 128 S.E. 2d 210 (1962); *Rogers v. Crest Motors, Inc.*, 516 P. 2d 445 (Colo. App. 1973); *Janssen v. Hook*, 1 Ill. App. 3d 318, 272 N.E. 2d 385 (1971).

The defendants Cooper argue that plaintiff's only allegation of negligence is that the defendants marketed a product in a defective condition, and that this contention is based solely upon the fact that the mouthguard broke; thus it is insufficient to withstand their motion for summary judgment.

Summary judgment is rarely appropriate in negligence actions because ordinarily it is the duty of the jury to apply the standard of care of a reasonably prudent person. *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268 S.E. 2d 190 (1980); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

All that appears in the record before us are the pleadings, plaintiff's interrogatories and defendants' answers thereto, and the summary of evidence presented at the plaintiff's deposition. Defendants have neither proven that an essential element of the plaintiff's claim is nonexistent, nor shown through discovery that he cannot produce evidence to support an essential element of his

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of a member of the family of the buyer, a guest of the buyer, or an employee of the buyer not covered by workers' compensation insurance may bring a product liability action directly against the manufacturer of the product involved for breach of implied warranty; and the lack of privity of contract shall not be grounds for the dismissal of such action."

claim; nor have they shown that an affirmative defense is insurmountable.

The trial court erred in entering summary judgment for the defendants Cooper. Thus, the case must be remanded to the Court of Appeals for further remand to the trial court for trial on the merits.

Reversed and remanded.

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

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST EXECUTED BY MURRAY BONDER AND WIFE, ANNE S. BONDER (PROPERTY NOW OWNED BY RICHARD S. ROBINSON AND WIFE, IRENE K. ROBINSON) DATED OCTOBER 6, 1972, AND RECORDED IN BOOK 739, PAGE 87, JOHNSTON COUNTY REGISTER OF DEEDS, CHARLES H. YOUNG, TRUSTEE

No. 56PA82

(Filed 3 August 1982)

1. **Mortgages and Deeds of Trust § 15— deed of trust on residential property— requirement of written consent for transfer of property—acceleration clause— increased rate of interest for transferee**

Provisions in a note and a deed of trust on residential property giving the lender the option to accelerate maturity of the loan upon failure of the borrowers "to observe, keep and perform any of the agreements, covenants and conditions herein set out" and prohibiting the borrowers from conveying the property without the written consent of the lender constituted a valid, nonrestricted due-on-sale clause which could properly be used by the lender to require a transferee of the security property to pay an increased rate of interest in order to assume the loan on the property.

2. **Mortgages and Deeds of Trust § 15— due-on-sale clause—use to generate higher interest**

G.S. 24-10(d), relating to maximum fees on loans secured by realty, has no bearing upon the ability of a due-on-sale clause to generate higher interest when the original borrower later transfers the property securing a loan.

Justices MITCHELL and MARTIN did not participate in the consideration or decision of this case.

Justice MEYER dissenting.

APPEAL by respondents pursuant to G.S. 7A-31 for discretionary review of the decision of the Court of Appeals (*Judge Whichard*, with *Judges Vaughn* and *Hill* concurring) reported at 55 N.C. App. 373, 285 S.E. 2d 615 (1982). The Court of Appeals affirmed the order entered by *Brannon, Judge*, at the 3 November 1980 Civil Session of Superior Court in JOHNSTON County, which permitted foreclosure upon a residential deed of trust.

The facts underlying this legal controversy are largely undisputed and are summarized as follows. On 6 October 1972, Murray Bonder and his wife, Anne S. Bonder, borrowed $50,000 at the interest rate of 7¾% per annum for the purchase of residential real estate from Raleigh Savings and Loan Association, which later became Raleigh Federal Savings and Loan Association (hereinafter referred to as the "Association"). The Bonders' loan was secured by a promissory note and a deed of trust. Neither instrument contained a prepayment penalty clause. The note included the following pertinent provision:

> We hereby agree that in case of non-payment of any installment of principal or of interest thereon, or any part of either, prior to the payment date of the next monthly installment, *or in case of default in the performance of any of the agreements or conditions of the deed of trust hereinafter mentioned*, then the whole of said principal sum remaining unpaid, together with interest thereon, and any other sums secured by said deed of trust, at the option of the payee or the legal holder hereof, shall become due and payable immediately, in which event the power of sale contained in said deed of trust may be immediately exercised. [Emphases added.]

The accompanying deed of trust similarly provided that:

> If . . . the parties of the first part [the Bonders] shall fail to pay any installment of the note herein described, or any part thereof, as the same shall hereafter become due; or shall fail to pay, when due, according to the terms and provisions thereof, any loan or advance hereafter made, principal and interest, or any part of either; *or shall fail to observe, keep and perform any of the agreements, covenants and conditions herein set out and agreed to be observed, kept and performed by the parties of the first part*, then and in any such

> event the entire amount of such note, loans, advances and any other amounts hereby secured, shall at the option of the holder of the note thereby secured immediately become due and payable; and upon application of the Association or the holder of the note or notes secured hereby, it shall be lawful . . . to sell the lands and premises hereinabove described at public auction to the highest bidder for cash. . . . [Emphases added.]

Among other things, the Bonders agreed, under the express terms of the deed of trust, that they would "not convey the premises . . . without the consent in writing of the Association, its successor or assigns. . . ."

On 4 June 1980, Richard S. Robinson and his wife, Irene K. Robinson, contacted the Association concerning their desire to purchase the Bonders' property by assumption of the loan already secured thereupon. The Association advised the Robinsons that the assumption agreement would require the payment of additional interest at the rate of 12% per annum. Upon learning this, the Robinsons discontinued their efforts to apply for an assumption of the Bonders' indebtedness with the Association. On 19 June 1980, the Bonders' attorney wrote a letter to the Association requesting its written consent for conveyance of the property. The Association did not reply to the letter or furnish such consent. The Bonders nonetheless conveyed the secured property to the Robinsons on 27 June 1980 by means of a warranty deed. Thereafter, the Robinsons tendered to the Association monthly installments of principal and interest in the amount and at the rate originally specified in the Bonder note and deed of trust. The Association refused to accept such payments; instead, it demanded immediate and full payment of the loan from the Bonders based upon their breach of the covenant prohibiting transfer of the property without the Association's prior written consent thereto. As the Bonders apparently did not honor this demand, the Association initiated a foreclosure proceeding upon the property pursuant to the terms of the deed of trust.

On 19 September 1980, the Johnston County Clerk of Superior Court concluded that the Bonders (respondents) had not defaulted upon the loan by reason of their conveyance of the property to the Robinsons and dismissed the Association's (peti-

tioner) action for foreclosure. Upon the Association's *de novo* appeal, the Superior Court entered an order authorizing the foreclosure. On respondents' appeal, the Court of Appeals affirmed the Superior Court and held, in reliance upon *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 224 S.E. 2d 580 (1976), that: (1) the covenant in the deed of trust requiring the lender's written consent to the transfer of the secured property and the accompanying provision for acceleration of the maturity of the total indebtedness upon the breach of any covenant combined to form a "due-on-sale" clause "which the lender [could use] to extract enhanced interest upon transfer of the security property"; and (2) since the language of the note and deed of trust was unambiguous regarding the non-restricted right of the lender to call the loan due and payable in full upon the borrowers' breach of any covenant therein, the trial court properly excluded respondents' proffered evidence concerning the parties' intent to limit such right to the situation where the lender's security might actually be threatened or impaired by the transfer. 55 N.C. App. at 376, 285 S.E. 2d at 616-17. Respondents finally appeal to our Court for dismissal of the foreclosure proceeding.

Womble, Carlyle, Sandridge & Rice, by A. L. Purrington, Jr., and H. Grady Barnhill, Jr., for the petitioner-appellee.

Mast, Tew, Armstrong & Morris, by George B. Mast and L. Lamar Armstrong, Jr., for respondent-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, by L. P. McLendon, Jr., Edward C. Winslow, III and Randall A. Underwood, amicus curiae for the North Carolina Savings and Loan League.

COPELAND, Justice.

The most significant issue precisely raised in this appeal is whether a savings and loan institution may demand full and present payment of the total outstanding amount of a loan secured by a deed of trust upon residential real estate if the borrowers breach their covenant in the deed not to convey the property without the institution's consent and then, in the event of the borrowers' failure to comply with the demand for payment, institute foreclosure proceedings upon the property in accordance with our statutes. We hold that the lending institution may indeed do so

where, as here, the language of the promissory note and deed of trust clearly bestow such a right in its favor.

Our previous decision in the case of *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 224 S.E. 2d 580 (1976), is both instructive and controlling here. The loan instruments in *Crockett* contained similar language which permitted the beneficiary in the deed of trust (mortgagee) to call the entire debt due and payable if the owner of the property (mortgagor) sold or transferred the property without the beneficiary-lender's consent. Recognizing that this kind of contractual language constituted a due-on-sale clause, we allowed full enforcement thereof by the savings and loan association and held that: (1) the due-on-sale clause was not a *per se* invalid restraint upon the property owner's right of alienation; (2) the clause could be validly exercised by the lender even though the transfer of the property did not actually impair its security or affect repayment of the original loan; and (3) the lender could withhold its consent to the conveyance for the sole purpose of seeking an increased interest rate upon the owner's original indebtedness so long as there were no prepayment penalties, and the demand therefor was not fraudulent, inequitable, oppressive or unconscionable. Our basic reasoning in *Crockett* is, on its face, applicable to the facts at bar and apparently requires some repeating:

> Merely by paying off the loan, plaintiff-trustor-borrower or the prospective conveyee can comply with the due-on-sale clause and insure that upon alienation the buyer will not lose his property by exercise of the right to foreclose. It is significant that requiring the loan to be paid off does not involve an extraction of a penalty. Unless the debtor pursues another course of action, the creditor is merely returned the still outstanding amount of the loan that was made to facilitate plaintiff's original purchase. *Thus, there is no real freezing of assets or discouragement of property improvement on account of the due-on-sale clause since the property can be freed by simply paying off the loan.* Moreover, the due-on-sale clause is part of an overall contract that facilitates the original purchase and, thus, promotes alienation of property.
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. . . [U]nder the loan agreement entered into in this case, plaintiff could prepay at anytime without penalty. Thus, defendant-beneficiary-lender would lose any profit or advantage he otherwise would have if he retained the loan, interest rates declined, and plaintiff prepaid. Although plaintiff-trustor-borrower might have to pay a re-financing charge, he would be able to prepay whenever he chose and take advantage of lower interest rates in the market. Plaintiff would not have to wait for an alienation of the property before being permitted to take advantage of changed interest rates. Thus, as between plaintiff-trustor-borrower and defendant-beneficiary-lender, plaintiff is in a more favorable position for taking advantage of fluctuations in interest rates assuming the due-on-sale clause is permissible. If the due-on-sale clause is not permissible, the plaintiff would have an even superior position. Additionally, we note that a lender could have charged a prepayment penalty of 1% for prepayment of a loan within the first year of the loan under G.S. 24-10, but otherwise no prepayment penalty would have been permissible. *Thus, in order to balance the ability of lender and borrower to take advantage of fluctuations in interest rates, equities favor the limited adjustment permissible by the due-on-sale clause.*

. . . In fact, a fair contractual agreement would appear to support a loan with no prepayment penalty and a due-on-sale clause. The immediate buyer has the security of having the ability to pay off his loan at no greater than the initial interest rate, and he can get a more favorable loan if interest rates decline. The lender can get a more favorable loan agreement if interest rates rise and there is a new owner of the realty.

In essence, it is the lender who has provided the opportunity for the initial purchaser to buy the realty. *It seems fair for the lender to be able to contract to receive an increased interest rate, on the very loan that is facilitating transfer of the property, in the event the original purchaser decides he is not going to continue ownership or pay off the loan so as to have full equity in the realty.* A prime purpose of the loan was to enable the buyer to purchase the realty. If the buyer sells before he obtains full equity, this purpose

> ceases. Under our free enterprise system the lender may lend his money under such terms as maximize his profits within the limits set by law. . . .
>
> In the absence of a due-on-sale clause, plaintiff-trustor-borrower would receive a premium for a favorable loan assumption when he sold his realty. This premium would be the result of the long term loan contract and a fortuitous rise in interest rates. By operation of the due-on-sale clause plaintiff is not able to realize this premium. *Upon sale of the realty plaintiff receives the fair market value of the realty without further benefiting from the loan he received.*

289 N.C. at 625-27, 224 S.E. 2d at 584-85 (emphases added). We reaffirm this sound reasoning today.

In essence, respondent-appellants attack the citadel of *Crockett* with little more than the same arguments advanced there by Justice Lake in his dissent. *See* 289 N.C. at 632-44, 224 S.E. 2d at 588-95; *see also* Note, Real Property Security—North Carolina Deals Mortgagors a Bad Hand, 13 Wake Forest L. Rev. 490 (1977). We shall not plow this ground again; instead, we stand firmly upon that which we so carefully tilled before. Nevertheless, we find it necessary to dispose of two contentions emphasized by respondents in their brief and during oral argument.

First, respondents say that the prior construction of a due-on-sale clause in *Crockett* should not be authoritative as to the enforceability of such a provision with respect to *all* real estate loan instruments since the property involved there was *commercial*, and here it is *residential*. We disagree. Our analysis in *Crockett* did not rely upon or refer to such a distinction, and we do not believe that one is merited now. Our opinion in *Crockett* was wholly based upon the unambiguous character of the contractual provisions of the loan instruments, not upon the specific character of the underlying property or the bargaining position of its purchaser. Justice Lake even conceded in his dissent that the rationale employed by the Court extended to "mortgages of typical family residences," 289 N.C. at 642, 224 S.E. 2d at 594, and we expressly so hold. We shall not assume that a residential borrower (or his attorney) is *per se* less capable than a commercial borrower of reading and understanding that which is printed in plain English in the instruments required for his obtention of a real

estate loan.[1] The due-on-sale clause is purely a matter of contract, and we shall not interfere with what the parties clearly contracted to do in that regard, whomever they may be, or retroactively change the manner in which they agreed to bind themselves. In sum, it is appropriate to quote once again the wise words of Justice Higgins in *Roberson v. Williams*, 240 N.C. 696, 700-01, 83 S.E. 2d 811, 814 (1954): "Ordinarily, when parties are on equal footing, competent to contract, enter into an agreement on a lawful subject, and do so fairly and honorably, the law does not permit inquiry as to whether the contract was good or bad, whether it was wise or foolish." *See Crockett, supra*, 289 N.C. at 630, 224 S.E. 2d at 587.

Secondly, respondents argue that the language in the loan instruments which is at issue in this case does not actually "amount to" a due-on-sale clause. Their sole basis for saying so is that the provision in the deed of trust requiring the Association's consent to conveyance of the secured property does not appear, as it did in *Crockett, supra, in the same paragraph* with the provision stating that the borrower's breach of agreements, covenants or conditions in the deed would trigger the Association's right to accelerate the maturity of the loan and demand full and present payment thereof. Such a distinction would certainly be artificial, and it would completely ignore the unmistakable substance of the deed's terms when they are, as they should be, read together as a consistent whole. In any event, we are satisfied that any doubt whatsoever concerning the interrelated nature of the foregoing provisions in the deed of trust is dispelled by the all-inclusive provision in the promissory note, which was also present in *Crockett*, that "in case of default in the performance of *any* of the agreements or conditions *of the deed of trust* hereinafter men-

1. There is, by the way, no allegation in this record that the Bonders did not fully comprehend the terms of their note and deed of trust. In fact, in this regard, their actions in the transfer of the property speak much louder than their words in this lawsuit. The record shows that they understood their covenants in the deed well enough to know that the prospective purchasers had to apply directly to the Association for an assumption of their loan, which the Robinsons initially did. Further, as evidenced by their attorney's subsequent letter to the Association, they also knew that they had to get the Association's written consent before they could convey the property. Despite such knowledge and understanding, the Bonders sold the property in flagrant violation of the Association's contractual rights with respect to transfer of the security.

tioned, then the whole of said principal sum remaining unpaid, together with interest thereon . . . shall become due and payable immediately. . . ." *See* 289 N.C. at 621, 224 S.E. 2d at 582 (emphases added).

We hold that the Bonders' home loan instruments with the Association contained a valid, non-restricted due-on-sale clause which the Association could fully enforce for the purpose of extracting higher interest from potential buyers of the secured residential property. We note that our decision reflects the majority trend on the issue today, whereas a respectable split of authority existed at the time we rendered our earlier decision in *Crockett, supra. See* Annot., 69 A.L.R. 3d 713 at § 4 (1976 and 1981 Supp.); Randolph, The FNMA/FHLMC Uniform Home Improvement Loan Note: The Secondary Market Meets the Consumer Movement, 60 N.C. L. Rev. 365, n. 1 at 365-66 (1982); *see, e.g., Lipps v. First American Service Corp.*, --- Va. ---, 286 S.E. 2d 215 (1982); *Mills v. Nashua Fed. Sav's. and Loan Assoc.*, 121 N.H. 722, 433 A. 2d 1312 (1981); *First Fed. Sav. & Loan Ass'n., Etc. v. Jenkins*, 109 Misc. 2d 715, 441 N.Y.S. 2d 373 (Sup. Ct. 1981); *First Fed. Sav. & Loan Ass'n., Etc. v. Kelly*, 312 N.W. 2d 476 (S.D. 1981). *But see State ex rel. Bingaman v. Valley Sav. & Loan*, 97 N.M. 8, 636 P. 2d 279, and cases cited at 283 (1981). We adhere to the rationales utilized in recent decisions upholding the enforcement of a due-on-sale clause in a residential mortgage in light of the reality of the true economics and banking interests involved, of which the following is a sampling:

> Whatever the precise numbers, it is clear that lenders negotiate home loans with the realistic expectation that they will not be held to maturity, and interest rates are adjusted accordingly. The device used to activate the "early" (actually *anticipated*) payoff before maturity is the due-on-sale clause, which reduces interest rate risk by reducing the average time over which a mortgage loan is outstanding. Invalidating the due-on-sale clause would in effect extend the life of the average mortgage loan perhaps two or three times longer than the lender had originally anticipated, intensifying the lender's risk of interest rate loss. It is fair to conclude that because of the reduced risk, use of an acceleration device *lowers* the interest rate at which the bank is willing to loan money. Viewed from this perspective, it can be argued that

> the mortgagors have already had the benefit of the clause which they now seek to invalidate.

Dunham v. Ware Sav. Bank, --- Mass. ---, 423 N.E. 2d 998, 1001-02 (1981).

> Calling a loan in order to get the full benefit of current interest rates is a legitimate and reasonable business practice —one which protects the Association members and their savings investments as well as fulfilling the statutory purpose of the association.
>
> . . . .
>
> By the enforcement of the acceleration clause in this case, Century seeks only to protect itself and its members from the inflationary and deflationary conditions of the money market. Such a motive is neither unlawful nor improper. The officers and directors of a savings and loan association have a fiduciary obligation to their depositors to obtain the best lawful yield of their mortgage portfolio.
>
> . . . The issue here is who will reap the profit. The VanGlahns seek it, by selling the property at a higher price, since its value is enhanced by the 7½% mortgage. On the other hand, Century seeks the additional profit which it would gain by loaning the principal at the current rates. The contractual rights of a mortgagee are no less entitled to the recognition and protection of the court than those of the mortgagor. . . . Accordingly, the "motive" of the mortgagee in this case, namely, accelerating the balance due so that it may receive higher interest rate on same when it is subsequently loaned, is proper, and the balance due may be accelerated.

Century Fed. Sav. & Loan Assn. v. Van Glahn, 144 N.J. Super. 48, 54-55, 364 A. 2d 558, 561-62 (1976) (citation omitted).

> In current market conditions, the due-on-sale clause obviously would be viewed with distaste by people in the shoes of Mrs. Bailey, for a mortgage or deed of trust which could otherwise continue until the original fixed maturity date (here 2007) at an extremely favorable interest rate (10% as against the current 15%) would be lost to them. Such a loan,

> if transferable to a buyer through assumption thereof as part of his purchasing arrangements, would have a distinct economic value. . . .
>
> In the final analysis, one must conclude that people like Mrs. Bailey are simply too eager to shift to others burdens properly belonging on their own shoulders. Even if the due-on-sale clause is valid, and has been triggered, and Mrs. Bailey, must, therefore, accelerate and pay off the balance due on her deed of trust loan, she, nevertheless, has been a beneficiary economically, vis-a-vis the deed of trust lender, as a result of the borrowing. The effects of inflation have served to erode the real, as distinct from the face, value of money. Hence, paying off $53,903.63 borrowed in 1977 with $53,903.63 of 1980 or 1981 dollars provides Mrs. Bailey with a tidy economic advantage.
>
> . . . .
>
> The lenders are not favored creatures of the law, at least as compared to borrowers. They must dot the "i"s and cross the "t"s.
>
> . . . .
>
> Nevertheless, the lenders have legal rights too. If they have complied with all requirements of the law, they are entitled to enforce their due-on-sale clauses for they are simply not restraints on alienation.
>
> . . . .
>
> . . . There is nothing inherently unfair or unreasonable in such a rule. The reason making it important that the loan should run its full 30 year course dissipates when the homeowner sells.

Williams v. First Fed. Sav. & Loan Ass'n., Etc., 651 F. 2d 910, 915-16, 926-28 (4th Cir. 1981) (footnote omitted).

The United States Supreme Court similarly recognized the basic economics involved in this situation in its landmark decision, *Fidelity Federal Sav. & L. Assn. v. De La Cuesta*, 50 U.S.L.W. 4916, 4923 (1982), wherein it held that the Federal Home Loan Bank Board's regulation permitting federally chartered savings

and loan associations to include due-on-sale clauses in their loan instruments pre-empted California's conflicting state law limitations upon the operation and enforcement of such clauses. To avoid any confusion upon this subject, we should say that there is no conflict between North Carolina and federal law concerning due-on-sale clauses. A *federal* savings and loan was involved in *Crockett, supra,* and a pre-emption question was raised in an *amicus* brief. However, our Court did not consider that facet of the case and instead relied upon principles of state law. *See* 289 N.C. at 632, 224 S.E. 2d at 588. We thus believe that the combination of *De La Cuesta, Crockett* and this opinion settle the issue in this jurisdiction concerning the general validity and enforceability of due-on-sale clauses in real estate loan instruments whether the lender be a state or federally chartered savings and loan association and whether the property be commercial or residential.

Respondents' additional contention concerning the trial judge's erroneous exclusion of evidence offered to show an intended restriction upon the due-on-sale clause by the parties in this case is meritless and must be overruled since the language of the provisions was unambiguous as written. *See Crockett, supra,* 289 N.C. at 631, 224 S.E. 2d at 587-88, and cases there cited.

[2] Respondents' final argument is that G.S. 24-10(d) prohibits an increase in interest rates upon a real estate loan by virtue of a due-on-sale clause. This position is inappropriately taken for the first time in our Court, and it is not supported by a corresponding assignment of error in the record on appeal. Nevertheless, it suffices to say that this statute has no bearing upon the ability of a due-on-sale clause to generate higher interest when the original borrower later transfers the property securing the loan. G.S. 24-10 is entitled "Maximum *fees* on loans secured by real property" (emphasis added), and its scope plainly does not extend to, nor does it even address, the separate and different issue of *interest rates.*

The decision of the Court of Appeals is affirmed.

Affirmed.

Justices MITCHELL and MARTIN did not participate in the consideration or decision of this case.

Justice MEYER dissenting.

I must respectfully dissent. Given the fact that *Crockett* is now the law of this State, I have no difficulty with the conclusion of the majority opinion as being in accord with *Crockett* so far as it relates to true "due on sale" instruments. I am astonished, however, that the majority has concluded that the language of the instrument before us constitutes "a valid, non-restricted due-on-sale clause which the Association could fully enforce for the purpose of extracting higher interest from potential buyers of the secured residential property."

In a rather lengthy opinion of some fourteen pages only one paragraph is devoted to an interpretation of the language in the instrument before us. Not a single case is cited bearing the language of the trust instrument in this case. The only case cited is *Crockett*, which the majority candidly admits does not contain the same, but only "similar" language. Even if one agrees that the decision in *Crockett* is correct in the context of a commercial loan, or for that matter, even in the context of a residential loan, it should not be controlling here.

I believe it is at least noteworthy that the majority opinion does not set out the precise language in *Crockett* and compare it in detail with the language of the *Bonder* trust instrument. The difference is telling:

The *Crockett* language:

> '[I]f the property herein conveyed is transferred without the written assent of Association, then . . . the full principal sum with all unpaid interest thereon shall at the option of Association, its successors or assigns, become at once due and payable without further notice and irrespective of the date of maturity expressed in said note.'

289 N.C. 620, 631, 224 S.E. 2d 580, 587-88 (1976).

Even if one disagrees with the result in *Crockett*, at least the foregoing language is clear—sale without consent accelerates maturity at the election of the lender. Both the requirement of consent and the penalty for failing to secure consent are found not only in the same paragraph but also within the same sentence.

The *Bonder* language:

> If, however, the parties of the first part . . . shall fail to observe, keep and perform any of the agreements, covenants and conditions herein set out and agreed to be observed, kept and performed by the parties of the first part, then and in any such event the entire amount of such note, loans, advances and any other amounts hereby secured, shall at the option of the holder of the note hereby secured immediately become due and payable . . . .

The foregoing appears in the middle of a lengthy paragraph on page 3 of the form. Some ten paragraphs later, as if a horse following the cart, there appears the following:

> That they will not convey the premises herein described without the consent in writing of the Association, its successor or assigns; and that no sale by the parties of the first part of the premises herein described and no forbearance or extension of time granted by the Association for the payment of the note or other indebtedness from time to time secured hereby to the parties of the first part (or to any other person in whom title to the premises herein described is vested) shall operate to release, modify or affect the liability of the parties of the first part as provided herein, or shall affect the validity or priority of the lien of this deed of trust.

Unlike the plain and concise language of the *Crockett* instrument, the language of the *Bonder* instrument requires a patching together of separate parts in order to construct a due-on-sale interpretation. This construction requires too much license and certainly cannot be said to correspond to the expectations of the parties when the instrument was signed. Before the advent of today's raging inflation, the traditional notion of circumstances which justified withholding of consent to the transfer and assumption of the mortgage was a sale and assumption which jeopardized the lender's security interest.

It should be emphasized that the Savings and Loan here did not refuse to permit the assumption of the note and deed of trust by the Bonders—it in fact agreed to it—but only upon the in-

crease of the interest rate from 7¾% to 12% per annum.[1] It is absolutely clear that the Savings and Loan did not question the creditworthiness of the Bonders. It simply wanted to extract additional interest. I hasten to point out that I would not question that motive so long as it reasonably appears that an enhanced interest rate upon sale was within the contemplation of the parties when the document was executed. The more modern deeds of trust generally include in plain language not only true due-on-sale provisions but more recently, variable interest rate provisions and provisions specifically for increasing the interest rate on sale.

I feel compelled to take issue with two other aspects of the majority opinion. First, unlike the majority, I am totally unwilling to say that "there is no conflict between North Carolina and federal law concerning due-on-sale clauses" without one sentence of analysis. I consider such a statement, without any analysis of the status of the federal law and comparison with our own, reckless and one which will come back to haunt us. The majority's brief treatment of *De La Cuesta* certainly does not justify such a statement. That case simply held that the Federal Home Loan Bank Board's regulation permitting federal savings and loan associations to include due-on-sale clauses in their loan instruments pre-empts conflicting State limitations on the operation and enforcement of such clauses. In the case before us there is no question of possible conflict between federal and state law. In fact, there is not present in the case even any question concerning the validity or enforceability of proper due-on-sale clauses. The only question before us is whether the language of the trust instrument here constitutes a due-on-sale clause. We should not blatantly announce that there is an absence of any conflict between federal and North Carolina law concerning due-on-sale clauses until the question is properly before us, fully briefed, fully researched and fully considered by this Court.

Second, the majority has completely mischaracterized a portion of Justice Lake's dissent in *Crockett* as a concession "that the *rationale* employed by the Court extended to 'mortgages of typical family residences.'" It was the result in the case and not

1. Query whether a demand for an increase from 7¾% to the current rate of 16% or 17% would be "unconscionable," "inequitable," or at least "oppressive" and therefore not permissible even under *Crockett*.

the rationale employed by the court to reach that result that Justice Lake interpreted to extend to mortgages of typical family residences. It is crystal clear that Justice Lake felt that the rationale as well as the result, when extended to typical residential loans, would be totally unrealistic.

> As I read the majority opinion, it holds that use of a 'Due-on-Sale Clause' for the sole purpose of requiring an increase in the rate of interest is reasonable and not oppressive and, therefore, entitled to the protection of the court. In the present case, the mortgaged property is not a single family residence but is a block of apartment houses. The mortgagor and Mrs. Crockett are thus investors in business property. They may, therefore, be on approximately 'equal footing' with the defendant. The majority opinion, however, does not rest upon this circumstance. It extends, apparently, to mortgages of typical family residences. When so extended, even if not when applied to the present case, the entire basis for the majority opinion seems to be utterly unrealistic.

289 N.C. at 642, 224 S.E. 2d at 594.

I vote to reverse the decision of the Court of Appeals and remand the case for ultimate dismissal of the foreclosure proceeding.

STATE OF NORTH CAROLINA v. ALEEN ESTES WALDEN

No. 162A81

(Filed 3 August 1982)

1. **Criminal Law § 9.1; Parent and Child § 2.1— assault on child—presence of parent—aiding and abetting—failure to attempt to prevent assault**

The failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed. Therefore, a mother could be found guilty of assaulting her child on a theory of aiding and abetting solely on the basis that she was present when her child was assaulted but failed to take reasonable steps to prevent the assault.

2. Criminal Law § 26.5; Parent and Child § 2.2— child abuse—assault—conviction of both—no double jeopardy

Even if the acts of defendant violated both the child abuse statute, G.S. 14-318.2, and the assault with a deadly weapon inflicting serious injury statute, G.S. 14-32(b), neither statute proscribes a crime which is a lesser included offense of the other, and a conviction or acquittal of one will not support a plea of former jeopardy against a charge for a violation of the other.

3. Criminal Law § 53— expert medical testimony—opinion based on observed facts

A medical expert was properly permitted to give his opinion concerning injuries to a child based on facts which he himself had observed during his examination of the child.

4. Criminal Law § 34.5— evidence of other offenses—admissibility to show identity and make out res gestae

In a prosecution of defendant as an aider and abettor for assault with a deadly weapon inflicting serious injury upon her child, evidence that the actual assailant had committed other attacks against defendant's children in the presence of defendant was competent to show a chain of circumstances in respect to the matter on trial which were so connected with the offense charged as to throw light upon the identity of the child's attacker and to make out the *res gestae*.

5. Criminal Law § 91— dismissal of charge—new indictment—speedy trial

Where defendant was charged by warrant dated 12 December 1979 with child abuse on 8 December, that charge was dismissed on 3 April 1980, a second warrant was issued on 3 April charging defendant with felonious assault on her child on 9 December 1979, defendant was indicted for the assault on her child on 28 April, defendant was brought to trial on the assault charge on 25 August, and the evidence showed that there were two separate assaults, one on 8 December and one on 9 December, the child abuse and the assault were not a "series of acts" or a "single scheme or plan" within the meaning of G.S. 15A-701(a)(1) so as to require the assault trial to take place within 120 days of the original child abuse charge, and the assault trial properly began within 120 days of the indictment on that charge.

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

ON discretionary review of the decision of the North Carolina Court of Appeals reported at 53 N.C. App. 196, 280 S.E. 2d 505 (1981).

The defendant was charged in a bill of indictment, proper in form, with the felony of assault with a deadly weapon inflicting serious bodily injury in violation of G.S. 14-32. She was tried at the 25 August 1980 Session of Superior Court, Wake County, upon her plea of not guilty and found guilty as charged by a jury.

She appealed to the Court of Appeals from judgment imposed by Judge Robert L. Farmer on 27 August 1980 sentencing her to imprisonment for a term of not less than five years nor more than ten years. The Court of Appeals ordered that the defendant be given a new trial for errors committed. Pursuant to G.S. 7A-31, the State petitioned this Court seeking discretionary review of the opinion of the Court of Appeals. On 1 December 1981 we allowed the State's Petition for Discretionary Review.

Rufus L. Edmisten, Attorney General, by Christopher P. Brewer, Assistant Attorney General, for the State-appellant.

Brenton D. Adams for the defendant-appellee.

MITCHELL, Justice.

[1] The principal question presented is whether a mother may be found guilty of assault on a theory of aiding and abetting solely on the basis that she was present when her child was assaulted but failed to take reasonable steps to prevent the assault. We answer this question in the affirmative and reverse the opinion of the Court of Appeals which held to the contrary and ordered a new trial.

On 28 April 1980, defendant was indicted under G.S. 14-32 as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 9th day of December, 1979, in Wake County Aleen Estes Walden unlawfully and wilfully and feloniously assault Lamont Walden, age one year, with a certain deadly weapon, to wit: a leather belt with a metal buckle, inflicting serious bodiyly [sic] injuries, not resulting in death, upon the said Lamont Walden, to wit: numerous cuts and bruises causing severe blood loss and requiring hospitalization.

Lamont Walden is defendant's son. Defendant was convicted by a jury and sentenced to 5-10 years imprisonment.

The State offered evidence at trial tending to show that Mr. Jasper Billy Davis heard a child crying in the apartment next to his on Saturday evening, 8 December 1979. On Sunday morning, 9 December 1979, at approximately 10:00 a.m., Davis heard a small

child screaming and hollering and heard a popping sound coming from the same apartment next door. The sound of the child screaming and hollering and the popping sound lasted for approximately one to one and one-half hours. Davis made a complaint to the Raleigh Police Department requesting that they investigate the noise that he was hearing.

Officer D. A. Weingarten of the Raleigh Police Department testified that he went to Davis' apartment on 9 December 1979. After speaking with Davis, the officer knocked on the door of the apartment next to the Davis apartment. A Miss Devine opened the door and allowed the officer to enter the apartment, where he stayed for a few minutes before leaving to obtain a search warrant. Officer Weingarten returned a short time later with a warrant to search the apartment in question. Upon entering the apartment, the officer saw Devine, the defendant Aleen Estes Walden and George Hoskins. The officer also saw five small children in a corner of the apartment and noticed cuts and bruises on the bodies of the children. One of the children the officer observed at this time was Lamont Walden, a small child in diapers. The officer observed red marks on the chest of Lamont Walden as well as a swollen lip, bruises on his legs and back and other bruises, scarring and cuts.

At trial three of these small children, Roderick Walden, ten years old, Stephen Walden, eight years old, and Derrick Walden, seven years old, testified that "Bishop" George Hoskins hit their brother Lamont Walden with a belt repeatedly over an extended period of time on Sunday, 9 December 1979. Each child testified that the defendant, their mother, was in the room with Hoskins and the baby (Lamont) at the time this beating occurred. Lamont Walden was crying and bleeding as a result of the beating Hoskins gave him. The children testified further that the defendant looked on the entire time the beating took place but did not say anything or do anything to stop the "Bishop" from beating Lamont or to otherwise deter such conduct.

Mrs. Annette McCullers, who is employed by Social Services of Wake County, testified that she observed the five children including Lamont on 9 December 1979. Lamont had bruises on his chest, red marks on his cheek, marks on his back and blood on his back. McCullers talked with Lamont's brothers at this time, and

each of them told her that Lamont had been beaten by "Bishop" George Hoskins.

Dr. David L. Ingram, a specialist in pediatric medicine at Wake Memorial Hospital and a child medical examiner, testified that, on 10 December 1979, he examined Lamont at Wake Memorial Hospital and observed bruises, skin breaks and purple marks on Lamont's body. There was blood in Lamont's urine which resulted in the loss of a substantial quantity of blood and required that Lamont be given a blood transfusion. Dr. Ingram testified that in his expert opinion the marks on Lamont were caused by hard blows to the body occurring less than a week prior to his examination.

The defendant offered evidence in the form of testimony of her father, Mr. Meredith Estes, tending to show that James Walden, the father of the Walden children, had whipped the children in the past when living with them. Estes testified that the defendant had never mistreated the children. He further testified that the children had told him that it was their father who beat them on the occasion in question, but that they had later changed their story and stated that George Hoskins beat them and also beat Lamont.

The defendant testified that she was living in an apartment with Miss Devine on 8 December 1979. Three of the defendant's sons had gone to the store with Devine and Hoskins. The defendant's two youngest children were with her. There was a knock on the door and the children's father entered. The father immediately began hitting Lamont Walden with a belt. The defendant tried to stop him but could not do so. The defendant testified that she was struck by the children's father on this occasion and received injuries to her face.

Based on the preceding evidence, the defendant was convicted of assault with a deadly weapon inflicting serious injury in violation of G.S. 14-32(b). During the trial, the State proceeded on the theory that the defendant aided and abetted George Hoskins in the commission of the assault on her child and was, therefore, guilty as a principal to the offense charged.

The defendant assigned as error the action of the trial court in denying her motion to dismiss and allowing the case against

her for the felonious assault charge to go to the jury, when all of the evidence tended to show that the defendant did not perform any affirmative act of commission to encourage the perpetrator and did not herself administer the beating to her child. In support of this assignment, the defendant contends, among other things, that the trial court erred in instructing the jury as follows:

> It is the duty of a parent to protect their children and to do whatever may be reasonably necessary for their care and their safety. A parent has a duty to protect their children and cannot stand passively by and refuse to do so when it is reasonably within their power to protect their children. A parent is bound to provide such reasonable care as necessary, under the circumstances facing them at that particular time. However, a parent is not required to do the impossible or the unreasonable in caring for their children.
>
> Now a person is not guilty of a crime merely because she is present at the scene. To be guilty she must aid or actively encourage the person committing the crime, or in some way communicate to this person her intention to assist in its commission; *or that she is present with the reasonable opportunity and duty to prevent the crime and fails to take reasonable steps to do so.*
>
> So I charge that if you find from the evidence beyond a reasonable doubt, that on or about December 9th, 1979, Bishop Hoskins committed assault with a deadly weapon inflicting serious injury on Lamont Walden, that is that Bishop Hoskins intentionally hit Lamont Walden with a belt and that the belt was a deadly weapon, thereby inflicting serious injury upon Lamont Walden; and that the defendant was present at the time the crime was committed and did nothing and that in so doing the defendant knowingly advised, instigated, encouraged or aided Bishop Hoskins to commit that crime; *or that she was present with the reasonable opportunity and duty to prevent the crime and failed to take reasonable steps to do so*; it would be your duty to return a verdict of guilty of assault with a deadly weapon, inflicting serious injury. (Emphases added.)

The defendant contends that the quoted instructions of the trial court are erroneous in that they permitted the jury to con-

vict her for failing to interfere with or attempt to prevent the commission of a felony. She argues that the law of this State does not allow a conviction in any case for aiding and abetting the commission of a crime absent some affirmative act of commission by the defendant assisting or encouraging the commission of the crime or indicating the defendant's approval and willingness to assist. We do not agree.

It is true, of course, that this Court speaking through Chief Justice Ruffin has stated:

> For one who is present and sees that a felony is about being committed and does in no manner interfere, does not thereby participate in the felony committed. Every person may, upon such an occasion, interfere to prevent, if he can, the perpetration of so high a crime; but he is not bound to do so at the peril, otherwise, of partaking of the guilt. It is necessary, in order to have that effect, that he should do or say something showing his consent to the felonious purpose and contributing to its execution, as an aider and abettor.

State v. Hildreth, 31 N.C. (9 Iredell) 440, 444 (1849). In a later case, Justice Ervin speaking for this Court said:

> The mere presence of a person at the scene of a crime at the time of its commission does not make him a principal in the second degree; and this is so even though he makes no effort to prevent the crime, or even though he may silently approve of the crime, or even though he may secretly intend to assist the perpetrator in the commission of the crime in case his aid becomes necessary to its consummation.

State v. Birchfield, 235 N.C. 410, 413, 70 S.E. 2d 5, 7 (1952), *quoted with approval in State v. Bruton*, 264 N.C. 488, 498, 142 S.E. 2d 169, 176 (1965). However, this general rule allows some exceptions. Where the common law has imposed affirmative duties upon persons standing in certain personal relationships to others, such as the duty of parents to care for their small children, one may be guilty of criminal conduct by failure to act or, stated otherwise, by an act of omission. *See generally* W. LaFave and A. Scott, Handbook on Criminal Law, § 26 at 184 (1972). Individuals also have been found criminally liable for failing to perform affirmative duties required by statute. *Id.*

Parents in this State have an affirmative legal duty to protect and provide for their minor children. G.S. 14-316.1; *In Re TenHoopen*, 202 N.C. 223, 162 S.E. 619 (1932); *State v. Mason*, 18 N.C. App. 433, 197 S.E. 2d 79, *cert. denied*, 283 N.C. 669, 197 S.E. 2d 878 (1973). Although our research has revealed no controlling case in this jurisdiction on the question of a parent's criminal liability for failure to act to save his or her child from harm, the trend of Anglo-American law has been toward enlarging the scope of criminal liability for failure to act in those situations in which the common law or statutes impose a responsibility for the safety and well-being of others. *See generally* W. LaFave and A. Scott, Handbook on Criminal Law, § 26, 182-91 (1972). *See, e.g.*, Annot. 1 A.L.R. 4th 38 (1980); Annot. 100 A.L.R. 2d 483 (1965). Thus, it has generally been thought that it is the duty of a parent who has knowledge that his or her child of tender years is in danger to act affirmatively to aid the child if reasonably possible to do so. Perkins on Criminal Law, Chapter 6, § 4, 597 (2d Ed. 1969).

We find no case from any jurisdiction directly in point on the precise question before us, i.e., whether a mother may be found guilty of assault on a theory of aiding and abetting solely on the ground that she was present when her child was attacked and had a reasonable opportunity to prevent or attempt to prevent the attack but failed to do so. The State has cited numerous cases from various states for the proposition that a mother can be held criminally responsible in such situations. Many of the cases relied upon by the State do, by way of strong *obiter dicta*, indicate criminal liability of a parent in such circumstances. But these statements have been made in cases in which the record would have supported a finding that the parent in one way or another conveyed approval of the criminal act beyond the approval inherent in merely failing to attempt to stop the commission of the crime. *E.g., Commonwealth v. Howard*, 402 A. 2d 674 (Pa., 1979); *State v. Smolin*, 557 P. 2d 1241 (Kan., 1976); *State v. Austin*, 172 N.W. 2d 284 (S.D., 1969); *State v. Zobel*, 134 N.W. 2d 101 (S.D.) *cert. denied*, 382 U.S. 833, 15 L.Ed. 2d 76, 86 S.Ct. 74 (1965); *People v. Ray*, 399 N.E. 2d 977 (Ill. App., 1979). The same is generally true with regard to cases decided by the courts of other common-law countries. *But cf. Rex v. Russell*, [1933] Vict. L R 59 (Aus., 1932) (*seriatim* opinion). Our own prior cases involving the criminal liability of parents who were present when their children

were harmed by others are likewise of little value as precedent in deciding the case before us, as they also tend to involve fact situations from which the jury could have convicted because it found that the parent charged committed affirmative acts of commission encouraging the perpetrator. *E.g., State v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915 (1956).

By contrast, the trial court's charge to the jury in the present case puts the issue squarely and unavoidably before us for decision. The trial court instructed the jury that parents have a duty to protect their children and cannot stand passively by and refuse to do so when it is reasonably within their power to provide the children protection. The trial court was, of course, correct in perceiving that whether a general legal duty of parents exists in such cases is a question of law to be determined by the trial court and stated to the jury, rather than a question of fact for the jury. *See* Frankel, Criminal Omissions: A Legal Microcosm, 11 Wayne L. Rev. 367, 369-70 (1965). The trial court's holding and instructions to the jury on such legal duties are, however, fully reviewable on appeal.

Having stated what it perceived to be the legal duty of a parent, the trial court then informed the jury specifically that they should convict the defendant if she failed to perform that duty. The trial court specifically allowed the jury to convict the defendant on a theory of aiding and abetting if they found that she was present and failed to intervene to protect her child. In this regard, the trial court stated that, if the jury found the defendant "was present with the reasonable opportunity and duty to prevent the crime and failed to take reasonable steps to do so; it would be your duty to return a verdict of guilty of assault with a deadly weapon, inflicting serious injury." Therefore, for purposes of this appeal, we must assume that the jury convicted based solely upon the ground set forth in this portion of the instructions and did not rely upon any evidence tending to show an affirmative act of commission by the defendant indicating her approval or encouragement of the assault on her child. Having made this assumption, we find no error in the trial court's instructions to the jury or in the verdict or judgment.

The traditional approach of most American jurisdictions, drawn largely from the English tradition, tends to confine the

duty to act to save others from harm to certain very restrictive categories of cases. This approach has frequently been the subject of criticism. *E.g.*, Seney, "When Empty Terrors Overawe"—Our Criminal Law Defenses, 19 Wayne L. Rev. 947, 952-58 (1973); Hughes, Criminal Omissions, 67 Yale L.J. 590 (1958). Critics have often pointed out the fact that most countries adopt a much more inclusive view in determining what classes of persons shall have a duty to rescue another when they can do so without danger to themselves. *See* Frankel, Criminal Omissions: A Legal Microcosm, 11 Wayne L. Rev. 367 (1965); Dawson, Negotiorum Gestio: The Altruistic Intermeddler, 74 Harv. L. Rev. 1073, 1101-06 (1961). The commentators tend to take the view that the duty to rescue another from peril and criminal liability for failure to do so should be based upon "the defendant's clear recognition of the victim's peril plus his failure to take steps which might reasonably be taken without risk to himself to warn or protect the victim." Hughes, Criminal Omissions, 67 Yale L.J. 590, 626 (1958).

Although we are not now prepared to adopt any such general rule of criminal liability, we believe that to require a parent as a matter of law to take affirmative action to prevent harm to his or her child or be held criminally liable imposes a reasonable duty upon the parent. Further, we believe this duty is and has always been inherent in the duty of parents to provide for the safety and welfare of their children, which duty has long been recognized by the common law and by statute. *E.g.*, G.S. 14-316.1; *In Re TenHoopen*, 202 N.C. 223, 162 S.E. 619 (1932). This is not to say that parents have the legal duty to place themselves in danger of death or great bodily harm in coming to the aid of their children. To require such, would require every parent to exhibit courage and heroism which, although commendable in the extreme, cannot realistically be expected or required of all people. But parents do have the duty to take every step reasonably possible under the circumstances of a given situation to prevent harm to their children.

In some cases, depending upon the size and vitality of the parties involved, it might be reasonable to expect a parent to physically intervene and restrain the person attempting to injure the child. In other circumstances, it will be reasonable for a parent to go for help or to merely verbally protest an attack upon

the child. What is reasonable in any given case will be a question for the jury after proper instructions from the trial court.

We think that the rule we announce today is compelled by our statutes and prior cases establishing the duty of parents to provide for the safety and welfare of their children. Further, we find our holding today to be consistent with our prior cases regarding the law of aiding and abetting. It remains the law that one may not be found to be an aider and abettor, and thus guilty as a principal, solely because he is present when a crime is committed. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). It will still be necessary, in order to have that effect, that it be shown that the defendant said or did something showing his consent to the criminal purpose and contribution to its execution. *State v. Hildreth*, 31 N.C. (9 Iredell) 440 (1849). But we hold that the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed. *Cf. State v. Haywood*, 295 N.C. 709, 249 S.E. 2d 429 (1978) (When a bystander is a friend of the perpetrator and knows his presence will be regarded as encouragement, presence alone may be regarded as aiding and abetting.).

Thus, we hold that the trial court properly allowed the jury in the present case to consider a verdict of guilty of assault with a deadly weapon inflicting serious injury, upon a theory of aiding and abetting, solely on the ground that the defendant was present when her child was brutally beaten by Hoskins but failed to take all steps reasonable to prevent the attack or otherwise protect the child from injury. Further, the jury having found that the defendant committed an act of omission constituting consent to and encouragement of the commission of the crime charged, the defendant would properly be found to have aided and abetted the principal. A person who so aids or abets another in the commission of a crime is equally guilty with that other person as a principal. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). Therefore, we find no error in the trial court's instructions, the verdict or the judgment on the charge of assault with a deadly weapon inflicting serious injury.

[2] The defendant also contended before the Court of Appeals that, if she is guilty of any crime, she is guilty of the misde-

meanor offense of child abuse proscribed in G.S. 14-318.2. Although the defendant may well be guilty of a violation of that statute, this fact would not preclude her conviction in the present case of assault with a deadly weapon inflicting serious injury in violation of G.S. 14-32(b). A violation of G.S. 14-32(b) requires proof of an assault by use of a deadly weapon by which serious injury was inflicted. These elements are not elements of a violation under G.S. 14-318.2. To obtain a conviction under G.S. 14-318.2, on the other hand, the State must show that the alleged acts were by a parent of a child less than 16 years of age. These elements are not elements of a violation of G.S. 14-32(b). Even if it is assumed that acts of the defendant comprised violations of both statutes, certain elements must be shown to support a conviction for violation of each statute which are not required to support a conviction for violation of the other. Therefore, neither statute proscribes a crime which is a lesser included offense of the other, and conviction or acquittal of one will not support a plea of former jeopardy against a charge for violation of the other. *See State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967). In such instances a defendant properly may be convicted of violations of both statutes when the same overall course of conduct by the defendant shows the existence of all of the necessary elements of each statute. This contention is without merit.

[3] The defendant also assigns as error the action of the trial court in allowing Dr. Ingram to give his opinion as a medical expert concerning the injuries to the defendant's baby, Lamont Walden. The defendant contends that the trial court erred in allowing certain of the doctor's testimony into evidence since that testimony was not given in response to properly framed hypothetical questions nor based upon the witness's personal knowledge and observation. In the present case, the doctor had made a thorough physical examination of the baby. We find that the answers he gave at trial concerning the condition of this child simply related his expert opinion based on facts which he himself had observed during his examination of the child. As such, his answers were properly admitted into evidence. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976).

[4] The defendant additionally assigns as error the action of the trial court in allowing into evidence testimony tending to show that Hoskins had committed other attacks against the children in

the presence of the defendant. The general rule is that the State may not offer proof of another crime independent of and distinct from the crime for which the defendant is being prosecuted even though the separate offense is of the same nature as the crime charged. Here, however, such evidence was competent as it tended to exhibit a chain of circumstances in respect to the matter on trial which were so connected with the offense charged as to throw light upon the identity of Lamont's attacker and to make out the *res gestae*. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

[5] The defendant further assigns as error the trial court's denial of her motion to dismiss in which she contended that the State did not bring her to trial within the time limits contained in G.S. 15A-701, the Speedy Trial Act. We find this assignment and contention also without merit. The State first initiated criminal charges against the defendant by warrant dated 12 December 1979 charging that the defendant committed misdemeanor child abuse on 8 December 1979. That charge was dismissed on 25 April 1980. A second warrant for the defendant's arrest was issued on 3 April 1980 charging that, on or about 9 December 1979, the defendant assaulted Lamont Walden, age one year, with intent to kill inflicting serious injury. Pursuant to this second warrant, the defendant was indicted on 28 April 1980 for the 9 December 1979 assault upon her son resulting in the conviction before us on appeal in this case. This case came on for trial on 25 August 1980. The defendant moved to dismiss the case under the provisions of G.S. 15A-701(a1) requiring that she be tried within the 120 days of indictment. Subsection (3) of this statute provides that, if a charge is dismissed and the defendant later charged with the same offense or an offense based upon the same act or transaction or part of a single scheme or plan, the trial must take place within 120 days of the original charge. The defendant contends that the misdemeanor child abuse on 8 December and the felonious assault on 9 December were part of a single plan and that subsection (3) applies and prohibited her trial on the charges of which she was convicted. We do not agree. The evidence is uncontradicted that there were two separate assaults, one on 8 December and one on 9 December 1979. Although the evidence tended to indicate the knowledge of the defendant with regard to both assaults, there was nothing to indicate that they were part

of a continuous plan or scheme. At most, the sequence of assaults tended to show the intent and *quo animo* of the defendant and Hoskins. They did not, in our view, establish a "series of acts" or a "single scheme or plan" within the meaning of subsection (3) of the statute.

The defendant has failed to show prejudicial or reversible error occurring in the trial court. 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, Wake County, for reinstatement of the verdict and the 27 August 1980 Judgment entered in Superior Court.

Reversed and remanded.

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

HENRY H. COCKRELL, JR., A. THOMAS OLLS, BRENDA OLLS, DANNY TAI, MARSHA TAI, GROVER COBB, JAMES METZGER, LOULIE METZGER, HAL BARNES, EARLEEN BARNES, ALAN BEAVERS, LINDY BEAVERS, HAROLD PENLEY, MARTHA PENLEY, RICHARD BRIGHT, BILLIE BRIGHT, THOMAS MITCHELL, ANN MITCHELL, WAYNE WHISTLER, PAM WHISTLER, ROGER BAKER, CONNIE BAKER, ALBERT LA VALLA, LORRAINE LA VALLA, PETITIONERS v. CITY OF RALEIGH, NORTH CAROLINA, G. SMEDES YORK, MAYOR, AVERY C. UPCHURCH, JAMES B. WOMBLE, S. TONY JORDAN, JR., EDWARD A. WALTERS, REV. ARTHUR J. CALLOWAY, MIRIAM P. BLOCK, AND JOHN A. EDWARDS, CITY COUNCIL MEMBERS, RESPONDENTS

No. 141A81

(Filed 3 August 1982)

1. Municipal Corporations § 2.1 — annexation proceeding — failure to include plans to extend bus service and cable television service — not included in G.S. 160A-47(3) — no error

G.S. § 160A-47(3) requires municipalities to include in their annexation reports plans to extend into the area proposed to be annexed only those *municipal services specifically enumerated in the statute*: police protection, fire protection, garbage collection, street maintenance, major trunk water mains, and sewer outfall lines. Therefore, the trial judge did not err in failing to allow petitioners to show that the Annexation Report and Annexation Ordinance were defective by reason of their failure to include plans for the extension of

transit service and CATV service into an area proposed for annexation. The fact that G.S. § 160A-47(3) does not require the two services excluded to be mentioned in the Annexation Ordinance, not the fact that they were provided by a franchise agreement or by an independent authority, provided the reason that it was not necessary to include the services in the Annexation Report since if a municipal service is one enumerated in G.S. § 160A-47(3), it must be included in the Annexation Report even though it is provided by an independent authority or under a franchise agreement.

2. **Municipal Corporations § 2.6— annexation proceeding—failure of city to comply with own policy for extending water service—no invalidation of annexation**

The failure of the City of Raleigh to comply with its own policy for extending water service when it connected its water system with a private water system in the area to be annexed in 1967 or when it acquired ownership of the system in 1977 did not invalidate the annexation since the violation cannot be undone and, to accept petitioners' position, would leave the subdivision forever immune from annexation no matter how intensely it developed.

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

APPEAL by petitioners pursuant to G.S. § 160A-50(h)[1] from a judgment by *Godwin, J.* filed 19 June 1981 declaring the annexation ordinance in question valid. The matter was heard without a jury at the 15 June 1981 Civil Session of Superior Court, WAKE County.

On 20 March 1980 the Raleigh City Council adopted a Resolution of Intent to consider annexation of the area known as "Brookhaven—Pickwick Village." A public hearing was held pursuant to proper notice, and thereafter on 20 May 1980 the City Council enacted Ordinance No. 1980-369, effective 30 June 1980, annexing the subject area. Prior to the adoption of the annexation ordinance, the City prepared an Annexation Report outlining its plans for extending municipal services to the area.

Petitioners are twenty-four residents of and owners of property within the area known as "Brookhaven" which is included within the territory annexed by Ordinance No. 1980-369. Pursuant to G.S. § 160A-50 petitioners, in apt time, filed a petition alleging that they would suffer material injury by reason of the City's failure in numerous respects to comply with the procedure and requirements of the annexation statutes in Part 3, Article 4A of

1. At all times pertinent to this appeal, appeals pursuant to G.S. § 160A-50(h) were directly to this Court. Effective 1 July 1981 such appeals are now heard by the Court of Appeals. 1981 N.C. Sess. Laws, ch. 682, s. 20.

Chapter 160A (1976 & 1981 Cum. Supp.). Among the allegations of the petition is the following:

> 11. The Annexation Report and Annexation Ordinance are defective in that they fail to set forth the plans of the City for extending to the area to be annexed every major municipal service performed by the City within the City limits at the time of annexation.

The petitioners sought to have the court declare the annexation ordinance null and void and remand the ordinance and report to the Raleigh City Council for further proceedings to correct the alleged defects. The City filed a reply denying the material allegations of the petition relating to the alleged defects in the annexation procedure and the annexation report.

A pretrial conference was held 12 June 1981 and the parties stipulated in effect (1) that the City had complied with the statutory procedures for annexation set out in G.S. § 160A-49, and (2) that the area proposed for annexation met the standards for urban development set out in G.S. § 160A-48. The sole question for hearing by the trial court was whether the City had satisfied the municipal service requirements set out in G.S. § 160A-47.

The case came on for trial on 17 June 1981. The petitioners presented evidence which tended to show that the City had violated its own utility extension policy in 1967, some thirteen years prior to the annexation, by extending water service to Brookhaven without requiring the developer to install a sewer system—a violation which the petitioners contend now made the City's compliance with G.S. § 160A-47(3)b impossible. They also attempted to present evidence that the City had failed to include in its Annexation Report and Annexation Ordinance plans for extending bus service and community antenna television service (CATV) to the area proposed for annexation.

From a judgment affirming the annexation, petitioners appealed. The trial judge issued an order continuing the stay of the effective date of the annexation ordinance until the appeal is resolved.

Jordan, Brown, Price & Wall, by R. Frank Gray, attorney for Petitioner-Appellants.

Thomas A. McCormick, Jr., City Attorney for Respondent-Appellees.

MEYER, Justice.

I

[1] The primary question presented for review is whether in a municipal annexation proceeding the City is required to include in its annexation report plans for extending into the proposed annexation area municipal services other than those enumerated in G.S. § 160A-47(3). For the reasons stated herein we hold that it is not and affirm the judgment of the trial court.

At the trial of this case the petitioners attempted to present evidence that the Annexation Report and Annexation Ordinance were defective by reason of their failure to include plans to extend bus service and cable television service to the area proposed for annexation. The petitioners intended to demonstrate that these services were "major municipal services" within the meaning of G.S. § 160A-47(3). The trial court, however, did not allow any of this evidence to be presented. In Conclusion of Law No. 6 in the Judgment and Order, the trial judge concluded as follows:

> Petitioners are not entitled to raise the issue of whether or not transit service and CATV service are 'major' municipal services required to be addressed in the Annexation Report, because the Petitioners did not raise those issues explicitly as required by G.S. 160A-50 or amend their petition and the general allegation of Paragraph 11 of the Petition will not suffice to allow a challenge to the annexation on those grounds.

While we agree with the conclusion that the petitioners were not entitled to introduce evidence of the City's failure to include plans for extending bus service and cable television service in the annexation report, we do so for a different reason than that expressed by the trial judge.

G.S. 160A-47(3) requires a municipality's annexation report to contain:

(3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:

a. Provide for extending police protection, fire protection, garbage collection and street maintenance services to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. If a water distribution system is not available in the area to be annexed, the plans must call for reasonably effective fire protection services until such time as waterlines are made available in such area under existing municipal policies for the extension of waterlines.

b. Provide for extension of major trunk water mains and sewer outfall lines into the area to be annexed so that when such lines are constructed, property owners in the area to be annexed will be able to secure public water and sewer service, according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions.

c. If extension of major trunk water mains and sewer outfall lines into the area to be annexed is necessary, set forth a proposed timetable for construction of such mains and outfalls as soon as possible following the effective date of annexation. In any event, the plans shall call for contracts to be let and construction to begin within 12 months following the effective date of annexation.

d. Set forth the method under which the municipality plans to finance extension of services into the area to be annexed.

The burden is on petitioners to establish by competent and substantial evidence the City's noncompliance with G.S. § 160A-47 (3). *See In re Annexation Ordinance*, 303 N.C. 220, 278 S.E. 2d 224 (1981); *Huntley v. Potter*, 255 N.C. 619, 122 S.E. 2d 681 (1961).

> The central purpose behind our annexation procedure is to assure that, in return for the added financial burden of municipal taxation, the residents receive the benefits of all the *major* services available to municipal residents. *See* 2 E. McQuillan, The Law of Municipal Corporation, § 7.46 (3d ed., 1979 rev.). *See also Moody v. Town of Carrboro*, 301 N.C. 318, 271 S.E. 2d 265 (1980). The minimum requirements of the statute are that the City provide information which is necessary to allow the public and the courts to determine whether the municipality has committed itself to provide a nondiscriminatory level of service and to allow a reviewing court to determine after the fact whether the municipality has timely provided such services. If such services are not provided, the residents of the annexed area would be entitled to a Writ of Mandamus requiring the municipality to live up to its commitments. G.S. 160A-49(h); *Safrit v. Costlow*, 270 N.C. 680, 155 S.E. 2d 252 (1967).
>
> . . . We believe that the report need contain only the following: (1) information on the level of services then available in the City, (2) a commitment by the City to provide this same level of services in the annexed area within the statutory period, and (3) the method by which the City will finance the extension of these services. *See Moody v. Town of Carrboro*, 301 N.C. 318, 271 S.E. 2d 265 (1980). With this minimal information, both the City Council and the public can make an informed decision of the costs and benefits of the proposed annexation, a reviewing court can determine whether the City has committed itself to a nondiscriminating level of services, and the residents and the courts have a benchmark against which to measure the level of services which the residents receive within the statutory period.

In re Annexation Ordinance, 304 N.C. 549, 554-55, 284 S.E. 2d 470, 474 (1981) (emphasis added).

In accord with this reasoning in *In re Annexation Ordinance*, as set forth by Chief Justice Branch, the required information is not that of plans for extending *all* municipal services, but only the "major" municipal services. It must be presumed that at the time G.S. § 160A-47(3) was enacted our Legislature was aware of the myriad of services traditionally furnished by our municipalities,

some of which we subsequently enumerate. Yet only six such services are specifically referred to in the statute.

In keeping with what we believe was clearly the intent of the Legislature, we hold that the statute requires municipalities to include in their annexation reports plans to extend into the area proposed to be annexed only those municipal services specifically enumerated in G.S. § 160A-47(3): police protection, fire protection, garbage collection, street maintenance, major trunk water mains, and sewer outfall lines.

We note that the overwhelming majority of the many annexation reports reviewed by this Court in recent years, including the one before us here, have contained plans for extending into the area proposed for annexation many of the wide range of municipal services not specifically enumerated in the statute. Among the services included have been plans for providing parks and recreation, street construction, street lighting, street cleaning, street name markers, public transit, and public utilities. *See*, for example, *In re Annexation Ordinance*, 303 N.C. 220, 278 S.E. 2d 224; *In re Annexation Ordinance*, 253 N.C. 637, 117 S.E. 2d 795 (1961). *See also Rexham Corp. v. Town of Pineville*, 26 N.C. App. 349, 216 S.E. 2d 445 (1975). Though not required by law to be included in the annexation report, plans for extension of these other services are very informative to persons in the proposed annexation area. The report of plans for extension of services is the cornerstone of the annexation procedure under Part 3, Article 4A of Chapter 160A, and to be of greatest possible benefit, the plans for services should be stated as fully and in as much detail as resources of the municipality reasonably permit.

Here, the City's Annexation Report contains plans for providing not only police and fire protection, street maintenance, water and sewer service, and garbage collection, as required by the statute, but also contains plans for providing parks and recreation, street cleaning and lighting, street name markers, and street construction. Clearly the report fulfilled the requirements of G.S. § 160A-47(3). We conclude therefore that the trial judge was correct in not allowing the evidence proffered by the petitioners to show that the Annexation Report and Annexation Ordinance were defective by reason of their failure to include plans

for the extension of transit service[2] and CATV service into the area proposed for annexation.[3]

The City of Raleigh provides public transit service through the Raleigh Transit Authority, a transit authority created by the General Assembly, and cable television service is provided pursuant to a franchise agreement. The City contends that since these services are not provided by the City proper it is not necessary to include them in the annexation report. G.S. § 160A-47(3) requires that the annexation report contain a statement setting forth the plans for extending "each major municipal service performed within the municipality at the time of annexation." A service, such as water or sewer service, is a "municipal service" even though it is performed or furnished by an independent authority or by franchise. The requirement extends to a major service "*performed within* the municipality," not *performed by* the municipality. We believe that the Legislature intended to include those services enumerated in G.S. § 160A-47(3) which are traditionally furnished by municipalities whether provided by the City work force, or in a particular instance, by an independent authority such as a countywide water-sewer authority, or by franchise. If the municipal service is one enumerated in G.S. § 160A-47(3), it must be included in the annexation report even though it is provided by an independent authority or under a franchise agreement.

II

[2] A second objection made by the petitioners is based upon their contention that the City of Raleigh violated its own utility

2. The Raleigh City Council amended the Brookhaven Annexation Report dated 15 April 1980 by adding a statement that transit services would be made available in the annexed area in substantially the same manner as available within the city limits.

3. The trial judge made the conclusion that petitioners were not entitled to raise these issues because their petition did not explicitly raise them as required by G.S. § 160A-50(b). Because of our holding that city bus service and CATV service are not "major" municipal services required to be addressed in the annexation report, we need not decide whether those issues were adequately raised in the petition challenging the annexation. See, however, *Moody v. Town of Carrboro*, quoting G.S. § 160A-50(b), "Such petition shall explicitly state what exceptions are taken to the action of the governing board and what relief the petitioner seeks." 301 N.C. 318, 271 S.E. 2d 265 (1980).

policy when in 1967 it extended water service to Brookhaven without requiring the developer to install a sewer system. They contend that this violation by the City of its own policy now makes compliance with G.S. § 160A-47(3)b (extending sewer outfall lines so as to make service in the annexed area available according to the same policies in effect within the City) impossible. We cannot agree.

Brookhaven is a residential subdivision developed during the early to mid-1960's. The original developer installed a private community water system to serve the subdivision. No sewer system was installed and most of the improved lots in the subdivision are served by septic tanks. In 1967 the City of Raleigh agreed to and did connect the Brookhaven water system to its municipal system to furnish water to the subdivision. Some ten years later, in 1977, the City acquired ownership of the Brookhaven system.

G.S. § 160A-47(3)b provides that, with regard to plans for extension of water and sewer service in a proposed annexation, the annexing municipality must:

> Provide for extension of major trunk water mains and sewer outfall lines into the area to be annexed *so that when such lines are constructed, property owners in the area to be annexed will be able to secure public water and sewer service, according to the policies in effect in such municipality for extending water and sewer lines to individual lots or subdivisions.*

(Emphasis added.)

The municipality must stand ready to offer such service according to its own water and sewer extension policies already in effect.

Petitioners do not contend that the City has failed to provide for the extension of major trunk water mains or sewer outfall lines to the Brookhaven area, but that the extension will not be such that the Brookhaven property owners will be able to secure water and sewer service according to the City policies in effect for extending water and sewer lines to individual lots or subdivisions.

The City of Raleigh's water and sewer extension policies contain specific requirements relating to the connection of privately

installed utility lines to the City's utility systems. Raleigh City Code §§ 8-2061 - 8-2074 (1980). These provisions are a part of the City's policy in effect for extending water and sewer lines to individual lots and subdivisions.

Specifically, Raleigh City Code Section 8-2066 provides in pertinent part that:

> No private water line, lines or system within any residential development or subdivision outside the corporate limits shall be connected with the water system of the city, nor will the city accept any dedication of the same and agree to furnish water service to consumers within any such residential development or subdivision, unless, at the same time, there is connected with the city sewerage system and dedicated to the city an adequate sewerage system or sewerage lines layed and constructed within such residential development or subdivision sufficient to make available adequate sewerage services for each of the residential lots within such subdivision . . . .

The City did not comply with Section 8-2066 when it connected its water system with the private water system in Brookhaven in 1967. Nor did the City apply or enforce this policy ten years later when it acquired ownership of the system by a combination of dedication and purchase. (There is no dispute that Section 8-2066 was in effect at these times.) The petitioners presented this evidence at the trial. The trial court concluded, however, that whether the City violated its own policy made no difference under the annexation laws. We agree.

Petitioners contend that it is now impossible for them to secure sewer service according to the City's policies. They argue that had the City of Raleigh enforced its policy as expressed in Section 8-2066 of the City Code in 1967 when it connected the Brookhaven water system to the City system, or in 1977 when it acquired ownership of the Brookhaven water system, provision for a sewer system would already have been made.

On the other hand, the City of Raleigh interprets Section 8-2066, and correctly so, to apply to those situations where individual homeowners are to become customers of the City of Raleigh, not of a private utility company. Apparently in 1967 the

City simply sold water to the developer of the subdivision who in turn sold it to the consumer. No individual consumer at the time of the City's initial linkup to the Brookhaven private system was a direct customer of the City of Raleigh. Mr. J. R. Butler, Public Utilities Director of the City of Raleigh, testified that the ordinance was not applicable to the Brookhaven area and that any other areas or subdivisions so situated would be treated the same as Brookhaven.

Even if Section 8-2066 applied to the Brookhaven situation as it existed in 1967 and 1977, it is obviously impossible to go back now and undo the violation. Under G.S. Chapter 160A, Art. 10 (1976 & 1981 Cum. Supp.), upon the initiative of the City Council, water and sewer line projects may be constructed and the cost thereof assessed against the adjoining property owners. Raleigh's Public Utilities Director referred to this procedure in his testimony. It is therefore possible that the petitioners will be subject to a substantial assessment for the cost of installing water and sewer laterals to serve individual lots in Brookhaven. The situation would be the same, however, for any subdivision being annexed which operates on wells and septic tanks and which has never been connected to the City's water system. It is too late to treat Brookhaven subdivision any differently because thirteen years ago it was connected to the City water system without the installation of a sewer system in violation of City policy.

Since the violation cannot be undone and sewers can never be provided according to the petitioners' interpretation of City policy, to accept petitioners' position would leave Brookhaven subdivision forever immune from annexation no matter how intensely it developed.

Petitioners do not contend that the sewer service provided them will be any different than that provided within the city limits prior to or at the time of annexation. The record fails to disclose any discrimination in the price or quality of water and sewer service. Petitioners' real objection seems to be the fact that they will be assessed for the installation of sewer lines, which would not be the case had the City required installation of a sewer system before the subdivision was connected to the City water system. Apparently, it is this financial consideration which prompts petitioners to pray that, because the present predica-

ment arises from the City's failure to enforce its own policy, the matter should be remanded to the City Council "to review what factors if any, should be taken into account in establishing the front foot cost for sewer line assessments in Brookhaven."[4]

The petitioners cannot use the City's failure to follow its policy to litigate the financial impact of possible sewer assessments against them.

> A property owner . . . can attack annexation proceedings only upon the grounds specified in the statutes. He cannot successfully resist annexation because a city ordinance will adversely affect his financial interest.

In re Annexation Ordinance, 278 N.C. 641, 648, 180 S.E. 2d 851, 856 (1971).

We hold that the failure of the City of Raleigh to comply with its own policy for extending water service to the subdivision occupied by the petitioners in 1967 or in acquiring ownership of the system in 1977 does not invalidate the annexation or require remand to the City Council.

The City of Raleigh has shown *prima facie* complete and substantial compliance with the provisions of our annexation statutes by setting forth its plans for extending to the area to be annexed the services enumerated in G.S. § 160A-47(3). The petitioners have the burden of showing by competent and substantial evidence a failure to meet the statutory requirements. *In re Annexation Ordinance*, 303 N.C. 220, 278 S.E. 2d 224. They have failed to carry their burden.

The judgment of the Superior Court affirming the annexation ordinance is

Affirmed.

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

4. The relief sought by the petitioners (consideration by the City Council of sewer assessment rates) is available in effect as a matter of law because of the requirement for public hearings to authorize any sewer assessment, and additional public hearings to confirm the amount of the assessment, which is built into the statutory assessment procedure. (G.S. Ch. 160A, Art. 10 (1976 & 1981 Cum. Supp.).)

STATE OF NORTH CAROLINA v. DAVID MAURICE BEATY

No. 97A81

(Filed 3 August 1982)

1. **Criminal Law § 66.1— in-court identification—opportunity for observation—independent origin**

A robbery victim had a sufficient opportunity to observe defendant so that his in-court identification of defendant was of independent origin and not tainted by any unnecessarily suggestive pretrial photographic identification where the victim testified that defendant stood in front of him in a well-lighted store for approximately five minutes; the victim was able to give an accurate description of the defendant to law enforcement officers; the victim looked through the photographic line-up once and immediately selected defendant's picture from the group; and only later was he told that defendant was in custody.

2. **Criminal Law § 86.5— cross-examination of defendant—robberies of other liquor stores—admission of such robberies**

In a prosecution of defendant for the armed robbery of an ABC store, cross-examination of defendant as to whether he had robbed other liquor stores and whether he had admitted these robberies to law officers was not tantamount to a suggestion that he had been arrested or indicted for such offenses and was admissible under the rule that a defendant who testifies may be asked for impeachment purposes whether he has committed specific criminal acts or been guilty of specified reprehensible conduct.

3. **Criminal Law § 75.1— confession—delay in taking defendant before judicial official**

Defendant's confession was not inadmissible on the ground that he was not taken before a judicial official without unnecessary delay pursuant to G.S. 15A-501(2) since that statute is predicated upon an "arrest," and defendant was not arrested until after he confessed.

4. **Criminal Law § 26.3; Robbery § 1.1— taking property belonging to store and employee—conviction of only one count of robbery**

A defendant who allegedly took money belonging to an ABC store and money belonging to the store manager by threatening the life of the manager with a firearm could lawfully be convicted of the armed robbery of either the store or the manager but not both. Furthermore, such defendant could also be convicted of a larceny from either the store or the manager if he were so charged.

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

APPEAL by defendant from judgments entered by *Llewellyn, J.* on 28 May 1981, Criminal Session of Superior Court, NASH County.

Defendant was tried upon two indictments, proper in form, each charging him with armed robbery. One charged the armed robbery of the Middlesex ABC store in Nash County and the other the armed robbery of its manager Franklin Perry. The jury found the defendant guilty of both charges. The trial judge sentenced defendant to life imprisonment for armed robbery of the ABC store and to imprisonment for not less than twelve nor more than twenty years for the armed robbery of Franklin Perry.

Defendant's assignments of error relate primarily to the admissibility of evidence concerning an in-court identification and certain inculpatory statements he made to law enforcement officers connecting him with the crimes charged as well as other armed robberies. Additionally, he argues that he has been subjected to multiple prosecutions for the same offense, and therefore the second indictment charging him with armed robbery of Franklin Perry must be quashed. We find no error on the evidentiary questions. For the reasons stated in response to defendant's double jeopardy argument, we arrest judgment in the second case thereby vacating that portion of the sentence based on his conviction under the second indictment.

Rufus L. Edmisten, Attorney General by George W. Boylan, Assistant Attorney General, for the State.

Joseph M. Hester, Jr., Attorney for Defendant-Appellant.

MEYER, Justice.

We note initially that defendant has failed to comply with Rule 28(b)(2) of the North Carolina Rules of Appellate Procedure requiring that the appellant's brief contain a concise statement of the case. Nevertheless, we have gleaned from the record on appeal, particularly the testimony given at trial, the following summary of the facts.

On 12 December 1980 at about 2:15 p.m., the defendant and another man entered the Middlesex ABC store where the store manager Franklin Perry was then working. Defendant asked for two half-gallons of rum. Mr. Perry asked defendant if he wanted dark or light rum. At this point, defendant became aware that another individual, a Mr. Womble, was in the store, and he told his companion to call at a phone booth to find out what kind of

rum "she" wanted. Mr. Perry remained behind the counter looking straight ahead and at the defendant until Mr. Womble left the store a few minutes later. Defendant then asked for two half-gallons of dark rum. As Mr. Perry bent down to get the rum, defendant jumped on the counter, squatted down, and pointed a shotgun at him. While defendant took money from the cash register and a cash drawer, he instructed his companion to take Mr. Perry's wallet, which was removed from his back pocket and which contained $208.

Three days after the robbery, Mr. Perry was asked to meet with ABC officers and at that time selected defendant's picture from a photographic array. Mr. Perry testified that he "spotted it right off." Deputy Sheriff M. M. Reams testified that on that same day, as a result of a lead, he asked defendant to come in for questioning. Defendant came voluntarily. Subsequent to Mr. Perry's photographic identification, Officer Reams advised defendant of his rights. In the presence of Officer Reams and an ABC officer, defendant signed a waiver of rights. At first defendant denied any involvement in the robberies, but after being informed that an identification had been made gave statements implicating himself in the Middlesex robbery as well as two others. At this time no warrants had been issued for the defendant and he had not been arrested. Both officers who were present at the interrogation testified that the defendant was cooperative; that he did not appear to be under the influence of any drugs; that he appeared to understand the proceedings; and that he did not request to leave at any time during the questioning.

At trial, defendant took the stand. He denied going into the Middlesex ABC store, participating in the robbery, and owning a firearm.

[1] Defendant contends that the pretrial photographic line-up was so suggestive and conducive to irreparable mistaken identity that it tainted the in-court identification. He does not argue that the array of photographs shown to the witness was such as to unduly single out the defendant or otherwise influence the witness's choice. Rather, he questions Mr. Perry's ability to adequately identify him, given the circumstances surrounding the robbery.

On voir dire, Mr. Perry testified that the defendant stood in front of him in a well-lighted store for approximately five

minutes. He was able to give an accurate description of the defendant to law enforcement officers. He looked through the photographic line-up once and immediately selected defendant's picture from the group. Only later was he told that the defendant was in custody. The trial court's findings are supported by competent evidence, and in turn support the conclusion that Mr. Perry's in-court identification of the defendant was of an independent origin, based solely on what he saw at the time of the robbery, and in no way tainted by any pretrial identification procedure so unnecessarily suggestive and conducive to irreparable mistaken identification as to constitute a denial of due process. We are bound by the court's ruling, and the in-court identification was properly allowed. *State v. Weimer*, 300 N.C. 642, 268 S.E. 2d 216 (1980); *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974).

[2] The trial court permitted the State, over objection, to cross-examine the defendant concerning the two other ABC store robberies in which defendant had admitted his involvement. Defendant assigns as error both the admission of the testimony and the court's refusal to reopen voir dire to determine the admissibility of these confessions.

Defendant relies on *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), and argues that the State improperly impeached him as to indictments, accusations and arrest. An inquiry as to whether the defendant had robbed other liquor stores and whether he had admitted these robberies to the officers is not tantamount to a suggestion that he had been arrested or indicted for these offenses. The information sought to be elicited falls within the recognized rule that a criminal defendant who testifies may, for impeachment purposes, be asked whether he has committed specific criminal acts or been guilty of specified reprehensible conduct. *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972).

Defendant persisted in denying his involvement in the other robberies. The District Attorney continued to press, finally confronting the defendant with the statements he had made. The record discloses that when so confronted, defendant volunteered information contained in the first statement. He was asked only to verify his signature on the second statement. The State made no reference to the nature or contents of the writings. "A

witness's denial of a conviction or of specific degrading conduct does not per se preclude further cross-examination with reference to these matters." *State v. Garrison*, 294 N.C. 270, 279, 240 S.E. 2d 377, 382 (1978). Also in *Garrison* the Court said: "It is for the trial judge to say how far the State may go 'in sifting' the witness who denies the commission of the acts about which he is cross-examined. The scope of such cross-examination is subject to his discretion." 294 N.C. at 278-79, 240 S.E. 2d at 382.

We find no basis for defendant's argument that further voir dire was necessary to determine the admissibility of defendant's confessions to offenses other than the crimes charged. The confessions were not introduced into evidence. The information contained in the confessions did, however, provide a good faith basis for the State's impeaching questions, and the court immediately instructed the jury that the only purpose of the testimony concerning other robberies was impeachment. These assignments are overruled.

[3] Defendant next contends that his confessions were obtained as a result of a substantial violation of G.S. § 15A-501(2), and therefore should have been suppressed pursuant to G.S. § 15A-974. He also assigns as error the admission into evidence of the Middlesex robbery confession because it was not voluntarily and understandingly given.

G.S. § 15A-501(2) provides that a law enforcement officer must, upon the arrest of a person, take him before a judicial official without unnecessary delay. We agree with the State that defendant's position is not well taken because G.S. § 15A-501(2) is predicated upon "arrest," and defendant was not arrested until after he confessed. Defendant's rights under G.S. § 15A-501(2) were not violated. The statute clearly contemplates post-arrest procedures. Defendant was not arrested until after his interrogation. The facts belie any suggestion that he was "technically" under arrest.

Further, counsel for the defendant concedes that the trial court's findings concerning the admissibility of the Middlesex robbery confession were supported by competent evidence and that the statement was properly admitted. Our review of the record yields the same conclusion, and the assignment of error is overruled. *State v. Stinson*, 297 N.C. 168, 254 S.E. 2d 23 (1979); *State*

v. Smith, 278 N.C. 36, 178 S.E. 2d 597, *cert. denied*, 403 U.S. 934 (1971).

[4] Finally, defendant contends that the second indictment herein must be quashed as he was subjected to multiple prosecutions for the same offense; the verdict will support only one judgment for a violation of G.S. § 14-87 (armed robbery). We agree.

In order to sustain the conviction and sentence at one trial for multiple offenses arising out of a single criminal incident, each offense must rest on different necessary elements. The test is "[w]hether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment" or "whether the same evidence would support a conviction in each case." *State v. Hicks*, 233 N.C. 511, 516, 64 S.E. 2d 871, 875 (1951).

The elements necessary to constitute armed robbery under G.S. § 14-87 are (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened. "Force or intimidation occasioned by the use or threatened use of firearms, is the main element of the offense." *State v. Mull*, 224 N.C. 574, 576, 31 S.E. 2d 764, 765 (1944). Ownership of the property is generally immaterial as long as the proof is sufficient to establish ownership in someone other than the defendant. *State v. Rogers*, 273 N.C. 208, 159 S.E. 2d 525 (1968).

We have found no North Carolina case dealing precisely with the very issue before us, that is, whether a person may be convicted of two counts of armed robbery where, in addition to the theft of an employer's money or property, the robber takes money or property belonging to an employee.[1] A brief review of

1. In *State v. Sellars*, 52 N.C. App. 380, 278 S.E. 2d 907 (1981), the court was faced with the question of whether defendant's motion for election or dismissal for duplicity should have been granted. Defendant was charged on a *single count* indictment alleging theft of $9.00 from a motel employee and $283.50 from the "presence, person, place of business of the Village Motel" and the employee. The court stated that defendant was charged with only one offense, not two. "The fact that in that robbery defendant obtained money both from the prosecuting witness and the Village Motel does not create separate offenses." 52 N.C. App. at 387, 278 S.E. 2d at 914.

several categories of robbery cases in which a double jeopardy issue was raised proves helpful. One category of cases involves the situation where more than one person is present during a robbery wherein the life of each is threatened and property is taken from the person of each. Here the robber can be convicted of more than one armed robbery offense. *State v. Gibbs*, 29 N.C. App. 647, 225 S.E. 2d 837 (1976); *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); *State v. Stitt*, 18 N.C. App. 217, 196 S.E. 2d 532 (1973).

Another category of cases involves the situation where two persons, both employees, are present during a robbery wherein the life of each is threatened incident to the theft only of property or money belonging to the employer. Here a single armed robbery is committed. *State v. Potter*, 285 N.C. 238, 204 S.E. 2d 649 (1974); *State v. Ballard*, 280 N.C. 479, 186 S.E. 2d 372.

The two categories are distinguishable: The first line of cases deals with robbery of two or more individuals, each assaulted and each thereby coerced into giving up personal property belonging to him. The second category involves robbery of a place of business in the presence of two or more individuals—multiple assaults, but theft of property from only one source, the business.

Similar facts in the recent case of *State v. Hall*, 305 N.C. 77, 286 S.E. 2d 552 (1982), posed a different but interesting question. There the defendant was charged with only one count of armed robbery although he took, at gunpoint, $40.00 of personal money from the person of a service station attendant and cash, cigarettes and wine belonging to the owner of the service station. The defendant argued that although he was charged with only one count of armed robbery, the submission of the two offenses of armed robbery to the jury deprived him of his right to a unanimous verdict because some of the jurors might have found him guilty of robbing the attendant and not the store, while others might have found him guilty of robbery of the store but not of the attendant. The Court found no error. This Court said:

> 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 in-

ference 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.

305 N.C. at 87, 286 S.E. 2d at 558.

Whereas in *Hall* and in *State v. Sellars*, 52 N.C. App. 380, 278 S.E. 2d 907 (footnote 1), there was only one count of armed robbery, in the case before us there are two separate indictments charging in one instance the armed robbery of the ABC store and in the other instance the armed robbery of the attendant.

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 pocket book 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.

305 N.C. 77, 87-88, 286 S.E. 2d 552, 558-59. (Emphasis added.)

Hall, *Ballard*, and *Sellars* left undecided the question presented by the fact situation now before us—a defendant charged with two counts of armed robbery resulting from the assault of a lone employee with property taken from both the employee and the business. In such a situation the indictments, or indictment if for multiple counts, often charge an armed robbery of the employee and a larceny of the property of the business. Here, however, there are separate indictments for armed robbery of the attendant and armed robbery of the store. Both indictments allege that "the life of Franklin Perry was endangered." It is simply a question of whether there was one armed robbery or two. The controlling factor in this situation is the existence of a single assault.

In respect of 'armed robbery' as defined in G.S. 14-87, '[f]orce or intimidation occasioned by the use of threatened use of firearms, is the main element of the offense.' *State v. Mull*, 224 N.C. 574, 576, 31 S.E. 2d 764, 765 (1944). Accord: *State v. Sawyer*, 224 N.C. 61, 65, 29 S.E. 2d 34, 37 (1944); *State v. Lynch*, 266 N.C. 584, 586, 146 S.E. 2d 677, 679 (1966). Variance between the allegations of the indictment and the proof in respect of the ownership of the property taken is not material. *State v. Rogers*, 273 N.C. 208, 212-13, 159 S.E. 2d 525, 528-29 (1968). '[I]n an indictment for robbery the allegation of ownership of the property taken is sufficient when it negatives the idea that the accused was taking his own property.' *State v. Sawyer*, *supra* at 65-66, 29 S.E. 2d at 37. The gravamen of the offense is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery.

> The double-jeopardy test applicable on the present record is the 'same-evidence test,' which is alternative in character. This test is defined in *State v. Hicks*, 233 N.C. 511, 516, 64 S.E. 2d 871, 875 (1951), in opinion by Justice Ervin, as follows: 'Whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment [citations], or whether the same evidence would support a conviction in each case. [Citations.]'

280 N.C. 479, 485, 186 S.E. 2d 372, 375 (1972). In this case, the source or ownership of the money taken is not significant for purposes of proving that the defendant, with the threatened use of a weapon, took property to which he was not entitled. The facts alleged in the second indictment, charging defendant with armed robbery of Mr. Perry, would have sustained a conviction under the first indictment, charging him with robbery of the ABC store in the presence of Mr. Perry. *State v. Hicks*, 233 N.C. 511, 64 S.E. 2d 871. There could be no armed robbery of the ABC store here except for the presence of Mr. Perry, and an assault upon him as he was the only person present. There was only one armed robbery—defendant could not be convicted of two counts of the same crime.

Unlike *Sellars* in which there was only one count of armed robbery and the defendant was only charged with one offense, here defendant was charged with two. The defendant Beaty could lawfully have been convicted of the armed robbery of *either* the attendant or the store but not both.

On the evidence in the record before us, defendant could also have been convicted of a larceny from either Mr. Perry or the ABC store had he been so charged.

The essential elements of armed robbery are:

1. the unlawful taking or attempted taking of personal property from another;

2. the possession, use or threatened use of firearms or other dangerous weapon, implement or means; and

3. danger or threat to the life of the victim.

State v. Joyner, 295 N.C. 55, 243 S.E. 2d 367 (1978); G.S. § 14-87(a).

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.

State v. Perry, 305 N.C. 225, 287 S.E. 2d 810 (1981); *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.

For proof of armed robbery it is necessary to show the use or threatened use of a weapon but unnecessary to show asportation. For proof of larceny it is necessary to show asportation but unnecessary to show the use or threatened use of a weapon. Each crime requires proof of an additional fact which the other does not. *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1981); *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973). Armed robbery and larceny are separate crimes. Thus, while the defendant here could have been convicted of one count of armed robbery and one count of larceny, had he been so charged, he could not properly be convicted of two counts of armed robbery. Nor can the case be remanded for resentencing on a lesser included offense since this is not a case in which there is a failure of proof of the crime charged but ample proof of a lesser included offense. *See State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810; *State v. Jolly*, 297 N.C. 121, 254 S.E. 2d 1 (1979). In *Smith v. Cox*, 435 F. 2d 453 (4th Cir. 1970), the defendant argued that he suffered double jeopardy on his convictions of robbery and *larceny* arising out of the same incident—theft of $51.00 from a store clerk and several hundred dollars belonging to the employer. The court held that defendant was properly convicted on both charges, pointing out that the elements necessary to prove the robbery charge differed from those necessary to prove the larceny charge. The court held that there were two separate acts, each independently constituting a crime.

Judgment must be arrested in one of the two cases. Judgment could be arrested in either. Because of the order in which the indictments were filed and because the defendant argued that

we should do so, we have elected to arrest judgment on the second indictment, Case No. 15715.

As to the judgment in Case No. 15608 (the armed robbery of the ABC store), we find no error. In Case No. 15715 (the armed robbery of Franklin Perry), the judgment must be arrested.

Case No. 15608—No error.

Case No. 15715—Judgment arrested.

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

JACK A. HOFFMAN, EMPLOYEE, PLAINTIFF v. RYDER TRUCK LINES, INC., EMPLOYER, SELF-INSURED, DEFENDANT

No. 89PA82

(Filed 3 August 1982)

Master and Servant § 50— workers' compensation—injury repairing truck leased to defendant—compensable

In a workers' compensation proceeding where plaintiff received an injury while repairing a truck he both leased to defendant and drove for defendant, the injury was compensable as arising out of and in the course of his employment since plaintiff was performing a necessary repair after he was "under load" and since the repair was an act preparatory or incidental to the fulfillment of his duty to make a scheduled delivery within an allotted time.

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

APPEAL by plaintiff pursuant to G.S. 7A-31 for discretionary review of the decision of the Court of Appeals (*Judge Arnold*, with *Judges Clark* and *Becton* concurring) reported at 54 N.C. App. 643, 284 S.E. 2d 181 (1981). The Court of Appeals reversed the opinion and award of the Industrial Commission which had ruled that plaintiff's accidental injury was covered by the provisions of the Workers' Compensation Act.

The general factual background of this case is as follows. Plaintiff was employed as a truck driver for defendant. Plaintiff drove his own truck, which defendant leased from him on a term

basis. It was plaintiff's responsibility to perform and pay for all repair and maintenance work on his truck. Plaintiff was injured as he attempted to repair his truck at home. At the time of the accident, the truck contained a load of freight which was to be delivered by plaintiff to a distant, interstate destination for defendant. A hearing was later held before the Industrial Commission to determine whether plaintiff's injury arose out of and in the course of his employment with defendant in light of the parties' contractual leasing arrangement.

The specific facts necessary for a clear understanding of the legal controversy are best gleaned from the subsequent opinion and award entered in plaintiff's favor by Commissioner Vance on 18 July 1980, which we quote in pertinent part:

FINDINGS OF FACT

1. Plaintiff had worked for defendant employer since June of 1976 by leasing a 1972 tractor and a 1973 trailer that he owned to defendant employer. (The lease called for plaintiff to receive 76 per cent of the amount paid for transporting a load of freight. Of this, 33 per cent was for the tractor, 13 per cent for the trailer and 26 per cent for the driver.)

2. The driver was covered by workers' compensation and was paid for by defendant employer and covered as long as he was under load. Plaintiff was responsible for maintenance of the equipment at his expense either by himself or having someone else do it under the lease agreement. Driver filled out a daily log showing when on a trip, when off-duty and repairing truck. The defendant employer required that the equipment be inspected between the 1st and 10th of each month. Plaintiff usually did maintenance work on his equipment between trips.

3. On Tuesday, October 31, 1978, plaintiff picked up a load of overhead cranes in Greenville, South Carolina to be delivered in Illinois. He entered in his log book that he had picked up the load. The load was to be delivered at his destination on Monday morning, November 6, 1978 between 7 and 9 a.m. He called his wife to tell her of the trip and she requested that he come by home and be there for the baby's birthday. After notifying defendant employer, he came by his home in Connelly Springs, North Carolina.

4. Some place between Greenville, South Carolina and Connelly Springs, North Carolina, plaintiff noticed a vibration. When he arrived at home, in his best judgment, he felt the truck would not have gone more than 150 more miles before the universal joint would have completely gone out.

5. It was a normal thing for plaintiff to pick up a load at one location and come by home before continuing on the last leg of the trip on a later date.

6. Plaintiff's truck remained at his home from November 1, 1978 to Saturday, November 4, 1978, loaded. At 11 a.m. on November 4, plaintiff purchased two universal joints. At 3:30 p.m. on the same date, he began working on the truck to repair the universal joints and do a pre-trip inspection as required on the truck for the trip. He planned to leave at 5 p.m. on November 4, 1978 in order to make delivery on the morning of November 6, 1978 as scheduled. When delivery was required early on Monday morning and there was more than 500 miles to drive, he made it a practice to leave on Saturday. From Connelly Springs, North Carolina to his final destination was well over 500 miles.

7. Plaintiff was using a 4-pound sledge hammer. He was resting on his knees knocking upward from an angle to remove the universal joints. After four or five licks, a sliver of steel one-sixteenth inch wide by one-quarter inch long flew off and hit his right eye. He was taken to the Glenn R. Frye Hospital by his wife within ten minutes.

8. Plaintiff was out of work from November 4, 1978 to May 2, 1979 when released.

9. Plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer on November 4, 1978.

. . . .

The above findings of fact and conclusions of law engender the following additional

CONCLUSIONS OF LAW

On November 4, 1978, plaintiff sustained an injury by accident arising out of and in the course of his employment

with defendant employer. "Preliminary preparations by an employee, reasonably essential to the proper performance of some required task or service, is generally regarded as being within the scope of employment and any injury suffered while in the act of preparing to do a job is compensable." Blair, *Workmen's Compensation Law* Sec. 9:32 (1974) . . . . G.S. 97-2(6); THOMPSON v. TRANSPORT CO., 32 N.C. App. 693.

Record at 4-6 [Defendant excepted to findings of fact nos. 1 and 9 and the conclusion of law.]

On defendant's administrative appeal, the Full Commission affirmed the compensation award. On defendant's further appeal, the Court of Appeals reversed the Industrial Commission and held that plaintiff was performing the duty of an *independent contractor* as he repaired his truck pursuant to an obligation under the lease agreement and that the injury was not covered by the Workers' Compensation Act since it did not occur in the scope of his employment as a *driver* for defendant. 54 N.C. App. at 646, 284 S.E. 2d at 183. Plaintiff appeals to this Court for reinstatement of the Commission's opinion and award.

Byrd, Byrd, Ervin, Blanton, Whisnant & McMahon, by C. Scott Whisnant, for plaintiff-appellant.

Van Winkle, Buck, Wall, Starnes & Davis, by Russell P. Brannon and Albert Sneed, Jr., for defendant-appellee.

COPELAND, Justice.

It is axiomatic that an opinion and award entered by the Industrial Commission may not be disturbed on appeal unless a patent error of law exists therein. *See* G.S. 97-86; *Godley v. County of Pitt*, and cases there cited, 306 N.C. 357, 293 S.E. 2d 807 (1982). In the instant case, our review is directed toward the resolution of a single issue: whether the Commission erred as a matter of law in finding and concluding that plaintiff's injury arose out of and occurred in the course of his employment as a truck driver for defendant. We disagree with the Court of Appeals and hold that, on these particular facts, the employee-driver and owner-lessor of the truck is entitled to workers' compensation for the accidental injury sustained by him.

We begin our analysis by reciting the familiar and well settled rule that "[w]hether an injury arose out of and in the course of employment is a mixed question of law and fact, and where there is evidence to support the Commissioner's findings in this regard, we are bound by those findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E. 2d 676, 678 (1980). An appellate court is, therefore, justified in upholding a compensation award if the accident is "fairly traceable to the employment as a contributing cause" or if "any reasonable relationship to employment exists." *Kiger v. Service Co.*, 260 N.C. 760, 762, 133 S.E. 2d 702, 704 (1963). In other words, compensability of a claim basically turns upon whether or not the employee was acting for the benefit of his employer "to any appreciable extent" when the accident occurred. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E. 2d 596, 600 (1955). Such a determination depends largely upon the unique facts of each particular case, and, in close cases, the benefit of the doubt concerning this issue should be given to the employee in accordance with the established policy of liberal construction and application of the Workers' Compensation Act. *See Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976); *Harden v. Furniture Co.*, 199 N.C. 733, 155 S.E. 728 (1930). With these principles in mind, we proceed to examine the individual merits of the case presently before us.

To clarify the matter, we note at the outset that, strictly speaking, there is no question here concerning the existence of a dual relationship between plaintiff and defendant. As driver and operator of the truck in the service of the defendant-carrier, plaintiff was, like any other driver, clearly an employee who was generally protected by the provisions of our workers' compensation law. As owner-lessor and caretaker of the truck, however, he was an independent contractor with defendant who was excluded from such statutory protection. Plaintiff wore these work "hats" separately at different times and which one he wore depended entirely upon the specific nature and aim of the duties he was then performing. *See McGill v. Freight*, 245 N.C. 469, 96 S.E. 2d 438 (1957); *Newsome v. Surratt*, 237 N.C. 297, 74 S.E. 2d 732 (1953); *Hill v. Freight Carriers Corp.*, 235 N.C. 705, 71 S.E. 2d 133 (1952); *Roth v. McCord*, 232 N.C. 678, 62 S.E. 2d 64 (1950); *Smith v. Central Transport*, 51 N.C. App. 316, 276 S.E. 2d 751 (1981). In short, the actual circumstances surrounding the task undertaken by

plaintiff determined whether he was working for himself or the carrier at any given time and thus whether he was, in fact, covered under the Act. *See Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137 (1944); 99 C.J.S. Workmen's Compensation § 105 (1958); *see also Suggs v. Truck Lines*, 253 N.C. 148, 116 S.E. 2d 359 (1960).

The crux of this case initially rests upon an interpretation of section eight of the parties' term leasing agreement, which undisputedly sets forth plaintiff's tasks as an independent contractor with defendant, as follows:

> OWNER shall have the duty to repair and/or accomplish all repairs and pay for the same as well as to make, provide, accomplish and pay for all costs of operation which may include but shall not be limited to the following maintenance: fuels, lubricants, tires (including changing and/or repairs), etc.; public liability and property damage insurance on the Equipment while not being operated in the service of CARRIER; payments for injury or damages to the operator, driver and helpers and to the Equipment while the Equipment is not being operated in the service of the CARRIER. . . .

The defendant-carrier essentially contends that this contractual provision *conclusively* establishes that *all* truck repairs were exclusively plaintiff's responsibility as owner-lessor and that the performance of such tasks were not included within the scope of his employment as a driver under *any* circumstances. We reject defendant's broad and all-encompassing interpretation of this clause.

Reading section eight as a whole, its logical and plain intent is to assign to the *owner-lessor* all costs and burdens associated with the *general* repair, maintenance and operation of the truck, regardless of who actually drives it for the carrier, and the duty to obtain his own liability and damage insurance to cover the vehicle *when it is not in the carrier's service.* By its terms, the clause does not exclude or affect the possible liability of the carrier for workers' compensation with respect to injuries received by an *employee-driver*, whomever he may be, as a result of his attempt to repair some part of the vehicle, and we shall not expand the applicability of the separate equipment lease beyond that for which it clearly provides. In any event, an employer would not be

permitted to escape his liability or obligations under the Act through the use of a special contract or agreement if the elements required for coverage of the injured individual would otherwise exist. G.S. 97-6; *see Watkins v. Murrow*, 253 N.C. 652, 118 S.E. 2d 5 (1961); *Brown v. Truck Lines*, 227 N.C. 299, 42 S.E. 2d 71 (1947).

Thus, the real issue in this case develops into a two-fold inquiry: (1) which "hat" was plaintiff wearing when he attempted to replace the universal joints on his truck at his home, and (2) if he was wearing the "hat" of an employee-driver, and not that of an owner-lessor and independent contractor, did this type of repair work fall within the scope of his employment? The overall circumstances of this case convince us that the Commission correctly concluded that plaintiff was indeed an employee of the carrier at the time of the accident and that his injuries arose out of and in the course of his employment.

The Commission's findings of fact nos. 2-7, to which defendant did not except and by which we are bound, are especially pertinent and persuasive in this regard. These findings are quoted in the beginning of the opinion and need not be reiterated in detail. It suffices to say that, in this record, it is undisputed that plaintiff was covered by defendant's workers' compensation insurance as an employee-driver once he was "under load" and that, after he picked up a load of freight, he was injured as he undertook the performance of a *specific* repair for the *limited* purpose of being able to complete delivery of the load already in tow. Significantly, the defendant-carrier did not contest the fact that the truck would not have been able to make the trip without replacement of the universal joints. That plaintiff attempted to make the repair at his home is not controlling for it is clear that he undertook this work and a pre-trip inspection of the vehicle on the very day of, and just prior to, his intended departure for the load's assigned destination. Considering everything in its most practical sense, the nature and goal of plaintiff's actions at the time of the accident support a conclusion that such activities were reasonably related to his employment and that he was about his employer's business to an appreciable degree, and not his own, when he was injured. *See Kiger v. Service Co., supra*, 260 N.C. 760, 133 S.E. 2d 702 (1963); *Guest v. Iron & Metal Co., supra*, 241 N.C. 448, 85 S.E. 2d 596 (1955). Thus, we cannot say, on the record before us, that the Commission erred as a matter of law in failing to conclude

that plaintiff was engaged in his contractual duties of general repair and maintenance of the truck as owner-lessor when the accident occurred, and this is true even though plaintiff ultimately bore the cost of all repairs under the lease, regardless of who performed them. *See also Harding v. Herr's Motor Express, Inc.*, 35 App. Div. 2d 883, 315 N.Y.S. 2d 693 (1970), *appeal denied*, 28 N.Y. 2d 487, 322 N.Y.S. 2d 1026 (1971), holding that the existence of an independent contractor relationship as to the maintenance of the leased truck would not necessarily bar a factual finding that plaintiff's performance of a *particular* repair was nonetheless an incident of his employment as a driver when he did such work at his home in preparation for a trip scheduled later that same day.

We hold that plaintiff's performance of a necessary repair, after he was "under load," was within the scope of his employment as a truck driver for defendant because it was an act preparatory or incidental to the fulfillment of his duty to make the scheduled delivery within the allotted time. *See* 82 Am. Jur. 2d Workmen's Compensation § 270 (1976); *see also Giltner v. Commodore Con. Carriers*, 14 Or. App. 340, 513 P. 2d 541 (1973); *Zelle v. Industrial Commission*, 100 Colo. 116, 65 P. 2d 1429 (1937). In so holding, we expressly approve of the similar reasoning utilized by the Court of Appeals to uphold a compensation award in an analogous case, involving the same kind of truck leasing agreement, in which the owner-lessor-driver was injured while he prepared his rig for a pre-trip inspection required by the carrier. *Thompson v. Transport Co.*, 32 N.C. App. 693, 236 S.E. 2d 312 (1977). We note that defendant, as well as the Court of Appeals, attempts to distinguish *Thompson* from the situation at bar on the basis that the inspection work done there was an express condition of plaintiff's employment as a driver. Such a distinction is a specious one at best in light of our overall analysis of the unique circumstances of this case, and it is plain in any event that the award of compensation in *Thompson* was, as here, based largely upon the determination that "[a]t the time of his injury plaintiff was furthering the business of his employer." 32 N.C. App. at 698, 236 S.E. 2d at 314.

In closing, we acknowledge our review of cases from other jurisdictions which defendant maintains have held to the "contrary," *i.e.*, that the owner-lessor-driver was not entitled to workers' compensation for injuries received as a result of repair

work performed upon the vehicle pursuant to the parties' leasing agreement. *Duetsch v. E. L. Murphy Trucking Co.*, 307 Minn. 271, 239 N.W. 2d 462 (1976); *Texas General Indemnity Company v. Bottom*, 365 S.W. 2d 350 (Tex. 1963). *Duetsch* and *Bottom* are readily distinguishable from the instant case since it is quite plain that, in both instances, the "repair" work performed by the plaintiff actually constituted *general* maintenance of the vehicle, and the vehicle was not "under load" at that time—indeed, the trailer compartment of the truck was not even attached thereto. These authorities are, therefore, totally unpersuasive here.

In conclusion, the facts of the case at bar sufficiently demonstrate that the injury was causally connected to plaintiff's employment and that the accident's occurrence was related to the employment in terms of time, place and circumstances; consequently, the statutory requirements for compensation were satisfied. G.S. 97-2(6); 8 Strong's N.C. Index 3d, Master and Servant § 55.4 (1977).

For the reasons stated, the decision of the Court of Appeals is reversed, and the opinion and award of the Industrial Commission is reinstated.

Reversed.

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

STATE OF NORTH CAROLINA v. JOHN WOOD

No. 74A81

(Filed 25 August 1982)

1. Criminal Law § 80.1— doctor's testimony concerning test results—business records exception inapplicable

In a prosecution for first degree rape, the trial court erred in permitting a doctor to testify that stained slides taken from samples provided by the prosecuting witness and the defendant revealed the presence of gonococcus bacteria. The business records exception had no application to the case since, although the doctor testified that the slides were stained and interpreted in the hospital's regular course of business, the doctor did not testify as to how

he received the results and there was no form of writing or preserved record which could be duly authenticated and a proper foundation laid.

2. **Criminal Law § 53— medical witness—hearsay testimony about what was observable on stained lab slides—inadmissible**

A doctor's testimony concerning what was observed on stained slides made from liquid from the prosecuting witness's vagina and from a liquid discharge from defendant's penis was hearsay and was not admissible to show the basis for the doctor's opinion since the doctor never gave a medical opinion and his testimony regarding the slides concerned someone else's observation of a fact in order to prove as substantive evidence the truth of that fact.

3. **Criminal Law § 169— error in admission of medical testimony—prejudicial**

In light of a conflict in identification testimony by the State's witness and testimony by defendant's witnesses which corroborated defendant's assertion that he was not the guilty party, a doctor's testimony that fluid samples taken shortly after the rape in question from the prosecuting witness's vagina and defendant's penis both contained gonococcus bacteria became an important factor in the State's case, and its improper admission into evidence was prejudicial error.

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

BEFORE *Judge William H. Helms*, presiding at the 30 March 1981 Criminal Session of RICHMOND Superior Court, and a jury, defendant was tried on indictments, proper in form, and found guilty of armed robbery (second offense), kidnapping and first degree rape. Defendant was sentenced to life imprisonment for each offense. He appeals as of right pursuant to G.S. 7A-27(a).

Rufus Edmisten, Attorney General, by Wilson Hayman, Associate Attorney, for the State.

Adam Stein, Appellate Defender, by Ann B. Petersen, for defendant appellant.

EXUM, Justice.

The question presented is whether the trial court erroneously admitted the testimony of state's witness, Dr. Joseph Deese, concerning findings on certain stained slides of body fluids when these findings were made by someone other than Dr. Deese. We conclude that the doctor's testimony is inadmissible hearsay, improperly admitted into evidence over defendant's objection, and constituted prejudicial error for which a new trial must be given.

Evidence presented by the state tended to show the following:

At 5:30 a.m. on 2 January 1981 while on her way to work Mrs. Vera Stevens stopped at the Little Giant Store on Highway 177 just outside Hamlet, N.C., to get some cigarettes. After making her purchase she left the store, got in her car and drove towards her work place. Moments after leaving the store Mrs. Stevens heard a noise in the back seat of her car. When she turned to look she saw a man sitting in the back seat holding a blue steel pistol pointed at her. Mrs. Stevens described him as being a light-skinned black man wearing a black coat, toboggan and tinted glasses. The man told her that he wanted her to "carry him somewhere," giving her directions as they drove along. Eventually he told her to turn off onto a dirt road. A short distance down the dirt road he ordered her to stop and to get in the back seat. At that point he made her take off her clothes and forced her to have sexual intercourse with him. The man kept his coat on the entire time. Mrs. Stevens testified that the material felt like it was either vinyl or leather and came down as far as his knees. It was dark at the time. Afterwards, the man let her dress and told her to drive back to the paved highway. He remained in the back seat of the car. As they were driving toward Ellerbe defendant stated he needed money. Mrs. Stevens said she had only change, less than two dollars, in her apron pocket. The man got the change. Around 6:45 that morning on Highway 211 near its intersection with Highway 5, Mrs. Stevens, at defendant's demand, let him out of the car. Mrs. Stevens drove to a nearby house and sought help. Later she was examined by Dr. Joseph Deese.

Officer Clingsmith of the Pinehurst Police Department was dispatched around 7:10 a.m. to the residence where Mrs. Stevens had gone. On his way he observed a black male wearing a three-quarter length black leather coat, toboggan and sunglasses walking along the side of Highway 211 at the entrance to Moore Memorial Hospital. After receiving a description of the assailant from Mrs. Stevens, Officer Clingsmith realized it matched that of the man he earlier had seen. An officer was dispatched to Moore Memorial Hospital to locate the man. That officer observed a black male wearing a three-quarter length black leather coat waiting in the hospital emergency room. The officer followed the man into a washroom and arrested him after the officer saw a blue steel pistol behind a commode. The officer found a toboggan and a pair of pink colored sunglasses on his person.

Defendant testified and denied his participation in the assault on Mrs. Stevens. His evidence tended to show as follows: On 2 January 1981 at approximately 5 a.m. he was at his aunt's house in Hamlet. He remained there until approximately 6:14 a.m. when he rode with his aunt and Sergeant First Class Leon J. Jiles to Aberdeen. The ride consumed approximately twenty-two to twenty-three minutes. After his aunt and Sergeant Jiles dropped him in Aberdeen, he walked to his girlfriend's house to find she had already left for work at Moore Memorial Hospital. He caught a ride part of the way, then walked the rest of the distance to the hospital. He was unable to locate his girlfriend when he got there, so he told a woman that if she saw the girl, he would be waiting in the cafeteria. After eating breakfast he went to the bathroom where he was confronted by police and placed under arrest.

The principal question for the jury at trial was the identity of Mrs. Stevens' assailant. A voir dire was conducted to determine the admissibility of Mrs. Stevens' in-court identification of defendant. The trial court, upon the basis of Mrs. Stevens' testimony, made findings of fact essentially as follows: Mrs. Stevens was abducted while it was dark at 5:30 a.m. on 2 January 1981; during the hour and fifteen minutes that Mrs. Stevens was with her assailant she had some opportunity to see his face; the parking area surrounding the Little Giant Store was well lighted and during their long drive, including passing through the town of Hamlet, they went through several areas lighted by street lights; the dashboard lights provided some illumination of the interior of the car; Mrs. Stevens had seen the man on one or two previous occasions at the Little Giant Store; it "was becoming light" at 6:45 a.m. when Mrs. Stevens' assailant left her; no pretrial identification procedures were conducted by the state; and Mrs. Stevens did recognize defendant as her assailant immediately upon his entering the courtroom. Upon these findings the judge overruled defendant's objections to Mrs. Stevens' in-court identification.

In addition to Mrs. Stevens' testimony before the jury, which accorded with her voir dire testimony, the state relied on its medical witness, Dr. Deese, to provide evidence implicating defendant as the perpetrator of the offenses. Dr. Deese testified that during examination of Mrs. Stevens he prepared a slide of liquid he observed at the bottom of her vagina beneath the cer-

vix. During examination of defendant he likewise prepared a slide of a liquid discharge from defendant's penis. Both slides were sent to the hospital's laboratory for staining (the physician referred to it as a "gram stain") and interpretation. Dr. Deese never saw the slides after he sent them to the laboratory. He neither stained nor interpreted the slides. Yet, over objection, he was permitted to testify that both stained slides revealed the presence of gonococcus bacteria, a bacteria that causes the venereal disease gonorrhea. As to Mrs. Stevens' slide, Dr. Deese did not say how he learned of the interpretation of the slide. As to defendant's slide, Dr. Deese referred to "results of the gram stain" which had been "returned" to him. The trial transcript does not reveal the form of the returned results. We do not know whether they were oral or written.

Obviously Dr. Deese testified to an observable fact, *i.e.*, the presence of gonococcus bacteria in liquid samples as revealed by the stained slides, when he himself did not make the observation. His testimony is based upon what someone else who did stain, observe and interpret the slides told him about that person's observation. Furthermore, Dr. Deese's testimony is offered to prove the truth of someone else's observation, *i.e.*, that the stained slides did reveal the presence of gonococcus bacteria. Thus Dr. Deese's testimony as to what the slides revealed is hearsay and inadmissible unless it comes within an exception to the hearsay rule. "Hearsay evidence consists of the offering into evidence of a statement, oral or written, made by a person other than the witness for the purpose of establishing the truth of the matter so stated." *Wilson v. Hartford Accident and Indemnity Co.*, 272 N.C. 183, 188, 158 S.E. 2d 1, 5 (1967); *Bullock v. Insurance Company of North America*, 39 N.C. App. 386, 250 S.E. 2d 732, *cert. denied*, 297 N.C. 176, 254 S.E. 2d 39 (1979). The state concedes as much.

[1] The state urges first the applicability of the business records exception to the hearsay rule. This Court stated the business records exception in *Sims v. Insurance Co.*, 257 N.C. 32, 35, 125 S.E. 2d 326, 329 (1962), as follows:

> Ordinarily, therefore, records made in the usual course of business, made contemporaneously with the occurrences, acts, and events recorded by one authorized to make them

> and before litigation has arisen, are admitted upon proper identification and authentication.

In *Sims* the Court applied that rule to hospital records, saying, *id.*:

> In instances where hospital records are legally admissible in evidence, proper foundation must, of course, be laid for their introduction. The hospital librarian or custodian of the record or other qualified witness must testify to the identity and authenticity of the record and the mode of its preparation, and show that the entries were made at or near to the time of the act, condition or event recorded, that they were made by persons having knowledge of the data set forth, and that they were made *ante litem motam.* The court should exclude from jury consideration matters in the record which are immaterial and irrelevant to the inquiry, and entries which amount to hearsay on hearsay.

Recently this Court applied the business records exception in permitting a state's witness, an ophthalmologist's technician, to read from records maintained by the ophthalmologist after the records themselves had been duly authenticated and a proper foundation laid. *State v. Galloway,* 304 N.C. 485, 284 S.E. 2d 509 (1981). We said in *Galloway,* 304 N.C. at 492, 284 S.E. 2d at 514:

> Although the entry in the records was hearsay, it is admissible under the business records exception. In this jurisdiction if business entries are made in the regular course of business, at or near the time of the transaction involved, and are authenticated by a witness who is familiar with them and the system under which they were made, they are admissible as an exception to the hearsay rule. 1 *Stansbury's North Carolina Evidence* § 155. Anderson testified that she is the keeper and has the custody and control of the doctor's medical records, that they are made in the regular course of business and that they are made close to the time of the transaction indicated. She was clearly familiar with the records and the system under which they were made and her testimony was used since Dr. McKinley was on vacation at the time of the trial. The testimony was competent and admissible and this assignment of error is overruled.

It was also true in *Galloway*, although not alluded to in the opinion, that the records there were made *ante litem motam*.

The business records exception has no application to this case. It is true that Dr. Deese testified that the slides were stained and interpreted in the hospital's regular course of business; but as the cases referred to above show, the exception contemplates the existence of some kind of writing or other form of preserved record which can be duly authenticated. Here the trial transcript does not show the existence of any such writing. Dr. Deese referred only to certain "results" which were "returned" to him. The writing, if there was one, was not duly authenticated. There is no testimony that the writing itself, if there was one, was prepared in the regular course of business; nor does it appear that the writing, if it existed, was prepared *ante litem motam*. The state cannot, therefore, be aided by the business records exception.

[2] The state next argues that the testimony was admissible to show the basis for Dr. Deese's opinion. The state relies on *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979), where, after summarizing the cases, we concluded, 296 N.C. at 462, 251 S.E. 2d at 412:

> (1) A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence. The opinion, of course, may be based on information gained in both ways.
>
> (2) If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion. *Penland v. Coal Co., supra*, 246 N.C. 26, 97 S.E. 2d 432.

This argument is severely undercut by the state's earlier concession that Dr. Deese's testimony about what was observable on the stained slides is hearsay (inasmuch as it was offered to prove the truth of the observation) and our conclusion that this concession is correct. Testimony as to matters offered to show the basis for a physician's opinion and not for the truth of the matters testified

to is not hearsay. "We emphasize again that such testimony is not substantive evidence." *State v. Wade, supra,* 296 N.C. at 464, 251 S.E. 2d at 412. Its admissibility does not depend on an exception to the hearsay rule, but on the limited purpose for which it is offered. Here Dr. Deese never gave a medical opinion. His testimony regarding the slides was not given to show the basis for an opinion. He testified, as we have shown, to someone else's observation of a fact in order to prove as substantive evidence the truth of that fact. This second argument in support of admissibility must therefore fail.

[3] Finally the state argues that even if Dr. Deese's testimony was inadmissible, the error in admitting it was harmless in light of other evidence tending to identify defendant as the perpetrator. Evidence erroneously admitted is prejudicial, or reversible, error if "there is a reasonable possibility that, had the error . . . not been committed, a different result would have been reached at trial. . . ." G.S. 15A-1443(a). The "burden of showing that such a possibility exists rests upon the defendant." *State v. Easterling,* 300 N.C. 594, 609, 268 S.E. 2d 800, 809; *accord,* G.S. 15A-1443(a). It is true that there is other testimony in the case, including the victim's identification of defendant, from which a jury could conclude that defendant was the guilty party. Defendant, however, swore that he was not the assailant. His witnesses, namely his aunt and her friend Sergeant Jiles, corroborated defendant's testimony that defendant was with them at the time the assault on Mrs. Stevens occurred. In light of this conflict in the testimony concerning the true identity of Mrs. Stevens' assailant, Dr. Deese's testimony that fluid samples taken shortly after the rape from, respectively, Mrs. Stevens' vagina and defendant's penis both contained gonococcus bacteria became an important factor in the state's case. It constituted the only scientific evidence in the case given by a witness who in the jury's eyes had no cause to be aligned with either side of the dispute. It probably shattered whatever balance might have existed in other evidence for the state and for defendant. We conclude, therefore, that there is at least a reasonable possibility that a different result would have been reached at trial had this evidence not been admitted.

Defendant has filed a motion for appropriate relief with this Court pursuant to G.S. 15A-1418 pending appeal. One of the

grounds asserted in the motion is the availability of evidence allegedly unknown to defendant at the time of trial despite defendant's attempt to discover it before trial. The evidence alluded to is a lab report concerning the stained slides. According to the allegations in the motion, a medical expert secured by defendant asserts that the lab report indicates that the stained slides are "nonconfirmatory" for gonococcus bacteria. We cannot here assess the validity of this allegation. Because of our disposition of the case it is unnecessary for us to do so or to take further action on the motion. If, of course, the allegation in the motion is true, it illustrates the hazard in permitting testimony of the sort given by Dr. Deese.

For error committed, defendant is to be given a

New trial.

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

JENNE EDER CRUTCHLEY v. WILLIAM F. CRUTCHLEY

No. 10PA82

(Filed 3 August 1982)

Arbitration § 1; Divorce and Alimony §§ 16, 22, 29— disputes concerning alimony, custody and child support—arbitration

In the absence of court proceedings, parties may settle their disputes as to alimony, custody and child support by arbitration, but once the issues are brought into court, the court may not delegate its duty to resolve those issues to arbitration. Further, while provisions of a valid arbitration award concerning alimony may by agreement be made binding on the parties and nonmodifiable by the courts, provisions of the award concerning custody and child support continue to be within the court's jurisdiction and are modifiable pursuant to G.S. 50-13.7.

Justice CARLTON concurs in the result.

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

ON plaintiff's petition for discretionary review of the decision of the Court of Appeals reported at 53 N.C. App. 732, 281 S.E. 2d

744 (1981), affirming the trial court's dismissal of plaintiff's motion in the cause.

Haywood, Denny & Miller by George W. Miller, Jr., for the plaintiff-appellant.

White, Hall, Mullen, Brumsey & Small by Gerald F. White and Jennette, Morrison & Austin by John S. Morrison, for the defendant-appellee.

MEYER, Justice.

The issue before this Court is whether an arbitration award, made pursuant to court-ordered arbitration with consent of the parties, for alimony, custody, and child support in a divorce proceeding is binding and nonmodifiable. We hold that such an award is void *ab initio* as the trial court has no authority to order arbitration.

The record reveals that plaintiff and defendant were married on or about 5 September 1959. Three children were born of the marriage, Rebecca Jane on 3 August 1962, Anna Louise on 3 October 1967, and William Frederick III, on 8 July 1972. On 22 March 1976, Mrs. Crutchley filed suit for, *inter alia*, divorce from bed and board, alimony pendente lite, permanent alimony, custody of the three children and child support. In answer, the defendant denied plaintiff's alleged grounds for divorce from bed and board, and prayed for custody of the children and dismissal of plaintiff's action.

On 18 October 1976, District Court Judge Beaman filed a CONSENT ORDER appointing Dr. B. C. West, Jr. as arbitrator in the cause, to be "guided by the following procedure:"

> (a) He shall review the pleadings appearing in this cause in order to familiarize himself with the contentions of the parties.
>
> (b) The arbitrator's report in this case shall be final and binding on all parties.
>
> (c) The arbitrator shall file his report in the office of the Clerk of Superior Court of Pasquotank County within a reasonable time after he has had opportunity to make a review and study of the matter.

(d) The arbitrator shall have full power and authority to require each of the parties to appear before him as he may deem advisable, to offer to him such evidence as he deems necessary, including documents, reports, checks, bookkeeping entries; income tax returns, and any and all other evidence that the parties desire to present to said arbitrator, and further including oral evidence that said parties desire to present to said arbitrator, it being the intent and purpose hereof that the said arbitrator shall have the opportunity to receive and consider, and the parties shall have the opportunity to present to the arbitrator, full and complete evidence pertaining to the case. The arbitrator shall interview any witnesses which the parties may bring before him and consider all other relevant evidence, and he shall have full subpoena power.

(e) The arbitrator is authorized and empowered to interview the parties, their witnesses, and review their documentary and oral evidence in conference, in an informal manner, open and formal hearing not being necessary.

2. It is the intent and purpose hereof that the said arbitrator is fully authorized and empowered to bring this controversy to a conclusion and, as aforesaid, his report shall constitute the final and binding decision with respect to this case.

3. After filing his report, the arbitrator shall suggest to the Court the amount of his compensation and a determination with respect to same shall be made by the Court.

On 1 December 1977, Dr. West entered an AWARD OF ARBITRATOR disposing of the issues of custody and visitation, child support, alimony, property distribution, and arbitrator's and attorney's fees. Pursuant to defendant's motion, on 1 December 1977, the district court confirmed the award and ordered the case removed from the docket "as having been settled by arbitration."

On 30 November 1978, plaintiff filed motions in the cause for modification of the judgment confirming the award to increase the amount of alimony and child support and to strike that por-

tion of the award which conditioned payment of alimony upon the plaintiff's abstention from cohabitation. In reply, the defendant requested that plaintiff's motion be dismissed and that the arbitration award remain in its present status as the final and binding agreement between the parties. The motion was heard on 21 July 1980 by Judge Beaman. By order entered in open court on that date, and signed with consent of counsel out of term on 11 August 1980, he ruled that "(1) plaintiff's motion in the cause should be denied; (2) the arbitrator's award is binding, and (3) the remedy of motion in the cause is not available to the plaintiff." In view of the ruling, he "concluded that it was unnecessary to hear any evidence in support of said motions," and denied and dismissed plaintiff's motions.

The plaintiff excepted to the entry of the order and appealed to the Court of Appeals. That court ruled that the only question before it was the validity and effect of the portion of the arbitrator's award concerning support of the plaintiff-appellant. The court then held that the issue of spousal support is arbitrable; the arbitrator's award is binding; and the court cannot modify the award without the consent of the parties.

Plaintiff's petition for discretionary review by this Court was allowed on 14 January 1982. Plaintiff subsequently filed with this Court a motion to amend the assignment of error[1] so that there can be no question that included within the scope of review to be undertaken by this Court is the question of the arbitrability of and subsequent modifications of awards for child support. That motion is hereby allowed.

The plaintiff contends that the trial court erred in ruling that the remedy of motion in the cause is not available to her. She argues that binding and nonmodifiable arbitration of domestic disputes is not available in the courts of this State and requests this Court to declare that such arbitration is against public policy.

1. Plaintiff's assignment of error reads as follows:

That the Court below committed error in dismissing the plaintiff's motions in the cause for the reason that the arbitrator's award entered on December 1, 1977, and the subsequent order of the Court confirming said award dated December 1, 1977, on its face failed to comply with the procedure in actions for alimony and alimony *pendente lite* as provided by G.S. 50-16.8(f) and for the further reason that all of said orders are subject to modification as provided by G.S. 50-16.9(a).

The defendant argues that since the Legislature did not exclude domestic disputes from the Act which provides a comprehensive procedure for the arbitration of "any controversy," the arbitration statute may be utilized for the resolution of domestic disputes (the Uniform Arbitration Act, 1973 N.C. Sess. Laws, ch. 676); that contrary to being against the public policy of this State, arbitration provides highly desirable benefits; and that since parties can enter into a valid binding agreement with respect to alimony, not modifiable without the consent of both parties, it would be illogical to rule that they may not enter into a binding agreement to abide by the decision of the arbitrator here on the issue of alimony.

While we cannot agree with the plaintiff that arbitration of domestic disputes is against public policy, we do agree that binding arbitration is not available in this State *by court order* in a civil action for alimony, custody and child support. We hold that while in the absence of court proceedings, parties may settle their disputes by arbitration, once the issues are brought into court, the court may not delegate its duty to resolve those issues to arbitration. Further, while provisions of a valid arbitration award concerning alimony may by agreement be made binding on the parties and nonmodifiable by the courts, provisions of the award concerning custody and child support continue to be within the court's jurisdiction and are modifiable pursuant to G.S. § 50-13.7.

In 1973, the Legislature enacted the Uniform Arbitration Act. 1973 N.C. Sess. Laws, ch. 676. It provides that parties may agree in writing to submit to arbitration "any controversy" then existing between them or include in any written contract a provision for settlement by arbitration of "any controversy" arising between them relating to the contract or nonperformance thereof. Such agreement or provision is valid, enforceable and irrevocable except with the consent of the parties, without regard to the justiciable character of the controversy. G.S. § 1-567.2 (1981 Cum. Supp.) The Act provides only two exceptions to which it will not apply: (1) any agreement or provision to arbitrate in which it is stipulated that it will not apply and (2) arbitration agreements between employers and employees or between their respective representatives, unless the agreement provides that it will apply. Since the Legislature did not exempt domestic relations disputes

from coverage by the Act, we find no legislative expression therein that arbitration of such disputes is against public policy.

The advantages of arbitration of domestic disputes have been expounded by commentators. *See* Holman & Noland, Agreement and Arbitration: Relief to Over-Litigation in Domestic Relations Disputes in Washington, 12 Williamette L. J. 527 (1976); Spencer & Zammit, Mediation—Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents, 1976 Duke L. J. 911; Comment, The Enforceability of Arbitration Clauses in North Carolina Separation Agreements, 15 Wake Forest L. Rev. 487 (1979). Note, Family Law—Modifying Arbitrator's Awards—a Nod to "Judges of the Parties' Own Choosing," 4 Campbell L. Rev. 203 (1981). Often mentioned as advantages are reduced court congestion, the opportunity for resolution of sensitive matters in a private and informal forum by self-chosen judges, speed, economy and finality. Of course, arbitration also has its disadvantages, the major one being the limited appellate review available to the parties.[2] Intertwined with this is the disadvantage that the arbitrator is bound by neither substantive law nor rules of evidence. As stated by this Court long ago:

> A mistake committed by an arbitrator is not of itself sufficient ground to set aside the award. If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party, and there is no help for it. There is no right of appeal, and the Court has no power to revise the decisions of 'judges who are of the parties' own choosing.' An award is intended to settle the matter in controversy and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens a door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus the object of references would be defeated and arbitration instead of ending would tend to increase litigation.

Patton v. Garrett, 116 N.C. 848, 858, 21 S.E. 679, 682-83 (1895).

2. G.S. §§ 1-567.13 and 1-567.14 provide the exclusive grounds and procedures for vacating, modifying, or correcting an award.

With regard to alimony, we find that in light of the fact that the right of a dependent spouse to support and maintenance is a property right which can be released by contract, the advantages to binding and nonmodifiable arbitration outweigh its disadvantages. *See Kiger v. Kiger*, 258 N.C. 126, 128 S.E. 2d 235 (1962). Parties to a divorce may enter into a valid agreement settling the question of alimony, and unless the court then orders alimony to be paid, the terms of the agreement are binding and can only be modified by the consent of both parties. *See Rowe v. Rowe*, 305 N.C. 177, 287 S.E. 2d 840 (1982); *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964); G.S. § 50-16.9 (1976); G.S. §§ 52-10, 52-10.1 (1981 Cum. Supp.). *See also White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979) (Periodic support payments are also not modifiable if they and other provisions for a property division between the parties constitute reciprocal consideration for each other.). Since the parties may settle spousal support by agreement, there exists no prohibition to their entering into binding arbitration under G.S. §§ 1-567.1-.20 to settle the issue of spousal support.

On the other hand, while there also exists no prohibition to the parties settling the issues of custody and child support by arbitration, the provisions of an award for custody or child support will always be reviewable and modifiable by the courts. It is a well-established rule in this jurisdiction that parents cannot by agreement deprive the court of its inherent and statutory authority to protect the interests of their children. *Williams v. Williams*, 261 N.C. 48, 134 S.E. 2d 227 (1964); *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963); *Kiger v. Kiger*, 258 N.C. 126, 128 S.E. 2d 235. Further, a court order pertaining to custody or support of a minor child does not finally determine the rights of the parties as to these matters. Instead, such an order "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." G.S. § 50-13.7(a) (1981 Cum. Supp.) *In re Peal*, --- N.C. ---, 290 S.E. 2d 664 (1982). *Tucker v. Tucker*, 288 N.C. 81, 216 S.E. 2d 1 (1975).

While the amount of child support agreed on by parties to a separation agreement is presumed, in the absence of contrary evidence, to be just and reasonable, it remains within the authority of the courts pursuant to Chapter 50 to order payments for support "in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to

the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." G.S. § 50-13.4(c) (1981 Cum. Supp.); *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487. The same reasoning applies to an arbitration award concerning child support.

Just as parents cannot by agreement deprive the courts of their duty to promote the best interests of their children, they cannot do so by arbitration. Those provisions of an arbitration award concerning custody and child support, like those provisions in a separation agreement, will remain reviewable and modifiable by the court. With regard to these issues, the need for the court to protect the welfare of children outweighs the advantages of arbitration.

In the case before us, if the parties had not come into court and asked the court to resolve their disputes, or if they had had the court action dismissed prior to arbitration, there would have existed no prohibition to their voluntary agreement to arbitrate the issues. Once a civil action has been filed and is pending, the court has no authority to order, even with the parties' consent, binding arbitration. Ordinarily, with the parties' consent, the judge can refer these issues to a referee. G.S. § 1A-1 Rule 53(a)(1) provides, however, that a reference cannot be made in "actions to annul a marriage, actions for divorce, actions for divorce from bed and board, actions for alimony without the divorce or actions in which a ground of annulment or divorce is in issue." The question of whether compulsory reference under Rule 53 is available is not before us.

Since the judgment ordering arbitration was void *ab initio*, the court should have heard evidence in support of plaintiff's motion in the cause as the issues of alimony and child support were still before the court. The decision of the Court of Appeals is reversed and the case is remanded to that court for further remand to the District Court, Pasquotank County, for further proceedings consistent with this opinion.

Reversed and remanded.

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

Justice CARLTON concurs in the result.

STATE OF NORTH CAROLINA v. LYNWOOD THOMPSON (ALIAS ZEDRICK ALSTON)

No. 93A81

(Filed 25 August 1982)

1. **Criminal Law § 87.2— questions asked on direct examination of rape victim not impermissibly leading**

A question asked by the State's attorney on direct examination of a rape victim was not impermissibly leading because the question objected to occurred in a series of similarly phrased questions to which no objection was made, and because, even if mildly suggestive, leading questions are often permitted in the trial court's discretion when the inquiry involves delicate matters such as sexual conduct which was involved in the objected to question.

2. **Rape and Allied Offenses § 6.1— lesser-included offense—failure to instruct proper**

In a prosecution for kidnapping, second degree rape, second degree sexual offense, felonious larceny, forgery and uttering a forged check, the trial court properly failed to instruct on the lesser-included offenses of attempted second degree rape and attempted second degree sexual offense since there was no evidence of any actions other than the completed acts.

3. **Kidnapping § 1.2— sufficiency of evidence**

In a prosecution for kidnapping, among other crimes, the trial judge properly denied defendant's motion to dismiss at the close of the State's evidence where the State offered ample evidence from which the jury could conclude that defendant took a victim, by force and against her will, from a populated section of Charlotte to a remote county road in order to steal her possessions and to commit various sexual offenses against her.

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

BEFORE *Judge William H. Helms* and a jury, defendant was tried at the 27 April 1981 Criminal Session of UNION Superior Court. He was found guilty of kidnapping, second degree rape, second degree sexual offense, felonious larceny, forgery and uttering a forged check. The larceny, forgery and uttering a forged check convictions were consolidated for judgment and defendant

was sentenced to ten years imprisonment. The rape and sexual offense convictions also were consolidated for judgment, defendant receiving a sentence of forty years imprisonment. Finally, defendant received life imprisonment for the kidnapping conviction. All sentences are to run consecutively. Defendant appealed his kidnapping conviction to the Supreme Court which allowed his motion to bypass the Court of Appeals on the other convictions on 23 October 1981.

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

Adam Stein, Appellate Defender, and Marc D. Towler, Assistant Appellate Defender, for defendant appellant.

EXUM, Justice.

Defendant argues that his conviction for second degree rape should be reversed because the trial court abused its discretion in permitting an allegedly leading question on a critical element of the offense to be asked and answered. He also argues that the trial court erred in failing to instruct on the lesser included offenses of attempted second degree rape and attempted second degree sexual offense. Finally, he argues there was insufficient evidence of kidnapping to support conviction of that offense. We conclude there was no error in the trial.

The state's evidence elicited at trial tends to show the following:

Susan Yanus, a thirty-year-old resident of Charlotte, attended a Christmas party on 14 December 1980. She was traveling alone in her 1976 yellow Gremlin from the party to a friend's apartment for breakfast and coffee. She parked in the parking lot of the Lakes Apartments at approximately 2 a.m., and as she stepped from her car a man ran up, got in the car himself, and pushed her back into the car. Because the overhead light in the car remained on for a short time she was able to see the man and identified him at trial as the defendant. Mrs. Yanus screamed as defendant entered the car. He punched her in the face with his fist five or six times. He told her "to shut up and he said he had just killed somebody and he didn't have anything to lose." He took her keys from her and drove the car to a deserted area outside the city

limits. The car was traveling too quickly for her to jump out. She attempted to calm defendant by talking to him, but he punched her periodically during the drive. She tried, unsuccessfully, to persuade him to stop. He told her he had a knife and reiterated that he had nothing to lose.

Defendant eventually stopped the car on a deserted dirt road in Union County. He told her to take off her clothes. When she refused he began punching her again and asked "would you like to have some lead pumped into you." She removed her clothes "[b]ecause I was afraid he was going to kill me." He forced her to take his private parts into her mouth and then pushed her down on the seat and "his private parts entered [her] private parts." While she dressed he took her driver's license and checkbook from her purse.

He turned the car around and dropped her off at a small grocery. She ran to the nearest home, awakened the residents and told them what had happened. They called the police and a girlfriend of hers. When the police officer arrived she took him to the road where the car had been parked. He then took her to the hospital. Mrs. Yanus testified that the fair market value of her car was $1500, and that one of her checks made payable to Lynwood Thompson was neither in her handwriting nor signed by her.

Mr. Shahkrokh Lavassani testified that he was working at a Fast Fare store in the afternoon of 14 December. Defendant pumped five dollars' worth of gasoline into a small yellow car. He then came into the store and stood in line to purchase a canned drink and some crackers as well as the gasoline. He attempted to purchase the items with a check purportedly signed by Susan Yanus and made to Lynwood Thompson for fifty dollars. When defendant could produce no driver's license, Lavassani said he would have to call his manager. Defendant waited while Lavassani called his manager, who in turn called the police.

Lieutenant Joe Moore of the Union County Sheriff's Department testified that at about 12:30 p.m. on 14 December he went to the Fast Fare in response to the manager's call. He found defendant seated in Mrs. Yanus' Gremlin and obtained the check drawn on her account. Defendant was frisked and Mrs. Yanus' driver's

license and registration card were found on him. He had no weapon on his person.

Defendant offered no evidence.

[1] Defendant first argues that a question asked by the state's attorney on direct examination of Mrs. Yanus was impermissibly leading and the trial court erroneously overruled his objection to it. During questioning about what had occurred after defendant parked the car on the deserted road, the state's attorney asked:

> Q. And after you were pushed on the seat, state whether or not his private parts entered your private parts.
>
> MR. MORGAN: OBJECTION, Your Honor, to the leading.
>
> A. Yes, they did.
>
> THE COURT: OVERRULED. EXCEPTION NO. 1.

We doubt that the question as propounded is leading. "A leading question is generally defined as one which suggests the desired response and may frequently be answered yes or no. [Citations omitted.] However, simply because a question may be answered yes or no does not make it leading, unless it also suggests the proper response." *State v. Britt*, 291 N.C. 528, 539, 231 S.E. 2d 644, 652 (1977). The extent to which a question may be leading, *i.e.*, suggestive of the desired answer, depends not only on the form of the question but also on the context in which it is put. *Howell v. Solomon*, 167 N.C. 588, 83 S.E. 609 (1914). The question objected to occurred in a series of similarly phrased questions to which no objection was made:

> Q. And after you were struck there on the dirt road, state whether or not your clothes were removed.
>
> A. Yes, they were.
>
> Q. And how is it that they were removed?
>
> A. I removed them.
>
> Q. And for what reason did you remove the clothing?
>
> A. Because I was afraid he was going to kill me.
>
> . . . .

Q. And after you removed your clothes, what, if anything, did the Defendant, Lynwood Thompson, do?

A. He grabbed my hair and pulled my head down to his lap.

. . . .

Q. Now, at the time you were taken by the hair and your head was pulled toward his lap, in what condition was the clothing of the Defendant?

A. His trousers were undone.

Q. And state whether or not any portion of his private parts were exposed at that time.

A. Yes, they were.

. . . .

Q. And thereafter, what, if anything, transpired?

A. Uh—he forced himself—himself into my mouth.

Q. State whether or not he placed his private parts—

A. Yes, he did.

Q. Into your mouth. State whether or not you consented to that act, Mrs. Yanus.

A. No, I didn't.

Q. And thereafter, what, if anything, did the Defendant do?

A. I—I pulled away from him and that's when I started screaming real bad and he said—that's when he said that's the way it's supposed to be. And I just went limp. And he dragged me and pushed me down on the seat.

Q. And after you were pushed on the seat, state whether or not his private parts entered your private parts.

MR. MORGAN: OBJECTION, Your Honor, to the leading.

A. Yes, they did.

THE COURT: OVERRULED. EXCEPTION NO. 1.

Q. State whether or not you consented to that act.

A. No, I didn't.

When considered in context it appears that the state's attorney was not attempting by the questions beginning "state whether or not" to suggest answers to the witness but was simply directing the witness's attention to various subjects of inquiry as the examiner proceeded from one subject to the next.

Assuming, arguendo, that these questions are mildly suggestive, it is well established that whether and to what extent leading questions may be propounded is a matter within the trial court's sound discretion and absent an abuse of discretion the trial court's rulings will not be disturbed on appeal. *State v. Britt, supra,* 291 N.C. 528, 231 S.E. 2d 644; *State v. Greene,* 285 N.C. 482, 206 S.E. 2d 229 (1974). Leading questions are often permitted in the trial court's discretion when the inquiry involves delicate matters such as sexual conduct. *State v. See,* 301 N.C. 388, 271 S.E. 2d 282 (1980); *State v. Henley,* 296 N.C. 547, 251 S.E. 2d 463 (1979). There was no abuse of discretion in permitting the challenged question in this case.

[2] Defendant next argues that the trial court committed reversible error in failing to instruct on the lesser-included offenses of attempted second degree rape and attempted second degree sexual offense. In order to justify submission of a lesser-included offense, however, there must be some evidence to support submission of the lesser offenses to the jury. As this Court stated in *State v. Lampkins,* 286 N.C. 497, 504, 212 S.E. 2d 106, 110 (1975):

> 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 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.

See also State v. Drumgold, 297 N.C. 267, 254 S.E. 2d 531 (1979).

In the instant case Mrs. Yanus testified positively that defendant forced her to perform fellatio against her will, and that he forced her to engage in vaginal intercourse against her will. There was no evidence of any actions other than the completed acts. Thus, the jury could properly conclude either that defendant committed the acts as described by Mrs. Yanus or that he did not. The trial court was correct in not submitting attempt charges to the jury.

[3] Finally, defendant argues that there was not sufficient evidence of each essential element of kidnapping to warrant denial of his motion to dismiss at the close of the state's evidence. The test of the sufficiency of the evidence in a criminal case is whether there is substantial evidence of all elements of the offense charged so any rational trier of fact could find beyond a reasonable doubt that defendant committed the offense. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Locklear*, 304 N.C. 534, 537-38, 284 S.E. 2d 500, 502 (1981). According to the definition of kidnapping found in G.S. 14-39(a), the state need only show "(1) an unlawful, nonconsensual restraint, confinement or removal from one place to another (2) for the purpose of committing or facilitating the commission of certain specified acts." *State v. Williams*, 295 N.C. 655, 664, 249 S.E. 2d 709, 716 (1978). Among the prohibited purposes are facilitation of the commission of a felony and "[d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed." G.S. 14-39(a)(2)-(3). The state has offered ample testimony from which the jury could conclude that defendant took Mrs. Yanus, by force and against her will, from a populated section of Charlotte to a remote county road in order to steal her possessions and to commit various sexual offenses against her. We conclude this assignment is without merit.

All other assignments of error not briefed and argued by defendant are deemed abandoned under N. C. Rule of Appellate Procedure 28(a). *State v. Samuels*, 298 N.C. 783, 260 S.E. 2d 427 (1979).

In defendant's trial we find

No error.

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

STATE OF NORTH CAROLINA v. JAMES FRANCIS BREEDEN

No. 1A82

(Filed 3 August 1982)

1. **Criminal Law § 34— inadmissibility of evidence of defendant's commission of another crime—failure to identify defendant as participant in other crime—evidence improperly admitted**

In a prosecution for armed robbery, the trial court erred in admitting evidence relating to defendant's commission of a crime other than the one for which he was being tried since, even though there were substantial similarities in the two crimes, defendant was not identified as a participant in the other crime, there was no direct evidence that defendant was one of the two men who robbed the other store, and the testimony did not come within one of the exceptions enumerated in *State v. McClain*, 240 N.C. 171 (1954).

2. **Criminal Law § 66.18— error to summarily deny defendant's motions to suppress in-court identifications**

The trial court erred in summarily denying defendant's motions to suppress the in-court identification by three witnesses since defendant's motions to suppress alleged a legal basis for the motion (competency of the evidence in that none of the three had been able to give an out-of-court identification), were supported by proper affidavits which supported the basis, and were uncontradicted by answer or denial of the State. G.S. § 15A-977(d).

3. **Criminal Law § 66.18— error to deny motion to suppress in-court identification—supporting affidavit—burden shifted to State**

The trial court erred in denying defendant's motion to suppress the in-court identification by a witness, who defendant contended had given a pretrial identification as the result of impermissibly suggestive out-of-court identification procedures, for failure of proof since defendant satisfied his burden of going forward with the evidence by complying with the affidavit re-

quirement of G.S. § 15A-977, and at that time, the burden shifted to the State to prove by a preponderance of the evidence that the evidence was admissible.

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

APPEAL by defendant from judgments entered by *Braswell, J.* at the 3 August 1981 Criminal Session of Superior Court, CUMBERLAND County.

Defendant was tried on four separate bills of indictment charging him with armed robbery. The four cases were consolidated for trial. From verdicts of guilty on all four counts and four sentences of life imprisonment imposed thereon, defendant appeals pursuant to G.S. § 7A-27(a).

Rufus L. Edmisten, Attorney General by K. Michele Allison, Associate Attorney and Charles J. Murray, Special Deputy Attorney General, for the State.

John G. Britt, Jr., Assistant Public Defender, for Defendant-Appellant.

MEYER, Justice.

Defendant assigns as error, *inter alia*, the trial court's denial of his motion *in limine* to exclude evidence of other charges or investigation involving offenses other than these on trial and allowing testimony relating to offenses for which he was not on trial. For the reasons set forth below, we hold that the court's rulings with respect to this motion were erroneous and that defendant is entitled to a new trial.

Pertinent to our discussion are the following facts: On the morning of 15 August 1980, two men entered Horne's Grocery and Package Store on Person Street in Fayetteville. The taller of the two wielded an automatic pistol; the shorter carried a rifle. Both men wore ski-type masks covering the upper portion of their faces. After announcing an intent to hold up the store, the men took money from the cash register, as well as personal items of jewelry and money from two employees, James Wiggins and Rachel Horne, and from two customers who were present in the store. A .32 revolver belonging to Rachel Horne was also stolen.

Several months after the robberies, the defendant was apprehended by a police officer investigating a shooting which, he

was told, involved the defendant. A search of defendant's vehicle uncovered three guns of various types, including the one belonging to Rachel Horne which was stolen in the robbery of Horne's Grocery.

The major issue in this case is whether the trial court's admission of the testimony of Thomas Odom concerning defendant's commission of another robbery constitutes reversible error. We hold that it does.

It is unnecessary to recite all of Odom's testimony at this time. It will suffice to give a summary relevant to the issue. Following a voir dire, and over defendant's objection, the State introduced the testimony of Thomas Odom relating to a robbery of a Wiener King restaurant, Odom's place of employment located within 100 yards of the grocery, which occurred within less than fourteen hours of the robbery of Horne's grocery. The witness Odom testified on voir dire that he observed the defendant for a period of 30 to 45 minutes at approximately 9:30 p.m. on the night of 14 August 1980; that he paid particular attention to the defendant and his companion who was shorter and stockier than the defendant because of their peculiar actions which he attributed to their intoxication; he described the car in which the defendant arrived as a 1978 or 1979 beige and brown Thunderbird; that shortly after closing at 10:00 p.m. on that date he was the victim of an armed robbery in the kitchen of the Wiener King committed by two individuals, one of which he described as the defendant's companion earlier in the night who was wearing the exact same clothes; he stated that the other taller robber "looked like the same guy that had come in earlier;" he described a small brown flat top hat worn by the taller robber and identified State's Exhibit No. 5 as the same type of hat; he identified State's Exhibit No. 4 as looking like the same gun used by the taller robber; on several subsequent occasions he had seen the defendant driving the same Thunderbird and had tried unsuccessfully to get the license plate number; and he identified the defendant's photograph. The witness testified to essentially the same facts in the presence of the jury; however, he was not allowed to testify that he had formed an impression that the defendant was the taller of the two robbers. The State argues that the evidence, notwithstanding its circumstantial nature, is sufficient to identify the defendant as the robber of the Wiener King. We do not agree.

While there are substantial similarities in the two crimes, particularly with regard to the race, height, and size of the robbers, the description of the hat and the fact that it was worn by the taller man, the proximity of the buildings, the gun, car, etc., there is no *direct* evidence that defendant was one of the two men who robbed the Wiener King.

[1] The general rule regarding the admissibility of evidence relating to the defendant's commission of a crime other than the one for which he is being tried is stated as follows:

> 'Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime.' 1 Stansbury, N.C. Evidence § 91 (Brandis rev. 1973); *State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972); *State v. Shutt*, 279 N.C. 689, 185 S.E. 2d 206 (1971). *See also State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973); *State v. Felton*, 283 N.C. 368, 196 S.E. 2d 239 (1973).

State v. Cates, 293 N.C. 462, 469, 238 S.E. 2d 465, 470 (1977). The exceptions to the rule of inadmissibility, as classified and enumerated in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), are as well established as the rule. The exceptions most relevant to this case are exceptions numbered 4 and 6 which read as follows:

> 4. 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. (Citations omitted.)
>
> . . . .
>
> 6. Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission. (Citations omitted.)

> Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity.

240 N.C. at 175-76, 81 S.E. 2d at 367.

The defendant argues that the State was not entitled to put on Odom's testimony under *McClain* exception number 4 because, in spite of his efforts to keep the testimony out, three of the victims were permitted to identify him at trial and therefore identity was not an issue. We cannot agree. The vigorous cross-examination of those identification witnesses in fact made identification the principal issue.

In *State v. Freeman*, 303 N.C. 299, 278 S.E. 2d 207 (1981), a rape victim positively identified the defendant. Defendant put on alibi evidence thereby making identification the principal issue in the case. The State was permitted to put on evidence of similar acts other than the rape with which defendant was charged to prove his identity as the perpetrator.

Had the defendant been identified as one of the participants in the Wiener King robbery, the evidence of that crime would have been admissible here on the issue of identification. It is not the absence of a question of identification, but the failure to identify defendant as a participant in the Wiener King robbery which makes the evidence inadmissible in the case *sub judice*. For the same reason, Odom's testimony was not admissible under *McClain* exception number 6 as tending to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission.

For this prejudicial error committed during the course of the trial, defendant is entitled to a new trial.

[2] The defendant also assigns as error the court's denial of defendant's motions to exclude certain in-court identifications. Motions to exclude in-court identification of the defendant by each of the four Horne's store robbery victims were made in compliance with the procedural mandates of G.S. § 15A-977(a). The affidavits accompanying the motions stated that the witnesses Horne and Wiggins were unable to identify the defendant from

photographic line-ups, and that witness Freeman neither gave a description to police officers, nor was he shown a photographic line-up. Defendant, apparently anticipating that his motions as to Horne, Wiggins and Freeman would be granted as a matter of course, did not request a voir dire hearing. The trial court denied defendant's motions without making findings of fact and indeed without conducting a hearing.

We hold that the trial judge was in error in summarily denying defendant's motions to suppress the in-court identification by witnesses Horne, Wiggins and Freeman. G.S. § 15A-977(c) allows summary denial of a motion to suppress evidence if:

(1) the motion does not allege a legal basis for the motion; or

(2) the affidavit does not as a matter of law support the ground alleged.

Defendant's motions to suppress alleged a legal basis for the motions (competency of the evidence), were supported by proper affidavits which support the basis, and were uncontradicted by answer or denial of the State. The motions, having raised legal issues and being properly supported by affidavits were not subject to summary denial. Moreover, G.S. § 15A-977(d) states that "[i]f the motion is not determined summarily the judge *must* make the determinations after a hearing and finding of facts." (Emphasis added.) Even in the absence of a request for the same, defendant was entitled to a voir dire hearing to determine the admissibility of the identification testimony.

[3] The motion pertaining to witness George Russell stated that pretrial identification *was* made, but was the result of impermissively suggestive out-of-court identification procedures. Defendant, apparently believing that his motion as to Russell was less certain to be granted, requested a voir dire hearing on that motion and the following exchange took place:

> MR. BRITT: As to the procedural conducting of the hearing, I would take the position that it is the State's burden to go forward at this time.
>
> COURT: I am aware of such contentions and I am aware of the law on this subject and I am also aware that the Supreme Court has ruled that it is not per se improper to

call upon the Defendant to go forward first so long as everybody knows that the burden of proof is always on the State. I now call upon you to go forward.

MR. BRITT: Your Honor, I am not prepared to go forward. I don't know if Mr. Russell is present or the officers involved. They are under subpoena I understand, made on application by the State.

COURT: Then for the failure of proof, your motion is denied.

We hold that the trial court also erred in denying the motion to suppress the in-court identification by George Russell for failure of proof. The affidavit supporting the motion as to the witness Russell stated that Russell had identified defendant from a photographic line-up as the taller robber while the witnesses present had described the taller robber as wearing a toboggan mask or ski mask to disguise his facial features. While this affidavit might have been more specific, we conclude that it adequately supported defendant's motion to suppress. Defendant satisfied his burden of going forward with the evidence by complying with the affidavit requirement of G.S. § 15A-977, at which time the burden shifted to the State to prove by a preponderance of the evidence that the evidence was admissible. *State v. Johnson*, 304 N.C. 680, 285 S.E. 2d 792 (1982); *see State v. Gibson*, 32 N.C. App. 584, 233 S.E. 2d 84 (1977). On appeal this Court is bound by the trial judge's findings of fact if there is competent evidence in the record to support them. *See State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137 (1980).

For the reasons stated herein, defendant is entitled to a

New trial.

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

Crowell v. Chapman

ELISABETH HURLEY CROWELL, DOUGLAS F. BOWERS AND WIFE, BETTY B. BOWERS, PLAINTIFFS v. MRS. LATTA W. CHAPMAN; HOWARD Y. DUNAWAY, JR.; HOWARD Y. DUNAWAY, JR., EXECUTOR OF THE ESTATE OF MARIE KEMP DUNAWAY; KEMP R. DUNAWAY, AND MARY ELIZABETH DUNAWAY PIITZ; CHARLES EDWARD STIRES AND WIFE, CONSTANCE P. STIRES; MEBANE DOWD NEELEY; STEPHEN REEVES COLE; JAMES S. L. RAY, JR.; JOSEPH G. WHEELER AND WIFE, MADELEINE M. WHEELER; V. A. VESPOINT AND WIFE, CLARA E. VESPOINT; NCNB MORTGAGE CORPORATION; AND TIM, INC.; INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS COMPOSED OF OWNERS OF LEGAL AND EQUITABLE TITLE OF REAL ESTATE WITHIN THE PERIMETER BOUNDARIES OF A MAP OF BLOCKS 11-A AND 11-B OF MYERS PARK RECORDED IN MAP BOOK 230 AT PAGE 131, MECKLENBURG COUNTY PUBLIC REGISTRY, DEFENDANTS AND W. THOMAS RAWLINGS AND WIFE, JEANNE P. RAWLINGS; STEPHEN D. HIRES AND WIFE, MIRANDA F. HIRES; AND JAMES T. HINSON AND WIFE, JANE PARDEE HINSON, INTERVENING DEFENDANTS

No. 129A81

(Filed 3 August 1982)

Parties § 2.1 — loss of real party in interest status — dismissal from case

When the original plaintiff in an action against a class of defendants to declare certain subdivision restrictive covenants unenforceable against plaintiff's lot lost her status as a real party in interest in the case by the sale of her lot, and the new owners of the lot were joined as parties plaintiff, the original plaintiff should have been dismissed from the case. G.S. 1-57; G.S. 1A-1, Rule 17(a).

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

PLAINTIFF Crowell appealed to the Court of Appeals from an order entered on 14 August 1980 by *Judge Johnson* presiding in MECKLENBURG Superior Court. The Court of Appeals, without an opinion and in an unpublished decision, concluded simply that there was no error in the order. The Supreme Court allowed plaintiff Crowell's petition for further review on 6 October 1981.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston by Gaston H. Gage, for plaintiff appellant.

Caudle, Underwood & Kinsey, P.A., by C. Ralph Kinsey, Jr. and John H. Northey III, for defendant appellees.

EXUM, Justice.

Plaintiff Crowell sued a class of defendants pursuant to Rule 23 of the N.C. Rules of Civil Procedure. Thereafter she lost her

status as a real party in interest in the case and filed a notice of voluntary dismissal under Rule 41(a). After joining the Bowers who had become the real parties in interest as parties plaintiff, Judge Johnson vacated plaintiff Crowell's motion of voluntary dismissal, in effect maintaining Crowell as a party plaintiff in the case. The Court of Appeals found no error in this result. We disagree and reverse.

On 6 July 1978 plaintiff Crowell filed complaint against various named defendants, all allegedly owners of lots in Myers Park Subdivision in Charlotte as representatives of a class constituting all owners in the subdivision. The complaint alleges that plaintiff owns a lot in this subdivision described as "Lot I" and that certain restrictive covenants purporting to pertain to this lot and appearing in plaintiff's chain of title are for various reasons not enforceable by defendants. The complaint prays for a judgment so declaring. On 5 February 1979 plaintiff Crowell by permission of an earlier order amended her complaint so as more precisely to define the class of defendants against which she sought relief. On 14 February 1979 certain named defendants filed motions to dismiss and for summary judgment insofar as plaintiff's action purported to be against a class of defendants not individually named. On 27 March 1979 Judge Snepp certified the action as being maintainable against a class of defendants represented by the named defendants and denied named defendants' motions to dismiss and for summary judgment as to the represented class. Judge Snepp served notice to the class of the pendency of the lawsuit. Thereafter certain named defendants filed answer, admitting some and denying other of plaintiff Crowell's allegations. The answer prayed that the complaint be dismissed and that the restrictive covenants be declared enforceable against plaintiff Crowell. On 28 May 1979, pursuant to Judge Snepp's notice, certain other defendants intervened and adopted the answer and defenses of the defendants originally named.

On 19 October 1979 plaintiff Crowell sold her Lot I to plaintiffs Bowers and, because she was no longer a real party in interest, filed a notice of voluntary dismissal of her claim pursuant to Rule 41(a).

On 22 January 1980 all answering defendants moved to join the Bowers as parties plaintiff on the ground that plaintiff

Crowell had on 19 October 1979 conveyed her interest in Lot I to them whereby the Bowers "became the real parties in interest." This motion came on for hearing before Judge Johnson who, on 19 August 1980, filed an order in which, after reciting some of the above procedural history, he found as a fact that:

> Douglas F. Bowers and wife, Betty B. Bowers, acquired the property that is the subject of this action from the plaintiff by deed dated and filed October 19, 1979 and are the successors in interest to the plaintiff in said property and are real parties in interest to the issues presented in this action.

In this order Judge Johnson also determined that plaintiff Crowell's notice of voluntary dismissal earlier filed was void because she failed to comply with Rule 23(c), and he ordered that the dismissal be vacated. Judge Johnson allowed defendants' motion to join the Bowers as "additional parties plaintiff."

On appeal, plaintiff Crowell argues: (1) She had an absolute right to take a voluntary dismissal under Rule 41(a) on 19 October 1979 and (2) Judge Johnson's order unconstitutionally imposes upon her a condition of involuntary servitude, N.C. Const. Art. I § 17, and deprives her of her liberty without due process, N.C. Const. Art. I § 19. The answering defendants argue on the other hand that because plaintiff had invoked the class action provisions of Rule 23, she could not take a Rule 41(a) voluntary dismissal; rather, her action must be dismissed, if at all, pursuant to Rule 23(c) which provides:

> *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the judge. In an action under this rule, notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the judge directs.

Defendants do not contend that plaintiff Crowell should not be let out of the case. Their brief asserts that all plaintiff need do is comply with Rule 23(c), "be dismissed as expected, and leave the case to be determined between plaintiffs Bowers . . . and the other defendants appearing." The brief refers further to the "inappropriateness of [plaintiff Crowell's] continued involvement in this litigation and prosecution of this appeal." Defendants have no objection to plaintiff Crowell's being dismissed from the case.

They concede she should be dismissed. Their position is simply that she cannot be dismissed via Rule 41(a), but only by resort to Rule 23(c).

In essence, then, the case is in this procedural posture: The original plaintiff Crowell, no longer a real party in interest, has no viable claim against anyone relating to Lot I which she no longer owns. She wants to be dismissed from the case. Defendants have no objection to this, but apparently say plaintiff cannot be let out because she has not complied with Rule 23(c). Defendants seek to keep this case alive; although it is not readily apparent why, if the case were dismissed entirely, defendants could not file their own lawsuit. The case, after all, has not as yet proceeded beyond the pleading stage—a stage which both sides seem to be inordinately enjoying. We can but marvel at the luxury by which these litigants and their counsel can bring this procedural potpourri all the way to us.

Since it is here, we must of course somehow try to untangle the knot which the lawyers have rather tightly tied. Plaintiff argues the solution lies in Rule 41(a) and the Constitution. The answering defendants say we should look to Rule 23(c), and the Constitution has nothing to do with it. We believe the tangle can best be unloosed and the right result reached through the proper application of G.S. 1-57 and Rule 17(a). We do not reach the question whether Crowell, had she remained the real party in interest, had an absolute right to take a voluntary dismissal or was, instead, relegated to proceeding via Rule 23(c).

G.S. 1-57 provides, with certain exceptions not here pertinent, that "[e]very action must be prosecuted in the name of the real party in interest. . . ." Rule 17(a) says in part:

> *Real party in interest.* Every claim shall be prosecuted in the name of the real party in interest . . . . No Action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Under G.S. 1-57 and Rule 17(a) only the real party in interest can prosecute a claim. With certain exceptions not here pertinent someone who is not a real party in interest cannot. However, Rule 17(a) provides that the action should not be dismissed "on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for . . . joinder or substitution of, the real party in interest." *See also, Burcl v. N.C. Baptist Hospital, Inc.*, 306 N.C. 214, 293 S.E. 2d 85 (1982).

Here, plaintiff Crowell filed her notice of voluntary dismissal *only because she was no longer a real party in interest.* We need not decide whether the action nevertheless under Rule 17(a) remained alive for a reasonable time thereafter to permit the Bowers to be joined as the real parties in interest. The fact is that the Bowers have now been joined and there has been no appeal from this aspect of Judge Johnson's order. Apparently the Bowers intend to prosecute the case. Since Crowell was no longer a real party in interest, Judge Johnson should, on that ground alone, have ordered that she be dismissed from the case.

Crowell in all events must be let out of the case. The real parties in interest have been let in. It seems needlessly hypertechnical now to quibble over whether Crowell gets out via a voluntary dismissal, or a motion under Rule 23(c), or simply an order of the trial court based on the fact that she can no longer prosecute the action. Under the circumstances of this case, we hold that Judge Johnson erred in not dismissing Crowell from the case on 19 August 1980.

The decision of the Court of Appeals finding no error in Judge Johnson's failure to dismiss Crowell is, therefore, reversed and the case is remanded to Mecklenburg Superior Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

RUDY VALLEY DORSEY v. ISABELLE A. DORSEY

No. 149A81

(Filed 3 August 1982)

Reformation of Instruments § 7— defendant's name on deed—misrepresented marital state—sufficient evidence for a jury

In plaintiff's action to have a deed reformed on the basis of fraud by defendant, the trial court erred in dismissing plaintiff's claim since plaintiff offered evidence that defendant misrepresented her marriageability and continued to conceal the fact that she had not been divorced from her former husband when she married plaintiff, and where a reasonable trier-of-fact could conclude that defendant intended to deceive plaintiff about the validity of their marriage, thus causing him to treat her as his lawful wife, and where a trier-of-fact could reasonably infer that plaintiff was actually deceived by defendant's continuing misrepresentation of their marital status, and relied upon the fraudulent induced belief that defendant was his wife in having her named, as his wife, a tenant by the entirety of the residential realty.

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

PLAINTIFF'S claim for reformation of a deed was dismissed by *Judge Larry Black*, sitting without a jury, at the 28 July 1980 Civil Session of MECKLENBURG District Court. Defendant was awarded attorney's fees. The Court of Appeals affirmed the dismissal, but reversed the fee award. 53 N.C. App. 622, 281 S.E. 2d 429 (1981). The Supreme Court allowed discretionary review on 3 November 1981.

Charles V. Bell for plaintiff appellant.

Marnite Shuford for defendant appellee.

EXUM, Justice.

Plaintiff seeks by this action to have the deed to residential real property reformed to reflect his sole ownership. The deed to the realty was made to both parties as husband and wife, but plaintiff contends defendant's name was placed on the deed because of her fraudulent representation that she was legally divorced from a former husband at the time she married plaintiff. The principal question presented is whether plaintiff offered sufficient evidence to make out a prima facie case that the fraud of defendant induced plaintiff to include her name on the deed. The

trial court believed not and the Court of Appeals agreed. We disagree and reverse.

At trial plaintiff offered evidence which tended to show the following:

Plaintiff and defendant have known one another since grammar school. On 11 August 1960 they were purportedly married in Lancaster, South Carolina. Plaintiff knew defendant had been previously married to Raymond Rudisill, but defendant told him before their marriage that she had obtained a divorce from Rudisill. On 9 May 1969 plaintiff bought a residence in Charlotte, for which the purchase price was entirely paid from his income. He had the deed titled to "Rudy V. Dorsey and wife, Isabell A. Dorsey."

On 4 March 1980 plaintiff received a letter from defendant's counsel which set forth defendant's claim for alimony, divorce from bed and board, child support, and possession of the property at issue here. He showed this letter to Ms. Magdalene Evans, a friend, who informed him that at the time of his marriage to defendant in 1960 defendant had not obtained a divorce from Rudisill. Until then he believed he and defendant were legally married. He learned that defendant's divorce from Rudisill was obtained in 1963, not before 1960 as defendant had led him to believe, in his conversation with Ms. Evans in 1980. Plaintiff offered into evidence a complaint seeking an absolute divorce from Rudisill which defendant verified on 16 December 1962.

With regard to having created in the property a tenancy by the entirety, plaintiff testified: "I would not have had her name put on my deed if I had known she was still married to Raymond Rudisill," and further, "if I had known she was still married to Raymond Rudisill I would have waited until she got her divorce, then I would have married her, then her name probably would have been on the deed, 'cause the house wasn't purchased until '69."

Ms. Evans corroborated plaintiff's testimony that she had informed him in May 1980 that defendant had not obtained a divorce from her first husband when plaintiff purportedly married defendant. Plaintiff was apparently shocked by this information. Ms. Evans knew defendant was not divorced from Rudisill at

the time of her marriage to plaintiff because defendant had discussed with her how to alter the date on the divorce papers to make it appear she had been divorced at the time of her marriage to plaintiff. She testified that they had actually changed the date, although the paper was not introduced at trial.

At the close of plaintiff's evidence defendant moved to dismiss for failure to make out a prima facie case. This motion was granted, the trial court finding that plaintiff failed to offer evidence "that at the time the property was conveyed to Plaintiff and Defendant jointly on May 9, 1969 that Defendant fraudulently induced Plaintiff to add Defendant's name to the deed." Thus he declared the parties to have equal interests as tenants in common of the property. He also ordered plaintiff to pay $500 to defendant's attorney as partial payment of her fees.

In addition to the reformation action, Judge Black consolidated with it for trial a separate suit by plaintiff to have the marriage declared void *ab initio*. The trial court declared the marriage void on the basis of defendant's prior existing marriage.

The Court of Appeals reviewed the trial court's dismissal of the reformation action and its award of attorney's fees. It agreed there was insufficient evidence that defendant's false representation at the time of the marriage induced plaintiff to have the property conveyed to them as tenants by the entirety nine years later. It reversed the award of attorney's fees, however, because they were not allowed by statute.

We believe the Court of Appeals erred in affirming the trial court's dismissal of plaintiff's action to reform the deed for insufficiency of the evidence. An action to reform an instrument usually arises in "cases in which there has been mutual mistake of the parties or mistake by one of the parties and fraud by the other." *Hubbard and Co., Inc. v. Horne*, 203 N.C. 205, 208, 165 S.E. 347, 349 (1932) (mistake of draftsman also basis for reformation); *see* 11 N.C. Index 3d, Reformation of Instruments § 1 (1978). All the essential elements for reformation must be proved by clear, strong, and convincing evidence. *Hubbard and Co., Inc. v. Horne, supra*, 203 N.C. at 209, 165 S.E. at 349. *See also Lawrence v. Heavner*, 232 N.C. 557, 61 S.E. 2d 697 (1950); *Burton v. Life and Casualty Ins. Co.*, 198 N.C. 498, 152 S.E. 396 (1930); *Ricks v. Brooks*, 179 N.C. 204, 102 S.E. 207 (1920). The elements of fraud

which must be proved in order to set aside a contract or other instrument are:

> First, there must be a misrepresentation or concealment. Second, an intent to deceive or negligence in uttering falsehoods with intent to influence the acts of others. Third, the representations must be calculated to deceive and must actually deceive. And, fourth, the party complaining must have actually relied upon the representations.

Ward v. Heath, 222 N.C. 470, 472, 24 S.E. 2d 5, 7 (1943). *See also Kemp v. Funderburk*, 224 N.C. 353, 355, 30 S.E. 2d 155, 157 (1944).

In the case now before us plaintiff offered evidence that defendant misrepresented her marriageability in 1960 and continued to conceal the fact that she had not been divorced from Rudisill when she married plaintiff throughout their purported marriage. A reasonable trier-of-fact could conclude that defendant intended to deceive plaintiff about the validity of their marriage, thus causing him to treat her as his lawful wife. Finally, a trier-of-fact could reasonably infer that plaintiff was actually deceived by defendant's continuing misrepresentation of their marital status, and relied upon the fraudulently-induced belief that defendant was his wife in having her named, as his wife, a tenant by the entirety of the residential realty.

Lawrence v. Heavner, supra, 232 N.C. 557, 61 S.E. 2d 697, and *Burleson v. Stewart*, 180 N.C. 584, 105 S.E. 182 (1920), two cases factually on all fours with the case before us now, support our conclusion that plaintiff has established a prima facie case. In *Lawrence* the Court found evidence that the "wife" had married the "husband" with knowledge that she had an existing marriage, and that he had inserted her name as a co-grantee to real property purchased with his money in the mistaken belief that she was his wife was sufficient to create a jury question in his action for reformation. 232 N.C. at 560, 61 S.E. 2d at 699. In *Burleson* the plaintiff had reserved a life estate for himself and his wife in real property conveyed to others. The Court held:

> The plaintiff was the owner of the land and the defendant joined in the deed as his wife, and it is clear that the reservation in the deed was not to the defendant, but to the wife of the plaintiff, and as her marriage with the plaintiff

> was void, she having at that time a living husband, there was no one to take the benefit of the reservation to her according to the intent of the owner of the land, and it would therefore be void.
>
> Again, the deed was executed either by the mutual mistake of both parties, if both believed the former husband to be dead, or by the mistake of the husband, the plaintiff, and the fraud of the wife, if she married the plaintiff knowing that her former husband was living, and in either event the court of equity would reform the deed and restore the plaintiff to his rights as owner of the land.
>
> We are therefore of opinion that the defendant has no rights in the land in controversy, and that the plaintiff is entitled to recover possession thereof.

180 N.C. at 585, 105 S.E. at 183 (deed named "T. C. Burleson and wife, Emily L. Burleson" as grantors in whom the life estate was reserved).

Thus, we believe plaintiff offered sufficient evidence to make out a prima facie case, and his action should not have been dismissed at the close of his evidence.

We agree with the Court of Appeals, for the reasons stated in its opinion, that the district court erred in awarding attorney's fees to defendant.

We affirm the Court of Appeals insofar as it reversed the trial court's award of attorney's fees. We reverse the Court of Appeals insofar as it affirmed the trial court's dismissal of plaintiff's claim for insufficient evidence and remand to Mecklenburg District Court for a new trial.

Affirmed in part;

Reversed in part and remanded for new trial.

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

WACHOVIA BANK & TRUST COMPANY, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF GEORGE G. JOHNSON v. CHARLES H. LIVENGOOD, JR., NORMAN B. LIVENGOOD, D. JOHNSON LIVENGOOD, BETTY J. CRISP, J. ERIC JOHNSON, JR. AND BETTY BUGG CROUCH

No. 86PA82

(Filed 25 August 1982)

Wills § 44— trust corpus—per capita or per stirpes distribution

Where testator's will provided that the net income of a trust should be paid in equal shares to his two sisters and his sister-in-law, or the survivors of them, and that at the death of the last survivor, the trust should terminate and be paid over "in equal shares" to his nieces and nephews "per stirpes," the testator did not intend to use the technical words "per stirpes" in their legal or technical sense as his use of the words "in equal shares" indicated otherwise, and therefore the general rule that where a bequest is to a class it takes per capita in the absence of clear language showing that the testator intended a different result applied.

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

ON defendants Livengood's petition for discretionary review from the decision of the Court of Appeals reported at 54 N.C. App. 198, 282 S.E. 2d 512 (1981), affirming summary judgment for the defendant Betty Bugg Crouch entered at the 8 December 1980 Session of Superior Court, DURHAM County, *Brewer, J.* presiding.

Powe, Porter and Alphin, P.A., by E. K. Powe and Eugene F. Dauchert, Jr., Attorneys for Charles H. Livengood, Jr., Norman B. Livengood and D. Johnson Livengood, defendant-appellants.

Marshall, Williams, Gorham & Brawley, by A. Dumay Gorham, Jr., Attorney for Betty Bugg Crouch, defendant-appellee.

MEYER, Justice.

The sole issue in this case is whether the provision in a will for distribution of trust assets upon termination "in equal shares to my nieces and Nephews per Stripes (sic)" requires a *per stirpes* or a *per capita* distribution. We hold that a *per capita* distribution is required.

On 20 May 1980 plaintiff, Wachovia Bank & Trust Company, N.A., trustee under the testamentary trust created under the Last Will and Testament of George G. Johnson, brought this

declaratory judgment action in Superior Court, Durham County, for a construction of that portion of the Johnson will providing for distribution of the trust assets upon its termination. Item Fourth of the will provided for the disposition of the residue, in fact comprising the majority, of Johnson's estate as follows:

> All of my other property, real, personal, and mixed, wherever the same may be situated, I give, devise and bequeath unto the Wachovia Bank and Trust Company, Durham, N.C., as Trustee, to be held, managed, and invested, reinvested, used and disposed of as follows:
>
> (1) The Trustee shall pay over the net income in equal shares to my sister, Mary Johnson Livengood, Helen Johnson Bugg, and my sister-in-law Helen Noell Johnson, or the survivors of them.
>
> (2) Upon the death of the last survivors of my sisters, Mary Johnson Livengood, and Helen Johnson Bugg, and my sister-in-law Helen Noell Johnson, this trust shall terminate and be paid over in equal shares to my nieces and Nephews per Stripes. (sic)

All of the named beneficiaries are now deceased, and the defendants in this action are all of the nieces and nephews of the testator. Defendant Betty Bugg Crouch is the daughter of Helen Johnson Bugg and filed answer contending that the will requires a *per stirpes* distribution, whereby she would receive one-third of the trust property; defendants Norman B. Livengood, D. Johnson Livengood and Charles H. Livengood, Jr., as sons of Mary Johnson Livengood, would each receive one-ninth of the trust property; and defendants J. Eric Johnson, Jr. and Betty J. Crisp, as children of Helen Noell Johnson, would each receive one-sixth of the property. Defendants Livengood filed answer contending that the will requires a *per capita* distribution whereby each of the six nephews and nieces would receive one-sixth of the trust property. Defendants J. Eric Johnson, Jr. and Betty J. Crisp did not answer plaintiff's complaint. Under either a *per capita* or a *per stirpes* distribution, they would each receive one-sixth of the trust property.

The answering defendants moved for summary judgment. It appearing that there was no genuine issue as to any material fact

and that the only issue presented was one of law, the trial court on 12 December 1980 entered summary judgment in favor of Betty Bugg Crouch, requiring a *per stirpes* distribution. The Court of Appeals affirmed that ruling, and on 3 March 1982 this Court allowed appellants Livengood's petition for discretionary review. The appellee is Betty Bugg Crouch. Plaintiff Wachovia is not involved in this appeal.

When the meaning of any part of a will is the subject of controversy, it is the prerogative of the court to construe the contested provision and declare the true meaning thereof. *Trust Co. v. Waddell*, 237 N.C. 342, 75 S.E. 2d 151 (1953). The intent of the testator is the polar star that must guide the court in the interpretation of a will, for his intent, as so expressed, is his will. *Wing v. Trust Co.*, 301 N.C. 456, 272 S.E. 2d 90 (1980); *Trust Co. v. Bryant*, 258 N.C. 482, 128 S.E. 2d 758 (1963); *Trust Co. v. Waddell*, 237 N.C. 342, 75 S.E. 2d 151.

In support of their contention that the will requires a *per capita* distribution, the appellants rely on the general rule that where a devise or bequest is to a class, such as nephews and nieces, the devisees take *per capita* unless it clearly appears that the testator intended a different division. *Trust Co. v. Bryant*, 258 N.C. 482, 128 S.E. 2d 758; *In re Battle*, 227 N.C. 672, 44 S.E. 2d 212 (1947). The appellee, Betty Bugg Crouch, on the other hand, points to the rule that when a testator uses technical words or phrases in disposing of property, it is presumed that he used them in their well-known legal or technical sense unless, in some appropriate way in the instrument, he indicates otherwise. *Ray v. Ray*, 270 N.C. 715, 155 S.E. 2d 185 (1967); *McCain v. Womble*, 265 N.C. 640, 144 S.E. 2d 857 (1965). As further authority for requiring a *per stirpes* distribution in this case, she points to two prior cases wherein this Court has given effect to the term *per stirpes*. First is *Walsh v. Friedman*, 219 N.C. 151, 13 S.E. 2d 250 (1941), wherein the language of the codicil was as follows:

> Upon the death of my daughter Catherine without having been married and without having entered a convent, I give and bequeath the same to and among such of my four sons, William S.; John F.; Charles H. and Henry C., as may be then living and the children then living of such as may have died *per stirpes*, in equal shares, absolutely.

Although the court pointed out that the question hardly arose, since all of the testator's children had died and only one left children, it interpreted the language to defeat what otherwise would have been a *per capita* distribution. Second, in *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 (1949), the Court interpreted as requiring a *per stirpes* distribution to the testator's grandchildren the following language:

> That this trust shall remain in full force and effect for sixty years from the date of my death, at which time my said estate shall be equally divided between the heirs of my children, and they shall receive all of my property, both real, personal and mixed, *per stirpes*.

Appellee Crouch argues that the language in this case, like that in *Walsh* and *Lide*, must be interpreted to require a *per stirpes* distribution. We cannot agree. In both *Walsh* and *Lide*, the devisees were referred to not as the testator's grandchildren, but as "the children . . . of [the testator's sons]," and "heirs of [the testator's] children." The devisees here, on the other hand, are referred to as "my nieces and Nephews." Furthermore, the words "in equal shares" can only mean *per capita*. *See Ex parte Brogden*, 180 N.C. 157, 104 S.E. 177 (1920). The use of those words in the will not only buttresses the *per capita* presumption, but also indicates that the term *per stirpes* (which the testator spelled *per stripes*) was not intended to be given its technical meaning. *See Ray v. Ray*, 270 N.C. 715, 155 S.E. 2d 185; *McCain v. Womble*, 265 N.C. 640, 144 S.E. 2d 857; *Trust Co. v. Bryant*, 258 N.C. 482, 128 S.E. 2d 758; *In re Battle*, 227 N.C. 672, 44 S.E. 2d 212. We conclude that the testator did not intend to use the technical words "*per stirpes*" in their legal or technical sense as his use of the words "in equal shares" indicates otherwise. We therefore apply the general rule that where a bequest is to a class (here nieces and nephews) it takes *per capita* in the absence of clear language showing that the testator intended a different result.

The testator intended each of his nieces and nephews to receive an equal share of the trust assets upon its termination. Thus, we hold that a *per capita* distribution is required under the language of the will.

The decision of the Court of Appeals is reversed and the case is remanded to that court for further remand to the Superior Court, Durham County. The Superior Court, Durham County shall vacate the entry of Summary Judgment for the appellee Betty Bugg Crouch and enter Summary Judgment for the appellants Livengood.

Reversed and remanded.

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

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

AMERICAN TRAVEL CORP. v. CENTRAL CAROLINA BANK

No. 390P82.

Case below: 57 N.C. App. 437.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 25 August 1982.

BARCLAYSAMERICAN/CREDIT CO. v. RIDDLE

No. 422P82.

Case below: 57 N.C. App. 662.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 August 1982.

CLOUTIER v. STATE

No. 392P82.

Case below: 57 N.C. App. 239.

Petition by Attorney General for writ of certiorari to North Carolina Court of Appeals denied 3 August 1982.

COFFEY v. AUTOMATIC LATHE CUTTERHEAD

No. 358P82.

Case below: 57 N.C. App. 331.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 August 1982.

COMPLEX, INC. v. FURST

No. 373P82.

Case below: 57 N.C. App. 282.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 25 August 1982.

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

FARMERS BANK v. BROWN DISTRIBUTORS

No. 372PA82.

Case below: 57 N.C. App. 313.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 3 August 1982.

FULLER v. SOUTHLAND CORP.

No. 375P82.

Case below: 57 N.C. App. 1.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 August 1982.

GLADSON v. PIEDMONT STORES

No. 371P82.

Case below: 57 N.C. App. 579.

Petition by defendants for discretionary review under G.S. 7A-31 denied 25 August 1982.

GOODWIN v. BALDWIN'S INC.

No. 425P82.

Case below: 57 N.C. App. 709.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 25 August 1982.

GUNTHER v. BLUE CROSS/BLUE SHIELD

No. 460P82.

Case below: 58 N.C. App. 341.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 August 1982.

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

HERNDON v. ROBINSON

No. 353P82.

Case below: 57 N.C. App. 318.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 August 1982. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 3 August 1982.

HOPE v. JONES

No. 400P82.

Case below: 57 N.C. App. 600.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 25 August 1982.

IN RE HUBER

No. 399P82.

Case below: 57 N.C. App. 453.

Petition by Hazelwood for discretionary review under G.S. 7A-31 Denied 3 August 1982. Motion by Guardian ad Litem and Mecklenburg County DSS to dismiss appeal for lack of substantial constitutional question allowed 3 August 1982.

INSURANCE CO. v. PRUITT

No. 251P82.

Case below: 56 N.C. App. 814.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 August 1982.

LEA CO. v. BOARD OF TRANSPORTATION

No. 397PA82.

Case below: 57 N.C. App. 392.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 25 August 1982.

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

LEONARD v. JOHNS-MANVILLE SALES CORP.

No. 396P82.

Case below: 57 N.C. App. 553.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 25 August 1982.

PLOW v. BUG MAN EXTERMINATORS

No. 308P82.

Case below: 57 N.C. App. 159.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 August 1982.

ROBERSON v. GRIFFETH

No. 359P82.

Case below: 57 N.C. App. 227.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 August 1982.

RUTLEDGE v. TULTEX CORP.

No. 415PA82.

Case below: 56 N.C. App. 345.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 3 August 1982.

SAINTSING v. TAYLOR

No. 406P82.

Case below: 57 N.C. App. 467.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 August 1982.

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

SCOVILL MFG. CO. v. TOWN OF WAKE FOREST

No. 452P82.

Case below: 58 N.C. App. 15.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 25 August 1982.

SHEETS v. SHEETS

No. 318P82.

Case below: 57 N.C. App. 336.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 August 1982.

SHEPHERD v. CONNESTEE

No. 377P82.

Case below: 57 N.C. App. 371.

Petition by plaintiffs for writ of certiorari to North Carolina Court of Appeals denied 25 August 1982.

STATE v. ANDERSON

No. 420P82.

Case below: 57 N.C. App. 602.

Petition by defendants for discretionary review under G.S. 7A-31 denied 25 August 1982.

STATE v. BEASLEY

No. 343P82.

Case below: 57 N.C. App. 208.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 3 August 1982. Motion by defendant to dismiss appeal for lack of significant public interest allowed 3 August 1982.

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

STATE v. BRYANT

No. 404P82.

Case below: 57 N.C. App. 600.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 August 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 25 August 1982.

STATE v. GOOCH

No. 484PA82.

Case below: 58 N.C. App. 582.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 25 August 1982.

STATE v. GRANT

No. 395P82.

Case below: 57 N.C. App. 589.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 August 1982.

STATE v. GRIFFIN

No. 442P82.

Case below: 57 N.C. App. 684.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 25 August 1982.

STATE v. GRIFFIN

No. 443P82.

Case below: 57 N.C. App. 709.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 25 August 1982.

STATE v. HANSON

No. 391PA82.

Case below: 57 N.C. App. 595.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 25 August 1982.

STATE v. HENRY

No. 294P82.

Case below: 57 N.C. App. 168.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 August 1982.

STATE v. JEFFRIES

No. 403P82.

Case below: 57 N.C. App. 416.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 August 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 25 August 1982.

STATE v. KEE

No. 374P82.

Case below: 57 N.C. App. 372.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 3 August 1982. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 3 August 1982.

STATE v. KIMBRELL

No. 370P82.

Case below: 57 N.C. App. 372.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 August 1982.

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

STATE v. MAVROGIANIS

No. 275P82.

Case below: 57 N.C. App. 178.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 August 1982.

STATE v. PILAND

No. 419P82.

Case below: 58 N.C. App. 95.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 August 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 25 August 1982.

STATE v. SHACKLEFORD

No. 466P82.

Case below: 56 N.C. App. 815.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 25 August 1982.

STATE v. SHERRILL

No. 412P82.

Case below: 57 N.C. App. 601.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 August 1982.

STATE v. THOMASON

No. 379P82.

Case below: 57 N.C. App. 601.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 August 1982.

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

STATE v. WASHINGTON

No. 356P82.

Case below: 57 N.C. App. 309.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 August 1982.

STATE v. WHALEY

No. 416P82.

Case below: 58 N.C. App. 233.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 25 August 1982.

STATE v. WILSON

No. 402P82.

Case below: 57 N.C. App. 444.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 25 August 1982.

TALAFERRO v. WRIGHT

No. 272P82.

Case below: 56 N.C. App. 643.

Petition by third-party defendant for discretionary review under G.S. 7A-31 denied 3 August 1982.

TECH LAND DEVELOPMENT v. INSURANCE CO.

No. 351P82.

Case below: 57 N.C. App. 566.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 August 1982.

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

TEXACO v. CREEL

No. 381PA82.

Case below: 57 N.C. App. 611.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 3 August 1982.

TRIANGLE AIR COND. v. BOARD OF EDUCATION

No. 405P82.

Case below: 57 N.C. App. 482.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 August 1982.

TURNER v. EPES TRANSPORT SYSTEMS

No. 331P82.

Case below: 57 N.C. App. 197.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 August 1982.

WHITEHURST v. BATES

No. 364P82.

Case below: 57 N.C. App. 372.

Petition by defendants for discretionary review under G.S. 7A-31 denied 25 August 1982.

WILLIAMS v. BETHANY FIRE DEPT.

No. 327PA82.

Case below: 57 N.C. App. 114.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 3 August 1982.

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

PETITIONS TO REHEAR

HOYLE v. ISENHOUR BRICK & TILE CO.

No. 82A82.

Case below: 306 N.C. 248.

Petition by defendants denied 25 August 1982.

IN RE MOORE

No. 5PA82.

Case below: 306 N.C. 394.

Petition by Lillie Ruth Moore denied 25 August 1982.

STATE OF NORTH CAROLINA v. SHERWIN RENE LUSTER

No. 23A82

(Filed 5 October 1982)

1. **Criminal Law § 7— entrapment—officer or agent of government**

Entrapment is a defense only when the entrapper is an officer or agent of the government.

2. **Criminal Law §§ 7.1, 121— entrapment by agent of police—instruction not required**

In a prosecution for felonious possession of a stolen automobile which was sold by defendant to a police-organized sting or undercover fencing operation, defendant was not entitled to an instruction on the defense of entrapment by an agent of the police where an unwitting third party, presented with an opportunity to commit the offense by an undercover police officer, induced defendant's participation in the offense without specific direction of the officer, since the third party was not an agent of the police. Nor was defendant entitled to the general entrapment instruction for the reason that the evidence established that he was not an innocent victim without predisposition to commit the crime where it disclosed that defendant accepted from the undercover officers a few hundred dollars for a relatively new automobile and then accepted from the third party only a percentage commission of that amount, and that defendant bragged to the undercover officers that he dealt in stolen cars, that he had inside contacts at a car dealership, and that he could get better and more expensive cars and other goods.

3. **Criminal Law § 121— evidence did not require entrapment instruction**

In a prosecution for larceny of an automobile which was sold by defendant to a police-organized sting or undercover fencing operation, testimony by defendant that, when he earlier sold a car to the undercover officers, an officer handed him money and asked him if he could bring some more cars did not require the trial court to instruct on the defense of entrapment where defendant's testimony was overwhelmingly refuted by the testimony of other witnesses present during the prior sale and by a videotape of that transaction.

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

Justice EXUM dissenting.

Justice CARLTON joins in this dissent.

ON appeal from an unpublished decision of a divided panel of the Court of Appeals.[1] This appeal involves two separate trials. In Case No. 79CRS22551 before *Clark, J.* at the 16 December 1979 Session of Superior Court, DURHAM County, defendant was found

1. 55 N.C. App. 482, 288 S.E. 2d 388 (1982).

guilty of felonious larceny of a 1979 Pontiac automobile and was sentenced to a term of imprisonment of six to ten years. Defendant gave notice of appeal and time for filing the record on appeal was extended from time to time but the appeal was never perfected. In Case No. 79CRS28603 before *Godwin, J.* at the 8 January 1980 Session of Superior Court, DURHAM County, defendant was found guilty of felonious possession of a 1978 Dodge automobile and was sentenced to six to ten years to commence at the expiration of the sentence imposed in Case No. 79CRS22551. As in the former case, notice of appeal was given and time for filing the record on appeal was extended from time to time but the appeal was never perfected. On the same day judgment was entered, a motion for appropriate relief was filed by defendant's trial counsel but was never heard or disposed of. Subsequently, on motion of defendant, his trial counsel was removed and new counsel was appointed. Defendant's new counsel filed motions to extend time for filing records on appeal, which the Court of Appeals treated as petitions for writs of certiorari and ordered that they be allowed. The cases were consolidated for appellate review. The Court of Appeals, with one judge dissenting, found no error.

Rufus L. Edmisten, Attorney General, by Sarah C. Young, Assistant Attorney General, for the State.

Charles H. Hobgood, Attorney for defendant-appellant.

MEYER, Justice.

Both of the cases before us involve the delivery and sale of the particular stolen automobile to a police-organized "sting" or undercover fencing operation. The issue before this Court in each case concerns the defense of entrapment—in Case No. 79CRS28603, whether the trial judge, though he gave an instruction on entrapment, erred in not instructing on entrapment by an agent, and in Case No. 79CRS22551, whether the trial judge erred in refusing to give an instruction on the general defense of entrapment. We find no error and affirm the decision of the Court of Appeals.

The main question presented by these two appeals is whether entrapment can be effected through an unwitting agent, or otherwise stated, whether the defense of entrapment is

available to a defendant where an unwitting third party, presented with an opportunity to commit the offense by an undercover police officer, then induces defendant's participation in the offense without specific direction of the officer. We hold that under such circumstances the defense of entrapment is not available.

In the interest of clarity we will state the summary of the pertinent facts in each case separately. However, we will not repeat in the second summary those facts not necessary to an understanding of the difference in the issue presented in that case.

Case No. 79CRS28603

In Case No. 79CRS28603 the State presented evidence that officers of the Durham, North Carolina Public Safety Department, and agents of the State Bureau of Investigation, working under cover, operated a sting operation in a building located at 624 East Geer Street in the city of Durham under the name of Part Time Help Limited. The officers used this part-time employment agency as a front for the purpose of buying stolen property. The operation began in November 1978 and ran through August 1979. Part Time Help Limited was listed in the telephone book and ran one advertisement in the newspaper announcing that they would offer people part-time jobs. Approximately seventy people utilized "the services" of Part Time Help Limited, although not that many were actually arrested. There were some legitimate inquiries for part-time jobs. The obvious purpose of the operation was to combat theft and theft rings and the fencing of stolen goods in and around Durham County. The undercover officers let it be known that they would buy stolen property. As the sale and purchase of the property took place, the transactions between the sellers and the undercover agents were videotaped by a hidden camera. Officer D. L. Raney of the Durham Public Safety Department testified that he was one of the undercover agents involved and that on 22 May 1979 at approximately 3:29 p.m., the defendant Sherwin Rene Luster and another man Ricky Lamont Burnette came into the building. The defendant Luster handed him a set of keys and Officer Raney went outside to look at the car that defendant had brought. As Officer Raney went outside to look over the car, the defendant and Burnette remained inside the

building with an undercover agent of the SBI, Bruce E. Black. Defendant was later charged with the possession of the car, a 1978 Dodge.

When Officer Raney returned to the building, the defendant stated that he could get new Mercedes-Benz and Cadillac automobiles. The defendant agreed to accept $400.00 for the Dodge. Officer Raney laid that amount of money on the counter and the defendant took it. The defendant did not tell the undercover officers specifically how he could get the Mercedes-Benz and Cadillac automobiles but said that he had someone working with him and he could get them.

The defendant did not say how he obtained the 1978 Dodge automobile nor was he asked by the officers.

Officer Raney testified that Burnette had been in quite a few times before and was considered a "regular." Burnette himself had previously brought cars to sell to the undercover officers. Raney testified that as part of the operation the officers encouraged people who came into the store to get other people to bring materials to them. He further testified that when they had recorded a person on tape enough times, they did not exactly discourage him from coming back with the same items, but they did not offer him as much money on succeeding purchases. The officers would continue to suggest to these people that they bring other people around. In effect, the officers told people that they wanted only quality merchandise but could not pay a great deal of money for it. They did not actually say that they would buy "stolen property."

Officer R. D. Simmons of the Durham Police Department was working as the video officer at the time the officers filmed the foregoing transaction with the defendant. In substance his testimony paralleled that of Officer Raney.

After proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape, it was admitted into evidence and shown to the jury over defendant's objection. Subsequently, defendant made a motion to view the videotape and have a court reporter transcribe the same. Upon proper order a court reporter, who was not present at the trial, viewed the videotape and prepared a transcript of the same which is set out in the record on appeal.

In addition to verifying Officer Raney's testimony, Officer Black testified that the defendant asked if the undercover agents could handle several new cars, indicating that he had access to new Dodges, Cordobas and Challengers, and that he had people working with him on the inside at the Dodge dealership. According to Officer Black, the defendant said that when he got a car, he didn't want to keep it too long and wanted to get it to Part Time as soon as he could.

Officer Black also testified on cross-examination that it was part of his work to get as many people involved in the fencing operation as possible. He told people who brought in property that if they knew others who had any merchandise for sale, to come in and the undercover agents would discuss purchasing the merchandise from them. Officer Black testified that he told this to Ricky Burnette.

Burnette testified that on several occasions he had sold various types of goods including five cars to the undercover agents. All of this had occurred before he met the defendant. He further testified that after a while the undercover officers discouraged him from doing further business and wanted him to bring someone else down with the cars. He made approximately fifteen to eighteen trips over a long period of time and brought five or six different people. Burnette further testified that on 22 May 1979 he went over to the defendant's house and told the defendant that he needed someone to drive a car from Coggin Pontiac, offering to give him a percentage of any money he received for the car. The defendant went to Coggin Pontiac with Burnette, who entered through the fence, got the car and drove it away. The defendant then drove the car to Part Time Help Limited. Burnette told the defendant that the people at Part Time Help Limited would not accept anything from him (Burnette) and asked the defendant to take the keys in and transact the deal for him. He further testified that he told the defendant how to talk to the people to get along with them.

The defendant testified that he had been convicted of misdemeanor breaking and entering when he was sixteen or seventeen but that he had not been in any trouble since then and he was now twenty-three years of age. He testified that he had been out of work some five or six weeks and that Burnette told him that

he was working for Part Time Help Limited when he asked the defendant to help him. Defendant testified that he went to Coggin Pontiac with Burnette and saw Burnette go through the fence and get the car. He followed Burnette to Chapel Hill Boulevard where they switched cars. Defendant then drove the car to Part Time Help Limited. He denied knowing that the car was stolen.

At the trial of this Case No. 79CRS28603 the defendant requested and the trial judge instructed the jury on the defense of entrapment. However, in instructing the jury initially, and later in instructing the jury on entrapment after the jury had asked the trial judge to repeat the definition of entrapment, the court instructed that the inducement had to come from one or some of the two police officers and two SBI agents who testified. The trial judge did not instruct that the inducement could come through someone acting as an agent for the officers (here Burnette). This the defendant cites as prejudicial error.

The defendant's theory of entrapment here is that the police induced an unwitting third party, Ricky Burnette, into becoming their agent for the purpose of persuading others to bring them stolen property and that Burnette persuaded the defendant, who was not otherwise so inclined, into helping him steal property. The defendant contends that his evidence showed that he was not otherwise disposed to commit the crime; that he was induced by Burnette to become involved; that Burnette through the financial manipulation of the police, became and was acting, although perhaps unwittingly, as an agent of the police; and that this evidence called for an instruction on the defense of entrapment by an agent. The defendant does not contend that entrapment must be found as a matter of law, but merely that his evidence was sufficient to justify the entrapment by agent charge.

In determining whether a defendant is entitled to raise the defense of entrapment, this Court employs a two-step analysis:

> 'Whether the defendant was entitled to have the defense of entrapment submitted to the jury is to be determined by the evidence. Before a Trial Court can submit such a defense to the jury there must be some credible evidence tending to support the defendant's contention that he was a victim of entrapment, as that term is known to the law.' *State v. Burnette*, 242 N.C. 164, 173, 87 S.E. 2d 191, 197 (1955). The

> defense of entrapment consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities. *Sherman v. United States*, 356 U.S. 369, 2 L.Ed. 2d 848, 78 S.Ct. 819 (1958); *State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975); *State v. Burnette, supra. In the absence of evidence tending to show both inducement by government agents and that the intention to commit the crime originated not in the mind of the defendant, but with the law enforcement officers, the question of entrapment has not been sufficiently raised to permit its submission to the jury. State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Coleman*, 270 N.C. 357, 154 S.E. 2d 485 (1967); *State v. Burnette, supra.* (Emphasis added.)

State v. Walker, 295 N.C. 510, 513, 246 S.E. 2d 748, 749-50 (1978).

Interpreting the evidence most favorably to the defendant it reflects only that the officers encouraged people who transacted sales with them to encourage other people to bring goods to them, and that once they had enough evidence on a suspect, they did not offer him as much money (which might have caused the suspect to seek others to act for them on a commission basis). We conclude that this is not sufficient evidence to indicate that such suspects became agents of the police, although unwitting ones, and therefore "the question of entrapment is not sufficiently raised to permit its submission to the jury." This conclusion is dictated by our assessment of the law and the evidence on the two elements necessary to entitle defendant to an entrapment charge as set forth in *Walker*. These two elements of (1) inducement and (2) origin of intent bear repeating:

> The defense of entrapment consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities.

295 N.C. at 513, 246 S.E. 2d at 749-50.

Inducement:

[1, 2] While there is authority in a minority of other jurisdictions to the contrary, North Carolina follows the majority rule that entrapment is a defense only when the entrapper is an officer or agent of the government.[2] *State v. Jackson*, 243 N.C. 216, 90 S.E. 2d 507 (1955). *See State v. Whisnant*, 36 N.C. App. 252, 243 S.E. 2d 395 (1978); *State v. Yost*, 9 N.C. App. 671, 177 S.E. 2d 320 (1970); Criminal Law—A Survey and Appraisal of the Law of Entrapment in North Carolina, 54 N.C. L. Rev. 982 (1976); 21 Am. Jur. 2d, Criminal Law, § 202 (1981). It is defendant's contention, however, that he was induced to commit the crime through Burnette, and that Burnette was acting as an agent of the police, albeit unwittingly. It is not disputed that Burnette "induced" the defendant to commit the crime or that the defendant succumbed to the inducement. Our law is replete with examples of defendants who, but for the "inducement" of another, would not have committed the crime charged. They are not afforded the defense of entrapment. The threshold question, then, is whether our law includes in its definition of *agent* an unwitting third party who, presented with an opportunity to commit the offense by an undercover police officer, then induces defendant's participation in the offense without specific direction from the officer. Our appellate Courts have not passed on this precise question.

We find the phrase "unwitting agent" to be a contradiction in terms. An agent is "(a) person authorized by another to act for him." Black's Law Dictionary 59 (rev. 5th ed. 1979). An agency relationship must be created by mutual agreement. It cannot be created by one party *in invitum*. *Johnson v. Orrell*, 231 N.C. 197, 56 S.E. 2d 414 (1949). If the existence of an alleged agency relationship is unknown to the "agent," the "agent's" authority is without scope or definition—a situation which invites abuse and far-reaching legal ramifications. Thus, where the government

2. The federal courts have universally declined to permit the defense to be raised in cases where an "entrapment" was accomplished by a private person rather than a government agent. States which have made entrapment a statutory defense uniformly provide that the inducement must come from a Government officer or his agent, or a person acting "under the direction" of the officer. Park, The Entrapment Controversy, 60 Minn. L. Rev. 163 (1976).

denies that the entrapper is, in fact, its agent, the defendant is required to produce substantial credible evidence of an agency relationship. *State v. Yost*, 9 N.C. App. 671, 177 S.E. 2d 320. This he failed to do. Defendant offered no evidence at trial other than that Burnette, acting on the suggestion of law enforcement officers, encouraged others to sell stolen goods to the officers. The evidence before us shows that Burnette was acting solely with the objective of furthering his own economic interests. In short, Burnette needed an accomplice and the defendant was induced, as a willing candidate, to act in that capacity.[3]

Origin of Criminal Design:

"[W]hen the defense of entrapment is raised, defendant's predisposition to commit the crime becomes the central inquiry." *State v. Salame*, 24 N.C. App. 1, 10, 210 S.E. 2d 77, 83 (1974), *cert. denied*, 286 N.C. 419, 211 S.E. 2d 800 (1975). See *United States v. Russell*, 411 U.S. 423, 36 L.Ed. 2d 366 (1973). There is ample evidence before us disclosing that defendant was predisposed to commit the crime charged. He bragged to the undercover agents that he dealt in stolen cars, that he had inside contacts at Coggin Pontiac, and that he could get better and more expensive cars and other goods, etc.

Officer Raney testified with respect to this aspect of the transaction as follows:

> When I had examined the car, I came back inside at which time the defendant stated that he could get new Mercedes and Cadillacs.

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3. The circumstances surrounding this particular "sting" operation suggest that Burnette's choice of the defendant was not based on a random selection of a theretofore nonpredisposed individual, but rather was based on facts known to him suggesting that defendant would participate willingly in the illegal activity.

> [T]here is little risk that a middleman will attempt to induce nonpredisposed persons to engage in crime when the middleman will receive no further reward for bringing additional people to the opportunity. For example, government agents occasionally establish a fictitious fencing operation to detect traffic in stolen property and, to inform the criminal community of their presence, form a network of middlemen simply by asking the fence's customers to tell their friends about the opportunity.

Note, Entrapment Through Unsuspecting Middlemen, 95 Harv. L. Rev. 1122, 1135 n. 66 (1982).

. . . .

When I re-entered the building I told the defendant that I would give him $400.00 for the car. He agreed to that. So I laid $400.00 on the counter, and Mr. Luster took the money. I don't know exactly how long this transaction took, probably ten minutes.

Mr. Luster said he could get new Mercedes and Cadillacs, that he had someone working with him. He didn't tell me specifically how he could get Mercedes or Cadillacs. He did not tell me how he got this particular automobile. I did not ask him how he did it. I wanted to ask him, but I didn't have the chance.

Agent Black, one of the undercover SBI agents, testified in this regard as follows:

Luster asked if we could handle several new cars and stated that he had access to new Dodges, Cordobas, Challengers, and that he had people working with him on the inside at the Dodge dealership just outside of Durham. He stated that he also might be able to bring us Mercedes and Cadillacs.

Officer R. D. Simmons of the Durham Police Department who was operating the video camera testified in part as follows:

I observed the two suspects enter through the front door of the operation, walk up to the counter where some conversation was held between the parties. Mr. Raney then left the operation and there was some conversation between the parties and Agent Black of the SBI. A few minutes later Officer Raney returned, there was discussion between the parties about the vehicle that was purchased by the undercover officers as well as a conversation held by Mr. Luster with regard to him being able to bring in some other cars, referring to Mercedes-Benz and Cadillacs. Officer Raney then placed approximately $400.00 on the counter which was recorded by the video camera and on the cassette tape. Mr. Luster picked the money, then the two suspects left the operation and the officers then made other transactions.

The following excerpts from the transcript of the videotape of the transaction verify the testimony of these witnesses:

LUSTER: Yeah, everybody calls me Buddy. Look, I want to know whether, you know, I could get back with you on something. 'Cause, like, I got access to the damn cars, right?

BLACK: Unh-hunh.

LUSTER: And, ah, if the money is right, man, I can get you any damn thing you want. To be frank about it.

BLACK: Well, we'll have to talk about what you want in the way of money.

LUSTER: Well, everything I'll be bringing will be new, see.

BLACK: Unh-hunh.

LUSTER: So what I really would like to do is I'd like to talk in terms of anywhere from five on up when you're talking about a brand new car.

BLACK: Well, depends on what it is.

LUSTER: Okay. Large cars. What are you saying, like Cadillacs, Mercedes.

BLACK: Yes.

LUSTER: Okay, I see what you (inaudible).

BLACK: Five usually is the very tops we can pay on anything, unless it's something real nice.

. . . .

AGENT: What kind of cars are you talking about?

LUSTER: Well, it'd be in the range of Dodge, or—Dodge, Cordoba, Challenger, or anything in that range.

AGENT: Some of those little Dodges? Imports? Like a Colt or something?

LUSTER: Yeah, well, it's a Charger.

BURNETTE: That's a Challenger.

LUSTER: Challenger.

. . . .

RANEY: You work at Coggins (inaudible).

LUSTER: No, I just got access to a lot of stuff (inaudible). I know some people out there.

RANEY: So you got some people that will help you?

LUSTER: Yeah, got some people that's helping me, is what I'm saying. So I wanted to get in touch with y'all and see what kind of business we could talk, really.

AGENT: We can do some business.

. . . .

LUSTER: Well, the way I be dealing with it, the car don't actually be hot, hot. See, it's like, ah, a car that has been rented before, and, like, the rental cars, they may have—may take upward of two months before they even do anything. Depends on whether they have to rent it out again. See what I'm saying? With this fleet, you know?

RANEY: So they don't even miss it?

LUSTER: Nah. Nah.

AGENT: Okay, that's cool. That's cool.

LUSTER: They won't miss it for two or three weeks, probably.

. . . .

LUSTER: Well, look, what kind of price are we talking on this one?

BLACK: Well, you've seen it, man. You tell him. I don't know.

RANEY: It's a nice little car. On a brand new one like that, I'd go four. Four hundred dollars.

LUSTER: Okay, sounds sweet.

RANEY: This is your first deal, so I'm going to do you right.

BLACK: We may not be able to go that high all the time.

RANEY: May not be able to go that high all the time. It's according to how things are going on the other end.

BLACK: And whenever anybody comes in down here for the first time and brings us something nice, you know, we try and do them right, you know.

LUSTER: When I come back, I'll probably have something nice (inaudible).

. . . .

LUSTER: Well, what I'm trying to tell you is this. Look, it may not be just this kind of car. See what I'm saying? It may be—yeah, I can get a Mercedes, any damn thing (inaudible).

BLACK: Hey, man, if you can bring us a Mercedes, we're in business.

LUSTER: What kind of price you talking about when you say—see, I like to know what price it is. That way, I can pick what I want (inaudible).

BLACK: We'll go a little higher than four on a Mercedes.

LUSTER: You'll go what, now?

BLACK: I'll go a little higher than four on a Mercedes. I would like to see it first, you know. I don't want to talk about price until I see the merchandise. See what I mean?

LUSTER: Okay.

AGENT: But if you can get a Mercedes in here, my man, we'll do some business.

LUSTER: Or a Cadillac?

AGENT: Or a brand new Cadillac. We want brand new ones.

LUSTER: Brand new, I don't mess with brand new ones. (Inaudible).

. . . .

AGENT: Man, you get us a Mercedes, a brand new Mercedes, we can do some good business with you.

LUSTER: Hey, man, that looks good to me.

(AGENT hands money to Luster.)

In support of his contention that he did not know the vehicle was stolen, defendant argues that his statements to the officers were not truthful; that at the behest of Burnette, he was merely "puffing" to impress them. We reject this argument. Defendant accepted from the officers a few hundred dollars for a relatively new automobile and then accepted from Burnette only a percentage commission of that amount. The facts belie the contention that he did not know before he entered Part Time Help Limited that the cars were stolen.

When a defendant's predisposition to commit the crime charged is demonstrated, the defense of entrapment is not available to him. *Hampton v. United States*, 425 U.S. 484, 48 L.Ed. 2d 113 (1976); *United States v. Russell*, 411 U.S. 423, 36 L.Ed. 2d 366; *Sherman v. United States*, 356 U.S. 369, 2 L.Ed. 2d 848 (1958); *Sorrells v. United States*, 287 U.S. 435, 77 L.Ed. 413 (1932).

It is true of course that the undercover agents provided the opportunity for defendant to make the sales. However, merely providing the opportunity for one predisposed to criminal conduct does not constitute entrapment. *See Sorrells v. United States*, 287 U.S. 435, 77 L.Ed. 413; *State v. Boles*, 246 N.C. 83, 97 S.E. 2d 476 (1957).

Based on the record before us, defendant was not entitled to have the defense of entrapment submitted to the jury. The fact that the trial court did so was favorable to the defendant and cannot be assigned as error. Defendant has not met his burden of proving either inducement or that the criminal design originated in the minds of government officials. There was no evidence of inducement by the law enforcement officers themselves. Nor do we accept defendant's argument that Burnette acted as an "unwitting agent" for the officers in inducing defendant's participation. In fact, the evidence negates the existence of any agency relationship. Defendant was not entitled to an instruction of entrapment by an agent. Finally, we find sufficient evidence negating defendant's theory that he was an innocent victim without predisposition to commit the crime.

While the question presented in the first case is whether defendant was entitled to an instruction on entrapment specifically by an agent of the police, the question presented in the second case is whether he was entitled to the general entrapment instruction.

Case No. 79CRS22551

[3] In Case No. 79CRS22551 defendant was convicted of felonious larceny of a 1979 Pontiac. The material facts are substantially the same as those in Case No. 79CRS28603. The case arose from incidents occurring on 23 May 1979, the day after the events in Case No. 79CRS28603, and involved defendant's second visit to the sting operation. The State presented evidence from two employees of Coggin Pontiac that a man fitting defendant's description took the 1979 Pontiac that was stolen from Coggin Pontiac. Again the defendant delivered a stolen car to Part Time Help Limited, negotiated the sale of the car, and took $500.00 for it. This second transaction was also videotaped.

During this trial, defendant testified that before talking to Burnette, he had never had any desire to participate in any kind of stolen goods ring; that on 22 May, Burnette asked him to take a car to Part Time Help Limited; and that upon delivery of the car, the officers paid him $400.00 and asked him if he could bring some more cars. The next day, 23 May, he did return with another car. He admitted that he drove the car from the Coggin Pontiac lot to Part Time Help Limited. He carried the keys in and took $500.00 for the car. He received $85.00 as his percent. He denied knowing that the car was stolen.

The defendant requested that the jury be instructed on the defense of entrapment. The trial judge denied the defendant's request and gave no instruction to the jury on the defense of entrapment. The defendant cites this as prejudicial error.

Defendant contends that he was entitled to the basic entrapment instruction in this case (79CRS22551) for the same reasons he was entitled to it in the first case (79CRS28603). Because the evidence in the two cases is substantially the same, and having determined that defendant was entitled to neither an entrapment by agent instruction nor the general entrapment instruction in Case No. 79CRS28603, we need not repeat our reasoning in that

regard here. Defendant further contends, however, that there was inducement by the officers themselves in this case which was not present in the first. He argues that on the 22 May visit, during the course of negotiations between him and the undercover agent, the officer handed him money and asked him if he could bring some more cars.

Defendant bases this contention upon his own self-serving testimony in recounting the events of the 22 May transaction:

> On the 22nd day of May, 1979 I didn't discuss the price of that Challenger that I got from Coggin Pontiac with this officer. I think the price was set. I discussed the price with him. I got the money on that day, $400.00. This officer had asked did I have, could I bring him some more cars. I don't recall telling this officer that I could get many cars from Coggin.

Defendant's statement is not supported by the testimony of any other witness present, the transcript of the videotape, or the videotape itself. We need not repeat the evidence previously recounted herein of the events of the incident on May 22. That evidence overwhelmingly refutes defendant's contention.

It is clear from this review of the evidence that the undercover agents did not induce defendant to commit the crime charged. Simply put, in Case No. 79CRS22551 there is insufficient evidence to support an instruction on entrapment.[4] The trial court properly denied defendant's request for the same. Defendant's sole assignment of error in Case No. 79CRS22551—the denial of his request for a general instruction on entrapment—is without merit.

The Court of Appeals found no error in the trial court's failure in Case No. 79CRS28603 to instruct on entrapment by an

4. We do not reach the question of whether defendant could properly raise the defense of entrapment under his plea of not guilty and upon his denial that he knew the vehicle was stolen. In North Carolina a defendant may properly raise the defense of entrapment under a plea of not guilty. But the defense is not available if the criminal act itself is denied. *State v. Neville*, 302 N.C. 623, 276 S.E. 2d 373 (1981). *See* 21 Am. Jur. 2d, Criminal Law, § 208 (1981); Annot., 5 A.L.R. 4th 1128 (1981). This Court has ruled that allowing a defendant to deny participation in a criminal *act* while claiming he was entrapped into committing the offense would be inconsistent, and has distinguished between denying *acts* and denying *intent*, which would not be inconsistent with entrapment.

agent and in its denial of defendant's request for a general entrapment instruction in Case No. 79CRS22551. The decision of the Court of Appeals is

Affirmed.

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

Justice EXUM dissenting.

Believing, as did Judge Wells in the Court of Appeals, that there is sufficient evidence in Case No. 79CRS22551 of the agency of Ricky Burnette to require that the jury be instructed on entrapment by an agent of the government and in Case No. 79CRS28603, there is sufficient evidence of entrapment by an agent to require a charge on this defense, I respectfully dissent.

The state's evidence in both cases tended to show as follows: From November 1978 to August 1979 Durham Police and the SBI conducted, in the words of one officer, a "sting operation or undercover fencing operation" on Greer Street in Durham. The officers held themselves out as an employment agency named "Part Time Help Limited" (hereinafter Part Time). As one officer testified, the real "purpose of this operation was to get people to bring us stolen property." Persons who did so were videotaped and later charged with criminal offenses involving the stolen property which they brought in. One officer testified:

> As part of this operation, we encouraged people who came into our store to get other people to bring materials to us. When we had seen a fellow enough times and we had gotten them on tape enough times we did not exactly discourage them necessarily from coming back with the same item, we knew to not offer him quite as much money as we got into him. We would continue to suggest to these people that they bring other people around. When we talked to these people, we made it known that we would buy property from them. We would say we would buy quality property but we could not pay a whole lot for it. We wanted good merchandise but we could not pay a whole lot of money for it. We did not actually say stolen property.

This officer also acknowledged that by the time of the incidents involving defendant, 22 and 23 May 1979, Part Time had dealt with Ricky Burnette "quite a few" times; "[h]e was a regular. He had brought us cars before." The director of the operation testified that he had been present "on numerous times in the store when Ricky Burnette came in for one purpose or another." Another officer testified:

> It was a part of my work in this investigation to get as many people involved in this fencing operation as possible. We told people who brought in property if they knew anyone else who had any merchandise that they wished to sell, for them to come in and we would discuss purchasing the merchandise from them. One of these people that I spoke to in this fashion was Ricky Burnette.

Again, an officer said:

> Ricky Lamont Burnette came into the store with Mr. Luster. I had seen Mr. Burnette on several occasions prior to this time. I had told Mr. Burnette that we would buy property.
>
> When we told these people that we would buy property, we just said property, we wanted quality property and we couldn't pay much for it. We didn't make that statement to all the individuals who came in our store.
>
> . . . .
>
> I either told or someone to the best of my knowledge advised Mr. Burnette that property could be bought there for money.

In Case No. 79CRS28603, tried before Judge Godwin, the state's evidence also tended to show that on 22 May 1979, defendant sold to Part Time a 1979 Dodge Challenger, which had been stolen on 22 May from Coggin Pontiac, for $400. In Case No. 79CRS22551, tried before Judge Clark, the state's evidence tended to show that on 23 May 1979, defendant sold to Part Time a 1979 Pontiac Grand Prix, which had been stolen on 23 May from Coggin Pontiac, for $500. On both occasions defendant was accompanied by Ricky Burnette.

In both cases defendant testified in his own defense and offered in corroboration the testimony of Ricky Burnette. Their testimony tended to show the following:

The officers at Part Time told Burnette in May 1979 they didn't want to buy any more cars from him. They asked him to bring someone else "down there with the cars." Burnette then contacted defendant, whom he had known five or six months, and requested defendant to help him take cars from Coggin Pontiac to Part Time. On both occasions Burnette himself actually took the cars from Coggin's lot and defendant observed Burnette talking with someone at Coggin before Burnette took the cars. After they left Coggin, defendant at Burnette's request drove the cars to Part Time where defendant negotiated the sales in the presence of Burnette. The two then left Part Time and Burnette paid defendant a "commission" for driving the cars and negotiating the sales. Defendant's "commission" on 22 May was $60 and on 23 May, $85.

Burnette suggested that defendant, who was unemployed, might get a job with Part Time if the people there were sufficiently "impressed" with him. Defendant bragged about his ability to deliver expensive cars in his negotiations with Part Time because Burnette instructed him to do this. Defendant did not know that the cars were stolen. Both transactions originated entirely in the mind of Burnette and defendant's participation was entirely at Burnette's suggestion. Defendant said: "Prior to talking with Mr. Burnette . . . I had never had any desire to participate in any kind of stolen goods ring." Defendant was twenty-three years old in May 1979 and had not been in any difficulty with the law since he was "sixteen or seventeen" when he was convicted of misdemeanor breaking and placed on probation.

In Case No. 79CRS28603 involving the 22 May transaction, Judge Godwin charged the jury generally on the defense of entrapment, but he limited the jury's consideration to actions by law enforcement officers themselves who were operating Part Time. He did not instruct the jury that defendant could be entrapped by the actions of Burnette acting as an agent for these officers. Defendant was convicted in this case of felonious possession of stolen property and sentenced to a maximum of six years' imprisonment. In Case No. 79CRS22551 involving the 23 May

transaction, Judge Clark refused to give instructions relating to the entrapment defense, even though defendant made a timely request that such instructions be given. Defendant was convicted of larceny of a motor vehicle and sentenced to not less than six nor more than ten years' imprisonment. His sentence for the 22 May transaction, Case No. 79CRS28603, was to begin at the expiration of the sentence imposed in Case No. 79CRS22551.

Defendant's argument that Judge Godwin erred by not instructing on entrapment by an agent of the officers and that Judge Clark erred by not instructing on entrapment at all is cogently and succinctly stated in his brief:

> The police induced an unwitting third party into becoming their agent for the purpose of persuading others to bring them stolen property. This third party, who was Ricky Burnette, persuaded the defendant, who was not otherwise so inclined, into helping him steal property. The defendant was, therefore, entitled to a jury instruction on entrapment by an agent of the police.

Entrapment may occur through actions of "law enforcement officers *or their agents*." *State v. Walker*, 295 N.C. 510, 513, 246 S.E. 2d 748, 749-50 (1978) (emphasis supplied). The principal question argued in the briefs is whether a private citizen like Burnette can in law be an agent of the police when he acts for them and at their direction, unaware of their true identity but believing them to be private citizens, so that a defendant induced to commit a crime by such a person can raise the defense of entrapment. The majority avoids directly addressing this question by concluding (1) even if Burnette were an agent of the police, there is no evidence that Burnette entrapped defendant because all the evidence showed defendant to have been predisposed to commit the crimes charged and these crimes originated in defendant's mind, rather than Burnette's, and (2) there is no evidence of an agency relationship between the police and Burnette because all the evidence shows that Burnette was acting in furtherance of his own interest and not at the direction or authorization of the police. I disagree with both conclusions; furthermore, I believe that a person like Burnette can be an agent of the police for purposes of the entrapment defense even if he does not know that his principals are police officers.

It is important to note that defendant does not contend that all the evidence in the case shows, as a matter of law, that he was entrapped. He argues only that there is some evidence in both cases from which a jury could conclude that he was entrapped by the actions of Burnette and that Burnette was then acting as an agent of the police. Defendant contends also that Burnette's unawareness that the persons for whom he acted were police officers does not preclude the existence of an agency relationship. I think defendant's assessment of both the evidence and the law is correct.

Whether a defendant is entitled to have the defense of entrapment submitted, absent questions of agency, is governed by well-established rules set out in *State v. Walker*, 295 N.C. 510, 513, 246 S.E. 2d 748, 749-50 (1978):

> 'Whether the defendant was entitled to have the defense of entrapment submitted to the jury is to be determined by the evidence. Before a Trial Court can submit such a defense to the jury there must be some credible evidence tending to support the defendant's contention that he was a victim of entrapment, as that term is known to the law.' *State v. Burnette*, 242 N.C. 164, 173, 87 S.E. 2d 191, 197 (1955). The defense of entrapment consists of two elements: (1) acts of persuasion, trickery or fraud carried out by law enforcement officers *or their agents* to induce a defendant to commit a crime, (2) when the criminal design originated in the minds of the government officials, rather than with the innocent defendant, such that the crime is the product of the creative activity of the law enforcement authorities. [Emphasis supplied.]

In *State v. Burnette*, 242 N.C. 164, 169, 87 S.E. 2d 191, 194 (1955), this Court discussed the defense of entrapment as follows:

> It is the general rule that where the criminal intent and design originates in the mind of one other than the defendant, and the defendant is, by persuasion, trickery or fraud, incited and induced to commit the crime charged in order to prosecute him for it, when he would not have committed the crime, except for such incitements and inducements, these circumstances constitute entrapment and a valid defense. [Citations omitted.]

> In the leading case of *Butts v. U.S., supra* [273 F. 35 (1921)], *Sanborn, C.J.*, said for the Court: 'The first duties of the officers of the law are to prevent, not to punish, crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it.'
>
> A clear distinction is to be drawn between inducing a person to commit a crime he did not contemplate doing, and the setting of a trap to catch him in the execution of a crime of his own conception. *S. v. Jarvis, supra* [105 W.Va. 499, 143 S.E. 235 (1928)]; *S. v. Mantis*, 32 Idaho 724, 187 P. 268; 15 Am. Jur., Criminal Law, p. 24; 22 C.J.S., Crim. Law, pp. 100-101.

The essence of entrapment, then, is the inducement by law enforcement officers or their agents of a person to commit a crime when, but for the inducement, that person would not have committed the crime.

If one assumes for purposes of this argument that Burnette was an agent of the police and they are therefore bound by his actions as an agent, there is plenary evidence that but for the importuning of Burnette, defendant would not have committed the crimes for which he was convicted. Defendant's evidence tended to show that Burnette persuaded defendant to help Burnette transport the automobiles from Coggin Pontiac to Part Time; the idea was Burnette's alone; before Burnette approached him, defendant had no desire to participate in illegal activities; and defendant had not engaged in any criminal activity for about six years.

The majority concludes, however, that all the evidence shows defendant was predisposed to commit these crimes; therefore the defense of entrapment is not available to him. The majority rests this conclusion largely on defendant's tape-recorded conversations with the officers at Part Time. These statements were made, of course, *after* the thefts were committed. While they may be some evidence of defendant's state of mind before the thefts, the logical connection is a weak one. Further, and most important, according to Burnette and defendant, defendant engaged in this conversation at the instructions of Burnette in an effort to please those with whom he dealt at Part Time so that he could obtain more

money for the vehicles and be given further opportunity to make similar deliveries.

Defendant also testified that he did not know the automobiles were stolen. This, in itself, is some evidence that he was not predisposed to steal them. The credibility of all this evidence is, of course, for the jury. Insofar as other evidence tends to show that defendant was predisposed, the evidentiary conflict should be resolved by the jury.

Defendant's six-year-old misdemeanor conviction does not show a predisposition to commit the crimes involved. *See Sherman v. United States*, 356 U.S. 369 (1958); *State v. Stanley*, 288 N.C. 19, 32-33, 215 S.E. 2d 589, 598 (1975).

There is no evidence that Burnette was told to approach this particular defendant or that Burnette knew that the persons at Part Time were law enforcement officers. Under these circumstances the courts are divided on whether a person like Burnette can be an agent of the officers for purposes of the entrapment defense. *See* Note, *Entrapment Through Unsuspecting Middlemen*, 95 Harv. L. Rev. 1122 (1982); Note, *Entrapment: An Analysis of this Agreement*, 45 B.U.L. Rev. 542, 563-65 (1965). The better reasoned view is that persons like Burnette can be an agent of law enforcement officers whereby defendants are entrapped.

> The defense of entrapment should not be withheld . . . merely because the third party inducer was unaware that he was being used by the government for law enforcement purposes. The mental processes of the third party inducer have little relevance to the inquiry for, wittingly or unwittingly, he may be an agent of the government, and it is therefore his actions and the mental processes and predisposition of the allegedly otherwise innocent defendant which bear scrutiny.
>
> Likewise, because the unwitting third party is not directed to purchase morphine from a *particular* individual, the government should not be allowed to avoid responsibility for the third party's actions. True, the third party may be classified as a free agent with regard to whom he approaches . . . . Nevertheless, it is foreseen by the government in each such instance that he must approach someone. Since it is the

> very purpose of the government that he do so in order to prosecute the person approached, the government should not be allowed with immunity to delegate the determination of whom to approach. Where a third person under these circumstances has induced another to participate in the crime, the government is the direct and foreseeable cause of this participation. The likelihood that this defendant is otherwise innocent is equally as great as, or no less than, where the government directed the third person to a particular individual. Accordingly, the defense of entrapment should be equally available.

Note, *supra*, 45 B.U.L. Rev. at 564-65.

Essentially, the same position is taken in an excellent Harvard Law Review Note which, after analyzing the application of the entrapment doctrine to undercover "sting" operations, calls upon the courts to "recognize that government responsibility for inducing persons not otherwise disposed to commit criminal acts is not attenuated by the fact that the offense is committed upon the immediate prompting of an unsuspecting intermediary." Note, *Entrapment Through Unsuspecting Middlemen*, 95 Harv. L. Rev. 1122, 1140 (1982). As the Court said in *People v. McIntire*, 23 Cal. 3d 742, 748, 591 P. 2d 527, 530 (1979): "Improper governmental instigation of crime is not immunized because it is effected indirectly through a pliable medium."

Our Court of Appeals has adopted this view in *State v. Whisnant*, 36 N.C. App. 252, 243 S.E. 2d 395 (1978). There defendant was convicted of selling a controlled substance. Ms. Reynolds, defendant's friend, called defendant and told her that she had a friend who needed drugs. Ms. Reynolds' friend was an undercover SBI agent by the name of Prilliman. There is nothing in the Court of Appeals' decision to indicate that Ms. Reynolds was aware that Prilliman was an SBI agent. The Court of Appeals concluded that the evidence "tends to show some inducement of defendant by Ms. Reynolds as the agent of Prilliman to commit the crime." The court said, 36 N.C. App. at 254, 243 S.E. 2d at 396-97:

> Under these circumstances it was the duty of the trial judge . . . to apply the law to the evidence by instructing the jury in substance that if Ms. Reynolds was acting as an agent for S.B.I. Agent Prilliman and she as such agent induced the

> defendant to commit the crime charged, the S.B.I. agent would be responsible for her actions and the defense of entrapment would be available to defendant. *Sherman v. United States*, [356 U.S. 369 (1958)].

I do not understand the majority to take a contrary position on this question.

The majority concludes simply that there is no evidence of an agency relationship between Burnette and the police at Part Time. The majority says there is no evidence of any mutual understanding between them, *i.e.*, no evidence that police authorized Burnette to act with regard to defendant and no evidence that Burnette in turn willingly acted pursuant to such authorization.

I disagree. There is evidence from which a jury could find that Burnette, when he dealt with defendant, did so as an agent of the police officers who were operating Part Time. It is true that, according to the officers' testimony, they never used the words "stolen property" in their conversations with Burnette. Nevertheless the state's evidence was that the "purpose of this operation was to get people to bring us stolen property" and that the officers encouraged regular customers like Burnette, who the officers knew to be thieves and who, in turn, knew that Part Time would buy stolen property, to solicit others to deal with Part Time. The officers' conversations with Burnette were designed to, and in effect did, direct him to tell others that Part Time was a fence for stolen property. The conversations were designed to, and in effect did, direct Burnette to get others not only to bring in the property which had already been stolen but also to steal property for which Part Time would provide an outlet. Burnette testified that the officers first persuaded him to steal cars and to bring them to Part Time. One officer even accompanied him on his first theft. After he had delivered a number of stolen cars to Part Time, the officers told him they would not buy more cars from him and directed him to "bring somebody else down there with the cars." Burnette testified in Case No. 79CRS22551:

> They [the officers at Part Time] contacted me . . . . They told me over the phone they had some work for me to do. So, I went down there . . ., and they told me they

wanted me to deliver a car, and I went to K-Mart. Officer Raney told me they wanted me to deliver a car.

We went to K-Mart parking lot. He got some Virginia tags out of his personal car, put them on a Chevrolet Impala, no a Caprice. Then he asked me which car did I want to drive. So, I got out of his car and I went, I followed him to Oxford, . . . we met a man up there. The man shined the light on the car and everything and after they transacted the business we left there. On the way back he asked me how much money did I think he got for the car. I said that I don't know, and he said, well you take anything, you know, car, gun, t.v., so and so on.

After this was told to me, I made many more trips to Part Time. I brought them automobiles.

They told me not to bring anything there, that they didn't want anything from me . . . sometime in May, 1979. They told me they didn't want any more cars from me. They indicated to me that I should go out and advise people about the availability of Part Time and the services that they offered. Most every time I went there they told me to bring somebody else down there new that wanted a little extra money.

After they told me they wouldn't take anymore [sic] cars from me, I approached someone else for the purpose of taking cars down there so that I could get money. That was Mr. Luster.

Burnette testified in Case No. 79CRS28603:

I am familiar with the gentlemen who were working behind the counter at Part Time. I see them here in the courtroom. These gentlemen told me that they weren't going to buy any more material from me. They told me this before I had gotten in contact with Mr. Luster. They told me that they weren't dealing with anymore cars, but what it was that they didn't want to buy no more cars from me. They wanted me to bring more people, bring somebody else down there with the cars. This is when I went to see Mr. Luster.

> When I went to see Mr. Luster I told him I had a job over at Part Time. Mr. Luster told me that he was looking for work. I did not tell him what was involved in the job.

Clearly this is evidence from which a jury could find that the officers at Part Time directed and authorized Burnette to go out and get other people to do the same thing he was doing, *i.e.*, stealing automobiles and other personal property and bringing them to Part Time to sell. Pursuant to this direction and authorization Burnette induced defendant to commit the thefts charged against him in this case.

Finally, since defendant admitted his actions in obtaining and delivering the stolen vehicles to Part Time, defendant's denial of knowledge that the vehicles were stolen does not render the defense of entrapment unavailable. Only where a defendant denies all participation in the criminal activity can he not avail himself of the defense of entrapment. *State v. Neville*, 302 N.C. 623, 276 S.E. 2d 373 (1981). The Court noted in *Neville* that: "The entrapment defense is not inconsistent with the defense of lack of mental state since the defense of entrapment itself is an assertion that it was the will of the government, and not of the defendant, which spawned the commission of the offense." *Id.* at 626, 276 S.E. 2d at 375.

I am cognizant of the need for undercover "sting" type operations in ferreting out crime. So long as these operations merely provide opportunity for persons predisposed to criminal activity to engage in it and be "stung," I applaud the officers for their energy and ingenuity. An operation, on the other hand, that encourages and incites criminal activity on the part of people who would otherwise have refrained from such activity has no place in the law enforcement arsenal. "The first duties of the officers of the law are to prevent . . . crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting . . . it." *State v. Burnette, supra*, 242 N.C. at 169, 87 S.E. 2d at 194 (quoting *Butts v. U.S.*, 273 F. 35, 38 (1921)), *quoted with approval* in *State v. Stanley, supra*, 288 N.C. at 28-29, 215 S.E. 2d at 595. As Justice Harlan wrote in *Lopez v. United States*, 373 U.S. 427, 434 (1963): "The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents. Such conduct, of course, is far different

from the permissible stratagems involved in the detection and prevention of crime." (Emphasis original.) Specifically, "sting" operations such as the Part Time investigation must serve only to detect criminal activity and not instigate it.

> The function of undercover investigation is to bring these hidden activities under control by detecting persons who are engaging in such a course of conduct or by 'predetecting' the crimes of persons who would commit them if presented with a favorable opportunity. However, law enforcement tactics that seek to induce persons who are not predisposed to crime to engage in criminal activity are intolerable for two reasons. First, individuals have a strong interest in privacy: law-abiding people should be left alone by the government. Second, law enforcement resources are wasted when the subjects of investigation are not predisposed to commit crimes. Governmentally created opportunities to engage in an illegal activity should therefore be designed to detect and apprehend only those who are predisposed to commit a similar offense.

Note, *supra*, 95 Harv. L. Rev. at 1130-31 (footnotes omitted). I fear, in light of the officers' own admissions, that although Part Time was intended to be merely a trap for the unwary criminal, it was instead infected with so much incitement and encouragement of criminal activity that defendant, not predisposed to crime (if his evidence is believed), was induced to engage in it.

Defendant is entitled in both cases to instructions on his defense that he was entrapped by Burnette acting as an agent of the police. I vote, therefore, that defendant be afforded new trials in both cases.

Justice CARLTON joins in this dissent.

STATE OF NORTH CAROLINA v. DENNIS LOMBARDO

No. 130A81

(Filed 5 October 1982)

1. **Arrest and Bail § 3.4; Criminal Law § 84— motion to suppress—initial seizure of defendant challenged—"fruit of the poisonous tree" doctrine—reliance on presumption of regularity of search warrant erroneous**

Where defendant made a timely objection to the validity of a search warrant on the basis that the initial seizure of defendant at an airport was unconstitutional and that the "fruit of the poisonous tree" doctrine applied to suppress evidence obtained under the warrant, the Court of Appeals erred in relying on the presumption of regularity of search warrants not introduced into evidence in holding the defendant's motion to suppress should have been denied.

2. **Criminal Law § 143.5— probation revocation hearing—inapplicability of exclusionary rule**

Because the exclusionary rule is built on the notion that evidence derived from searches and seizures is oftentimes the foundation upon which a conviction will rest and the strength of the State's case will be measured by the caliber of such evidence admissible at *trial*, extending the application of the exclusionary rule to *probation revocation hearings* will add nothing to its deterrent effect so long as the enforcement officer does not know that the defendant is on probation.

3. **Criminal Law § 143— G.S. 15A-1343(b)(15) not extended to include application of exclusionary rule to probation revocation hearing**

G.S. 15A-1343(b)(15), which provides that the "Court may not require as a condition of probation that the probationer submit to any other search [besides one conducted by his probation officer] that would otherwise be unlawful," does not extend to prohibit evidence obtained from an unlawful search from being admitted into evidence at a probation revocation hearing.

4. **Criminal Law § 143.5— prior case excluding evidence in probation revocation hearing overruled**

The Court expressly overruled *State v. McMilliam*, 243 N.C. 775 (1956) and held that evidence which does not meet the standards of the Fourth and Fourteenth Amendments to the United States Constitution *may be admitted in* a probation revocation hearing.

Justice EXUM dissenting.

Justices COPELAND and MARTIN join in this dissent.

WE granted defendant's petition for discretionary review under G.S. 7A-31 (1981) to review the decision of the Court of Appeals, 52 N.C. App. 316, 278 S.E. 2d 318 (1981), that reversed and

remanded the order of *Judge Frank R. Brown* entered at the 11 August 1980 Session of Superior Court, HYDE County.

The main question presented in this appeal is whether the exclusionary rule applies in probation revocation hearings.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Frank P. Graham, for the State.

Herman E. Gaskins and Joel Hirschhorn, admitted pro hac vice, for defendant-appellant.

CARLTON, Justice.

I.

A.

In light of our holding below that the exclusionary rule is not applicable in probation revocation hearings, an extensive recitation of the facts in this case is unnecessary. However, in order to address the erroneous reasoning of the Court of Appeals, we summarize the essential facts.

Defendant was convicted of felonious sale and delivery of marijuana, a violation of G.S. 90-95(a)(1), in the Superior Court, Hyde County, on 13 August 1979. He received a five-year prison sentence which was suspended. Defendant was placed on probation. One of the conditions of probation was that defendant not have in his possession or control during the five years of probation any controlled substance as defined in Chapter 90 of the North Carolina General Statutes, unless prescribed by a medical doctor and dispensed by a physician or pharmacist.

Fifteen days later, defendant was arrested at Miami International Airport for possession of marijuana.[1] The circumstances leading up to that arrest are not contested. The stipulated facts are as follows: Officer William Johnson of the Dade County Public Safety Department saw defendant at about 5:00 p.m. standing on the sidewalk outside the National Airlines Terminal at Miami International Airport. Defendant was holding a suitbag and briefcase in one hand and a ticket in the other. He appeared nervous

1. Marijuana is a Schedule VI controlled substance under G.S. 90-94, possession of which is prohibited under G.S. 90-95.

and impatient. Defendant then set down his luggage, walked over to a porter and began talking with him. Johnson moved closer, saw that defendant had a baggage claim check, and learned that defendant was en route to New Orleans. Johnson noticed that defendant also had a brown American Tourister suitcase on the sidewalk and overheard the defendant tell the porter he was concerned that this suitcase, which had already been checked for the flight, might not get aboard the plane which was to leave in ten minutes. After showing the porter his ticket and requesting that the suitcase be placed aboard the plane, Johnson watched the defendant carry his briefcase, suitbag and ticket into the terminal. Defendant stopped, set down his luggage and examined his ticket. Johnson thought he saw defendant put the claim check "either down the front of his pants or in his watch pocket." Johnson noted that defendant's jeans "were very tight." Defendant looked around nervously and continued through the airport. At this point, Johnson got another officer, Det. D'Azevedo, to join him. The two officers then followed the defendant toward the boarding area. D'Azevedo displayed his badge to defendant and asked to speak to him. Defendant stopped. D'Azevedo asked defendant to show him his ticket and identification. Defendant appeared pale and sweaty. He gave D'Azevedo his ticket and his Florida driver's license. Defendant's hands shook so violently that he nearly dropped the license. D'Azevedo turned around and began writing down the information. Johnson, still standing behind the defendant, then watched the defendant place his hand, which was trembling violently, into the front of his pants and then, with what appeared to be a claim check in his hand, into the back of his tight-fitting blue jeans. Johnson then moved, grabbed both of defendant's arms and seized his check. Meanwhile, D'Azevedo observed that the name on defendant's ticket did not match the name on his driver's license. At this point, Johnson left to procure the suitcase that went with the claim check he had seized from the defendant. The defendant then asked D'Azevedo, "Am I under arrest, because if I'm not, I'm leaving." D'Azevedo told him he was not free to leave.

The officers obtained the services of the U.S. Customs narcotics detector dog unit. After retrieving the defendant's suitcase, they placed it among three other suitcases randomly selected. A narcotics detector dog then "alerted" to the presence of a narcotic

odor coming from defendant's suitcase. Defendant was informed of this and placed under arrest for possession of an unknown controlled substance of unknown quantity. About half an hour later defendant and his luggage were transported to another station. During this trip Johnson and another officer questioned defendant about prior arrests and other matters relating to this case, although neither officer had informed defendant of his constitutional rights. D'Azevedo asked for defendant's consent to search his briefcase and suitbag; defendant refused to give his consent. D'Azevedo had another dog at the second station inspect defendant's briefcase and suitbag along with an unrelated briefcase placed with them. This dog indicated narcotics in both defendant's briefcase and his suitbag.

A search warrant was obtained for the three pieces of luggage based on the "alerts" by the two U.S. Customs dogs. The suitcase and briefcase were forced open because defendant would not give the officers the combinations for the locks. About twenty grams of marijuana were found in the suitcase; no narcotics were found in the briefcase or suitbag.

Defendant's probation officer instituted a revocation hearing in North Carolina based on the Miami arrest. Defendant moved to suppress any evidence obtained from that arrest on the ground that it had been unconstitutionally obtained. Defendant's motion was granted by Judge Brown and the State appealed.

[1] The Court of Appeals reversed and remanded, holding that Judge Brown erred in treating the matter as a warrantless search when the record disclosed that the search of defendant's luggage in Miami was made pursuant to a search warrant. Its reasoning was then based on the presumption that the search warrant was valid because it did not appear in the record. The court concluded: "In the present case, the search warrant does not appear of record, and the record before us demonstrates that defendant offered no evidence of facts with which to overcome the presumption of regularity of the search warrant or to overcome the resulting prima facie evidence of the reasonableness of the search." 52 N.C. App. at 321, 278 S.E. 2d at 321 (1981).

The Court of Appeals' reasoning is erroneous. First, the court failed to initially determine whether the information used to obtain the warrant was procured through an unconstitutional

seizure. If the information was so obtained then the warrant and the search conducted under it were illegal and the evidence obtained from them was "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 484-88, 83 S.Ct. 407, 416-17, 9 L.Ed. 2d 441, 453-55 (1963). As such, the evidence would be inadmissible if the exclusionary rule is applied to probation revocation hearings.

Second, a careful reading of the two opinions of this Court cited by the Court of Appeals in support of its application of the presumption of regularity indicates the Court of Appeals misunderstood the presumption. These opinions demonstrate that the presumption is applicable only in situations where the defendant challenges the validity of a search warrant that was not introduced into evidence on the ground that the warrant itself does not conform to *technical statutory requirements. State v. Spillars*, 280 N.C. 341, 350-51, 185 S.E. 2d 881, 887 (1972) (addressing contention that an affidavit must be attached at all times to the search warrant); *State v. Shermer*, 216 N.C. 719, 721, 6 S.E. 2d 529, 530 (1940) (discussing whether an affidavit used to support a warrant must be signed or the attesting person examined). *See also State v. McGowan*, 243 N.C. 431, 433, 90 S.E. 2d 703, 705 (1956) (deciding whether a warrant is defective if it is not signed by one authorized to issue it).

Moreover, the Court of Appeals failed to recognize two other factors that must be examined before the presumption of regularity will apply: the presumption will operate *only* when the facts in the record do not indicate the occurrence of any irregularities and no objection to the validity of the warrant has been raised in a timely fashion. In *State v. McGowan*, this Court explained the operation of the presumption of regularity:

> In this case neither the State nor the defendant introduced the warrant in evidence. If nothing else appears and if no objection to the validity of the warrant had been raised in the Superior Court, we would be justified in presuming the officers of the law performed their legal duties and that the warrant was legal and valid. (Citations omitted.) In this case, however, something else *does* appear and the validity of the warrant *was* challenged in the Superior Court.

243 N.C. at 433, 90 S.E. 2d at 705 (1956) (original emphasis).

In the case at bar the record plainly discloses that defendant made a timely objection to the validity of the warrant when defense counsel filed a motion to suppress the evidence obtained under the warrant on the basis of the seizure of defendant at the airport. Indeed, the thrust of defendant's arguments before this Court and the Court of Appeals has been directed to the constitutionality of that initial seizure—the threshold issue the Court of Appeals failed to address—and the applicability of the "fruit of the poisonous tree" doctrine. Moreover, the uncontroverted facts to which both parties stipulated plainly raise the question of the validity of defendant's initial seizure at the airport. Hence, the Court of Appeals erred in relying on the presumption of regularity of search warrants not introduced into evidence.

II.

A.

As noted above, defendant's primary contention from the outset has been that he was unconstitutionally seized in the Miami airport in violation of the fourth and fourteenth amendments. He relies primarily on *Reid v. Georgia*, 448 U.S. 438, 100 S.Ct. 2752, 65 L.Ed. 2d 890 (1980). Judge Brown agreed that the seizure was unconstitutional and allowed the motion to suppress. It is unnecessary for us to address the constitutionality of defendant's seizure and the resulting search because we hold, as discussed below, that the exclusionary rule is not applicable in probation revocation hearings.

B.

[2] In deciding whether the exclusionary rule should be applied in probation revocation hearings, we must keep in mind its purpose. In *United States v. Calandra* the United States Supreme Court stated that the "prime purpose" of the exclusionary rule is "to deter future unlawful police conduct" by removing the incentive to disregard the fourth amendment. 414 U.S. 338, 347, 94 S.Ct. 613, 619-20, 38 L.Ed. 2d 561, 571 (1974). Its purpose is "not to redress the injury . . . ." *Id.*

The deterrent effect of the exclusionary rule is based on the assumption that a police officer realizes that his duty is to conduct searches and seizures only in a manner that will help secure a *conviction*. The officer knows that the prosecution can obtain a

conviction only if the evidence he acquires is admissible at *trial.* The exclusionary rule deters police misconduct because the enforcement officer knows that if he violates a defendant's constitutional rights the evidence he obtains in so doing will not be admissible at trial. If the evidence is not admissible (and the prosecution has nothing else upon which to base its case), the defendant cannot be convicted. In effect, the officer's search or seizure has been a waste of time.[2]

Because the exclusionary rule is built on the notion that evidence derived from searches and seizures is oftentimes the foundation upon which a conviction will rest and the strength of the state's case will be measured by the caliber of such evidence admissible at *trial,* extending the application of the exclusionary rule to *probation revocation hearings* will add nothing to its deterrent effect. To hold otherwise would be to erroneously assume that an officer would approach any given search or seizure as if the suspect was on probation, an unrealistic assumption at best. The foregoing is true, of course, so long as the enforcement officer does not know that the defendant is on probation. If the officer knows that the defendant is on probation the officer may not be deterred from conducting an illegal search or seizure of the defendant unless he knows the evidence obtained from such illegal conduct is excluded at a probation revocation hearing.

As we stated in *State v. Hewett,* 270 N.C. 348, 351, 154 S.E. 2d 476, 478 (1967), probation is "an act of grace" accorded one who has been convicted of crime. The "defendant carries the keys to his freedom in his willingness to comply with the court's sentence." *Id.* at 353, 154 S.E. 2d at 479. In the case at bar, fifteen days after he was convicted of felonious sale and delivery of marijuana, officers found that same drug in defendant's possession in violation of his probation. While the exclusionary rule may well apply in defendant's trial in Florida, we hold that it will not apply in his North Carolina probation revocation hearing. To apply the rule in such cases would severely damage our probation system by allowing those like Lombardo, who show a total

2. We note that if a police officer conducts unconstitutional searches or seizures merely to harass, he will do so without regard to whether the exclusionary rule applies.

disregard for the system, to exclude evidence of their personal probation violations.

C.

[3] Defendant also argues that the North Carolina statute that governs the terms which may be imposed as a condition of probation should be extended judicially to include application of the exclusionary rule to probation revocation hearings. G.S. § 15A-1343(b)(15) (Cum. Supp. 1981) provides that "[t]he Court may not require as a condition of probation that the probationer submit to any other search [besides one conducted by his probation officer] that would otherwise be unlawful." Defendant contends that since the court cannot require, as a condition of probation, that the probationer submit to unlawful searches, it also should not be able to admit evidence obtained from an unlawful search to revoke the probation. This argument fails, however, to acknowledge the crucial distinction between the conditions that may be imposed on a probationer and the type of evidence that may be used to prove a violation of those conditions. If, in contravention of G.S. § 15A-1343(b)(15), a court could require a defendant to submit to unlawful searches as a condition of his probation, then the court, in effect, would have the power to rescind a defendant's fourth amendment rights.[3] Moreover, the mere refusal to submit to such a search would constitute a violation of defendant's probation. That is, without regard to whether a defendant had engaged in any illegal or unacceptable behavior, his probation could be revoked simply because he refused to waive his constitutional rights. This is not the result when we decline to extend the exclusionary rule to probation revocation hearings. In refusing to apply the rule to probation revocation hearings we decide only that given that a defendant's rights were violated by an officer unaware of defendant's status, nevertheless, we will admit the evidence derived from the unconstitutional search or seizure because to exclude it would not further the interest of deterring police misconduct.

D.

[4] Defendant correctly cites this Court's decision in *State v. McMilliam*, 243 N.C. 775, 92 S.E. 2d 205 (1956) [hereinafter cited

3. We do not discuss here the propriety of such actions.

as *McMilliam II*], for the proposition that evidence obtained under an unlawful search warrant or without a search warrant must be excluded in a probation revocation hearing. However, for the reasons stated above, we expressly overrule *McMilliam II* and hold that evidence which does not meet the standards of the fourth and fourteenth amendments to the United States Constitution *may be admitted in a* probation revocation hearing.[4] Although the United States Supreme Court has not yet agreed to address the issue, *Queen v. Arkansas*, 271 Ark. 929, 612 S.W. 2d 95, *cert. denied*, 50 U.S.L.W. 3351 (1981), our determination that the exclusionary rule will not apply in probation revocation hearings is in accord with the overwhelming majority of state courts and federal circuits that have answered the question, 77 A.L.R. 3d 636, 641 (1977); 30 A.L.R. Fed. 824, 827 (1976). Of the sixteen state courts which have addressed the issue, thirteen have held that the exclusionary rule does not apply in probation revocation hearings.[5] Five of the six federal circuit courts that have faced the

4. We note that this Court determined in another case that the evidence in *McMilliam II* was procured in violation of defendant's state constitutional rights, *State v. McMilliam* [companion case to *McMilliam II* hereinafter cited as *McMilliam I*], 243 N.C. 771 (1955). The evidence in *McMilliam I* was excluded at defendant's criminal trial under a statute which provided generally that evidence obtained without a warrant shall be incompetent "in the trial of any action," G.S. 15-27. *McMilliam II*, which we overrule today, judicially extended the reach of G.S. 15-27 by excluding incompetent evidence at probation revocation hearings. Although G.S. 15-27 has been repealed by Act of April 11, 1974, ch. 1286, § 26, 1973 N.C. Sess. Laws 490, 556, this Court must still examine the constitutional basis for application of the exclusionary rule to probation revocation hearings.

5. *Arizona—State v. Towle*, 125 Ariz. 397, 609 P. 2d 1097 (1980) (where police do not know arrestee is a probationer).

California—People v. Rafter, 41 Cal. App. 3d 557, 116 Cal. Rptr. 281 (1974); *People v. Hayko*, 7 Cal. App. 3d 604, 86 Cal. Rptr. 726 (1970).

Colorado—People v. Wilkerson, 189 Colo. 448, 541 P. 2d 896 (1975) (except where the unreasonable search or seizure is such as to shock the conscience of the court); *People v. Atencio*, 186 Colo. 76, 525 P. 2d 461 (1974).

Florida—Croteau v. State, 334 So. 2d 577 (Fla. 1976); *Bernhardt v. State*, 288 So. 2d 490 (Fla. 1974); *Brill v. State*, 159 Fla. 682, 32 So. 2d 607 (1947); *Kinzer v. State*, 366 So. 2d 874 (Fla. Dist. Ct. App. 1979); *Latham v. State*, 360 So. 2d 127 (Fla. Dist. Ct. App. 1978); *Bruno v. State*, 343 So. 2d 1335 (Fla. Dist. Ct. App. 1977), *cert. denied*, 354 So. 2d 986 (Fla. 1977).

The Florida Supreme Court has determined, however, that the Florida Constitution requires that the exclusionary rule be applied in probation revocation hearings. *Grubbs v. State*, 373 So. 2d 905 (1979).

question have held similarly;[6] only the fourth circuit has applied the exclusionary rule in probation revocation hearings, *United*

Illinois—People v. Watson, 69 Ill. App. 3d 497, 387 N.E. 2d 849 (1979) (except where police harassment demonstrated); *People v. Swanks*, 34 Ill. App. 3d 794, 339 N.E. 2d 469 (1975); *People v. Dowery*, 20 Ill. App. 3d 738, 312 N.E. 2d 682 (1974), *aff'd*, 62 Ill. 2d 200, 340 N.E. 2d 529 (1975).

Indiana—Dulin v. State, 169 Ind. App. 211, 346 N.E. 2d 746 (1976) (unless evidence illegally seized as part of a continuing plan of police harassment or in a particularly offensive manner).

Maine—State v. Caron, 334 A. 2d 495 (Me. 1975).

Montana—State v. Thorsness, 165 Mont. 321, 528 P. 2d 692 (1974).

New Hampshire—Stone v. Shea, 113 N.H. 174, 304 A. 2d 647 (1973).

Oregon—State v. Nettles, 287 Or. 131, 597 P. 2d 1243 (1979); *State v. Ray*, 41 Or. App. 763, 598 P. 2d 1293 (1979).

Pennsylvania—Commonwealth v. Davis, 234 Pa. Super. 31, 336 A. 2d 616 (1975).

Rhode Island—State v. Spratt, 386 A. 2d 1094 (R.I. 1978).

Washington—State v. Proctor, 16 Wash. App. 865, 559 P. 2d 1363 (1977) (unless police act in bad faith); *State v. Simms*, 10 Wash. App. 75, 516 P. 2d 1088 (1973); *State v. Kuhn*, 7 Wash. App. 190, 499 P. 2d 49, *aff'd on other grounds*, 81 Wash. 2d 648, 503 P. 2d 1061 (1972).

Apparently, the only states which hold that the exclusionary rule should apply in probation revocation hearings are Georgia, Oklahoma and Texas:

Georgia—Adams v. State, 153 Ga. App. 41, 264 S.E. 2d 532 (1980); *Giles v. State*, 149 Ga. App. 263, 254 S.E. 2d 154 (1979); *Amiss v. State*, 135 Ga. App. 784, 219 S.E. 2d 28 (1975); *Cooper v. State*, 118 Ga. App. 57, 162 S.E. 2d 753 (1968).

Oklahoma—Michaud v. State, 505 P. 2d 1399 (Okla. Crim. App. 1973).

Texas—Moore v. State, 562 S.W. 2d 484 (Tex. Crim. App. 1978); *Rushing v. State*, 500 S.W. 2d 667 (Tex. Crim. App. 1973).

Although the Court of Appeals of New York has not expressly addressed the applicability of the exclusionary rule in probation revocation hearings, it has held that a motion to suppress evidence illegally seized should be granted in a probation revocation hearing where two probation officers and a police officer aware of defendant's status conducted the illegal search. *People v. Jackson*, 46 N.Y. 2d 171, 385 N.E. 2d 621, 412 N.Y.S. 2d 884 (1978).

6. The fifth, sixth, seventh and ninth circuits have all held that the exclusionary rule does not apply in probation revocation hearings. The second circuit held that the rule is not applicable in parole revocation proceedings. *United States v. Wiygul*, 578 F. 2d 577, 578 (5th Cir. 1978) (absent a demonstration of police harassment); *United States v. Vandemark*, 522 F. 2d 1019, 1020 (9th Cir. 1975); *United States v. Winsett*, 518 F. 2d 51 (9th Cir. 1975); *United States v. Farmer*, 512

States v. Workman, 585 F. 2d 1205 (4th Cir. 1978). We note, however, that in *Workman* the officers conducting the search were the defendant's probation officer and an Alcohol Beverage Control agent who presumably knew the defendant was on probation. The facts in that case are clearly distinguishable, therefore, from the situation existing when defendant Lombardo was seized and searched at the Miami International Airport; that is, the police officers who searched Lombardo and his belongings were not aware of his status as a probationer when the search was conducted. Because the officers conducted their seizure and search of defendant as a preliminary step to a desired *conviction* of defendant in the Florida courts, their conduct was not the sort that application of the exclusionary rule to probation revocation hearings would deter.

In overruling *McMilliam II* this jurisdiction joins the mainstream of American legal thought about the issue before us. When *McMilliam II* was decided over twenty-six years ago, the exclusionary rule had not yet been applied on constitutional grounds in state court proceedings.[7] In reaching our decision today, however, this Court has the benefit of over twenty years of experience in dealing with the exclusionary rule, wisdom gathered from many jurisdictions including our own. We feel that our decision to overrule *McMilliam II* is sound in light of this experience, the deterrent purpose of the exclusionary rule, and the viability of the probation system.

For all the reasons articulated above, we hold that the exclusionary rule should not be applied in probation revocation hearings.

The decision of the Court of Appeals is modified and affirmed. This cause is remanded to the Court of Appeals with in-

F. 2d 160, 162-63 (6th Cir. 1975); *cert. denied*, 423 U.S. 987, 96 S.Ct. 397, 46 L.Ed. 2d 305; *United States v. Brown*, 488 F. 2d 94, 95 (5th Cir. 1973); *United States v. Hill*, 447 F. 2d 817, 818-19 (7th Cir. 1971); *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648, 650-52 (E.D. La. 1970), *aff'd*, 438 F. 2d 1027 (5th Cir. 1971), *cert. denied*, 404 U.S. 880, 92 S.Ct. 195, 30 L.Ed. 2d 160 (1971); *United States ex rel. Sperling v. Fitzpatrick*, 426 F. 2d 1161, 1163-64 (2d Cir. 1970) (exclusionary rule not applicable to parole revocation proceedings).

7. The United States Supreme Court made the fourth amendment exclusionary rule applicable to the states through the fourteenth amendment in 1961 in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961).

structions to remand to the trial court for further proceedings consistent with this opinion.

Modified and Affirmed.

Justice EXUM dissenting.

I.

I cannot agree with the majority's decision to overrule *State v. McMilliam*, 243 N.C. 775, 92 S.E. 2d 205 (1956) (*McMilliam II*), in order to hold that evidence which has been unlawfully seized is no longer incompetent and inadmissible in probation revocation proceedings. The issue before us is not whether *to extend* the exclusionary rule to probation revocation hearings; it is whether to depart from the rule we have had for over twenty-six years that evidence which is the product of an illegal search and seizure may not be used to invoke criminal sanctions against a probationer.

The majority correctly concludes in Part II-D of its opinion that *State v. McMilliam, supra*, holds that evidence unlawfully obtained "must be excluded in a probation revocation proceeding." Because this Court has never overruled its precedent lightly, *State v. Dixon*, 215 N.C. 161, 167, 1 S.E. 2d 521, 524 (1939), the pertinent question is whether there is a sufficiently sound basis for reversing *McMilliam II*. Put another way, the question is "whether the policies which underlie the proposed rule are strong enough to outweigh both the policies which support the existing rule and the disadvantages of making a change." *Walter v. Schaefer, Precedent and Policy*, 34 U. Chi. L. Rev. 3, 12 (1966). It can be demonstrated, when the competing policies are weighed in this matter, that *McMilliam II* should not be overruled.

The majority's reasons for recanting the *McMilliam II* rule are: (1) excluding unlawfully obtained evidence in a probation revocation proceeding does nothing to further deterrence of police misconduct absent knowledge by the police that the individual searched is a probationer; (2) permitting a probationer to assert the exclusionary rule would severely damage the probation system; (3) allowing illegally obtained evidence to be admitted does not contravene the policies of G.S. 15A-1343(b)(15); (4) the weight of authority is against the exclusion of illegally-obtained evidence in a probation revocation hearing; and (5) to overrule

McMilliam II is sound in light of experience with the exclusionary rule.

The most significant reason given by the majority for its decision to overrule *McMilliam II* is that to do so will not reduce the exclusionary rule's deterrence of police misconduct, which the Supreme Court in *United States v. Calandra*, 414 U.S. 338, 347 (1974), considered to be the rule's "prime purpose." To me, this argument falls in on itself. For by overruling *McMilliam II* the majority has simply carved out another exception to the exclusionary rule. Any rule, and whatever values the rule is designed to promote, must necessarily be compromised and its effectiveness reduced in direct proportion to the number of exceptions attached to it. As more exceptions are created to a rule's application, the weaker the rule becomes. It makes no sense to say that a probation revocation hearing exception to the exclusionary rule does not reduce the deterrent value of the rule. Inexorably it will.

The question is not whether the deterrent value of the exclusionary rule will be reduced by our overruling *McMilliam II*. The question is whether the benefits of continued application of the exclusionary rule to probation revocation hearings outweigh both the rule's harmful effects and the disadvantages inherent in overruling one of our precedents.

In *Calandra*, *supra*, the United States Supreme Court was faced with the question whether illegally-seized evidence should be suppressed in grand jury proceedings. The Court analyzed the problem by "weigh[ing] the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context." 414 U.S. at 349. In balancing these factors, it determined not to extend the exclusionary rule because to do so "would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury." 414 U.S. at 351-52. Factors it considered significant were that grand juries are not presided over by judges, are not impeded by "evidentiary and procedural restrictions applicable to a criminal trial," and do not "finally adjudicate guilt or innocence." 414 U.S. at 343, 349-50. To extend the rule "would delay and disrupt" proceedings and "[s]uppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation

of issues only tangentially related to the grand jury's primary objective." *Id.* at 349. This is the analysis used by the Fourth Circuit Court of Appeals, relying on *Calandra*, in *United States v. Workman*, 585 F. 2d 1205 (4th Cir. 1978), in which that court concluded that the exclusionary rule should apply in probation revocation proceedings. *But see United States v. Winsett*, 518 F. 2d 51 (9th Cir. 1975) (applied *Calandra* balancing test and concluded that exclusionary rule should not apply in probation revocation proceedings).

Applying the exclusionary rule in probation revocation hearings, unlike the problems foreseen for grand jury proceedings by the Supreme Court in *Calandra*, has few significant harmful effects. In a probation revocation hearing in North Carolina a trial judge presides and routinely culls incompetent evidence. Thus, suppression hearings are handled by the presiding judge without unduly prolonging the proceedings. To apply the rule does not "severely damage" our probation system as the majority asserts; indeed, we have been applying the rule for at least twenty-six years without observable harmful effects. Since *McMilliam II*, the instant case is the first one to reach our appellate courts in which the applicability of the exclusionary rule in probation revocation proceedings has even been raised.

That some guilty individuals will "go free" is admittedly a cost of excluding illegally-obtained evidence. But the cases in which the exclusionary rule is successfully asserted are few indeed and cases dismissed because of it are numerically insignificant. A study conducted by the United States General Accounting Office revealed that the rule has *minimal* impact on federal case outcomes. In only 1.3 percent of federal felony cases studied was evidence excluded as a result of a Fourth Amendment motion. Virtually no cases were dropped because of search and seizure problems—only four-tenths of 1 percent. Comptroller General of the U.S., *Impact of the Exclusionary Rule on Federal Criminal Prosecution*, Rep. No. GGD-79-45 (April 19, 1979); *see generally, Hearings on Exclusionary Rule Legislation Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary* (statement of Prof. William W. Greenhalgh, Chairperson of American Bar Association's Criminal Justice Section's Legislation Comm., on behalf of ABA). As noted, in North Carolina the exclusionary

rule's applicability to probation revocation hearings has been raised in only two appellate cases in twenty-six years.

On the other hand, continued application of the exclusionary rule in probation revocation hearings in our state will have the benefit of desirable simplicity. North Carolina courts have long followed the rule that evidence which is incompetent at trial is also incompetent in probation revocation hearings. *State v. Hewett*, 270 N.C. 348, 154 S.E. 2d 476 (1967) (revocation of probation may not be supported by incompetent hearsay); *State v. Morton*, 252 N.C. 482, 114 S.E. 2d 115 (1960) (must be sufficient competent evidence to support revocation); *State v. Pratt*, 21 N.C. App. 538, 204 S.E. 2d 906 (1974) (hearsay evidence incompetent and insufficient to support revocation). The *McMilliam II* rule is simply another application of the more general proposition.

The majority's holding that evidence will not be excluded "so long as the enforcement officer does not know that the defendant is on probation" unduly complicates the law. How will this rule work? In the instant case there is no evidence that D'Azevedo and Johnson knew or did not know of defendant's probationary status. The majority assumes, because defendant was convicted in North Carolina and seized and searched in Miami's airport, that the officers were not aware of his probationary status. But these officers were on routine duty in the airport, and their work was reviewed by the captain of the Narcotic Investigation Section. It is at least possible, if not probable, that drug enforcement officers in Miami are aware of the status of individuals who have been convicted of drug violations in Eastern Seaboard states, particularly when such individuals, like defendant here, possess a Florida driver's license. Even if there were evidence of the officers' knowledge of defendant's status, the majority gives no hint as to what kind of knowledge would invoke the exclusionary rule. Is mere knowledge that an individual is on probation, without knowledge of the specific conditions of his probation, sufficient? The majority offers little guidance for our trial courts who must administer its new rule.

Overruling *McMilliam II* seriously undercuts the policies behind G.S. 15A-1343(b)(15) which states: "The court may not require as a condition of probation that the probationer submit to any other search that would otherwise be unlawful." I fail to see

the majority's "crucial distinction between the conditions that may be imposed on a probationer and the type of evidence that may be used to prove a violation of these conditions." The broader policy served by this statute is that a probationer's constitutional protection against unlawful searches should be equal to the protection accorded other citizens. But to admit evidence that was obtained through an unlawful search of a probationer achieves the same practical effect as requiring him to submit to it. It renders the protection of the statute meaningless.

Finally, the *McMilliam II* rule protects certain basic principles of our jurisprudence. First, as the Fourth Circuit pointed out in *United States v. Workman*, *supra*, 585 F. 2d at 1211:

> [T]he Supreme Court has never exempted from the operation of the exclusionary rule any adjudicative proceeding in which the government offers unconstitutionally seized evidence in direct support of a charge that may subject the victim of a search to imprisonment. Indeed, the Court has observed that standing to invoke the exclusionary rule 'is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on a victim of the search.' *United States v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed. 2d 561 (1974).

Second, excluding unlawfully obtained evidence assures the integrity of the judicial process and promotes the integrity of the executive branch. As stated in *Mapp v. Ohio*, 367 U.S. 643, 659 (1961):

> Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States*, 277 US 438, 485 (1928): 'Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.'

Who is in more need than the probationer of the example the government sets by refusing to use the illegal actions of its

agents to exact a penalty? The government, assisted by the judiciary, does little to further the goal of probation—defendant's rehabilitation—when it allows illegal means to be used to prove he has violated a condition of probation.

In conclusion, I believe we should refuse to overrule *McMilliam II* even though it may be against the weight of authority from other jurisdictions. The better-reasoned approach, and the one which should be more meaningful to us, is that taken by our own Fourth Circuit Court of Appeals in *United States v. Workman, supra*, 585 F. 2d 1205. I see little to be gained by abolishing the exclusionary rule in probation revocation proceedings and much to be lost. We are no wiser than the Court which decided *McMilliam II*, authored by Justice, later Chief Justice, Parker. The case is not clearly wrong. Indeed, to me, it is clearly right. It should remain the law in North Carolina.

II.

Because I believe unlawfully obtained evidence must be excluded in defendant's probation revocation proceeding, I reach the second question raised by defendant. This question is whether his claim check was taken by law enforcement officers in the Miami airport in violation of his constitutional protection against unreasonable searches and seizures, thus tainting the subsequent identification of his luggage and evidence upon which the search warrant was based and in turn tainting the evidence seized during the subsequent search of his suitcase.

The Fourth Amendment of the United States Constitution guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause." This guarantee is applicable to the states. *Mapp v. Ohio, supra*, 367 U.S. 643. The question is at what point a non-border stop of a traveler at an airport by law enforcement personnel triggers the protection of the Fourth Amendment. The Fifth Circuit, sitting *en banc*, recently attempted to synthesize United States Supreme Court decisions on search and seizure and their own precedent in the context of the "stops, interrogations, and searches of suspected drug smugglers by law enforcement officers at airports." *United States v. Berry*, 670 F. 2d 583, 588 (5th Cir. 1982). In a scholarly opinion by Judge Frank

M. Johnson, Jr., the Court developed a useful analytical framework for assessing the constitutionality of law enforcement activity in airports. The Court relied on *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny, in rejecting the argument by the defendants that any interrogation police initiate *at an airport* must be held an impermissible seizure unless it is based on reasonable suspicion. *United States v. Berry, supra*, 670 F. 2d at 590-91. In *Terry*, the Supreme Court balanced the government's interest in effective police investigative techniques against the individual's interest in personal security. 392 U.S. at 20-27. It concluded that a police officer with reasonable grounds to believe

> 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 other's 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 persons in an attempt to discover weapons which might be used to assault him.

392 U.S. at 30-31. Subsequent cases have affirmed the proposition that an officer may make a brief investigatory stop, if not done too intrusively, when he has a reasonable suspicion that an individual is involved in criminal activity. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Adams v. Williams*, 407 U.S. 143 (1972).

The Court of Appeals in *Berry* also noted that the Supreme Court has not considered all contact between police and private citizens as being within the scope of the Fourth Amendment. For example, in *Terry v. Ohio*, 392 U.S. at 19 n. 16, the Court stated, "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *See also Sibron v. New York*, 392 U.S. 40, 63 (1968). *Cf. Schneckcloth v. Bustamonte*, 412 U.S. 218, 225 (1973) (voluntariness of consent to a search at issue).

Thus, the *Berry* court concluded, 670 F. 2d at 591, that Supreme Court cases have carved "three tiers of police-citizen encounters: communication between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment, brief 'seizures' that must be supported by reasonable suspicion, and full-scale arrests that must be supported by probable cause." As illustrated in *Terry v. Ohio, supra*, and our own opinion in *State v. Rinck*, 303 N.C. 551, 280 S.E. 2d 912 (1981), a contact between a police officer and a citizen may be initiated on a reasonable, articulable suspicion of criminal activity and then develop into an arrest supported by probable cause.

The "seizure" referred to in *Berry* has sometimes been referred to in our cases as "a brief stop," "investigatory stop," temporary detention "for purposes of investigating," *State v. Douglas*, 51 N.C. App. 594, 596-97, 277 S.E. 2d 467, 468-69 (1981), *aff'd per curiam*, 304 N.C. 713, 285 S.E. 2d 802 (1982), or simply a "stop," *State v. Rinck, supra*, 303 N.C. at 560, 280 S.E. 2d at 920.

Defendant argues that the initial stop by Detective D'Azevedo was unlawful because it was not based on a reasonable suspicion that defendant was involved in criminal activity. However, as the *Berry* Court ably demonstrates, the Supreme Court has never decided whether an initial stop of a citizen in an airport is a seizure which must be supported by reasonable suspicion. 670 F. 2d at 591-94. In *United States v. Mendenhall*, 446 U.S. 544 (1980), the Court considered the question of whether a stop by Drug Enforcement Administration Agents (DEA) of an airline passenger who fit aspects of a "drug courier profile"[1] was a

1. A "drug courier profile" is a list prepared by the DEA of characteristics it believes many drug smugglers possess. Apparently, the list of characteristics changes from airport to airport. *United States v. Berry*, 670 F. 2d at 598-99 n. 17. In *Elmore v. United States*, 595 F. 2d 1036, 1039 n. 3 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980), the following list was given of factors which may be found on a profile:

> The seven primary characteristics are: (1) arrival from or departure to an identified source city; (2) carrying little or no luggage, or large quantities of empty suitcases; (3) unusual itinerary, such as rapid turnaround time for a very lengthy airplane trip; (4) use of an alias; (5) carrying unusually large amounts of currency in the many thousands of dollars, usually on their person, in briefcases or bags; (6) purchasing airline tickets with a large amount of small denomination currency; and (7) unusual nervousness beyond that ordinarily exhibited by passengers.

seizure. The Court was unable, however, to achieve a majority opinion on whether a seizure occurred. In addition, in *Mendenhall* the defendant was found to have freely consented to accompany the DEA agents to their office and to the search of her person.

In another airport case, *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam), the Court did not address the issue of whether the defendant had been seized when he was approached by a DEA agent who identified himself as such and asked defendant and another man for their airline ticket stubs and identification. The Court merely decided that the state court decision could not stand in that it held the stop was a lawful "seizure" based on reasonable suspicion because the defendant fit the DEA drug courier profile in a number of respects.

The *Berry* Court examines *Mendenhall* and *Reid* along with *Brown v. Texas*, 443 U.S. 47 (1979) (detention of pedestrian in high crime area), *Delaware v. Prouse*, 440 U.S. 648 (1979) (automobile stop case), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (stop of vehicles at border checkpoints). It determined that no case answered the question whether an airport stop is always an impermissible seizure if unsupported by reasonable suspicion or probable cause.[2] It did determine from the precedent, however, that the proper analytic approach to answering the question is by "weighing the intrusion on an individual's Fourth Amendment interest against the government interest." 670 F. 2d at 594.

The Court balanced the "very substantial" governmental interest in ending drug smuggling against the intrusion on an individual's Fourth Amendment privacy interests. *Id.* at 594-595. It concluded "that airport stops of individuals by police, if of extremely restricted scope and conducted in a completely non-coer-

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The secondary characteristics are (1) the almost exclusive use of public transportation, particularly taxicabs, in departing from the airport; (2) immediately making a telephone call after deplaning; (3) leaving a false or fictitious call-back telephone number with the airline being utilized; and (4) excessively frequent travel to source or distribution cities.

2. The Supreme Court has granted certiorari to review a case in which a Florida Appellate Court held that a motion to suppress should have been granted because the defendant's consent to search his luggage had been tainted by a previous improper confinement. *Florida v. Royer*, 389 So. 2d 1007 (Fla. Dist. Ct. App. 1980) (rehearing *en banc*), *pet. for review denied*, 397 So. 2d 779 (Fla. 1981), *cert. granted*, --- U.S. ---, 102 S.Ct. 631, 70 L.Ed. 2d 612 (1981).

cive manner, do not invoke the Fourth Amendment." *Id.* at 594. The balance is "extremely delicate" and the difference between "voluntary, unintrusive communication between police and citizens" and "forced interrogation by police that is so intrusive as to be a seizure, regardless of the government interests involved, rests on fine distinctions in the degree of coercion police may use in an airport stop." *Id.* at 595. The test the Court used of when a seizure has occurred is the same suggested by Justice Stewart in *Mendenhall. Id.* A stop is a seizure "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S. at 554. If a stop has been deemed a seizure it is constitutional only if based on a reasonable suspicion, 670 F. 2d at 598, or as we have said, "reasonable grounds to believe that criminal activity may be afoot." *State v. Rinck, supra,* 303 N.C. at 559, 280 S.E. 2d at 919. The Supreme Court has held that mere similarity of a defendant with aspects of the DEA drug courier profile does not give rise to a reasonable suspicion because generally the "circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." *Reid v. Georgia, supra,* 448 U.S. at 441. The *Berry* Court concluded that the presence of a particular factor on a drug courier profile does not preclude its use if an officer, in light of his experience and the circumstances of the particular case, can demonstrate it supports a reasonable suspicion that an individual is involved in smuggling drugs. 670 F. 2d at 601.

The Court went on to discuss when a seizure may be so intrusive as to be tantamount to an arrest which must be supported by probable cause. It stated that if individuals are required, without their consent, to accompany police to an airport office, it is an arrest which must be supported by probable cause. *Id.* at 601-03. We have said that an arrest occurs when "law enforcement officials interrupt [one's] activities and significantly restrict his freedom of action." *State v. Rinck, supra,* 303 N.C. at 558, 280 S.E. 2d at 919.

On the facts regarding the two defendants in *Berry,* the Court concluded that the initial stop to ask an individual's identification and travel plans, even though motivated by the agent's

suspicion that the individual was a drug smuggler, was not a seizure. When it was determined from that stop that Berry was attempting to hide his true identity, was traveling with a companion, and initially had given a false name to the agents, there was a reasonable suspicion justifying a seizure of him and his companion in light of their earlier nervousness and the officers' knowledge that Berry had the name of a person for whom they had been told to watch. The Court further found that the subsequent decision of Berry and his companion to accompany the agents to their office and to submit to a search was freely given consent under facts not pertinent to the question raised by defendant Lombardo.

Upon the principles enunciated in *Berry*, with which I agree, and the Supreme Court precedents on which it is based, I conclude that the initial stop of defendant by Officer D'Azevedo was a permissible encounter outside the prohibition of the Fourth Amendment. D'Azevedo identified himself and asked defendant to speak with him for a moment. Defendant stopped and D'Azevedo asked for his ticket and identification. Even though D'Azevedo stopped defendant because he says his suspicions were aroused by his nervousness and his actions with his claim check,[3] there is no evidence that the officers conveyed that impression to Lombardo or that his decision to identify himself was the product of coercion.[4] A citizen may choose to cooperate with police requests.

Whether defendant's increased nervousness and the discrepancy in names on his ticket and license gave rise to a reasonable suspicion for a more intrusive investigation constituting a seizure by D'Azevedo need not be decided because there was no justification for Johnson's grabbing defendant from behind and seizing his claim check from him while D'Azevedo was

3. Neither officer indicated that their suspicions were aroused because defendant fit particular factors in a drug courier profile.

4. I must re-emphasize the point stressed in *Berry* that the distinction between "voluntary, unintrusive communication" and "forced interrogation" constituting a seizure is subtle. 670 F. 2d at 595. The record before us shows that defendant produced his driver's license and ticket in response to the question: "May I please see your ID and ticket?" These words are not facially coercive and no other circumstances up to this point are indicative of coercion. Furthermore, D'Azevedo, prior to asking for defendant's identification had requested defendant to stop and had identified himself as a police officer.

writing down defendant's name and license number. Johnson was about ten yards behind defendant. He did not know at that time that there was any discrepancy in the names on the driver's license and the ticket. He did note that defendant appeared to be extremely nervous. His concern for D'Azevedo's safety aroused by defendant putting his claim check into his pocket and continuing to reach deeper into the pocket is unreasonable in light of his previous observation that defendant was wearing very tight jeans. If defendant's jeans were indeed very tight, then the presence of a weapon would have been apparent before defendant reached into his pocket. Because none was noted by Johnson and because there was no basis for believing at that point that the claim stub was evidence of a crime, I believe he had no justification for grabbing defendant.

Furthermore, Johnson's actions in grabbing defendant, securing him against a ticket counter while advising him he was a police officer and not to struggle was an arrest, *State v. Rinck*, *supra*, and not merely a temporary detention which may be based on a reasonable suspicion of criminal activity. As an arrest, it must be supported by showing probable cause. There being no probable cause at that time for defendant's arrest, Johnson's subsequent taking of the claim check from defendant and use of it to retrieve defendant's luggage was impermissible, as was his having the luggage sniffed by the U.S. Customs dog.

Thus the search warrant obtained with this information and the marijuana obtained from the search of defendant's luggage were unlawful as being fruits of an illegal arrest. I believe the trial court properly suppressed this evidence of defendant's possession of illegal drugs at his probation revocation hearing.

I believe the decision of the Court of Appeals should be reversed.

Justices COPELAND and MARTIN join in this dissent.

Appeal of Willett

APPEAL OF DONALD BRENT WILLETT FROM THE DECISION OF THE REFUND COMMITTEE OF THE UNIVERSITY OF NORTH CAROLINA AT GREENSBORO TO CLAIM HIS NORTH CAROLINA INCOME TAX REFUND UNDER THE SET-OFF DEBT COLLECTION ACT

No. 249PA82

(Filed 5 October 1982)

ON 12 May 1982 we granted appellant's petition for discretionary review under G.S. 7A-31 (1981) to review the decision of the Court of Appeals, 56 N.C. App. 584, 289 S.E. 2d 576 (1982), that affirmed the order of *Judge Darius B. Herring, Jr.*, entered at the 27 May 1981 Session of Superior Court, DURHAM County.

The main question presented in this appeal is whether the University of North Carolina must provide a hearing in conformance with the Administrative Procedure Act, G.S. 150A-23 to -37 (1978), when it seeks to setoff a student's debt against the student's state income tax refund under the Setoff Debt Collection Act, G.S. 105A-1 to -16 (1979).

Attorney General Rufus L. Edmisten, by Associate Attorney David E. Broome, Jr., for the State.

Michael W. Willis, for the petitioner-appellee.

PER CURIAM.

The facts in this case are set out at length in the Court of Appeals' opinion reported at 56 N.C. App. 584, 289 S.E. 2d 576 (1982). After reviewing the record and briefs and hearing oral arguments on the question presented, we conclude that the petition for further review was improvidently granted. The order granting discretionary review is vacated. The decision of the Court of Appeals affirming the actions of the trial court remains undisturbed and in full force and effect.

Discretionary review improvidently granted.

ALICE MOORE v. JOHN C. CRUMPTON, CAROL CRUMPTON, AND JOHN C. CRUMPTON, JR.

No. 76PA82

(Filed 5 October 1982)

1. **Parent and Child § 8— tort by unemancipated child—liability of parent for failure to control child's behavior**

The parent of an unemancipated child may be held liable in damages for failing to exercise reasonable control over the child's behavior if the parent had the ability and the opportunity to control the child and knew or should have known of the necessity for exercising such control. Before it may be found that a parent knew or should have known of the necessity for exercising control over the child, it must be shown that the parent knew or in the exercise of due care should have known of the propensities of the child and could have reasonably foreseen that failure to control those propensities would result in injurious consequences.

2. **Parent and Child § 8— rape by unemancipated child—parents not liable for damages**

In an action against defendant parents to recover damages for their unemancipated son's rape of plaintiff after he had used alcohol and drugs, summary judgment was properly entered in favor of defendant mother because she had no opportunity and no reason to know of any necessity on her part to control the child where the evidence before the court showed that the mother and father were separated; the son had been placed under the exclusive care and control of the father; and the mother was at the beach at the time of the rape and had had no contact with or responsibility for the son for over a month. Furthermore, summary judgment was properly entered for defendant father because the evidence before the court would not support a conclusion that he either knew or should have known that he had the ability reasonably to control his son's actions so as to prevent injurious consequences or a conclusion that he knew or should have known that his failure more closely to control the son would result in generally injurious consequences to anyone other than the son himself where it showed: the son was seventeen years old at the time of the rape; the son left home and the rape occurred during the very early morning hours at a time when parents ordinarily would not be expected to be engaged in maintaining surveillance of their children; the parents knew that the son had used controlled substances and alcohol, that he had engaged in sexual intercourse, and that he had committed an assault on another person with a deadly weapon a year or more before the attack on plaintiff; the parents had obtained psychiatric and psychological counseling help for the son because of his problems with drugs and alcohol; and two experts who had examined the son indicated to the parents that there was no reason to foresee that the son would be harmful to himself or others and that they did not think the son could be involuntarily committed to an institution.

3. **Rules of Civil Procedure § 56— summary judgment before compliance with discovery order—harmless error**

Any error in the trial court's entry of summary judgment for defendants before defendants had complied with prior orders directing them to make discovery was harmless where the point which plaintiffs sought to prove by the items defendants had been ordered to produce was shown by other evidence before the court.

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

ON discretionary review of the decision of the Court of Appeals, 55 N.C. App. 398, 285 S.E. 2d 842 (1982) (Opinion by *Judge Wells* with *Judge Arnold* concurring and *Judge*, now *Justice, Harry C. Martin* concurring in the result) which affirmed summary judgment in favor of the defendants entered by *Judge James H. Pou Bailey* 18 November 1980 in Superior Court, ORANGE County.

Epting, Hackney & Long, by Lunsford Long, for plaintiff-appellant.

Robert B. Glenn, Jr., and Newsom, Graham, Hedrick, Murray, Bryson, Kennon & Faison, by James L. Newsom, for defendant-appellees.

MITCHELL, Justice.

The most significant issue presented by this case is whether a parent of an unemancipated minor child may be held liable in damages for failing to take reasonable steps to exercise control over the child's behavior. We conclude that a parent may be held liable in such situations, if the parent knows or should know that he or she has the ability and opportunity to control the child and knows or should know of the necessity for exercising such control.

The plaintiff brought this personal injury action against the defendant, John C. Crumpton, Jr. and his parents, the defendants John C. Crumpton and Carol Crumpton, alleging that John, Jr. had raped her during the early morning hours of 28 June 1978. On that date John, Jr. was 17 years old having been born on 19 October 1960. The plaintiff further alleged that the defendants John and Carol Crumpton knew or had reason to know that John, Jr. used drugs and was of a dangerous mental state and disposition which made it foreseeable that he would intentionally injure

others unless reasonable steps were taken to supervise and control him. The plaintiff asserted that the defendants John C. Crumpton and Carol Crumpton had a legal duty to exercise reasonable care to control and supervise John, Jr. so as to prevent him from intentionally injuring others. She alleged that they failed to perform this duty, in that they failed to prevent John, Jr. from having access to and using illegal drugs and deadly weapons and failed to prevent him from going abroad alone at night after having used such drugs and after having gained possession of such deadly weapons. She further alleged that, as a proximate result of the negligence of the defendants John and Carol Crumpton, the defendant John C. Crumpton, Jr. broke into her home while under the influence of illegal drugs and repeatedly raped her by force and against her will after using a deadly weapon, a knife, to overcome her resistance.

At the time the trial court ruled upon these defendants' motion for summary judgment, the forecasts of evidence of the parties consisted of materials contained in their pleadings, supporting affidavits, depositions and exhibits. The forecasts of evidence of the parties established that John Crumpton, Jr. was one of five children of John and Carol Crumpton. John, Jr. was born with a club foot and was found during early childhood to have hypoglycemia, diabetes and ulcerative colitis. During his childhood and early adolescence, his family life was comfortable and secure. He went with his parents and grandparents on regular hunting, fishing and golfing activities as well as on frequent trips to the beach.

He began using marijuana and other controlled substances at an early age, however, and was a regular user of various controlled substances by the time he was thirteen years old. His parents were aware of his use of controlled substances and attempted by various methods to discourage his use of these illegal substances. John, Jr. continued the use of controlled substances, purchasing them at times with the allowance money his parents still gave him on an irregular basis and at times with money he earned from part-time jobs. During this period of his life, John, Jr. frequently argued with his parents and skipped school. He was once arrested for carrying a concealed knife. He also impregnated a young girl and apparently was hospitalized on one occasion for a drug overdose. Prior to the rape of the plaintiff, John,

Jr. owned or was in possession of various hunting knives and guns given to him by his parents. Although his parents kept alcoholic beverages in the home, the pint of bourbon which John, Jr. drank on the night of the rape was apparently obtained at a friend's home.

During May of 1978, Carol Crumpton and John Crumpton separated and she moved to a new address. By agreement of the couple, Carol Crumpton took their three youngest children to live with her, and John Crumpton had custody of John, Jr. and one other child of the marriage. On 28 June 1978, Carol Crumpton was on vacation at the beach. Sometime prior to that date, John Crumpton completed plans for a vacation for himself and the other child in Hawaii. Before leaving home, he made arrangements for John, Jr. to visit with grandparents in Roxboro. Apparently, after his father left Chapel Hill on vacation, John, Jr. drank a large amount of whiskey, took some type of controlled substances, got "high" and broke into the plaintiff's home on 28 June 1978 and raped her.

The forecasts of evidence of the parties also tended to indicate that the defendants John and Carol Crumpton consulted a psychologist when John, Jr. was nine years old due to problems associated with his physical infirmities. They sought the help of school guidance counselors and various mental health professionals when John, Jr. was in junior high school and had developed academic and drug related problems. The parents made frequent attempts to discipline John, Jr. and to reason with him. They sent him to a private high school during the tenth grade in order to provide a change of environment, and he performed well there. They returned him to the private high school for the eleventh grade, but John, Jr. refused to stay and returned home early during that school year. John, Jr. and his parents went to numerous mental health professionals for counseling. In addition to this counseling, John, Jr. was treated by John A. Gorman, Ph.D., a clinical psychologist, and Landrum S. Tucker, M.D., a psychiatrist. Each of these men saw, diagnosed and treated John, Jr. on several occasions. Dr. Tucker saw John, Jr. on five occasions in January and February of 1978 and among other things reviewed his psychological testing. Both Dr. Gorman and Dr. Tucker indicated to the defendants John and Carol Crumpton that John, Jr. was not disposed toward violent or dangerous behavior

and that he was not a person who should or could be involuntarily committed. Although both doctors indicated that John, Jr. would require continued treatment, he broke off his counseling with both of them. His parents could not or did not require him to return.

Based upon the foregoing forecasts of evidence by the parties, the trial court granted summary judgment for the defendants John and Carol Crumpton. The plaintiff appealed to the Court of Appeals which affirmed the judgment of the trial court. The plaintiff petitioned this Court for discretionary review which we allowed.

The plaintiff contends that the Court of Appeals erred when it concluded that:

> parents cannot be held liable in negligence for the wrongful acts of their unemancipated children unless (1) there is an agency relationship; (2) the parent has directly aided, abetted, solicited, or encouraged the wrongful act; or (3) the parent has entrusted the child with a dangerous instrumentality, the use of which caused the injury.

It is necessary to our resolution of this issue that we review the law of this jurisdiction relative to the liability of parents for the torts of their unemancipated children. Having done so, we conclude that the Court of Appeals applied an incorrect rule of law.

As there is no controlling statute on the issue of the liability of the defendant parents in the present case, the common law controls. In North Carolina and in all other jurisdictions applying common law principles, it is a well-established doctrine that the mere fact of parenthood does not make individuals liable for the wrongful acts of their unemancipated minor children. *Brittingham v. Stadiem*, 151 N.C. 299, 66 S.E. 128 (1909). *See*, Annot. 54 A.L.R. 3d 974 (1973). But while relationship alone does not make a parent liable for the wrongful acts of an unemancipated minor child, a parent who knows or should know of dangerous propensities of his child may be held liable for failing to exercise reasonable control over the child so as to prevent injury to others caused by these dangerous propensities. *Lane v. Chatham*, 251 N.C. 400, 111 S.E. 2d 598 (1959).

We are aware that certain of our prior cases may be read as limiting a parent's liability for acts of the parent's unemancipated child to those situations in which the parent specifically approved the act of the child or in which the child acted strictly in the capacity of servant or agent for the parent, *E.g. Hawes v. Haynes*, 219 N.C. 535, 14 S.E. 2d 503 (1941); *Robertson v. Aldridge*, 185 N.C. 292, 116 S.E. 742 (1923); *Linville v. Nissen*, 162 N.C. 95, 77 S.E. 1096 (1913); *Brittingham v. Stadiem*, 151 N.C. 299, 66 S.E. 128 (1909). To the extent that these and other cases may be construed as placing such limitations upon a parent's liability for the acts of the parent's unemancipated child, they are overruled.

In other cases we have pointed out that a parent also may be liable for the acts of an unemancipated child if the parent was *independently negligent*, "as in permitting the child to have access to some dangerous instrumentality." *Smith v. Simpson*, 260 N.C. 601, 609, 133 S.E. 2d 474, 480 (1963) (quoting 3 Strong: N.C. Index, Parent and Child, § 7, p. 529, currently found in 10 Strong's N.C. Index 3d, Parent and Child, § 8, p. 39). The quoted words were intended by us only to serve as an example of one type of act for which a parent could be found independently negligent and not intended to describe the sole situation in which a parent could be held liable for independent negligence. A proper interpretation of the applicable rules would allow no such limitation upon the liability of parents for negligent failure to control their unemancipated children. The liability of a parent for failure to exercise reasonable control over an unemancipated child arises from the *independent negligence of the parent* and not from the imputed negligence of the child. *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974). Thus, a parent may be held liable for the independently negligent act of failing to exercise reasonable control without regard to whether the unemancipated child's tort is intentional or the result of negligence.

[1] The correct rule is that the parent of an unemancipated child may be held liable in damages for failing to exercise reasonable control over the child's behavior if the parent had the ability and the opportunity to control the child and knew or should have known of the necessity for exercising such control. *Langford v. Shu*, 258 N.C. 135, 128 S.E. 2d 210 (1962); *Lane v. Chatham*, 251 N.C. 400, 111 S.E. 2d 598 (1959). RESTATEMENT (SECOND) OF TORTS

§ 316 (1965); 67A C.J.S. *Parent & Child*, § 125 (1978); 54 A.L.R. 3d 974 (1973); 59 Am. Jur. 2d *Parent and Child* § 133 (1971). Before it may be found that a parent knew or should have known of the necessity for exercising control over the child, it must be shown that the parent knew or in the exercise of due care should have known of the propensities of the child and could have reasonably foreseen that failure to control those propensities would result in injurious consequences. *Lane v. Chatham*, 251 N.C. 400, 111 S.E. 2d 598 (1959). This does not mean that the particular injury occurring must have been foreseeable, but merely that consequences of a generally injurious nature might have been expected. *White v. Dickerson, Inc.*, 248 N.C. 723, 105 S.E. 2d 51 (1958); *Bowen v. Mewborn*, 218 N.C. 423, 11 S.E. 2d 372 (1940). The issue in the final analysis is whether the particular parent exercised reasonable care under all of the circumstances. *Langford v. Shu*, 258 N.C. 135, 139, 128 S.E. 2d 210, 213 (1962).

We turn now to the application of these rules in the present case. The plaintiff contends that the forecast of evidence was sufficient to require that this case be submitted to the jury on the issue of the defendants' alleged negligence and the issue of damages. We disagree and are of the opinion that the trial court correctly entered summary judgment for the defendants John C. Crumpton and Carol Crumpton.

Summary judgment should rarely be granted in negligence cases. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). Even where there is no dispute as to the essential facts, where reasonable people could differ with respect to whether a party acted with reasonable care, it ordinarily remains the province of the jury to apply the reasonable person standard. Additionally, before summary judgment will be properly entered, the moving party has the burden to show the lack of a triable issue of fact and to show that he is entitled to judgment as a matter of law. *Oestreicher v. American National Stores, Inc.*, 290 N.C. 118, 225 S.E. 2d 797 (1976).

The plaintiff contends that the forecasts of evidence presented to the trial court by the parties conflicted as to crucial issues which could only be resolved by a jury trial. The plaintiff also contends that the reasonableness standard could only be applied in this case by the jury. In support of this contention, the

plaintiff points specifically to various discrepancies in the statements of the defendants. For example, John, Jr. testified that he went home at 12:10 a.m. on 28 June 1978 after drinking nearly a pint of bourbon, taking "crystal THC" and "smoking some reef," and that he took "acid" after he arrived home. He testified that he thereafter left home and went to the plaintiff's house where the rape occurred. He also testified that when he arrived home after the rape, his father and sister were still there and that "by six or seven I was coming down off my high and I was pretty sure that they were there." The defendant John C. Crumpton, father of John, Jr., indicated that he had already left for California and Hawaii with his daughter by this time.

As another example, John, Jr. indicated that on several occasions he had "run away from home" and stayed with a girl in Washington. His parents indicated that he did go to see the girl but that he did not run away. Also, at one point the defendant Carol Crumpton stated that she took John, Jr. to a child psychologist in Chapel Hill as a result of John, Jr.'s problem with "pot and friends." The defendant father indicated that John, Jr. went to see Dr. Gorman because he was not taking the necessary medication for his diabetic condition. John, Jr. said he saw all of his therapists because of drugs.

Other examples of conflicts in the testimony of the defendants are apparent. John, Jr. said he argued with his mother over drugs and that his father was aware of these arguments. John, Jr. further indicated that he had never struck his mother. The defendant father said that the arguments were over John, Jr.'s diabetic condition and his household duties and that John, Jr. never struck his mother. The defendant mother said that the arguments were over drugs, alcohol and household duties, and that John, Jr. did strike her on one occasion. The father said that John, Jr. was never seen at North Carolina Memorial Hospital for a drug overdose. John, Jr. said he was seen for this reason "a couple of times." The defendant mother said that he was seen for this reason on only one occasion.

It would serve no purpose to set forth further conflicts in the testimony of the three defendants which are pointed out by the plaintiff in her brief. Even when these conflicts are construed in the light most favorable to the plaintiff and most adverse to the

defendant parents, John C. Crumpton and Carol Crumpton, the defendant parents were entitled to summary judgment in their favor.

[2] Summary judgment in favor of the defendant Carol Crumpton was clearly correct. She separated from the defendant John Crumpton in May of 1978 and moved out of his home. John, Jr. and one other child continued to live in the home with their father. The couple's three other children lived with Carol Crumpton. From May of 1978 forward, Carol Crumpton did not have custody or control of her son John, Jr. Since the child had been placed under the exclusive care and control of his father, the mother had no opportunity and no reason to know of any necessity on her part to control the child. On 28 June, 1978, the night the plaintiff was raped, the defendant Carol Crumpton was at the beach, far away from Chapel Hill, and had had no regular contact with or responsibility for the 17 year old boy for over a month. The facts brought out at the summary judgment hearing failed to disclose any forecast of evidence that she knew or should have known that there was any necessity for her to control the child she had left in the custody of his father. Summary judgment in her favor was proper.

We next consider the liability *vel non* of the defendant father, John C. Crumpton. His son John, Jr. was 17 years old at the time of the rape of the plaintiff. That rape occurred approximately four months prior to the child's eighteenth birthday. The opportunity to control a young man of this age obviously is not as great as with a younger child. The crime involved occurred during the very early morning hours after parents would ordinarily be expected to be in bed. Short of standing guard over the child twenty-four hours a day, there was little that the defendant father could do to prevent John, Jr. from leaving the home after the father was asleep. If John, Jr.'s testimony that, although under the influence of alcohol and various controlled substances, he was "pretty sure" that his father was at home at the time the plaintiff was raped is to be believed, he apparently left home after midnight and at a time when parents ordinarily would not be expected to be engaged in maintaining surveillance of their children.

John, Jr.'s use of controlled substances involved serious violations of the criminal law. Even when parents are aware that

their children have previously engaged in such conduct, there frequently is little they can do to prevent a reoccurrence of such use by their teenage children. The defendant parents in the present case sought professional help for John, Jr. early and often. We fail to see that much more could have been done by them, short of physically restraining his movements and placing him under twenty-four hour a day observation. We note that the failure to control John, Jr. was not limited to the parents' effort. The State has made the use of some of the controlled substances which John, Jr. apparently used shortly before the rape a major felony. Even this failed to prevent this young man, of an age to be fully responsible for his criminal acts in this jurisdiction, from engaging in such felonious activities.

We find no indication in the forecasts of evidence that the defendant parents had any indication that John, Jr. was disposed to commit the crime committed against the plaintiff. At worst the parents were aware that John, Jr. had been involved in an assault on another person with a deadly weapon a year or more before the attack on the plaintiff. They knew he had used controlled substances and were aware that he had engaged in sexual intercourse. However, they had no recent information to indicate that another assault might occur or that John, Jr. might become involved in a forcible rape accomplished through the threatened use of a deadly weapon.

Until very recently, acts such as those John, Jr. directed toward the plaintiff had the potential of resulting in a sentence of death in this jurisdiction and to this day can result in a sentence of life imprisonment, even for one as young as John, Jr. The failure of the State to control John, Jr.'s conduct through the threat of such drastic consequences, although clearly not dispositive of any issue relative to his parents' liability, would tend to indicate that the ability of the defendant parents in the present case to control him was in fact limited.

The forecasts of evidence of the parties clearly show that the defendant parents began to seek psychiatric and psychological counseling and treatment for John, Jr. at a very early point in his life. They went to considerable expense to obtain such counseling and treatment for John, Jr. and to place him in a private school in order that he might receive additional assistance. Prior to the at-

tack on the plaintiff, both Dr. Gorman and Dr. Tucker who were qualified experts in such matters had examined John, Jr. and had indicated to the defendant parents that there was no reason to foresee that John, Jr. would be harmful to himself or others. For this reason these experts indicated to the parents that they did not think John, Jr. could be involuntarily committed. These two experts continue to hold the view that John, Jr. was not committable prior to the rape of the plaintiff and have so stated in sworn affidavits which are a part of the record before us. Thus, even had the defendant parents anticipated that John, Jr. would have committed a crime of violence at some future date, in all probability they would have been unable to have their minor child committed to an institution. As they had been advised that this potential method of control of John, Jr. was not available, their knowledge or reason to know of means of controlling John, Jr., if such means existed, was greatly reduced. Perhaps parents in such situations could arrange to watch their child twenty-four hours a day. In this case, however, the defendants had other children who also needed care and affection. As the defendant father, John C. Crumpton, had separated from his wife and been left with total responsibility for John, Jr. and one other child, it would have been almost impossible for him to watch John, Jr. twenty-four hours a day.

We do not think that the forecasts of the parties revealed evidence which might be forthcoming and which would support a conclusion that the defendant father either knew or should have known that he had the ability reasonably to control his son's actions so as to prevent injurious consequences. Nor do we think the forecasts would tend to support a conclusion that the father knew or should have known that his failure more closely to control John, Jr. would result in generally injurious consequences to anyone other than, perhaps, John, Jr. Therefore, the trial court correctly entered summary judgment for the defendant father, John C. Crumpton.

[3] The plaintiff further contends that the trial court erred in denying her oral motion to continue the hearing concerning the defendants' motion for summary judgment until such time as the defendants had complied with prior orders directing them to make discovery. Ordinarily the completion of discovery is required prior to granting summary judgment. *See Joyner v.*

Hospital, 38 N.C. App. 720, 248 S.E. 2d 881 (1978). The items which the defendants had been ordered to produce included John, Jr.'s report cards from schools in Chapel Hill and other documents which the plaintiff contends would have impeached the defendant parents by showing that they were aware of their son's difficulties in the school system of Chapel Hill. Any error here was harmless to the plaintiff. The forecasts of evidence on behalf of both the plaintiff and the defendants clearly indicated that John, Jr. had difficulty in the public school system in Chapel Hill. Clearly, the parents were well aware of his problems and sought expensive professional help and private schooling for him. Failure of the defendants to produce the report cards and other documents to show that the defendant parents were aware of such facts was not harmful to the plaintiff in this case.

As pointed out by Judge Wells for the majority in the Court of Appeals, this case represents "the story of a modern American family tragedy." Unfortunately, as in this case, such stories often do not have happy endings for the family or society. Although we have rejected the rule of law relied upon by the Court of Appeals, we find the result it reached to be correct. For the reasons stated herein, the opinion of the Court of Appeals affirming the judgment of trial court is

Modified and affirmed.

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

STATE OF NORTH CAROLINA v. HENRY WEAVER

No. 24A81

(Filed 5 October 1982)

1. Rape and Allied Offenses § 6.1— taking indecent liberties with a child under the age of sixteen not lesser offense of first-degree rape of a child of twelve years or less

In a prosecution for first-degree rape of a child "of the age of twelve years or less," G.S. 14-27.2(a)(1), the trial court did not err in failing to instruct on the offense of taking indecent liberties with a child under the age of sixteen,

G.S. 14-202.1, as a lesser included offense. Although it might be argued that under certain factual circumstances taking indecent liberties with a child is a lesser included offense of first-degree rape, the facts of a particular case do not determine whether one crime is a lesser included offense of another. Rather, the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime. To the extent that *State v. Shaw*, 293 N.C. 616 (1977) is in conflict with the holding of this case, it is expressly overruled.

2. **Rape and Allied Offenses § 6.1— assault on child under twelve—not lesser offense of first-degree rape of child under twelve**

Assaulting a child under the age of twelve, G.S. 14-33(b)(3), is not a lesser included offense of first-degree rape of a child of the age of twelve or less, G.S. 14-27.2(a)(1).

3. **Rape and Allied Offenses § 6.1— assault on female by male over eighteen not lesser offense of first-degree rape of a child under twelve**

Assault on a female by a male over eighteen, G.S. 14-33(b)(2), is not a lesser included offense of first-degree rape of a child under twelve, G.S. 14-27.2(a)(1).

4. **Criminal Law § 91.4— absence of counsel—denial of motion to continue—no abuse of discretion**

The trial court did not abuse its discretion in denying defendant's motion to continue based upon the absence of one of defendant's two attorneys for the closing arguments.

5. **Constitutional Law § 48— standard to be used in determining what constitutes ineffective assistance of counsel**

The standard to be used in determining what constitutes ineffective assistance of counsel is the standard expressed in *McMann v. Richardson*, 397 U.S. 759 (1970). That standard determines whether counsel's performance was "within the range of competence demanded of attorneys in criminal cases." Using the McMann standard, defendant failed to demonstrate that he received ineffective assistance of counsel when his main attorney was unable to give the closing argument and the other attorney (1) failed to request that her closing argument be recorded and (2) was just out of law school with no experience in trying a case of this magnitude.

6. **Constitutional Law § 40— no deprival of lawyer of defendant's choice**

An indigent defendant represented by two lawyers does not have the right to require that the lawyer of his choice deliver the closing argument at his trial; therefore, there was no merit to defendant's contention that his constitutional rights were violated when his main attorney was unable to deliver the closing argument and his other attorney had to fill in.

Justices MITCHELL and MARTIN did not participate in the consideration or decision of this case.

ON appeal from judgment of *Owens, Judge*, entered 17 October 1980 in the Superior Court, MECKLENBURG County. Defend-

ant was convicted of first-degree rape and sentenced to life imprisonment. He appeals to this Court as a matter of right pursuant to G.S. 7A-27(a) (1981). This case was docketed and argued as No. 24 at the Fall Term 1981.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Nonnie F. Midgette, for the State.

Appellate Defender Adam Stein and Ann Petersen, admitted pro hac vice, for defendant-appellant.

CARLTON, Justice.

The primary question on this appeal is whether the offenses of taking indecent liberties with a child under the age of sixteen, G.S. 14-202.1 (1981); assaulting a child under the age of twelve, G.S. 14-33(b)(3) (1981); and assault on a female by a male over the age of eighteen, G.S. 14-33(b)(2) (1981), are lesser included offenses of first-degree rape of a child of the age of twelve or less, G.S. 14-27.2(a)(1) (1981).

I.

Evidence for the State tended to show that Cassandra Westbrook was eleven years old on 16 April 1980. Defendant, about 48 years of age, was the father of Cassandra's half-brother. On 16 April 1980, defendant, Cassandra's aunt, Martha Brown, Cassandra and two other children went downtown to look for an inner tube for a bicycle tire. Cassandra gave the following testimony at trial. Defendant led Cassandra through town to the end of a dead-end street, telling her he knew a place where they could get a tire. He led her through a wooded area to a creek. There defendant choked her, threatened her with a knife, and struck her in the face. He told her to take down her pants; she complied. Cassandra also testified that defendant then "put his privates against mine. When I say privates I mean his penis." Cassandra then pulled up her pants and the two prepared to leave. Defendant pulled her pants down again and repeated the act described above. Cassandra testified, "He put his private parts inside me halfway." He also "put his mouth to my private parts." Defendant then made her put her mouth to his penis and told her to open her shirt. When she did not do so he ripped her shirt and brassiere. He put his mouth on her breast. He then

wiped Cassandra with a white, brown and orange rag he had brought along. He told Cassandra that if she told her mother about the incident, he would kill her and her mother.

Defendant and Cassandra then returned to town where defendant bought Cassandra new clothes. She changed into the new clothes in the rest room of the Krispy Kreme shop where defendant worked. Defendant made three phone calls, one of which was to Cassandra's aunt, Martha Brown, who came to the doughnut shop to pick up Cassandra.

Cassandra's mother, Peggy Westbrook, testified that when she questioned Cassandra upon her arrival home, Cassandra denied that anything was wrong. Later, according to Ms. Westbrook, Cassandra began to have nightmares and do poorly in school. Cassandra's teacher called from school to say that Cassandra's grades were dropping. At the end of May 1980, Cassandra told her mother "a little bit about what happened." Ms. Westbrook testified, "She said he put his mouth on her, made her put her mouth on him and he put it in." Ms. Westbrook called the police.

The investigating officer, Sylvia Williamson, testified that Cassandra showed her the place where the alleged assaults occurred. They found the towel which Cassandra identified in court as similar to the one defendant used on the occasion in question. Ms. Williamson said Cassandra told her that defendant put his penis in her private area and "stroked." He also made her perform oral sex on him.

At the close of the State's evidence, the State and defendant stipulated that a crime laboratory examination of the towel failed to reveal the presence of hair or sperm.

A specialist in obstetrics and gynecology testified for defendant that he examined Cassandra some six weeks after the incident. He found no evidence of trauma to her genitals. He also testified that Cassandra told him defendant's penis had not been inserted into her vagina, mouth or rectum. On cross-examination Cassandra testified she had told the doctor this because she was embarrassed.

On Friday, the day scheduled for final arguments, defendant's lead counsel was not present in court because he had a fam-

ily medical emergency. The trial court denied defendant's motion to continue the case until the following Monday. The court did recess until 2 p.m. in order to give defendant's assisting counsel, Ms. Isabell Day, time to prepare her closing argument. Although Ms. Day had been present throughout the trial, she told the court, "I have never had a jury trial before. This is my first time in front of the jury, my first examination of a witness in front of a jury, and I have never argued to a jury before." Ms. Day made the closing argument.

Defendant requested the court to instruct the jury on the offenses of assault on a female, assault on a child under twelve years of age, and taking indecent liberties with a child. The court instructed only on first-degree rape and attempted first-degree rape.

The jury convicted defendant of first-degree rape and he was sentenced to life imprisonment. He appeals the life sentence to this Court as a matter of right.

II.

Before this Court, defendant contends that the trial court erred in failing to instruct the jury on the offenses of taking indecent liberties with a child under the age of sixteen, G.S. 14-202.1 (1981); assaulting a child under the age of twelve, G.S. 14-33(b)(3) (1981); and assault on a female by a male over the age of eighteen, G.S. 14-33(b)(2) (1981)—offenses defendant argues are lesser included offenses of first-degree rape of a child of the age of twelve or less, G.S. 14-27.2(a)(1) (1981). We hold that these offenses are not, as a matter of law, lesser included offenses of first-degree rape of a child of the age of twelve or less, G.S. 14-27.2(a)(1) (1981).

The well-established rule in this jurisdiction is:

> When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment. Further, when there is some evidence supporting a lesser included offense, a defendant is entitled to a charge thereon even when there is no specific prayer for such instruction, and error in failing to do so will not be cured by a

verdict finding a defendant guilty of a higher degree of the same crime.

State v. Banks, 295 N.C. 399, 415-16, 245 S.E. 2d 743, 754 (1978) (quoting *State v. Bell*, 284 N.C. 416, 419, 200 S.E. 2d 601, 603 (1973)).

A.

[1] Defendant was indicted and tried for the first-degree rape of a child "of the age of 12 years or less," G.S. 14-27.2(a)(1) (1981). That statute provides: "(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse: (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 "taking indecent liberties" statute in force at the time defendant was indicted defined that crime as follows:[1]

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.
>
> (b) Taking indecent liberties with children is a felony punishable by a fine, imprisonment for not more than 10 years or both.

G.S. 14-202.1 (Cum. Supp. 1979), *amended by* G.S. 14-202.1(1981).

It is clear from the statutory definition of these two crimes that the offense of taking indecent liberties with a child under

1. The substantive portions of this statute remain as they were enacted in 1975 with only the punishment provision amended to provide that the crime is "punishable as a Class H felony."

G.S. 14-202.1 has essential elements which are not also essential elements of first-degree rape under G.S. 14-27.2(a)(1). The age requirements under the indecent liberties statute are not the same as those for first-degree rape. Under the indecent liberties statute the defendant must be "*16* years of age or more" and "at least *five* years older" than the victim; the victim must be "under the age of *16* years." Under the first-degree rape statute the defendant must be "*12* years or more" and "*four* or more years older than the victim;" the victim must be "*12* years or less." (Emphases added.) Although both crimes have age requirements, those requirements are not the same. The offense of taking indecent liberties with a child, G.S. 14-202.1, contains different age requirements, or different essential elements, from the first-degree rape statute, G.S. 14-27.2(a)(1), and thus is not a lesser included offense of first-degree rape.

It might be argued that *under certain factual circumstances* taking indecent liberties with a child is a lesser included offense of first-degree rape. For example, in all cases in which the defendant is over seventeen and the victim is under twelve, as here, all the age elements of both statutes are met. However, if the defendant is less than seventeen years old it is possible that he will be four but not five years older than his victim; the age differential element of the rape statute would be met but not the age differential element of the indecent liberties statute. In that case, satisfying the age requirements of the statutory rape law does not automatically satisfy the age requirements of the indecent liberties statute. The age differential element of the "lesser" crime of taking indecent liberties is not completely included in the "greater" crime, the rape offense.

We do not agree with the proposition that the *facts* of a particular case should determine whether one crime is a lesser included offense of another. Rather, the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime. *State v. Banks*, 295 N.C. 399, 415-16, 245 S.E. 2d 743, 754 (1978). In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense. The determination is made on a *definitional* not a factual basis.

There is another essential element of the crime of taking indecent liberties with a child under G.S. 14-202.1 that is not an essential element of first-degree rape under G.S. 14-27.2(a)(1): the element of sexual purpose under G.S. 14-202.1(a)(1) or, in the alternative, the element of a "lewd or lascivious act" under G.S. 14-202.1(a)(2). The statute defining first-degree rape does not require a sexual purpose or a "lewd or lascivious act." We note that sexual purpose *may* be inherent in an act of rape.[2] However, a sexual purpose or a "lewd or lascivious act" is not an element of proof under the first-degree rape statute, G.S. 14-27.2(a)(1) (1981).

We hold, therefore, that the offense of taking indecent liberties with a child under G.S. 14-202.1 is not a lesser included offense of statutory rape under G.S. 14-27.2(a)(1) because the age elements are different and, while sexual purpose may be inherent in an act of forcible vaginal intercourse, it is not required to be proved in order to convict a defendant of rape.

We realize that our holding here is in apparent conflict with *State v. Shaw*, 293 N.C. 616, 239 S.E. 2d 439 (1977). There, in a different context, it was said that the offense of taking indecent liberties with a child was a "lesser offense . . . necessarily included in the offense of rape." *Id.* at 632, 239 S.E. 2d at 449. We also note our recent holdings in *State v. Ludlum*, 303 N.C. 666, 281 S.E. 2d 159 (1981) and *State v. Williams*, 303 N.C. 507, 279 S.E. 2d 592 (1981). In *Williams*, Chief Justice Branch wrote:

> The offense of taking indecent liberties with children requires proof that the crime be willful and that it be for the "purpose of arousing or gratifying sexual desire." Thus, the offense of taking indecent liberties with children *requires proof of essential elements not contained in the offense proscribed by G.S. 14-27.4(a)* [first-degree sexual offense] *and is*

2. We also note, however, that recent scientific literature suggests that most rapists do not act "for the purpose of arousing or gratifying sexual desire," (as the indecent liberties statute requires) but to satisfy a powerful aggressive need. Nat'l Inst. of Law Enforcement and Criminal Justice, Law Enforcement Assistance Admin., U.S. Dept. of Justice, *Forcible Rape: Final Project Report*, at 14 (1978) (written by Battelle Memorial Institute Law and Justice Study Center) (quoting Bromberg and Coyle, *Rape: A Compulsion to Destroy*, 22 Medical Insight 21-25 (1974)). See also Cohen, Garofalo, Boucher and Seghorn, *The Psychology of Rapists*, 3 Seminars in Psychiatry 307-27 (1971). Indeed, rape is often characterized today not as a "lewd or lascivious act," but as an "act of violence," Mitra, " . . . *For She Has no Right or Power to Refuse Her Consent*," 1979 Crim. L. Rev. 558 (1979).

therefore not a lesser-included offense of the latter first-degree sexual offense. We therefore hold that the trial court did not err in failing to instruct on G.S. 14-202.1.

303 N.C. at 514, 279 S.E. 2d at 596. (Emphasis added.)

We reached the very same result in *Ludlum* in an opinion by Justice Exum, 303 N.C. at 674, 281 S.E. 2d at 164.

Our holdings in *Williams*, *Ludlum* and the case at bar are clearly consistent with the long-standing rule in this jurisdiction that a lesser included offense is one in which the greater offense contains all of the essential elements of the lesser offense. Our holding in *Shaw* is in conflict with that rule. Therefore, to the extent that it holds that the offense of taking indecent liberties with a child is a lesser included offense of statutory rape, *Shaw* is hereby expressly overruled.

B.

[2] We also reject defendant's contention that assaulting a child under the age of twelve, G.S. 14-33(b)(3), is a lesser included offense of first-degree rape of a child of the age of twelve or less, G.S. 14-27.2(a)(1).

One is guilty of a misdemeanor assault under G.S. 14-33(b)(3) if he "[a]ssaults a child under the age of 12 years." It is readily apparent that this crime has an essential element which is not also an essential element of the crime of first-degree rape of a child of the age of twelve years or less: an *assault.* G.S. 14-27.2(a)(1) provides that a person is guilty of first-degree rape only if he "*engages* in vaginal intercourse" with the young victim; no concomitant assault is required.

This lack of an assault requirement under the statutory rape law, G.S. 14-27.2(a)(1), is understandable given the purpose of the statute. Unlike the provision of the first-degree rape statute that applies if the victim is an adult, G.S. 14-27.2(a)(2), the forbidden conduct under the statutory rape provision, G.S. 14-27.2(a)(1), is the act of intercourse itself; any force used in the act, any injury inflicted in the course of the act, or the apparent lack of consent of the child are *not* essential elements. This is so because the statutory rape law, G.S. 14-27.2(a)(1), was designed to protect children under twelve from sexual acts.

It may be argued that vaginal intercourse with a child under twelve is itself an assault. This is not the case because the crime of assault has essential elements which are not also essential elements of statutory rape. For example, assault generally requires proof of state of mind of either the defendant or the victim—the defendant's intent to do immediate bodily harm or the victim's reasonable apprehension of such harm. The statutory rape law, G.S. 14-27.2(a)(1), does not contain a state of mind element, however. Assault on a child under twelve, G.S. 14-33(b)(3), is not, therefore, a lesser included offense of first-degree rape of a child under twelve, G.S. 14-27.2(a)(1).

C.

[3] In addition, we reject defendant's contention that assault on a female by a male over eighteen, G.S. 14-33(b)(2), is a lesser included offense of first-degree rape of a child under twelve, G.S. 14-27.2(a)(1).[3] The offense of assault on a female has essential elements that are not also essential elements of the crime of first-degree rape of a child of the age of twelve years or less. First, G.S. 14-33(b)(2) contains an assault requirement which, as explained above in section B, is not an essential element of statutory rape, G.S. 14-27.2(a)(1). Second, the two requirements under G.S. 14-33(b)(2) that the defendant be a "male person" and "over the age of 18 years" are not essential elements included in the statutory rape law, G.S. 14-27.2(a)(1). Therefore, assault on a female by a male over eighteen is not a lesser included offense of first-degree rape of a child of the age of twelve or less because all of the elements of the assault offense are not included in the rape offense.

D.

In summary, the trial court correctly refused to charge on the requested "lesser" offenses and properly charged on an attempt to commit the crime charged. G.S. 15-170 (1978), enacted in this state almost a century ago, provides that a defendant may be convicted on an indictment of (1) the crime charged therein, or

3. We note that although defendant stated this contention in his brief, "no reason or argument is stated or authority cited" in support of this contention, Rule 28(b)(5), N.C. Rules App. Proc., 303 N.C. 713, 715 (1981) (amending by renumbering Rule 28(b)(3), N.C. Rules App. Proc., 287 N.C. 669, 742 (1975)). We will, however, address this issue rather than deem it abandoned.

(2) a less degree of the crime charged, or (3) an attempt to commit the crime charged, or (4) an attempt to commit a less degree of the crime charged. The offenses requested for submission by the defendant here fit none of the enumerated categories. The trial court properly instructed the jury with respect to categories one and three.

III.

Defendant next contends that he was denied effective assistance of counsel and continued representation of counsel of his choice when the trial court denied his motion for continuance. Defendant relies on the proposition that although a motion for a continuance generally is addressed to the sound discretion of the trial judge, and review is limited to a showing of an abuse of that discretion, when the question presented is based on a constitutional right, it is reviewable as a question of law. *State v. McFadden*, 292 N.C. 609, 611, 234 S.E. 2d 742, 744 (1977). He contends that the trial court erred not only as a matter of law but under a traditional abuse of discretion standard as well.

A.

[4] We first summarily reject defendant's contention that the trial court abused its discretion in failing to allow the motion for continuance. In *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976), this Court stated, "before ruling on a motion to continue the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice." *Id.* at 483, 223 S.E. 2d at 386. Here, the trial court listened to Ms. Day, a member of the public defender's office, request a continuance until the following Monday so that Mr. Chapman, the lead counsel for the public defender's office, could make the closing argument to the jury. Ms. Day advised the court that her duties in the case were primarily the cross-examination of the prosecuting witness and the presentation of an introductory statement to the jury in the closing argument. She also told the court that Mr. Chapman planned to make the primary closing argument and that this was her first jury trial. Ms. Day had participated in the entire trial. The trial court found that Ms. Day was a "fully capable attorney to present final arguments to the jury" and gave her until 2 p.m. that day to prepare her argument. We note no argument by defendant that Ms. Day did not present

an adequate argument to the jury. Clearly, on the record before us, we are unable to find that the trial court abused its discretion in denying the continuance motion.

B.

[5] Defendant also contends that he was denied his state and federal constitutional right to effective assistance of counsel as a matter of law. He urges that we make clear the standard to be used in determining what constitutes ineffective assistance of counsel. With our adoption today of the *McMann* test, we hope this uncertainty is dispelled.

In *State v. Milano*, 297 N.C. 485, 256 S.E. 2d 154 (1979), this Court noted the standard the United States Supreme Court used in evaluating the advice counsel gave the defendant in *McMann v. Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed. 2d 763 (1970). We interpreted *McMann* as holding that the gauge of effective assistance of counsel is whether counsel's performance was "within the range of competence demanded of attorneys in criminal cases." *State v. Milano*, 297 N.C. at 494, 256 S.E. 2d 159 (quoting *McMann v. Richardson*, 397 U.S. at 770-71, 90 S.Ct. at 1448-49, 25 L.Ed. 2d at 773). We also noted that, "[t]he courts . . . have consistently required a stringent standard of proof on the question of whether an accused has been denied Constitutionally effective representation. . . . To impose a less stringent rule would be to encourage convicted defendants to assert frivolous claims which could result in unwarranted trial of their counsels." *State v. Milano*, 297 N.C. at 494, 256 S.E. 2d at 159 (quoting *State v. Sneed*, 284 N.C. 606, 613, 201 S.E. 2d 867, 871-72 (1974)).

In *State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981), this Court applied both the *McMann* test and the ABA Standards Relating to the Defense Function, without adopting either standard. *Id.* at 120-21, 282 S.E. 2d at 799-800. In *State v. Maher*, 305 N.C. 544, 290 S.E. 2d 694 (1982), we observed in a footnote that this Court had not yet decided which standard is to be used. *Id.* at 549 n.1, 290 S.E. 2d at 697 n.1. It was assumed in *State v. Vickers*, 306 N.C. 90, --- S.E. 2d --- (1982), that the *McMann* test had been adopted by this Court. *Id.* at ---, --- S.E. 2d at ---.

To resolve any confusion which understandably might now exist, we expressly adopt today the *McMann* standard. In apply-

ing the test to the case at bar we must decide whether counsel's performance was "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. at 771, 90 S.Ct. at 1449, 25 L.Ed. 2d at 773.

Defendant concedes he is unable to demonstrate the level of Ms. Day's competence because her closing argument was not recorded. However, he argues that Ms. Day's failure to request that her closing argument be recorded is proof of her incompetence. Alternatively, defendant contends that a "lawyer just out of law school with no experience in trying cases, is incompetent as a matter of law to give the . . . closing arguments" in a trial of this nature.

We reject defendant's first assertion summarily. Defendant cites no authority for the proposition that an attorney's failure to request the recording of a closing argument demonstrates, as a matter of law, that counsel is incompetent. This failure to provide authority for such an assertion is probably due to the fact that there is none. Many, if not most times, closing arguments are not recorded. We note that only rarely do records in criminal cases that reach this Court contain them. The trial court, having watched Ms. Day participate in the entire trial, found her fully capable of presenting the closing argument. We cannot imagine that counsel's failure to have her closing argument recorded violates the *McMann* standard, or any other standard of competence.

Moreover, mere inexperience of counsel, without more, does not constitute ineffective assistance of counsel. *State v. Poole*, 305 N.C. 308, 312-13, 289 S.E. 2d 335, 338-39 (1982); *e.g., United States ex rel. Williams v. Twomey*, 510 F. 2d 634, 638-39 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975). The trial court had sufficient evidence of Ms. Day's ability to adequately present defendant's closing argument. As we said in *Poole*, "[t]he trial court was in a position far superior to ours to observe [counsel'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." *Id.* at 313, 289 S.E. 2d at 339.

C.

[6] Finally, defendant contends that his constitutional rights were violated because he was deprived of the lawyer of his choice. This argument is patently without merit. Ms. Day was one of *two* lawyers the State provided to assist the defendant in presenting his case. The trial court's findings indicate that Ms. Day participated throughout the trial. It was planned that she would present part of the closing argument. Defendant has no legal basis for his complaint that his constitutional rights were violated because only one of the two lawyers assisting in his defense could participate in this brief portion of the trial. An indigent defendant does not have the right to a lawyer of his choice. *State v. Sweezy*, 291 N.C. 366, 371, 230 S.E. 2d 524, 528 (1976); *State v. Robinson*, 290 N.C. 56, 65, 224 S.E. 2d 174, 179 (1976); *e.g., United States v. Hampton*, 457 F. 2d 299, 301 (7th Cir.), *cert. denied*, 409 U.S. 856 (1972). It follows, therefore, that an indigent defendant represented by two lawyers does not have the right to require that the lawyer of his choice deliver the closing argument at his trial.

Defendant had a fair trial, free from prejudicial error.

No error.

Justices MITCHELL and MARTIN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. SAMUEL LEE JACKSON

No. 83A81

(Filed 5 October 1982)

1. Criminal Law § 66.4— charges dismissed—no right to lineup

Defendant had no right under G.S. 15A-281 to demand a lineup when the State had taken a voluntary dismissal of the charges against him.

2. Criminal Law §§ 66.12, 66.17— confrontation in hall near courtroom—no taint of photographic and physical lineups—independent origin of in-court identification

A "confrontation" when two State's witnesses saw defendant being led in handcuffs from the lockup beside the courtroom down a hall did not taint

subsequent photographic and physical lineup identifications by those two witnesses and another witness where all of the State's witnesses testified that no suggestions were made to them by the police at the photographic display which would indicate that any one of the photographs was of defendant, and defendant's counsel was present at the physical lineup and stipulated that he observed no impropriety in the manner and method in which the identification procedure was conducted. Furthermore, even if the pretrial identification procedures had been tainted by the confrontation in the hall, defendant could not have been prejudiced thereby where the trial court made findings of fact, fully supported by the voir dire testimony, that each witness had an adequate opportunity to view defendant in good lighting and in close proximity at the time of the crime, and such findings supported the trial court's conclusion that the in-court identifications were independent in origin.

3. Criminal Law § 99.9— questions by trial judge—ownership of money taken in robbery—no expression of opinion

In a prosecution for armed robbery of a furniture sales center, the trial court did not express an opinion in violation of G.S. 15A-1222 in asking questions attempting to clarify the testimony of a salesman at the center concerning the ownership of money taken from his possession during the robbery since proof of ownership was not essential to establish robbery, and the questions in no way intimated the trial judge's opinion regarding the witnesses credibility, defendant's guilt or a factual controversy to be resolved by the jury.

4. Criminal Law § 141.1— special indictment charging previous conviction—inapplicability of statute

Provisions of G.S. 15A-928(b) and (c) requiring a special indictment charging defendant with a previous conviction to be filed with the principal pleading and requiring that defendant be arraigned on the special indictment prior to the close of the State's case did not apply in this armed robbery case since the statute applies solely to cases in which the fact that the accused "has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter," G.S. 15A-928(a), and the armed robbery statute in effect at the time of defendant's arrest and conviction, G.S. 14-87(a), made no distinction between first and second offenders in terms of the punishment they might receive.

5. Robbery § 4.1— ownership of property taken in robbery—no fatal variance

There was no merit to defendant's contention that there was a fatal variance in an armed robbery case on the ground that the indictment charged that defendant took property belonging to the Furniture Buyers Center and the evidence showed that he took property belonging only to a salesman of that business since (1) the State was permitted to reopen its case to show that defendant stole property belonging both to the Furniture Buyers Center and to the salesman personally, and (2) it was not necessary for the State to show whose money defendant took as long as the evidence showed that the money was not defendant's own.

6. Criminal Law § 97.1— no abuse of discretion in permitting additional evidence

The trial court did not abuse its discretion in allowing the State to reopen its case to present further testimony after defendant's argument to the jury.

7. Robbery § 4.3— armed robbery—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution of defendant for the armed robbery of a furniture sales business where three eyewitnesses presented a detailed account of the events which occurred at the time of the robbery and made in-court identifications of defendant; each witness testified that defendant threatened his life if he refused to tell defendant where the money was; one witness specifically stated that defendant robbed him of $1,480 and a $1,000 check; and an accomplice testified that he, along with defendant and another person, robbed the furniture sales business on the date in question by the use of a deadly weapon.

ON appeal by defendant from *Gavin, Judge*, at the 14 November 1978 Criminal Session of GUILFORD County Superior Court, High Point Division.

Defendant was charged in a bill of indictment, proper in form, with the armed robbery of Furniture Buyers Center, Inc., in High Point, North Carolina. Defendant entered a plea of not guilty.

The prior procedural history of this case is important for a proper understanding of defendant's arguments. Defendant was initially charged by warrant. He made a motion pursuant to G.S. 15A-281 requesting a lineup. Defendant's motion was granted, and the lineup was ordered to be held on 16 August 1978. This order was orally rescinded by Judge Yeattes when he learned the State intended to take a voluntary dismissal of the case on 17 August 1978. The State did dismiss the action on 17 August and no lineup was held.

After the case was dismissed in district court, defendant was led in handcuffs from the lockup beside the courtroom down the hall. One of the State's witnesses, Albert Rice, was standing in the hallway at the time and testified that he recognized defendant as he passed by.

Also on 17 August 1978, after the dismissal of the action in district court, the State's witnesses, Terrie Cecil and Mike Hughes, were taken to the High Point Police Department where they were shown a series of photographs. Both witnesses identified defendant from the fifteen pictures in the photographic display.

On 5 September 1978, the grand jury returned a true bill of indictment charging defendant with armed robbery of the Furniture Buyers Center.

At defendant's request, a lineup was held on 9 November 1978. Witnesses Cecil and Hughes immediately identified defendant. Witness Rice testified that he first marked number three but asked the officer conducting the lineup if he could change his ballot. He was given a new ballot and correctly marked defendant's number.

At trial, the State offered evidence tending to show that on 13 February 1978, at approximately 11:30 a.m., three black men entered the Furniture Buyers Center in High Point. Terrie Cecil, an employee of the Furniture Buyers Center, testified that the three black males came into the building and stood in the hallway outside her office for a few moments. They did not arouse her suspicion at that point, and she left her desk to walk back to the catalog room. One of the black men entered the catalog room and told her she was needed in her office. When she returned to her desk, everyone in the room was lying on the floor. She, too, was pushed to the floor as the black men announced they were going to rob the Center.

On voir dire she testified that she could identify defendant as one of the three black men who robbed the Center. She stated that she could identify him from having seen him on the day of the robbery, independent of the photographic display and lineup. She was thereafter permitted to make an in-court identification in the presence of the jury.

Another of the State's witnesses was able to make a positive identification of defendant. Mike Hughes, a furniture salesman, was present at the Furniture Buyers Center on the morning of the robbery. Hughes testified that he was in the secretary's office when he heard a commotion in the hall. He looked up from his chair to see what was happening when defendant peered through the doorway. A few seconds later, three black males burst into the office and shouted, "This is a robbery, everyone on the floor."

The court determined on voir dire that Hughes' identification was premised solely on his observations of defendant at the Furniture Buyers Center, and he was permitted to make an in-court identification of defendant.

Albert Rice, a self-employed furniture salesman who had an office at the Center, was the third witness to identify defendant as one of the robbers. He also testified that he was in the secretary's office when defendant first looked through the doorway. He complied with the robbers' demand to lie on the floor. Rice testified that defendant then grabbed him by the arm, put a gun to his head and shoved him into the office where the safe was located. The safe was open but there was no money in it. One of the robbers kicked Mr. Rice and demanded to know where the money was. When Rice told them he did not know, the robbers searched him and took from his person $1,480.00 and a check for $1,000.

On voir dire, Rice testified his identification of defendant was based solely on his observations made at the time of the alleged criminal incident. When the jury returned, Rice resumed his testimony and, like Hughes and Cecil, identified defendant as one of the perpetrators.

The State also offered the testimony of Raynard Reeves. Reeves stated that he, defendant and another black male robbed the Furniture Buyers Center on 13 February 1978. He admitted that he pled guilty to this crime pursuant to a plea bargain and received a sentence of eighty years. Reeves' testimony regarding the details of the robbery was very sketchy; he could not remember the location of the Center nor could he remember what he did after the robbery. He attributed his faulty memory to the fact that he was on heroin at the time of the robbery.

After the State rested but before defendant put on any evidence, the State was permitted to reopen its case for the purpose of having defendant plead to a special indictment alleging that he had been previously convicted of armed robbery. Defendant, out of the presence of the jury, admitted the previous conviction.

Defendant offered evidence in the nature of an alibi. Katie Jackson, defendant's mother, testified that defendant drove her to work on 13 February 1978 and that they left her home in Winston-Salem to drive to Clemmons sometime before 12:00 noon.

After defendant's argument to the jury, the State was permitted to reopen its case to present additional testimony from

Albert Rice. In clarification, Mr. Rice testified that of the money taken from him, $1,400 belonged to the Furniture Buyers Center while $80.00 and the $1,000 check belonged to him. The court asked Rice to define his relationship to the Center. He testified that he was a buyer and salesman with no ownership interest in the Center. On further questioning from the court, he stated that he was in charge of the Furniture Buyers Center on the day the robbery occurred.

The jury returned a verdict of guilty of armed robbery, and the court imposed a life sentence. Defendant gave notice of appeal. When no record had been filed on appeal after two extensions of time had been granted, Judge Washington dismissed defendant's appeal. We allowed defendant's petition for writ of certiorari on 12 January 1982.

Rufus L. Edmisten, Attorney General, by Reginald L. Watkins, Assistant Attorney General, and Floyd M. Lewis, Associate Attorney, for the State.

L. Samuel Dockery, III, for defendant-appellant.

BRANCH, Chief Justice.

We consider defendant's first and third assignments of error together since they raise related procedural and constitutional issues.

By this assignment of error, defendant initially contends that the trial judge erred in his motion to dismiss based on the State's failure to conduct the lineup as ordered by the district court on 15 August 1978. Defendant argues that the failure to hold the lineup at this time violated his statutory right to request that nontestimonial procedures be conducted.[1]

The State maintains that the voluntary dismissal of the case on 17 August 1978 obviated any necessity for the lineup. In fact, the district court order for a lineup was rescinded verbally by

1. G.S. 15A-281 provides that a person charged with an offense punishable by imprisonment for more than one year may request that nontestimonial identification procedures be conducted. If it appears that the results of specific nontestimonial procedures will be of material aid in determining whether defendant committed the offense, the judge to whom the request was directed must order the State to conduct the procedures.

Judge Yeattes when he was informed of the State's intention to dismiss the action. The State argues that because the charges were no longer pending against defendant and because the order had been rescinded, defendant's contentions are without merit.

The State further contends that any possible prejudice was cured when defendant was granted a lineup after the true bill of indictment was returned against him.

Defendant, however, strenuously argues that the lineup held on 9 November 1978 did not cure the prejudice engendered by the failure to hold the earlier lineup. Defendant argues the second lineup was not curative because of an alleged unlawful showup which occurred immediately after the State's dismissal of the case on 17 August.

After defendant's case was dismissed in district court, he was led in handcuffs from the lockup beside the courtroom down the corridor and was observed by the State's witnesses, Terrie Cecil and Albert Rice. Immediately after this confrontation, Cecil was taken to the High Point Police Department where she was shown a photographic lineup including defendant's picture.

Defendant argues that this confrontation in the hallway was so suggestive that it led to an irreparable mistaken identification of defendant both at the photographic lineup held that same afternoon and at the physical lineup held later on 9 November.

No mention of these identification procedures was made to the jury. Defendant nevertheless challenges the admissibility of the witnesses' *in-court* identification testimony on the ground that it is tainted by the out-of-court identification procedures conducted under constitutionally impermissible circumstances. He challenges the trial court's findings of fact and conclusions of law that each witness's in-court identification was independent of any influence other than their observations on the day of the crime.

We overrule defendant's first and third assignments of error.

[1] First, we find no impropriety in the State's failure to hold the lineup as ordered by the district court judge on 15 August. The State, for whatever reason, decided to take a voluntary dismissal in the case. When Judge Yeattes learned of the State's intention, he properly rescinded his earlier order, finding it was

no longer necessary to proceed with the lineup. Certainly defendant has no statutory right to demand a lineup when charges are no longer pending against him.

[2] Neither do we accept defendant's contention that the so-called "confrontation" between defendant and the State's witnesses was so damaging that the photographic and physical lineups that followed were unconstitutionally tainted.

Only one of the State's witnesses, Albert Rice, actually recognized defendant as he was ushered by. Miss Cecil testified that she saw a black man for an instant out of the corner of her eye but she had no idea it was defendant. Witness Hughes was not in the corridor at the time and did not view defendant. Furthermore, only Cecil and Hughes were taken to the Police Headquarters to identify defendant from the photographs. Thus, the only witness who could reasonably have been influenced by this "confrontation" was not present at the photographic display held that same afternoon.

All of the State's witnesses testified that no suggestions were made to them by the police at the photographic display which would indicate that any one of the photographs was of defendant. Defendant's counsel was present at the physical lineup and stipulated that he observed no impropriety in the manner and method in which the identification procedure was conducted.

The trial judge specifically found that there were no unconstitutional identification procedures involving defendant. When a trial court's findings of fact are supported by competent evidence, they are binding upon this Court. *State v. Stepney*, 280 N.C. 306, 317, 185 S.E. 2d 844, 851 (1972); *State v. McVay*, 279 N.C. 428, 432, 183 S.E. 2d 652, 655 (1971); *State v. Hines*, 266 N.C. 1, 11, 145 S.E. 2d 363, 369 (1965). There was plenary evidence in the record to support the trial judge's findings that the identification procedures were free of constitutional error.

Finally, we note that even if the pretrial identification procedures had been tainted by the confrontation in the corridor, defendant could not have been prejudiced. We have consistently held that an in-court identification is competent, even if improper pretrial identification procedures have taken place, so long as it is determined on voir dire that the in-court identification is of in-

dependent origin. *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968).

The trial judge held separate voir dire examinations before admitting each witness's testimony identifying defendant as one of the robbers. The court found facts, fully supported by the voir dire testimony, that each witness had an adequate opportunity to view defendant in good lighting and in close proximity at the time of the crime. The court's conclusions, properly supported by these findings of fact, were that the in-court identifications were independent in origin.

We recognize that there must be clear and convincing evidence to support the trial court's findings that a witness's in-court identification is independent of any unconstitutional identification procedure. *State v. Yancey, supra.* The evidence in instant case meets this standard, and we are bound by the trial court's determination. *State v. Tuggle*, 284 N.C. 515, 520, 201 S.E. 2d 884, 887 (1974).

These assignments are overruled.

[3] By his second assignment of error, defendant contends that the trial court's examination of the State's witness, Albert Rice, constituted an expression of opinion in violation of G.S. 15A-1222. Defendant argues that by questioning Rice as to who owned the Furniture Buyers Center and who was in charge, the court supplied elements essential to the State's case, to-wit, ownership and control of the alleged stolen property. This argument is without merit.

State v. Jenerett, 281 N.C. 81, 187 S.E. 2d 735 (1972), is directly on point. In *Jenerett*, the defendant was prosecuted for a homicide committed in the perpetration of a robbery. There, we held that the defendant was not prejudiced by the trial court's inquiry as to the ownership of the store where the crime occurred and the merchandise contained therein because proof of ownership was not essential to establish robbery. *Id.* at 88, 187 S.E. 2d at 740. As long as the evidence shows the defendant was not taking his *own* property, ownership is irrelevant. *State v. Spillars*, 280 N.C. 341, 345, 185 S.E. 2d 881, 884 (1972); *State v. Rogers*, 273 N.C. 208, 212-13, 159 S.E. 2d 525, 528 (1968); *State v. Lynch*, 266

N.C. 584, 586, 146 S.E. 2d 677, 679 (1966). A taking from one having the care, custody or possession of the property is sufficient. 67 Am. Jur. 2d *Robbery* § 14 (1973).

The evidence in this case clearly indicates defendant took the money from Rice's possession and that it was not defendant's property. Rice testified that he was robbed of a substantial sum of cash plus a check for one thousand dollars. It was unclear from his testimony, however, whether the money belonged to him or to the Furniture Buyers Center. Obviously, the trial judge was merely attempting to clarify the witness's testimony regarding ownership of the money.

The law is well settled that the trial court may direct questions to a witness for the purpose of clarifying his testimony. *State v. Pearce*, 296 N.C. 281, 250 S.E. 2d 640 (1979); *State v. Freeman*, 280 N.C. 622, 187 S.E. 2d 59 (1972). Here, the questions in no way intimated the court's opinion regarding the witness's credibility, defendant's guilt or a factual controversy to be resolved by the jury. *State v. Yellorday*, 297 N.C. 574, 581, 256 S.E. 2d 205, 210 (1979).

This assignment of error is without merit.

We elect to consider defendant's fourth and fifth assignments of error together as they both deal with the provisions of G.S. 15A-928.

[4] We first consider defendant's contention that the special indictment and notice of second offense of armed robbery were improperly filed and therefore should be dismissed.

G.S. 15A-928(b) provides, in part, that the special indictment must be filed with the principal pleading. G.S. 15A-928(c) provides, inter alia, that the defendant must be arraigned on the special indictment prior to the close of the State's case. The State did not comply with either of these statutory requirements in this case. The grand jury returned the indictment charging defendant with armed robbery of the Furniture Buyers Center on 28 August 1978. The notice of second offense of armed robbery was not filed until 26 October 1978 and the special information was not filed until 27 October. Furthermore, defendant was not arraigned on the special indictment until after the State had rested its case. The judge allowed the State to reopen for the purpose of having

defendant plead to the special indictment. Defendant claims he is entitled to a new trial because of the State's failure to comply with these portions of G.S. 15A-928.

We hold that G.S. 15A-928 does not apply in this case. The statute applies solely to cases in which the fact that the accused "has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter . . . ." G.S. 15A-928(a). Defendant's prior conviction of armed robbery did not raise the offense for which defendant was charged to one of "higher grade." *See State v. Jeffers*, 48 N.C. App. 663, 666, 269 S.E. 2d 731, 733-34 (1980). Upon proof of this previous conviction, defendant would *not* be tried for an offense carrying a higher statutory punishment.[2] The statute in effect at the time of defendant's arrest and conviction, G.S. 14-87(a), made no distinction between first and second offenders in terms of the punishment they might receive. The statute provided that upon a conviction of armed robbery, the defendant could be sentenced to imprisonment for not less than seven years nor more than life.

Thus, defendant was simply charged with the offense of armed robbery on two separate occasions. His prior conviction was *not* a statutory element to be proved by the State in this case.

Defendant also contends the trial court abused its discretion in permitting the State to reopen its case in order to arraign defendant on the special indictment.

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2. An example of when a defendant *would* be tried for an offense carrying a heavier punishment upon proof of a prior conviction is when he is charged a second time with driving while under the influence of intoxicating liquor. G.S. 20-179. The State would be required to allege and prove the prior conviction(s) as an element of the offense in order to subject the accused to the higher penalty for second, third or subsequent offenses. *State v. Williams*, 21 N.C. App. 70, 72, 203 S.E. 2d 399, 401 (1974); *State v. White*, 246 N.C. 587, 590, 99 S.E. 2d 772, 774 (1957).

We caution the Bench and Bar that when G.S. 15A-928 does apply, the statute must be strictly followed in order to apprise defendant of the offense for which he is charged and to enable him to prepare an effective defense. Thus, the special indictment charging defendant with the previous conviction(s) of a specified offense must be filed *with* the principal pleading. Furthermore, the defendant must be arraigned upon the special indictment after commencement of the trial but *before* the close of the State's case.

The trial court has discretionary power to permit the introduction of additional evidence after a party has rested. *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980); *State v. Carson*, 296 N.C. 31, 249 S.E. 2d 417 (1978); *State v. Coffey*, 255 N.C. 293, 121 S.E. 2d 736 (1961). As stated above, the State was not required to arraign defendant on a special indictment. Although this procedure was unnecessary, we find no abuse of discretion in the trial judge's ruling. Furthermore, no evidence of defendant's previous conviction was before the jury. Thus, defendant may not claim prejudice in this regard.

In light of our holding that G.S. 15A-928 does not apply in this case, we do not deem it necessary to discuss defendant's argument that this statute forced him to testify against himself in violation of the Fifth Amendment to the United States Constitution.

By his sixth assignment of error, defendant argues that the trial court erred in denying his motion for nonsuit at the close of the State's evidence.

Defendant waived his right to assert the denial of this motion on appeal by introducing evidence on his own behalf. G.S. 15-173. Only defendant's motion for nonsuit made at the close of all the evidence is subject to appellate review.

[5] By this same assignment of error, defendant argues that his motion for nonsuit should have been granted for a fatal variance between the indictment and the State's evidence. The indictment charges that defendant took property belonging to the Furniture Buyers Center. Defendant maintains the evidence presented by the State showed that he took property belonging only to Albert Rice.

First, we note that the trial judge permitted the State to reopen its case and recall Albert Rice for further testimony. Rice's testimony made it perfectly clear that defendant stole property belonging both to the Furniture Buyers Center and to Rice personally.

Defendant, however, would not have been entitled to a dismissal of the charge against him even if this testimony had not been elicited from Albert Rice. We quote from *State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881 (1972):

> [I]t is not necessary that ownership of the property be laid in a particular person in order to allege and prove armed robbery. The gist of the offense of robbery is the taking by force or putting in fear. An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property. [Citations omitted.]

Id. at 345, 185 S.E. 2d at 884. *See also State v. Rogers*, 273 N.C. 208, 212-13, 159 S.E. 2d 525, 528 (1968); *State v. Lynch*, 266 N.C. 584, 586, 146 S.E. 2d 677, 679 (1966).

This assignment of error is overruled.

[6] Defendant's next argument is that the trial court abused its discretion in allowing the State to reopen its case to present further testimony of Albert Rice after defendant's argument to the jury. Defendant claims Rice's testimony was prejudicial because it supplied an element of the crime charged, i.e., that defendant took property belonging to the Furniture Buyers Center.

We have decided this point adversely to defendant. It was not necessary for the State to show whose money defendant took as long as the evidence showed that the money was not defendant's own. We find the trial judge did not abuse his discretion in permitting the State to recall Albert Rice. This assignment of error is dismissed.

[7] We next turn to defendant's contention that the trial court erred in failing to grant his motion for nonsuit at the close of all the evidence. Defendant maintains his motion was improperly denied because the State did not present substantial evidence of all material elements of the offense charged. We disagree.

In ruling upon defendant's motions challenging the sufficiency of the evidence, we apply the often-repeated rule that the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences therefrom in the State's favor. *State v. Wright*, 302 N.C. 122, 126, 273 S.E. 2d 699, 703 (1981). There was sufficient evidence to repel defendant's motion for judgment as of nonsuit.

Three eyewitnesses made in-court identifications of defendant. Their testimony presented a detailed account of the

events occurring at the Furniture Buyers Center on 13 February 1978. Each witness testified that defendant threatened his life if they refused to tell him where the money was. Albert Rice specifically stated that defendant robbed him of fourteen hundred eighty dollars and a one thousand dollar check. Also, an accomplice, Raynard Reeves, testified that he, along with defendant and another black male, robbed the Furniture Buyers Center on 13 February 1978 by the use of a deadly weapon.

Finally, defendant formally assigns as error the trial court's entering and signing of the judgment. An exception to signing of the judgment entered upon defendant's conviction of armed robbery is without merit where the indictment properly charges the defendant with armed robbery, the evidence supports the judgment and the sentence is within the statutory limits. *State v. Hughes*, 8 N.C. App. 334, 174 S.E. 2d 1 (1970).

In instant case, the indictment properly charged defendant with armed robbery in violation of G.S. 14-87, the State's evidence supported the judgment, and the sentence of life imprisonment was within statutory limits. This assignment of error is overruled.

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

No error.

PAUL HAIGLER WEEKS v. DOROTHY WALSH HOLSCLAW AND GARY LEE WALSH

No. 58PA82

(Filed 5 October 1982)

Damages § 3.4— per diem arguments with cautionary jury instructions proper

It is not improper for counsel to use per diem arguments to the jury in assessing damages for pain and suffering where the evidence of pain is sufficient to provide a "factual or legal justification" for the argument and where the trial judge instructs the jury that they are not to be governed by the amount of damages suggested by counsel for whatever unit of time counsel employed, that their argument does not constitute evidence but is merely an approach to the damage issue which the jury may consider but need not adopt,

and that the jury's ultimate obligation is to arrive at a lump sum amount which, in its view, is supported by the evidence and is fair and just to both the plaintiff and the defendant.

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

Justice MEYER dissenting.

BEFORE *Judge William Z. Wood* and a jury at the 15 December 1980 Civil Session of CALDWELL Superior Court plaintiff was awarded $10,780 in compensatory damages for personal injuries. The Court of Appeals affirmed. 55 N.C. App. 335, 285 S.E. 2d 321 (1982). The Supreme Court granted defendants' petition for discretionary review on 30 March 1982.

Beal and Mu, P.A., by Beverly T. Beal, for plaintiff appellee.

Todd, Vanderbloemen and Respess by J. R. Todd, Jr., for defendant appellants.

EXUM, Justice.

The principal question raised by this case is whether a plaintiff seeking damages for pain may make what is commonly referred to as a "per diem" argument[1] that the jury consider a formula by which a monetary value is assigned to a particular unit of time and this value is multiplied by the total number of such units during which the pain persisted. We hold that such an argument is permissible, but when it is used the trial judge should give appropriate cautionary jury instructions.

The parties stipulated that defendant Holsclaw was negligent in operating her automobile and caused the accident in which plaintiff was injured on 18 April 1979. They also agreed

1. This kind of argument is commonly called a "per diem" argument because in its most usual form plaintiff selects one day as the unit of time. *See, e.g., Beagle v. Vasold,* 65 Cal. 2d 166, 417 P. 2d 673, 53 Cal. Rptr. 129 (1966) (argument approved); *Botta v. Brunner,* 26 N.J. 82, 138 A. 2d 713 (1958) (argument rejected); and *Worsley v. Corcelli,* 119 R.I. 260, 377 A. 2d 215 (1977) (argument approved provided cautionary instructions given). Occasionally, as in the instant case, plaintiff uses smaller units of time. *See, e.g., Thompson v. Kyles,* 48 N.C. App. 422, 269 S.E. 2d 231, *discretionary review denied,* 301 N.C. 239, 283 S.E. 2d 135 (1980) (hours and minutes) (argument approved). The principle is the same whatever unit of time is used; and for ease of reference we shall refer to such argument as a "per diem" argument.

Holsclaw's negligence would be imputed to defendant Walsh, the owner of the automobile. The only issue for trial was the amount of plaintiff's damages.

Plaintiff's evidence at trial tended to show the following:

On 18 April 1979 he was driving his automobile on Highway 90 near Lenoir, North Carolina. His wife was a passenger and they were going forty to fifty miles per hour. Without warning plaintiff's 1974 Pinto automobile was hit from the rear. His head "snapped forward" and he felt "a definite snap and pain in my neck." He managed to stop the car, got out and sat down on the rear bumper of his Pinto. Plaintiff was taken by ambulance to Caldwell Memorial Hospital emergency room where he was examined by Dr. Theodore Hairfield. Upon the basis of his clinical examination and X-rays, Dr. Hairfield diagnosed plaintiff's injury as a cervical sprain or "sprain of the neck on the left side." He prescribed a muscle-relaxant and heat treatments. He subsequently saw plaintiff in an office visit on 23 April, during which he told him to continue the medication and heat. He noted plaintiff suffered pain on movement of the neck. On 2 May he noted that plaintiff "continued to have pain and difficulty with shoulder movement and lifting, . . . tenderness along the shoulder blade area and the folder muscle of the shoulder," and "tenderness along the spinal column." He asked plaintiff to continue his heat applications and to restrict use of his left arm. On 8 May plaintiff continued to have some limitation of neck movement and pain, so Dr. Hairfield prescribed a new medication to relieve inflammation and pain. Dr. Hairfield examined plaintiff again on 24 May and noted little change, but on 13 June plaintiff showed "considerable improvement." He "was able to move without severe limitation." The doctor started him on an exercise program to improve his muscle tone and strength. On 7 August the X-rays were repeated. There was no appreciable change. Dr. Hairfield told plaintiff to continue his exercises and return if necessary. On 25 August 1980 Dr. Hairfield examined plaintiff for right shoulder pain. Plaintiff made no complaint about his left shoulder.

Plaintiff was finally examined five days before trial, and Dr. Hairfield found he continued to suffer discomfort on neck movement and had some limitation of shoulder movement. Plaintiff had approximately one-quarter inch less muscle mass in his left arm than his right.

In Dr. Hairfield's opinion plaintiff's injuries "would have some permanency" since they had existed for so long after his accident. The doctor testified, "So the fact that he had had symptoms . . . for four months would make me believe at that time that I would be surprised if he got completely recovered. . . ."

Plaintiff, fifty years old at the time of trial, testified that he had not had any shoulder or neck pain before the accident and that "I have experienced pain almost constantly since the day of the accident . . . . The pain is greater after I have been on my feet all day. At night sometimes I can't sleep because of the pain . . . . There is pain in the morning. It usually takes me 30 to 45 minutes to get unwound to where I can move around." He also stated, "Before the accident, I would jog, play golf. I like to cut wood. I can't do that now. I am not able to play golf now; I do not play softball." Furthermore, his injury has caused him difficulty and pain in completing his tasks as a salesman in a men's clothing store, and in doing household chores. Plaintiff's wife confirmed that he takes pills for pain almost daily, moves stiffly and slowly, and no longer helps her with chores such as mowing grass or vacuuming the house.

Plaintiff offered evidence that the cost of Dr. Hairfield's services, the ambulance, and the X-rays was $147.95. In addition, he missed six days' work after the accident when he was earning $140 per five-day work week. Finally, plaintiff offered into evidence the mortuary tables in G.S. 8-46 which showed plaintiff's life expectancy to be 24.96 years.

Defendant offered no evidence.

In his closing argument, plaintiff's counsel said:

> Now, ladies and gentlemen, I have done a little figuring, and you can focus your attention over here just a little bit. I want to ask you to look with me for just a moment at some figuring that I have been doing. Now, ladies and gentlemen, you will recall that the evidence was that Mr. Weeks is in continuous pain. That was the evidence that he testified to. You will recall that the doctor expressed an opinion about the permanency of the injury, and his opinion was that it is a permanent injury. You will also recall that it was his opinion that the accident did cause the injury that he found when he

> examined Mr. Weeks, my client, and so let's talk about this permanent, this pain and suffering a little bit. Now, according to my figures it has been 608 days since the accident occurred. Let's talk about 608 days of pain, and let's not even talk about 24 hours a day. Let's talk about maybe 15 hours a day. 608 days at 15 hours of pain a day. Now, ladies and gentlemen, you add this up. 9,120 hours is what I get.
>
> . . . .
>
> 9,120 hours, ladies and gentlemen, 60 minutes an hour, I find that to be 367,200 minutes. Let us talk about, as far as the pain and suffering is concerned, fifty cents a minute in terms of what my client ought to receive.
>
> . . . .
>
> Well, let's talk about ten cents a minute, ten cents a minute from the time of the accident until now. I get that to be $36,720.00.

Defendant's prompt objection to this argument was overruled. The jury awarded plaintiff damages of $10,780.

Plaintiff's evidence tends to show that during the period of time between the accident and trial he suffered pain "almost constantly" as a result of injury caused by the accident. In light of this evidence counsel's per diem argument based on this period of time was appropriate.

This Court first addressed the per diem argument question in *Jenkins v. Harvey C. Hines Co.*, 264 N.C. 83, 141 S.E. 2d 1 (1965), but did not answer it because it concluded plaintiff's evidence of pain was insufficient to provide a "factual or legal justification" for the argument. *Id.* at 91, 141 S.E. 2d at 7.[2] The Court noted, however, that, *id.*:

2. The Court alluded to this portion of plaintiff's testimony, 264 N.C. at 91, 141 S.E. 2d at 7:

> 'Answering the question whether at the present time my hand or finger pains me, it feels like it is drawn up, or being drawn; it feels almost like it looks, tight. It doesn't interfere with my rest at night now. It doesn't give me any pain other than the feeling of being drawn. That is a discomfort.'

Yet plaintiff's per diem argument suggested that plaintiff should be compensated for *pain* at the rate of one cent per minute for the time she is awake during her life expectancy of twenty-five years.

> [O]ur statute, G.S. 84-14, in pertinent part, provides: 'In jury trials the whole case as well of law as of fact may be argued to the jury.' Too, under our decisions, '(c)ounsel have a wide latitude in arguing their cases to the jury, and have the right to argue every phase of the case supported by the evidence, and to argue the law as well as the facts.' 4 Strong, N.C. Index, Trial § 11, p. 298.
>
> Disposition of this appeal in defendant's favor does not require that we accept the decision and reasoning in *Botta* [26 N.J. 82, 138 A. 2d 713 (1958) (a leading case rejecting per diem arguments)].

Our Court of Appeals has held that per diem arguments, supported by the evidence, are permissible. *Thompson v. Kyles*, 48 N.C. App. 422, 269 S.E. 2d 231, *discretionary review denied*, 301 N.C. 239, 283 S.E. 2d 135 (1980). We agree with the Court of Appeals' decision in *Thompson* and conclude that the Court of Appeals correctly applied *Thompson* to the instant case. By this opinion we wish only to give our reasons for this conclusion and to state our additional holding that when per diem arguments are used the trial court should give cautionary jury instructions.

Although we have never decided the per diem argument question, it has been much litigated and decisions[3] on it abound in other jurisdictions. They are collected in a recent annotation, "Per Diem or Similar Mathematical Basis for Fixing Damages for Pain and Suffering," 3 A.L.R. 4th 940 (1981). There is little that we can, or propose to, add to the debate. Suffice it to say that according to the annotation five approaches to the question have developed. One approach is simply that the per diem argument is appropriate. Another is that the argument is appropriate provided the trial court gives proper cautionary jury instructions. A third approach is that the per diem argument should not be used. A fourth approach is that the question should be left to the trial court's sound discretion. Finally, some courts have refused to take a general position for or against such arguments, preferring instead to make more narrow decisions based on the facts of the particular case. We are persuaded by the reasoning of those

3. The question has also produced a plethora of scholarly articles for and against such argument, many of which are collected in *Beagle v. Vasold*, *supra*, n. 1, 65 Cal. 2d at 174-75, 417 P. 2d at 677, 53 Cal. Rptr. at 133.

courts which conclude that the per diem argument may be used provided it is accompanied by cautionary instructions to the jury. *See, e.g., Eastern Shore Public Service Co. v. Corbett*, 227 Md. 411, 177 A. 2d 701 (1962); *Worsley v. Corcelli*, 119 R.I. 260, 377 A. 2d 215 (1977).

Our reasons for adopting this approach are these: The jury's ultimate task in answering the damages issue in a personal injury action, assuming that it has determined to award some amount of damages, is somehow to assign a monetary value to the injured party's intangible losses attributable to pain, suffering, disfigurement and disablement if there is evidence of these losses. By time-honored practice in this state, counsel for both plaintiffs and defendants are permitted in argument to suggest to the jury what this monetary value should be in a lump sum.[4] If counsel may suggest such lump sum amounts to the jury as appropriate damages, they ought to be permitted to tell the jury how they arrived at the lump sum. If they arrived at it through the use of a per diem type formula, they should be able to so advise the jury.[5]

In at least two jurisdictions which have rejected the per diem argument, New Jersey and Pennsylvania, counsel is not per-

4. Before our present Rules of Civil Procedure were adopted, it was the practice at trial to read the pleadings to the jury, including the *ad damnum* clause of the complaint. Note, *Trial Practice—Damages—Pain and Suffering—Per Diem Argument to the Jury*, 38 N.C. L. Rev. 289 (1960). Present North Carolina Rule of Civil Procedure 7(d) provides, "Unless otherwise ordered by the judge, pleadings shall not be read to the jury." Nevertheless, it is still the practice in this state for counsel for both sides to suggest, if they wish, lump sum amounts for the jury's consideration on the personal injury damage issue. Our trial judges, for example, ordinarily instruct juries on this issue as follows:

> I instruct you that if you reach this issue, you are not to be governed by the amount of damages suggested by the parties or their attorneys, but you are to be governed exclusively by the evidence in the case and the rules of law I have given you with respect to the measure of damages.

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5. We recognize that when he was Chief Justice of the California Supreme Court, the Hon. Roger Traynor argued that although counsel should be permitted to suggest a lump sum to the jury, it does not follow that they ought to be able to use the per diem approach in arriving at this sum, *Beagle v. Vasold*, *supra*, n. 1, 65 Cal. 2d at 183-84, 417 P. 2d at 683, 53 Cal. Rptr. at 139 (Traynor, C.J., concurring). We have the greatest respect for the judicial acumen of then Chief Justice Traynor, but having examined his argument on the point in question, we are simply not persuaded by it.

mitted to suggest a lump sum amount to the jury. The leading New Jersey decision rejecting per diem arguments, *Botta v. Brunner*, 26 N.J. 82, 138 A. 2d 713 (1958), recognized that the decision "conflicts to some degree" with earlier New Jersey cases holding that counsel could advise the jury with regard to the amount in the *ad damnum* clause of the complaint and could otherwise suggest a lump sum figure. The Court in *Botta* expressly overruled these prior decisions. *Id.* at 103-04, 138 A. 2d at 725. In Pennsylvania, which prohibited the per diem argument in *Ruby v. Casello*, 204 Pa. Super. 9, 201 A. 2d 219 (1964), the Court had earlier "steadfastly refused to allow counsel to disclose the amount claimed or expected when damages are unliquidated." Note, *supra*, 38 N.C. L. Rev. at 291, n. 7 (citing *Stassun v. Chapin*, 324 Pa. 125, 188 A. 111 (1936)). To argue that certain intangible losses should be compensated by using a monetary amount per unit of time is simply another way of arguing that they should be compensated by a lump sum amount for the entire period of time, *i.e.*, the sum of the units of time, during which they persisted.

Neither do we believe that juries will be unduly swayed by such arguments or that the arguments will lead to excessively high verdicts. We can think of no reason why a jury is more likely to adopt counsel's assessment of what is a proper amount per unit of time than it is to adopt counsel's assessment of what is a proper lump sum amount for the entire period of time involved. In the instant case the jury, as was its prerogative, rejected the view of plaintiff's counsel of the amount of damages it should assess per unit of time and came in with a verdict much smaller than counsel had suggested. It is likely that juries approach the assessment of damages for intangible losses by considering both the intensity and extent of the losses and their duration. In effect, consciously or subconsciously, juries probably assign some value to some unit of time during which the losses persisted in arriving at their ultimate answer to the damages issue, whether or not such an approach is suggested to them by counsel.

Finally, there are safeguards against excessively high verdicts. First, the trial court may allow, with the consent of the plaintiff, a remittitur. *Bethea v. Town of Kenly*, 261 N.C. 730, 136 S.E. 2d 38 (1964); *Lazenby v. Godwin*, 40 N.C. App. 487, 253 S.E. 2d 489 (1979); *Redevelopment Commission of City of Durham v. Holman*, 30 N.C. App. 395, 226 S.E. 2d 848, *discretionary review*

denied, 290 N.C. 778, 229 S.E. 2d 33 (1976). If plaintiff does not consent to a remittitur, the trial court has broad discretion to set aside the verdict and order a new trial. *See Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). Third, by our holding today the trial court, if a per diem argument is used, must instruct the jury in a manner similar to the instructions with regard to counsels' lump sum suggestions. The trial judge should tell the jury that they are not to be governed by the amount of damages suggested by counsel for whatever unit of time counsel employed, that this argument does not constitute evidence but is merely an approach to the damages issue which the jury may consider but need not adopt, and that the jury's ultimate obligation is to arrive at a lump sum amount which, in its view, is supported by the evidence and is fair and just to both the plaintiff and the defendant.

On all other questions presented we agree with the Court of Appeals' disposition and reasoning and deem it unnecessary to address them further. The decision of the Court of Appeals is, therefore

Affirmed.

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

Justice MEYER dissenting.

The majority properly points out the potential problems inherent in allowing a per diem argument: the danger of excessively high verdicts necessitating new trials, jury abuse of the per diem figure as evidence of value of the pain and suffering, and a more frequent need to consider remittitur. In short, by our decision today we merely further complicate an area of the law which need not be further complicated. Yet, for this additional burden to be placed on our courts, the majority offers no affirmative benefit of allowing the per diem argument but simply attempts to refute the standard arguments against it.

The fixing of monetary damages for pain and suffering is within the exclusive province of the jury. To suggest that a figure for just compensation can be fixed with mathematical certainty is,

to say the least, misleading. Typically, there is no evidentiary basis whatsoever for a mathematical formula. Certainly no witness is qualified to testify that the injured party's pain and suffering is worth a sum certain in dollars and cents per hour or minute.

While it is possible that the per diem argument may lead to an excessive verdict, I do not fear that so much as I do the probability that the jury will, in spite of cautionary instructions, be led to believe that the mathematical formula is itself some evidence of the value of the pain and suffering. This possibility is recognized by the majority as evidenced by its suggested cautionary instruction that the per diem "argument does not constitute evidence."

If the jury's ultimate obligation is to arrive at a *lump sum amount* which, in its view, is *supported by the evidence* (emphasis supplied), and if the per diem argument does not constitute evidence, then the per diem argument serves no legitimate purpose. Although decidedly advantageous to the injured plaintiff, it is an unnecessary advantage and one which does not outweigh the potential abuse and concomitant costs in time and dollars to our courts and the respective litigants. I would vote to reverse the Court of Appeals.

JAMES LAWRENCE SMITH v. BYNUM McRARY, D/B/A McRARY HARLEY-DAVIDSON

No. 91PA82

(Filed 5 October 1982)

1. Bailment § 3.3— theft of motorcycle from bailee—no contract to keep in certain building

Plaintiff bailor of a motorcycle failed to offer sufficient evidence of an express or implied contract that defendant bailee would repair and store his motorcycle only in his main building so as to render defendant liable under a contract theory for the loss of plaintiff's motorcycle by theft from a smaller building behind the main building where plaintiff's evidence tended to show only that he delivered the motorcycle to defendant at his main building to be serviced and repaired, that defendant moved the motorcycle to a smaller building without plaintiff's permission, and that the motorcycle was stolen from the smaller building, and there was no evidence that plaintiff and defendant discussed the storage of plaintiff's motorcycle in a particular place.

2. Rules of Civil Procedure § 15.1— denial of motion to amend complaint—no abuse of discretion

The trial court did not abuse its discretion in the denial of plaintiff's motion to amend his complaint made about three months before trial where the proposed amendment was no more than surplusage and could not withstand a motion to dismiss for failure to state a claim. Furthermore, even if the denial of the motion were error, plaintiff suffered no prejudice because the facts delineated in the proposed amendment actually were introduced into evidence.

3. Bailment § 3.1— theft of motorcycle from bailee—instructions on bailee's duty of care

In plaintiff bailor's action to recover damages for the theft of his motorcycle from defendant bailee's premises, the trial court erred in giving the jury instructions which implied that the absence of a statutory duty requiring defendant to take particular security measures or establishing a standard of care was relevant in determining whether defendant had met his duty of care under negligence principles.

4. Negligence § 27.1— evidence of insurance properly excluded

In plaintiff bailor's action to recover damages for the theft of his motorcycle from defendant bailee's premises, plaintiff's testimony that defendant, on an occasion before the instant bailment, told him that he had insurance to cover any theft, offered by plaintiff not to prove that defendant had theft insurance but to show that he did not ask about security measures for his motorcycle because he thought any theft would be covered by insurance, had only slight probative value to the issue being tried by the jury and was properly excluded by the trial court.

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

BEFORE *Judge Peter L. Roda* and a jury at the 13 October 1980 Civil Session of BUNCOMBE District Court, plaintiff sought damages for the theft of his motorcycle from defendant's business. The jury found that plaintiff had not been damaged by defendant's negligence, and the trial court ordered the action dismissed. Plaintiff appealed. The Court of Appeals ordered a new trial. 54 N.C. App. 635, 284 S.E. 2d 192 (1981). This Court granted discretionary review on 3 March 1982.

James Lawrence Smith and Joel B. Stevenson for plaintiff appellee.

Harrell & Leake by Larry Leake for defendant appellant.

EXUM, Justice.

This is an action by a bailor of a motorcycle who seeks to recover for its loss from the bailee from whom it was stolen. The principal question presented is whether plaintiff offered sufficient evidence of an express or implied contract that the bailee would keep the motorcycle in a particular location, the breach of which might render the bailee liable. Disagreeing with the Court of Appeals, we conclude plaintiff did not. We also conclude it was not prejudicial error to deny plaintiff's motion to amend his complaint when the amendment purports, but fails, to state a claim for breach of contract. We agree with the Court of Appeals' conclusion that plaintiff is entitled to a new trial on his negligence claim because of error in the jury instruction on this aspect of the case.

The evidence at trial tended to show the following:

On 29 September 1979 plaintiff brought to defendant's business a motorcycle he had previously purchased from defendant. He took his motorcycle to the service department located in the main building of defendant's business so it could be checked as required under the warranty and receive routine maintenance. The only charge for this service was the cost of consumable items such as oil and oil filters.

While leaving his motorcycle plaintiff noticed a "Butler building" or shed in back of the main building, but it did not occur to him what its use might be. Defendant did not indicate to plaintiff that his motorcycle might be stored in the shed. Plaintiff knew that defendant had a burglar alarm system in the main building because one of defendant's mechanics had told him about it before he initially bought his motorcycle. When he left his motorcycle for servicing, plaintiff did not ask defendant whether the burglar alarm was working or where he was going to keep the motorcycle after servicing it.

Defendant testified as an adverse witness for plaintiff. When plaintiff brought in his motorcycle, defendant did not tell him where it would be stored. Plaintiff never asked where it would be stored, whether the burglar alarm worked, or what kind of locks were used on the doors to the main building.

Defendant attempted to contact plaintiff after his motorcycle was repaired but learned plaintiff was in the hospital and would

not be able to pick it up for a few days. He stored it in the shed because he needed the room in the repair shop. It was stored with its key in the ignition and gas in the tank. On 15 October 1979 defendant discovered that plaintiff's motorcycle and one other had been stolen. He estimated the total value of the stolen property to be $10,000. The shed had been broken into, although the main building, which had nine new motorcycles on display, had not.

Defendant testified that he had installed an automatic lighting system and a burglar alarm system in both the shed and the main building. He also had a chain link fence around the rear of the premises with a fence for the driveway. That fence and the door to the shed were secured with padlocks that were not case-hardened. Defendant's business had been burglarized three times before the theft of plaintiff's motorcycle. Each time it was the main building that had been burglarized. His burglar alarm was installed after the first burglary. It was turned on in his shop for the last two burglaries and the alarm had been cut off in the Asheville Police Department.

Defendant routinely turned on the burglar alarm and locked the padlocks on the fence and shed when he left the shop. He learned, however, on the day the theft was discovered that his alarm system was not working. He periodically checked his alarm by calling the police department, then setting off the alarm to see if they received the signal. He could not remember when he had last checked it before plaintiff's motorcycle was stolen.

The investigating officer testified that he found the lock to the shed and it appeared to have been cut with a bolt cutter. The lock to the gate had also been removed. An expert in preventive security measures testified that he would not recommend any type of lock that was not case-hardened because only case-hardened locks can resist bolt cutters. In addition, he would not recommend a padlock as a security measure.

The following issues were submitted to the jury and answered as indicated:

1. Was the plaintiff damaged by the negligence of the defendant?

ANSWER: No.

2. What damages, if any, is the plaintiff entitled to recover of the defendant?

ANSWER: _____.

[1] The first question that must be addressed is whether plaintiff offered sufficient evidence of an implied or express contract that defendant would repair and store his motorcycle only in his main building. None of the authorities cited by plaintiff support his argument or the Court of Appeals' holding that plaintiff's proof is sufficient to create a jury issue of an express or implied contract. Plaintiff's evidence tended to show that he delivered the motorcycle to defendant at his main building, that defendant moved the motorcycle to a smaller building without plaintiff's permission, and that the motorcycle was stolen from the smaller building.

In order for a party with the burden of proof to create a jury question in a civil case he must offer enough evidence, when that evidence is viewed most favorably to him, "of each element of the claim so that 'reasonable men may form divergent opinions of its import.' " *Wachovia Bank & Trust Co., N.A. v. Rubish*, 306 N.C. 417, 424, 293 S.E. 2d 749, 754 (1982) (quoting *State Auto. Mutual Ins. Co. v. Smith Dry Cleaners, Inc.*, 285 N.C. 583, 587, 206 S.E. 2d 210, 213 (1974)). Merely delivering a motorcycle for servicing to a particular building is not sufficient, standing alone, to allow a jury to infer that there is an implied contract between the bailor and the bailee that the motorcycle will at all times be kept in that building, even after the repair has been completed.

The leading North Carolina case in this area, *Pennington v. Styron*, 270 N.C. 80, 153 S.E. 2d 776 (1967), does not stand for the proposition that mere delivery of a vehicle to a particular location gives rise to an implied contract that it will be kept in that location. In *Pennington* the plaintiff "took his boat to the defendant's yacht basin and it was placed in an open slip which he said he had rented . . . . It was identified by a little tag with plaintiff's name on it." *Id.* at 81, 153 S.E. 2d at 777. In order to accommodate a larger yacht, the defendant moved the plaintiff's yacht to another slip and placed the larger yacht in the plaintiff's slip. Subsequently, the plaintiff's yacht was damaged while in the new slip. The defendant testified that he had never agreed with the plaintiff to

maintain a particular slip for his boat, but the Court held that a jury could find the defendant absolutely liable under the plaintiff's evidence if they found "that defendant had agreed to keep plaintiff's boat in a particular place, that is, in the slip in which plaintiff had left it, and that defendant had no authority to move the boat." *Id.* at 84, 153 S.E. 2d at 779.

The case now before us is distinguishable from *Pennington* on at least two bases. First, in *Pennington* the essential purpose of the bailment was to store the plaintiff's boat, not to service and repair it. To achieve that purpose the plaintiff rented a particular space or slip. Second, the space was labeled with the plaintiff's name, and even defendant testified that he would not try to use somebody else's slip to accommodate new boats in the basin if the boat assigned to a given slip was out and likely to be returning soon. *Id.* at 82, 153 S.E. 2d at 778. In the instant case there is no similar evidence that plaintiff delivered his motorcycle to a particular space on defendant's property which had been allocated or labeled for his use distinct from the use of others who brought in their motorcycles for servicing or repair. There is no evidence that plaintiff and defendant even discussed the storage of plaintiff's motorcycle in a particular place.

Plaintiff quotes 8 Am. Jur. 2d, *Bailments* § 202 (1980) to support his argument that proof of mere delivery of the motorcycle to the main building is sufficient evidence from which a jury could imply a contract that it will be kept there. It is true that the cited section contains the following language: "It has been held, in the absence of any express agreement on the subject that an agreement that the property is to be kept at a particular place may be implied from the fact that it was left at such place by the bailor." The only case cited for this principle, *McCurdy v. Wallblom Furniture & Carpet Co.*, 94 Minn. 326, 102 N.W. 873 (1905), however, has a much narrower holding. The plaintiff in *McCurdy* sought to store certain goods in the defendant's store. The defendant explained that the goods would be stored in his warehouse which was located in another part of town. The parties agreed on a charge and the bailor took his goods to the bailee's warehouse and saw them stored in it. Subsequently, the bailee moved the goods to a new place of business without the bailor's consent and they were destroyed by fire. Thus, although the written warehouse receipt did not specify where the goods were to be

kept, there was an express discussion and agreement that they were to be stored in the warehouse to which they were delivered. *Id.* at 327-30, 102 N.W. at 874-75. Plaintiff cites us to no authority, nor were we able to find any, for the principle that mere delivery of goods for repair, without any discussion about the location of the repair or storage, is sufficient to give rise to a finding of an implied contract as to the location.

[2] Related to the question of the sufficiency of plaintiff's evidence is whether there was error in the denial of plaintiff's motion to amend his complaint made on 23 July 1980, about three months before trial. Plaintiff's original complaint stated only a claim based on defendant's alleged negligence. His motion to amend sought to add the following to his complaint:

> 1. That the Plaintiff realleges and incorporates herein in his second cause of action the paragraphs 1 and 2 of the original Complaint filed on December 10, 1979.
>
> 2. That at the time said motorcycle was left with the Defendant, it was delivered to the Defendant at his main office and service building, where the Defendant had a large showroom of new motorcycles and an exhibit of antique and collector motorcycles.
>
> 3. That the Plaintiff is informed and believes and therefore, alleges and says that on or about the 12th day of October, 1979, the Defendant moved the Plaintiff's motorcycle from his main office and service building to another structure located behind the main office and service building, and that this movement was made without the knowledge, permission or agreement of the Plaintiff herein.
>
> 4. That said motorcycle was not returned to the Plaintiff herein, for the reason that sometime between October 12, 1979, and October 15, 1979, the motorcycle was stolen during a burglary of the small building.
>
> 5. That because the Defendant moved the motorcycle from the place where it was bailed to another place for storage without the knowledge or consent of the Plaintiff, the Defendant is absolutely liable for the loss of the Plaintiff's motorcycle.

The motion to amend was denied on 28 August 1980 by Judge Fowler.

Under Rule 15(a) of the North Carolina Rules of Civil Procedure, leave to amend after the statutory time for amending as "a matter of course" has elapsed "shall be freely given when justice so requires." G.S. 1A-1, Rule 15(a). *See Roberts v. Reynolds Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972). A motion to amend "under Rule 15(a) is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion." *Edwards v. Edwards*, 43 N.C. App. 296, 298, 259 S.E. 2d 11, 13 (1979). *See also Carolina Garage, Inc. v. Holston*, 40 N.C. App. 400, 253 S.E. 2d 7 (1979); 3 Moore's Federal Practice ¶ 15.08[4] (2d ed. 1982).

In the instant case the denial of plaintiff's motion to amend was not an abuse of discretion because the proposed amendment is no more than surplusage. The facts it attempts to add, as we have already demonstrated, are insufficient to state a second claim for relief; therefore plaintiff's proposed amendment could not withstand a motion to dismiss for failure to state a claim. Because to grant his motion to amend would be a futile gesture, the denial of his motion was not error. *See, e.g., Collyard v. Washington Capitals*, 477 F. Supp. 1247 (D.C. Minn. 1979); Wright & Miller, Federal Practice and Procedure: Civil § 1487 (1982).

Furthermore, even if the denial were error plaintiff suffered no prejudice because the facts delineated in the proposed amendment actually were introduced into evidence.[1] We believe, as previously discussed, that these facts are not sufficient evidence from which a jury could imply a contract to keep the motorcycle only in the main building. Thus, we conclude that the Court of Appeals erred when it reversed the trial court and ordered a new trial on the theory that defendant's deviation from a contract with plaintiff made him absolutely liable for the theft of plaintiff's motorcycle.

1. Under Rule 15(b) of the N.C. Rules of Civil Procedure if evidence is admitted without the objection that it goes to an issue not in the pleadings, and it does in fact raise an issue not in the pleadings and was reasonably understood as doing so by the parties, then the pleadings are regarded as amended to conform to the proof. *Mangum v. Surles*, 281 N.C. 91, 98, 187 S.E. 2d 697, 702 (1972).

[3] We agree with the Court of Appeals' conclusion, however, that plaintiff is entitled to a new trial for error in the instructions on defendant's duty of care. In applying negligence principles to the facts of the given case, the trial court stated:

> Now, in this matter, members of the jury, the plaintiff contends that the defendant was negligent in that his burglar alarm was not working; that the locks he used for both the fence and for the building were not of a proper type, and that he left the key in the ignition. *There is no statute in North Carolina that would require the defendant to do any of these things. There is no law that you cannot—the defendant in this case has violated no law so these would be for your concern only as it applies to the question of 'Was the defendant negligent?'* [Emphasis supplied.]

The trial court was apparently attempting to explain to the jury that there was no North Carolina statute which required defendant to take particular security measures or which established a standard of care. But to a lay juror this instruction may have been confusing, as the Court of Appeals noted, in that it implied the absence of a statutory duty was relevant to determining whether defendant had met his duty of care under negligence principles. Although other parts of the charge correctly state the applicable rules, the challenged portion is sufficiently misleading to be held to be prejudicial error. *See McNair v. Goodwin*, 264 N.C. 146, 147, 141 S.E. 2d 22, 23 (1965) (per curiam).

[4] Because there must be a new trial on the negligence cause of action, we address the only additional question presented which is likely to arise on retrial. Plaintiff asserts that he should have been allowed to testify about a conversation he had with defendant, on an occasion before the instant bailment, in which defendant allegedly told him that he had insurance to cover any theft of plaintiff's motorcycle. Plaintiff argues this evidence was offered not to prove the fact that defendant had theft insurance, but to rebut defendant's testimony that plaintiff had not questioned him about security measures before leaving his motorcycle. Plaintiff sought to explain that he did not ask about such measures because he thought any theft of his motorcycle would be covered by insurance. This testimony, standing alone, had extremely slight probative value in view of the issue to be tried by the jury.

It does no more than confuse this issue for the jury. *Pettiford v. Mayo*, 117 N.C. 27, 23 S.E. 252 (1895). The likelihood that it would play upon the prejudices of the jury greatly outweighs whatever probative value it has. Therefore, the trial court properly excluded this evidence. *Pearce v. Barham*, 267 N.C. 707, 712, 149 S.E. 2d 22, 26 (1966); 1 Brandis on N.C. Evidence, §§ 77, 80 (2d rev. ed. of Stansbury's N.C. Evidence 1982).

For the reasons given, the decision of the Court of Appeals is

Modified and affirmed.

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

STATE OF NORTH CAROLINA v. LACY LEE PRATT

No. 197A82

(Filed 5 October 1982)

1. **Criminal Law § 61.2— shoeprint comparison—lay testimony**

The trial court did not err in permitting an officer's lay opinion testimony concerning the similarity of shoeprints found at the crime scenes and the design on the sole of the tennis shoes defendant was wearing at the time of his arrest.

2. **Criminal Law § 68; Rape and Allied Offenses § 4— microscopic consistency of hairs—relevancy**

Expert testimony that pubic hairs taken from a rape victim and pubic hair samples obtained from defendant were "microscopically consistent" was relevant as tending to place defendant in the victim's presence at the time of the rape.

3. **Kidnapping § 1.2; Rape and Allied Offenses § 5; Robbery § 4.3— rape, kidnapping, and armed robbery—sufficiency of evidence**

The evidence was sufficient for the jury to find that defendant was the perpetrator of a rape, two kidnappings and two armed robberies where one victim made a positive voice identification of defendant as the perpetrator, and where other evidence tended to show that a thumbprint identified as defendant's was found on the rear view mirror of the victims' car, that tennis shoe impressions found at the crime scene were made by tennis shoes defendant was wearing at the time of his arrest, and that pubic hair found on the rape victim's person was microscopically consistent with pubic hair samples taken from defendant.

4. Criminal Law § 113.9— recapitulation of evidence—necessity for objection at trial

Any objection to the court's recapitulation of the evidence must be brought to the court's attention in time to afford an opportunity for correction, and if timely objection is not made in the trial court, the error will not be considered on appeal.

5. Robbery § 4.3— armed robbery—ownership of property taken

In a prosecution for two armed robberies, there was no merit to defendant's contention that the trial court erred in submitting to the jury the offenses of armed robbery and common law robbery of the female victim on the ground that there was no evidence of a taking of any property belonging to her since (1) the evidence did show that the female victim had money of her own in the male victim's car and that defendant took it from her, and (2) there is no requirement in an armed robbery case that the person from whom property is taken be the owner thereof, and evidence that defendant took money from the female victim which did not belong to defendant was sufficient to support submission of the robbery offenses.

6. Kidnapping § 1.2— defendant not entitled to mitigating punishment for kidnapping

Defendant did not qualify for mitigated punishment under G.S. 14-39(b) for two kidnappings where the trial court found that defendant sexually assaulted the female victim, and where the court found that the male victim was not released by defendant in a safe place in that the victim released himself and he was not in a safe place because he had been bound, he had no hands, and he was undressed in the wintertime in an area unfamiliar to him.

APPEAL by defendant from *Hairston, J.*, at the 16 November 1981 Criminal Session of MONTGOMERY County Superior Court.

Defendant was charged with rape, two counts of kidnapping and two counts of armed robbery. He entered a plea of not guilty to each of the offenses charged.

The State offered evidence tending to show that on 21 February 1981, at approximately 9:00 p.m., Penny Jo Suggs (now Hoover) and Kenneth Hoover were parked in Hoover's 1979 Subaru near a place known as the "Pack House" in Candor, North Carolina. While in their parked automobile, the couple noticed two cars turn in from Whiskey Road in front of their car. The second car, a blue Ford Granada, stopped in front of the Subaru, focused its headlights on the couple for a few seconds and then proceeded toward the rear of the "Pack House."

Ms. Suggs testified that within a few minutes a black male, later identified by Ms. Suggs as the defendant, appeared from

behind the "Pack House" and approached Hoover's car, brandishing a double barrel shotgun. Defendant rapped on the passenger window and demanded that Ms. Suggs let him into the car. Ms. Suggs unlocked her door and defendant climbed into the back seat. Holding the shotgun to Hoover's head, defendant demanded that Hoover start the car and drive according to his directions. Defendant forced Hoover to drive to a secluded area known as the "pond." There, he ordered Mr. Hoover and Ms. Suggs out of the car. Ms. Suggs was told to remain beside the car while defendant led Mr. Hoover to a group of trees nearby. At gunpoint defendant demanded that Mr. Hoover hand over his wallet. Mr. Hoover informed defendant that all of his money was in the car. Defendant then ordered Hoover to undress from the waist down. When Hoover complied, defendant pushed him down, tied him to a tree and threw his clothes and shoes into the woods. Mr. Hoover, who was handicapped because he had no hands, was then abandoned.

Defendant then returned to where Ms. Suggs was standing and took from her all the money which had been in the car. He then forced her to return to the car and drove away from the "pond" area. Ms. Suggs testified that she noticed defendant reach up and adjust the rear view mirror as he drove away.

Defendant proceeded to a "sand pit" area where he ordered Ms. Suggs to get out of the car. Pointing the shotgun at her head, defendant informed Ms. Suggs she would be "a dead lady within three minutes." He then instructed her to disrobe from the waist down and to lie on the ground. After she complied with his demand, defendant raped her. After intercourse, defendant told her to get up and get dressed. He showed her a dirt road and told her she could reach the highway safely by proceeding in that direction. Defendant then got into Mr. Hoover's car once again and drove away.

Although neither victim could physically identify the defendant, Ms. Suggs was able to make a positive voice identification. Both Ms. Suggs and Mr. Hoover testified that the black male appeared to have a speech impediment. Ms. Suggs heard defendant's voice at the probable cause hearing and testified the voice was unmistakably that of the black man who committed the crimes on 21 February 1981.

The State offered additional evidence tending to show that a thumbprint identified as defendant's was found on the rear view mirror of Hoover's car.

Deputy Sheriff M. B. Mullinix testified that in his opinion the tennis shoe impressions found at the "pond" area and near the "Pack House" were made by the same Converse tennis shoes defendant was wearing at the time of his arrest. Bloodhounds tracked the footprints and scent to a point near defendant's residence.

Finally, an expert in hair comparison testified that the negroid pubic hair found on Ms. Suggs' person was "microscopically consistent" with pubic hair samples of defendant.

Defendant presented evidence in the nature of an alibi. Three witnesses testified they were with defendant from at least 8:30 p.m. until approximately 11:00 p.m. on the evening of 21 February 1981.

Defendant testified in corroboration of the alibi testimony and further related that he met a Mr. Cooper at 4:30 p.m. that afternoon and played basketball with him until 8:00 p.m. He and Cooper then drove to the Quik-Chek in Candor. Cooper entered the store while defendant remained outside. Defendant testified that he saw a blue Subaru roll from the gas pump. Defendant jumped out of his car and into the Subaru and "mashed down the emergency brakes" to keep the car from rolling away. Defendant testified he did not know whether he might have inadvertently hit the rear view mirror.

Defendant admitted to owning a blue Ford Granada but denied owning a gun. He also stated that he did not remember telling Detective Walser that he and his wife had gone to a movie on the night of 21 February 1981.

Mr. Hoover testified, in rebuttal, that the emergency brake to his Subaru must be pulled *up* by hand and that his car has automatic transmission.

The jury returned verdicts of guilty on all charges. The trial judge imposed sentences of life imprisonment on the rape and kidnapping charges, a sentence of forty to fifty years for the armed robbery of Kenneth Hoover and a sentence of seven to fourteen

years for the armed robbery of Penny Jo Suggs. Defendant appealed the life sentences directly to this Court pursuant to G.S. 7A-27(a). We allowed defendant's motion to bypass the Court of Appeals on the other charges pursuant to G.S. 7A-31(b).

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

Millicent Gibson for defendant-appellant.

BRANCH, Chief Justice.

[1] Defendant first contends the trial court erred in permitting lay opinion testimony regarding the similarity of shoeprints found at the crime scenes and the design on the sole of the tennis shoes defendant was wearing at the time of his arrest. Officer M. B. Mullinix was permitted to testify, over defendant's objection, that in his opinion defendant's Converse tennis shoes were the same shoes that had made the impressions in the sand at the "pond" area and near the "Pack House" where the black male approached Hoover's car.

Defendant argues this testimony was improper because there is no evidence showing when the footprints were made. Defendant further argues that the size and design of the tennis shoes are not unique to the defendant but are common to the general population. Also, defendant points to the time that elapsed between the assailant's encounter with the victims and the discovery of the footprints several hours later. For these reasons, defendant contends the similarity of the sole designs does not point with sufficient certainty to the defendant as the perpetrator to warrant submission of this evidence to the jury.

Initially, it must be borne in mind that this assignment of error challenges the *admissibility* of the shoeprint evidence rather than the sufficiency of the evidence, standing alone, to carry the case to the jury.

We are of the opinion that *State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981), squarely answers the question posed by this assignment of error adversely to defendant. There we stated:

> Evidence of shoeprints at the scene of the crime corresponding to those of the accused may always be admitted as tend-

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

In the present case, evidence of shoeprints found in the driveway the day following the attack which corresponded with those of the accused was properly admitted as tending to connect defendant with the crime. The admissibility of such evidence is consistent with the rule of relevance which permits the introduction of any evidence which "has any logical tendency however slight to prove the fact at issue in the case." 1 Stansbury, North Carolina Evidence § 77 (Brandis rev. 1973). Here, defendant's plea of not guilty placed upon the State the burden of proving every element of the crime charged, including identity. The shoeprint evidence was, therefore, admissible to corroborate the prosecuting witness's identification of defendant as her assailant. The weight to be given it was a matter for the jury since it was not the sole evidence connecting defendant with the crime.

Id. at 108-09, 273 S.E. 2d at 672. *See also, State v. Long*, 293 N.C. 286, 295-96, 237 S.E. 2d 728, 734 (1977).

Here the footprint evidence found within hours after the commission of the crimes was admissible as some evidence of the perpetrator's identity.

[2] By this same assignment of error, defendant contends the trial court erred in admitting the expert testimony of Special Agent Scott Worsham comparing the pubic hair found on Ms. Suggs with pubic hair samples obtained from defendant pursuant to a non-testimonial identification order. The witness testified the negroid pubic hair found on the victim was "microscopically consistent" with defendant's pubic hair and "could have originated from Lacy Lee Pratt." Defendant argues that because Agent Worsham could not positively identify the defendant from the hair comparison, the testimony was inadmissible. Defendant's contention is without merit.

This Court has consistently approved similar expert testimony regarding comparison of hair samples. In *State v. Barber*, 278 N.C. 268, 179 S.E. 2d 404 (1971), the State's expert

witness testified that hair samples taken from a rape victim's bed and from the defendant were "microscopically identical." We held such testimony admissible for it was a "link in the chain proving that the crime was committed by a Negro, and that that Negro was the defendant." *Id.* at 276-77, 179 S.E. 2d at 410. *See also, State v. Perry*, 298 N.C. 502, 509-11, 259 S.E. 2d 496, 501 (1979) (hair from victim's sweater "similar" to defendant's hair).

We find *Barber* directly applicable to instant case. The expert testified that the pubic hairs taken from Ms. Suggs and the samples obtained from defendant were "microscopically consistent." This testimony tended to place defendant in the victim's presence at the time of the rape and therefore satisfies the accepted legal standard that "evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." 1 Stansbury's North Carolina Evidence § 77 at 234 (Brandis rev. ed. 1973). This assignment of error is overruled.

Defendant next assigns as error the trial court's denial of his motion for nonsuit and to dismiss all charges made at the close of the State's evidence.

North Carolina General Statute 15-173 provides that "[i]f the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and *cannot urge such prior motion as ground for appeal.*" (Emphasis added.) Defendant presented evidence on his own behalf at trial and thereby waived his right to assert on appeal the denial of his motion for nonsuit and dismissal made at the close of the State's evidence. Only defendant's motion made at the close of all the evidence is subject to appellate review.

[3] Defendant also assigns as error the trial court's denial of his motion for nonsuit and to dismiss all charges made at the close of his evidence and again at the close of all the evidence. Defendant maintains that the circumstantial evidence against him, even when considered in the light most favorable to the State, was insufficient to warrant submission of the charges to the jury. Defendant argues the shoeprint, fingerprint, and hair identification evidence was inconclusive and did not distinguish defendant as the perpetrator of the crimes.

In advancing these arguments, defendant totally ignores the unequivocal voice identification of him by Ms. Suggs. Ms. Suggs testified, without objection, that upon hearing defendant's voice at the probable cause hearing, she unquestionably recognized the voice as that of her assailant. Irrespective of the circumstantial evidence, the probative value of which defendant strenuously disputes, this voice identification was sufficient in itself to justify submitting the case to the jury. *State v. Jackson*, 284 N.C. 321, 335, 200 S.E. 2d 626, 635 (1973); *State v. Cogdale*, 227 N.C. 59, 61, 40 S.E. 2d 467, 468-69 (1946). The shoeprint, thumbprint, and hair identification evidence merely tended to corroborate the victim's voice identification of defendant.

The trial court properly denied defendant's motion for nonsuit and to dismiss all charges at the close of all the evidence.

By his fourth assignment of error, defendant contends the trial court erred in summarizing the evidence as to the robbery from Ms. Suggs. The trial judge instructed the jury:

> [T]he assailant—or the alleged assailant, drove off and after driving around ended up at a location called the sand pit; that there he asked Penny Suggs what about her money. She indicated that it was in the car.

The defendant maintains this recapitulation of the State's evidence was erroneous because there was nothing in the record to indicate the assailant took money from Ms. Suggs or from the car.

To the contrary, the State did offer evidence tending to support the trial court's charge. Officer Walser testified that in a statement given to him by Ms. Suggs she indicated that, after forcing Mr. Hoover to get undressed, the black male returned to where she was standing and "took the money from her." On questioning from the court, Ms. Suggs testified that her money was in the car. Therefore, we conclude there was sufficient evidence that defendant took money from Ms. Suggs to justify the court's charge.

[4] Furthermore, even if the evidence was misstated, the defendant failed to make any objection or otherwise bring to the court's attention any error in the summarization. Any objection to the court's recapitulation of the evidence presented must be brought

to the court's attention in time to afford an opportunity for correction. *State v. Squire*, 302 N.C. 112, 119-20, 273 S.E. 2d 688, 693 (1981); *State v. Willard*, 293 N.C. 394, 402, 238 S.E. 2d 509, 514 (1977). If timely objection is not made in the trial court, the error will not be considered on appeal. *State v. Squire, supra.* By failing to note his objection so that it might be remedied by the trial judge, defendant waived any right to assert error in this regard.

[5] By this same assignment of error, defendant contends the trial court erred in submitting to the jury the offenses of armed robbery and common law robbery of Penny Jo Suggs. Defendant argues the submission of these charges was erroneous because there was no evidence presented that there had been a taking of any property belonging to *her.* While we feel the evidence presented did show that Ms. Suggs had money of her own in the car and that defendant took it from her, such a finding is not necessary to refute defendant's argument. Defendant's contention is without merit simply because there is no requirement that the person from whom the property is taken be the owner thereof. 67 Am. Jur. 2d *Robbery* § 14 (1973). *See also State v. Spillars*, 280 N.C. 341, 345, 185 S.E. 2d 881, 884 (1972); *State v. Rogers*, 273 N.C. 208, 212-13, 159 S.E. 2d 525, 528-29 (1968); *State v. Lynch*, 266 N.C. 584, 586, 146 S.E. 2d 677, 679 (1966). As long as it can be shown defendant was not taking his own property, ownership need not be laid in a particular person to allege and prove robbery. *State v. Spillars, supra*, at 345, 185 S.E. 2d at 884. Obviously in instant case defendant was not retrieving his own property from Ms. Suggs. Thus, it makes no difference whether Ms. Suggs or Mr. Hoover owned the money. The charges of armed robbery and common law robbery were properly submitted to the jury.

Defendant also assigns as error the denial of his motions to set aside the verdicts based upon insufficiency of the evidence.

A motion to set aside the verdict as being against the weight of the evidence is addressed to the discretion of the trial court, and its refusal to grant the motion is not reviewable on appeal in the absence of abuse of discretion. *State v. Hamm*, 299 N.C. 519, 523, 263 S.E. 2d 556, 559 (1980); *State v. Boykin*, 298 N.C. 687, 702, 259 S.E. 2d 883, 892 (1979), *cert. denied*, 446 U.S. 911, 64 L.Ed. 2d 264, 100 S.Ct. 1841 (1980). Ms. Suggs identified defendant by voice and this evidence alone was sufficient to withstand nonsuit. There

was also considerable circumstantial evidence tending to implicate defendant. We find no abuse of discretion in the trial court's denial of defendant's motions.

[6] Finally defendant contends the trial court erred in finding that the kidnappings were aggravated kidnappings pursuant to G.S. 14-39(b).[1] It should be noted from the outset that the term "aggravated kidnapping" is a misnomer and should not be used in connection with this statute. *See State v. Williams*, 295 N.C. 655, 664, 249 S.E. 2d 709, 716 (1978). G.S. 14-39(a) defines the crime of kidnapping. Subsection (b) of the statute prescribes the punishment for kidnapping as well as a lesser punishment when certain mitigating circumstances appear. To qualify for the lesser punishment, defendant must show, by a preponderance of the evidence, that he released the kidnap victim in a safe place and that the victim was neither sexually assaulted nor seriously injured. *Id.* at 670, 249 S.E. 2d at 719. Defendant objects to the trial court's failure to find the existence of these mitigating factors entitling him to the lesser punishment provided in G.S. 14-39(b).

The trial court found that defendant did not release Mr. Hoover; that Mr. Hoover released himself; and that Mr. Hoover "was not in a safe place considering that he had been bound, that he was undressed in the wintertime in an area unfamiliar to him, and in view of his obvious handicap which appears of record, that he has no hands." As to the female victim, the trial court found she had been sexually assaulted by defendant.

1. At the time of defendant's trial and conviction, G.S. 14-39(b) provided as follows: "(b) Any person convicted of kidnapping shall be guilty of a felony and shall be punished by imprisonment for not less than 25 years nor more than life. If the person kidnapped, as defined in subsection (a), was released by the defendant in a safe place and had not been sexually assaulted or seriously injured, the person so convicted shall be punished by imprisonment for not more than 25 years, or by a fine of not more than ten thousand dollars ($10,000), or both, in the discretion of the court."

G.S. 14-39(b) was amended, effective 1 July 1981. The statute now provides for two degrees of kidnapping and reads, in pertinent part, as follows: "If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony."

The evidence unquestionably supports the trial court's findings. We agree with the trial court that defendant did not qualify for mitigated punishment under G.S. 14-39(b). This assignment of error is without merit.

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

No error.

STATE OF NORTH CAROLINA v. LARRY JAMES MEADOWS

No. 89A81

(Filed 5 October 1982)

1. **Criminal Law § 62— polygraph examination—stipulation not adhered to—evidence inadmissible**

The trial court erred in admitting into evidence the results of a polygraph examination administered to defendant since a stipulation authorizing the examination was not complied with. The stipulation required both the prosecuting witness and defendant to be given "similar" tests "under the same terms [and] conditions," therefore, where one party was given two completed tests which were reliably administered on a reliable machine, the stipulation required that the other party be given two tests at approximately the same time and place on the same machine by the same operator.

2. **Criminal Law § 62— polygraph examination—instruction concerning erroneous**

Where evidence of a polygraph examination was admitted into evidence, the trial court erred in stating to the jury that it "may consider it along with all the other facts and circumstances in determining the defendant's guilt or innocence . . . ," since results of a polygraph examination cannot be used to show a defendant's guilt or innocence of the crime charged.

3. **Burglary and Unlawful Breakings § 5— element of lack of consent—sufficiency of evidence**

Where defendant defended his burglary charge at trial upon the theory that the prosecuting witness consented for him to enter her home, the prosecuting witness presented evidence that defendant entered without her consent, and the trial court properly instructed the jury on this issue, the defendant could not on appeal seek relief upon the theory that the prosecuting witness's husband gave defendant permission to enter the home. Further, the evidence did not support the alternate theory.

Justices MITCHELL and MARTIN did not participate in the consideration or decision of this case.

BEFORE *Judge Ronald W. Howell*, presiding at the 10 November 1980 Criminal Session of MECKLENBURG Superior Court, and a jury, defendant was found guilty of first degree burglary and second degree rape. He was sentenced to life imprisonment on the burglary charge and appeals of right pursuant to G.S. 7A-27(a). On the rape charge, he was sentenced to prison for a minimum of twenty and a maximum of forty years; he appealed, and we allowed his motion to by-pass the Court of Appeals on 29 July 1981.

Rufus L. Edmisten, Attorney General, by Alfred N. Salley, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by James H. Gold, Assistant Appellate Defender, for defendant appellant.

EXUM, Justice.

In this appeal defendant's dispositive assignments of error relate to the admissibility of polygraph examination results and jury instructions pertaining to this evidence. We find merit in these assignments and order a new trial. We find no merit in defendant's contention that the burglary charge should have been dismissed or that the jury instructions on this offense were erroneous. Other errors assigned are not likely to arise at a new trial; therefore they do not merit discussion.

The state's evidence tends to show:

Valerie Moore, the alleged victim, lived with her husband, Mike, and three children in a trailer home five miles east of Lincolnton. On the night of 14-15 July 1980, Valerie Moore was at home with her children. Mike Moore was not there. At around 3:30 a.m. she was awakened by defendant calling her name. Defendant, a friend of Mike's, had gained entry into the residence while Valerie was asleep. He told Valerie that Mike had showed him how to get in the trailer and had told him to come there and wait for him.

Valerie ordered defendant to leave, whereupon he pulled a butcher knife and told her that if she screamed he would cut her throat. He then forced her to leave the residence and walk to a corral in the woods. There was a cot or mattress in the corral. Defendant told Valerie that Mike had been sleeping with his wife,

that he was doing this to spite Mike, that he did not want to hurt her but wanted to hurt Mike. He also told her that he had a gun behind the cot and was going to shoot her husband with it.

After reaching the cot, defendant forced Valerie to have intercourse with him and then he walked her back to the residence. When they approached they found that Mike had come home. Valerie cried out to her husband and ran to the residence. Mike had some words with defendant and then entered the residence to see if Valerie was all right. Defendant left and was arrested later that morning.

Defendant's defense was that Valerie Moore consented to both his entry into the residence and to sexual intercourse. His evidence, consisting primarily of his own testimony, tended to show that he and Valerie had consensual intercourse twice before the occasion in question. On this occasion, defendant said both his entry into the residence and the sexual intercourse were accomplished with Valerie's consent, but Mike caught them returning to the trailer. As he was leaving the trailer defendant heard Mike beating Valerie. He heard Valerie ask her husband to stop beating her because "he made me do it."

Mike was not called as a witness by either the state or the defendant.

I.

[1] By his first assignment of error defendant contends that the trial court erred in admitting into evidence the results of a polygraph examination administered to him for the reason that the stipulation authorizing the examination was not complied with. We agree with this contention.

The state and the defendant stipulated that defendant would submit to a polygraph examination and the results would be admitted into evidence provided a number of conditions were met. One of these conditions was that Valerie Moore would also "submit herself to a similar polygraph examination under the same terms, conditions and stipulations" governing the defendant's examination and that Valerie's results would also be admissible into evidence. The stipulation provided further: "The specific polygraph procedures to be used, both the scope and actual wording of the relevant test questions, the examination conditions, and

all other aspects of the examination shall be at the polygraphist's sole discretion."

Evidence as to the manner in which the polygraph examinations of Valerie and defendant were conducted came from the polygraphist, Albert Stout. Stout testified that he scheduled the examinations of Valerie and defendant for the morning of 21 October 1980. While both parties were waiting to take their examination, they encountered each other in Stout's offices. According to Stout, who observed the encounter, "Ms. Moore was quite visibly shaken; visibly I mean to almost startled." Stout then proceeded with Valerie's polygraph examination. The results, in Stout's opinion, were inconclusive; they were inconclusive, in his opinion, because of Valerie's recent encounter with defendant. Stout said, "I could not come up with a conclusion on Ms. Moore, because of the experience, what we call the antidampening climax situation where a stimuli is invoked that a person relives the same incident over again and they can't come down. I tried to calm Ms. Moore down, but to no avail." Stout then proceeded to conduct a polygraph examination of defendant. When asked about the possible effect of the encounter with Valerie Moore on defendant, Stout said, "The only thing I seen about Mr. Meadows is that he was very within himself, calm, and etc." Stout testified that in his opinion defendant's polygraph examination indicated "deception." Stout testified that he gave Valerie Moore a second polygraph examination on 4 November 1980. In his opinion the results of this examination indicated no "deception."

We are satisfied that by according Valerie Moore, but not defendant, a second opportunity to take the polygraph examination under the circumstances here presented, the polygraphist violated that provision of the stipulation which required that both defendant and Valerie Moore take "a similar polygraph examination under the same terms [and] conditions."

It is settled in this jurisdiction that evidence relating to polygraph examinations is not admissible unless the parties stipulate its admissibility and the trial court, in its discretion, determines to admit it. *State v. Milano*, 297 N.C. 485, 256 S.E. 2d 154 (1979); *State v. Brunson*, 287 N.C. 436, 215 S.E. 2d 94 (1975); *State v. Foye*, 254 N.C. 704, 120 S.E. 2d 169 (1961). The provisions

of the stipulation governing admissibility of this evidence must be strictly complied with. *Chambers v. State*, 146 Ga. App. 126, 245 S.E. 2d 467 (1978); *see State v. Milano, supra; Butler v. Florida*, 228 So. 2d 421 (Fla. Dist. Ct. App. 1969); *People v. Reagan*, 395 Mich. 306, 235 N.W. 2d 581 (1975). In *Milano* we held that polygraph results unfavorable to defendant but obtained pursuant to a stipulation of admissibility could be admitted against defendant, but defendant was not entitled to offer the favorable results of a psychological stress evaluation, a test also designed to indicate the presence or absence of deception, because the stipulation did not by its terms cover the latter test. 297 N.C. at 500, 256 S.E. 2d at 162-63.

Here Valerie Moore was given two opportunities to "pass" the polygraph; she succeeded on the second. Defendant was given only one. The only justification for this procedure is the polygraphist's opinion that a chance encounter between defendant and Valerie Moore immediately before both tests were conducted caused Valerie Moore not to "pass" her test but had no effect on defendant's failure to "pass" his.

This justification will not suffice. The stipulation required both parties to be given "similar" tests "under the same terms [and] conditions." Therefore if one party, for whatever reason, is given two completed tests which were reliably administered on a reliable machine, *i.e.*, two chances to "pass," the stipulation requires that the other party be given two tests at approximately the same time and place on the same machine by the same operator.

Here Valerie Moore's first examination was not aborted before it was completed, nor was it unreliable because of improper administration or a machine malfunction. Her first examination was completed and the results duly obtained. The polygraphist testified on voir dire that Valerie Moore's first examination "was a reliable examination, but . . . because of certain uncontrollable things that I was not able to overcome certain fears by [Valerie Moore]."

Neither does the first stipulation, giving the polygraphist sole discretion with regard to the manner in which the tests are to be conducted, override the stipulation that the tests be "similar" and be given under the "same terms [and] conditions."

The first stipulation refers only to the manner in which both tests must be given. It is subject to the stipulation that both tests be similar and conducted under the same terms and conditions. Construing the stipulations together, the agreement means that however the polygraphist decides to give the tests he must give similar tests to both parties and they must be given under the same terms and conditions.

The stipulation will remain in full force and effect and will govern the admissibility of whatever polygraph-related evidence is offered at the new trial. In order, however, that both Valerie Moore and defendant be given "a similar polygraph examination under the same terms [and] conditions," similar tests should be readministered to both parties at or about the same time and place by the same polygraphist on the same machine.

II.

[2] In his second assignment of error defendant contends that the trial court erred in its instructions to the jury with respect to the consideration they should give to the evidence relating to the polygraph examinations. We agree with this contention.

During the course of the polygraphist's direct examination he was asked if he had an opinion whether defendant showed deception in answering certain questions during the polygraphic examination. Defendant objected; the court overruled the objection and instructed the jury as follows:

> COURT: Again, members of the jury, there is evidence that the defendant voluntarily submitted to a lie detector or a polygraph test. This is not to be considered by you in any way as proving any element of any crime charged against the defendant. If it shows anything, which is for you to determine, along with all the other evidence in the case, it shows at most and may be considered by you at most in determining whether at the time the defendant took the test on October 21, 1980, he was telling or not telling the truth.
>
> [You may consider it along with all the other facts and circumstances in determining the defendant's guilt or innocence; because it is solely the province of the jury to determine the guilt or innocence, and even though you may consider the results of the polygraph test, what weight if any, should be

given to such tests or the result of such tests, is for you and you alone to say and to determine and you'll remember that at all times.]

Defendant correctly assigns as error the portion of the instruction enclosed in brackets. In *State v. Milano, supra*, 297 N.C. at 499, 256 S.E. 2d at 162, this Court said:

> The law is clear that even if the results of a polygraph examination are properly admitted at trial, that evidence cannot be used to show a defendant's guilt or innocence of the crime charged; it may only be used as evidence relating to a defendant's credibility.

While the first part of the instruction quoted above is correct, it is followed by an incorrect statement of the law. The jury did not know which instruction to follow. "It has been uniformly held that where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted on the incorrect part." *State v. Parrish*, 275 N.C. 69, 76, 165 S.E. 2d 230, 235 (1969), *quoted with approval in State v. Harris*, 289 N.C. 275, 280, 221 S.E. 2d 343, 347 (1976).

III.

[3] Defendant next contends the trial court erred in denying his motion to dismiss the burglary charge because all of the evidence shows that Mike Moore gave him permission to enter the trailer. He further argues that the trial court erred by failing to instruct the jury that it must find that defendant entered the trailer without the consent of both Valerie and Mike Moore in order to convict him of first degree burglary. We conclude there is no merit in these arguments in light of the evidence.

"The constituent elements of burglary in the first degree are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein." *State v. Person*, 298 N.C. 765, 768, 259 S.E. 2d 867, 868 (1979). The breaking and entry of the dwelling must be without the consent of anyone authorized to give consent. *State v. Boone*, 297 N.C. 652, 256 S.E. 2d 683 (1979); *State v. Friddle*, 223 N.C. 258, 25 S.E. 2d 751 (1943); *State v. Goffney*, 157 N.C. 624, 73 S.E. 162 (1911); *State v. Rowe*, 98 N.C. 629, 4 S.E. 506

(1887); *State v. Tolley*, 30 N.C. App. 213, 226 S.E. 2d 672, *disc. rev. denied*, 291 N.C. 178, 229 S.E. 2d 691 (1976); Annot., *Burglary—Entry with Consent*, 93 A.L.R. 2d 531 (1964). Defendant argues that the state's evidence shows that Mike Moore gave defendant permission to enter the trailer on the occasion in question and that Mike Moore, being an occupant of the trailer (there is no evidence that Mike Moore was an owner of the trailer), was authorized to consent to defendant's entry. The state contends that since actual occupancy of the dwelling is a necessary element of first degree burglary only the actual occupant at the time of entry has authority to consent to the entry; therefore even if Mike Moore did consent on the occasion in question, it is unavailing to defendant. In light of the evidence in the case we do not reach the question posed by the parties.

Defendant testified in his own behalf. He never testified that Mike Moore had given him permission to enter the Moore trailer on the occasion in question. Defendant testified simply that Valerie Moore willingly permitted him to enter the trailer and, thereafter, consented to sexual intercourse. Defendant testified that he and Mike were "mostly drinking friends" and that he had "been to the Moore residence with Mike Moore a lot." He also testified that he had been to the Moore residence at times when Mike was not there, had been let into the residence by Valerie Moore and had had consensual sexual relations with her on these other occasions.

Defendant's testimony, far from demonstrating defendant's reliance on Mike Moore's permission to enter the residence, affirmatively negates such reliance. According to defendant, he and Valerie Moore had met at the residence clandestinely without Mike Moore's knowledge before the occasion in question. The incident being tried was just another in a series of similar rendezvous. Indeed when Mike Moore returned and caught defendant and Valerie Moore together, defendant testified:

> Mike ran up to me and said, 'I finally caught you, you son-of-a-bitch, I know you been messing with my wife.' He swung at his wife and she ran into the house and then he walked up to me and said, 'Man, why do you want to do me like this?' He walked up on me again and I told him to get off me and I put my hand out and said, 'Get off.' And he ran into the house and he started fighting with his wife.

The only defense to the burglary charge supported by defendant's testimony is that Valerie Moore consented to his entering the trailer.

Valerie Moore denied that she consented to defendant's entry. Testifying for the state, she said that on the night in question she had locked the front door and was in her darkened bedroom when she heard someone call her name. She "turned over and I saw someone standing there with a cigarette in their hand, I saw the light of the cigarette. He [the defendant] said, 'Mike told me I could come down here.' I was just waking up at this time, trying to get myself set on what he was saying. He said that Mike showed him how he could get in the house. He said that Mike told him to come and wait for him. I said, 'Well, what do you mean? I don't care if Mike did tell you to come down here. I don't appreciate you coming in my house at this time of night, regardless of what Mike said. If Mike told you, I don't appreciate Mike telling you because that's not showing me any respect at all.' And he said, 'Well, he told me to come down here and wait on him.' "

In light of the theory of defendant's defense as revealed by his own testimony, it is clear that Valerie Moore's testimony is not evidence tending to prove that Mike Moore had given defendant permission to enter the trailer. It tends to prove only that defendant *said* to Valerie Moore that Mike Moore had given him permission to enter the Moore residence. If believed, it tends to prove the ruse by which defendant tried to assuage her fears.

The issue joined at trial in the burglary case, therefore, was whether Valerie Moore, not Mike Moore, consented to defendant's entry. The trial court properly instructed the jury on this issue, saying that the jury would have to find, among other things, beyond a reasonable doubt, that defendant entered into the Moore residence when it was occupied by Valerie Moore "without her consent" in order to convict defendant of first degree burglary.

"The theory upon which a case is tried in the lower court must prevail in considering the appeal and interpreting the record and determining the validity of the exceptions." *State v. Honeycutt*, 237 N.C. 595, 599, 75 S.E. 2d 525, 527 (1953). A defendant is not permitted to defend at trial upon one theory "and, upon an adverse verdict, call upon the appellate court to grant relief on

the ground that the presiding judge should have intervened and guided his defense to another theory . . . ." *State v. Blackwell*, 276 N.C. 714, 720, 174 S.E. 2d 534, 538, *cert. denied*, 400 U.S. 946 (1970).

For the reasons stated, defendant is given a

New trial.

Justices MITCHELL and MARTIN did not participate in the consideration and decision of this case.

STATE OF NORTH CAROLINA v. DARRYL F. YOUNGER

No. 132A82

(Filed 5 October 1982)

1. **Rape and Allied Offenses § 4.3— purpose of rape victim shield statute**

The rape victim shield statute, G.S. 8-58.6, was designed to protect the witness from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from evidence of sexual conduct which has little relevance to the case and has a low probative value, but the statute was not designed to shield the prosecuting witness from her own actions which have a direct bearing on the alleged sexual offense.

2. **Criminal Law § 89.4; Rape and Allied Offenses § 4.3— rape victim shield statute—prior inconsistent statement showing sexual activity**

In a prosecution for rape and burglary wherein the prosecutrix testified in the district court that she had sex on the night of the alleged rape with the defendant's roommate, the rape victim shield statute did not prohibit the defendant from impeaching the credibility of the prosecutrix by cross-examining her about a prior inconsistent statement she had made to the examining physician only hours after the alleged rape that she was sexually active with a boyfriend and last had sex one month prior to the alleged crimes. Rather, the prior statement had a strong probative value since it related directly to her account of the incident and those events leading up to it and should have been admitted by the trial court.

3. **Rape and Allied Offenses § 4.3— prior inconsistent statement showing sexual activity—determination of admissibility—hearing by trial court**

In determining whether a prior inconsistent statement by an alleged rape victim showing previous sexual activity has enough probative value to negate its prejudicial effect, the trial court should follow a procedure similar to the one set out in G.S. 8-58.6(c), including an in-camera hearing in which the court can hear and evaluate the arguments of counsel before making a ruling.

4. Rape and Allied Offenses § 4.3— victim's sexual activity after rape—inadmissibility as distinct pattern of similar behavior

The trial court did not err in ruling that an alleged rape victim's sexual activity with defendant's roommate one week after the date of the alleged rape did not constitute evidence of a distinct pattern of behavior similar to defendant's version of the incident so as to be admissible under G.S. 8-58.6(b)(3).

DEFENDANT appeals as a matter of right from judgment of *Albright, J.*, entered on October 23, 1981, Session of Superior Court, SURRY County, imposing two terms of life imprisonment on defendant, the sentences to run concurrently. Defendant was charged in indictments, proper in form, with first degree burglary and first degree rape.

The evidence disclosed that the defendant, Darryl F. Younger, was arrested on 17 February 1981, and charged with the offenses indicated on the same date.

The State's evidence tended to show that on 17 February 1981 the defendant, Darryl F. Younger, unlawfully broke into and entered an apartment rented at that time by one Sarah Lonne Davis located at Surry Villa Apartments in Dobson, North Carolina. According to the prosecuting witness, the defendant forced open her door, after she had partially opened it, and entered the premises without her permission and against her will. After entering the premises, according to the prosecuting witness, the defendant had sexual intercourse with her against her will. When defendant entered the apartment he had in his hand a pistol, which he later displayed and threatened to use. The alleged breaking and entering and rape occurred about 3:00 a.m. About 5:30 a.m. on the same day, defendant was arrested by the Dobson Police Department and the Surry County Sheriff's Department and charged with the criminal offense of first degree burglary and first degree rape. The evidence disclosed that the witness went to the Dobson Police Department about 4:00 a.m. on the same day and made a full report of the alleged burglary and rape. The prosecuting witness was then taken by the Police Department to Northern Hospital of Surry County, and examined by a physician.

The defendant's evidence tended to show in testimony by the defendant himself that he knew the prosecuting witness and had

been in her apartment on previous occasions, and that on this morning the prosecuting witness let him in her apartment and consented to having sexual relations with him.

The case was submitted to the jury with the permissible options of returning a verdict of first degree burglary and first degree rape, second degree rape, or not guilty. The jury in turn found the defendant guilty of first degree burglary and first degree rape.

There was evidence that the defendant and his former roommate, Glenn Gravely, lived in the same apartment complex as the victim. The evidence with regard to Gravely indicated that for several weeks prior to the alleged rape and burglary, he had been regularly going to the apartment of the victim at late hours and having intercourse with her. There was in-camera testimony on direct examination of Glenn Gravely that he had intercourse with Sarah Lonne Davis in her apartment one week *after* the alleged rape.

The medical testimony of Dr. Beyer, who examined the victim at the hospital later on the morning of 17 February 1981, disclosed that among other things, the victim's physical condition was consistent with having had intercourse on the night of the alleged rape. Judge Albright entered an order denying the defendant the right to cross-examine the prosecuting witness about certain statements made by her to the examining physician.

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

Attorney General Rufus L. Edmisten by Assistant Attorneys General Douglas A. Johnston and George W. Lennon, for the State.

Stephen G. Royster and Michael F. Royster, for the defendant.

COPELAND, Justice.

Defendant argues and maintains that Judge Albright erred when he entered an order denying defendant the right to cross-examine the prosecuting witness about certain statements made by her to the examining physician, to-wit, that she was sexually

active with a boyfriend and last had sex one month prior to the alleged burglary and rape. The defendant contends that in light of the prosecuting witness's testimony at district court that she had sex on the night of the alleged rape with the defendant's roommate, he should be allowed to challenge her credibility based on these two inconsistent statements. In response to this contention, the State argues in substance that the evidence of the statements about sexual activity with her boyfriend one month before the alleged rape is not probative of any element of the offense in question, but at best, goes merely to the weight of the evidence.

The order of Judge Albright that forbade the cross-examination of the prosecuting witness concerning what she had told Dr. Beyer was entered in connection with an in-camera hearing wherein the court also ruled that the defendant could not ask the witness, Dr. Beyer, anything relating to the statement made by the prosecutrix to the doctor on the morning of his examination. Judge Albright ruled that the defendant's question amounted to nothing less than evidence of sexual behavior on the part of the prosecuting witness, making it irrelevant to any issue in this case. Judge Albright was of the opinion that G.S. 8-58.6, commonly referred to as the rape shield statute, controlled his determination and since the request did not fall under one of the four categories set out in G.S. 8-58.6(b) it must be irrelevant. We believe Judge Albright misconstrued the scope of G.S. 8-58.6(b).

"G.S. 8-58.6 is nothing more than a codification of this jurisdiction's *rule of relevance* as that rule specifically applies to the past sexual behavior of rape victims." *State v. Fortney*, 301 N.C. 31, 37, 269 S.E. 2d 110, 113 (1980). (Emphasis added.) Prior to the enactment of G.S. 8-58.6, the prosecuting witness's general reputation for unchastity was admissible during a rape trial for the purpose of attacking her credibility and showing her proneness to consent to sexual acts. *Fortney, Id., State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978). Such a rule was based on antiquated ideas of what evidence was probative to a woman's willingness to consent to sexual relations. When the courts applied these antiquated ideas to the necessarily elastic rules of relevance, prior sexual behavior of little or no probative value, was often admitted into evidence. Today, "[c]ommon sense and sociological surveys make clear that prior sexual experience by a woman with one man does not render her more likely to consent

to intercourse with an often armed and frequently strange attacker." *Fortney*, 301 N.C. at 38, 269 S.E. 2d at 114. In *Fortney*, this Court recognized that G.S. 8-58.6 cast aside the idea, "that *any* previous sexual behavior of a rape victim is *per se* relevant to a rape proceeding." *Fortney*, 301 N.C. at 38, 269 S.E. 2d at 113. (Original emphasis.) In order to avoid prejudice and insure that the effects of such antiquated beliefs would not linger, our Legislature passed G.S. 8-58.6 which set out in clear language four categories in which evidence of the sexual behavior of the prosecutrix may be brought out at trial.

Each category is directed at those instances where specific prior sexual behavior of the prosecutrix is clearly relevant to the alleged sexual offense at trial. First, G.S. 8-58.6(b)(1) allows the introduction of previous sexual behavior between the complainant and the defendant. Second, G.S. 8-58.6(b)(2) allows specific instances of sexual behavior to be brought into evidence in order to show that the defendant did not commit the alleged act. Third, G.S. 8-58.6(b)(3) permits introducing evidence of sexual acts which establish a distinctive pattern of behavior that tends to show the prosecutrix either consented to the act or behaved in a manner that led the defendant to believe she consented. And fourth, under G.S. 8-58.6(b)(4) evidence of sexual behavior may be offered as the basis of expert psychological opinion that the complainant fantasized or invented the acts charged.

[1] In each of these four categories it is not hard to see that the relevance and the probative value of such behavior far outweigh any prejudice such conduct might arouse in the minds of the jury. This statute was designed to protect the witness from unnecessary humiliation and embarrassment while shielding the jury from unwanted prejudice that might result from evidence of sexual conduct which has little relevance to the case and has a low probative value. However, as each of the four categories under G.S. 8-58.6(b) so vividly illustrates, the statute was not designed to shield the prosecuting witness from her own actions which have a direct bearing on the alleged sexual offense.

[2] Unlike some distant sexual encounter which has no relevance to this case other than showing the witness is sexually active, the prior inconsistent statement made by this prosecuting witness has a direct relation to the events surrounding this alleged rape.

We have repeatedly held that prior inconsistent statements made by a prosecuting witness may be used to impeach his or her testimony when such statements bear directly on issues in the case. *State v. Williams*, 91 N.C. 599 (1884); *State v. Cope*, 240 N.C. 244, 81 S.E. 2d 773 (1954). It is our belief that the statute was not designed to shield the prosecutrix from the effects of her own inconsistent statements which cast a grave doubt on the credibility of her story. It must be remembered that G.S. 8-58.6(b) "define(s) those times when the prior sexual behavior of a complainant is relevant to issues raised in a rape trial and (is) *not a revolutionary move to exclude evidence generally considered relevant in trials of other crimes.*" *Fortney*, 301 N.C. at 42, 269 S.E. 2d at 116. (Emphases added.) In other words, the statute was not intended to act as a barricade against evidence which is used to prove issues common to all trials. Inconsistent statements are, without a doubt, an issue common to all trials.

In this case, as in most sex offense cases, the prosecuting witness' testimony is crucial to the State's evidence and her credibility as a witness can easily determine the outcome at trial. Therefore, the prosecutrix's prior statement to the examining physician, only hours after the alleged rape, which was inconsistent with her testimony at District Court, has a strong probative value, especially since it relates directly to her account of the incident and those events leading up to it.

[3] Of course, the relevance and probative value of such an inconsistent statement must be weighed against its prejudicial effect. Since such evidence produces a high prejudicial impact upon the jury, the trial court should follow a procedure similar to the one set out in G.S. 8-58.6(c) for determining if the evidence has enough probative value to negate its prejudicial effect. Such a procedure would entail an *in-camera* hearing in which the court can hear and evaluate the arguments of counsel before making a ruling.

As we stated in *Fortney*, G.S. 8-58.6 is only a codification of the "rule of relevance" as it pertains to issues in a rape case. Therefore the statute does not transcend the bounds of relevance but only clarifies its use. *Fortney, supra*, does not stand for the proposition that since prior sexual conduct is highly prejudicial it can never be referred to unless it falls within the guidelines of

G.S. 8-58.6(b). If such were true the tail would truly be wagging the dog. Instead, this statute stands for the realization that prior sexual conduct by a witness, absent some factor which ties it to the specific act which is the subject of the trial, is irrelevant due to its low probative value and high prejudicial effect.

The able trial judge misconstrued the scope of G.S. 8-58.6 in treating it as the sole gauge for determining whether evidence is admissible in rape cases. Impeachment by prior inconsistent statements is a practice invoked in all types of trials against all types of witnesses. This was not an attempt by the defendant to impeach the credibility of the witness by revealing acts of prior sexual conduct, rather it challenges her credibility through her own prior inconsistent statements. The fact that this question includes a reference to previous sexual behavior does not prevent its admission into evidence, instead the sexual conduct reference goes to the degree of prejudice which must be balanced against the question's probative value.

In light of the extreme importance of an eyewitness's credibility, we feel that the denial of an opportunity to impeach the prosecuting witness with prior inconsistent statements was highly prejudicial to defendant's case. Therefore, we must conclude that defendant is entitled to a new trial.

[4] In addition, defendant argues that he should have been permitted to cross-examine the prosecuting witness about her sexual activity with Glenn Gravely one week after the date of the alleged rape. The defendant relies on G.S. 8-58.6(b)(3) which states:

> The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior 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 to reasonably believe that complainant consented.

Judge Albright, in an in-camera hearing order, stated that the defendant could only cross-examine the prosecutrix concerning consensual sexual acts with Glenn Gravely at her apartment, late at night which took place on or before the night in question.

The trial court found that the sexual relations between the prosecuting witness and Gravely which occurred before the rape were evidence of a distinct pattern of behavior within the meaning of G.S. 8-58.6(b)(3) but the sole act after the rape was not within the meaning of subsection (b)(3).

In our opinion, the trial judge has been more than liberal in his interpretation of what is a *distinctive* pattern of behavior and there were clearly enough facts for him to determine that the post rape sexual encounter was not evidence of a distinct pattern of behavior similar to the defendant's version of the incident. Therefore, the provisions of G.S. 8-58.6(b)(3) do not give the defendant any comfort.

The other assignments of error will probably not recur on retrial and we do not discuss them.

For the reasons stated, a new trial is ordered for the defendant.

New trial.

STATE OF NORTH CAROLINA v. GENE McGAHA

No. 109PA82

(Filed 5 October 1982)

Rape and Allied Offenses § 9— engaging in a sexual act with victim "of the age of twelve years or less"—does not cover engaging in sexual act with a victim twelve years and eight months old

A judgment finding defendant guilty of committing a first-degree sexual offense under G.S. 14-27.4(a)(1) for engaging in a sexual act with a victim who was twelve years and eight months old must be arrested where the statute forbids such conduct with children "of the age of twelve years or less." After a child celebrates his twelfth birthday, he is no longer "twelve years or less," he is twelve *and more*.

Justice MARTIN dissenting.

Justices EXUM and MITCHELL join in this dissent.

WE granted defendant's petition for certiorari to review the judgment of *Britt, Judge*, entered at the 10 August 1981 Session of Superior Court, SCOTLAND County.

The sole question presented is whether defendant was lawfully indicted for committing a first-degree sexual offense under G.S. 14-27.4(a)(1) (1981) for engaging in a sexual act with a victim who was twelve years and eight months old, the statute forbidding such conduct with children "of the age of 12 years or less."

Attorney General Rufus L. Edmisten, by Assistant Attorney General W. Dale Talbert, for the State.

Haywood, Denny & Miller, by Charles H. Hobgood and George W. Miller, Jr., for defendant-appellant.

CARLTON, Justice.

Gene McGaha, a forty-year-old college graduate, was indicted for committing a sex offense under G.S. 14-27.4(a)(1) (1981). The statute states that "[a] person is guilty of a sexual offense in the first degree if the person engages in a sexual act: (1) [w]ith a victim who is a child *of the age of 12 years or less* . . . ." (Emphasis added.) The indictment alleged that the victim was "a child 12 years 8 months old and thus of the age of 12 years or less . . . ." Before tendering his plea of guilty to this charge and five other sex crimes, McGaha told the court: "I cannot state that I am guilty in case number 2594 [G.S. 14-27.4(a)(1) offense] because I was drunk and cannot remember, but I feel that it is in my best interest to plead guilty based on evidence I have heard." McGaha then was sentenced to life imprisonment for the first-degree sex offense, the sentence to run concurrently with other sentences imposed.

Defendant contends that he cannot be lawfully indicted under G.S. 14-27.4(a)(1) for engaging in a sexual act with a child twelve years and eight months old because the age requirement of the statute is not satisfied; the victim is not of the age of "12 years or less." In essence, defendant argues that once a child passes his twelfth birthday he is over twelve years of age; he is no longer "12 years or less." We must agree.

A similar question was presented to this Court over twenty-seven years ago; we find the decision in that case controlling here. In *Green v. Patriotic Order Sons of America, Inc.*, 242 N.C. 78, 87 S.E. 2d 14 (1955), a widow sought to recover from a funeral benefit association benefits accruing upon her husband's death.

The widow was entitled to the funeral benefits only if her husband was not "over fifty years" when he enrolled in the association. The husband's age at enrollment was fifty years and four months. This Court held that after the husband reached his fiftieth birthday he was over fifty years of age. *Id.* at 83, 87 S.E. 2d at 17. The Court stated, "when a person reaches his fiftieth birthday he would have lived fifty calendar years, of twelve calendar months each. Hence after his fiftieth birthday he would be over fifty years of age." *Id.*

So it is here. When defendant's victim reached his twelfth birthday, he had lived twelve calendar years of twelve months each. Therefore, after his twelfth birthday, he was something *more* than twelve. Clearly, under the *Green* rationale, he was not "12 years or less." *Accord Gibson v. People*, 44 Colo. 600, 99 P. 333 (1909); *State v. Carroll*, 378 So. 2d 4 (Fla. Dist. Ct. App.), *cert. denied*, 385 So. 2d 761 (1980); *Knott v. Rawlings*, 250 Iowa 892, 96 N.W. 2d 900 (1959); *State v. Maxson*, 54 Ohio St. 2d 190, 375 N.E. 2d 781 (1978).

The State relies in part on a recent decision of the Court of Appeals construing similar language in our first-degree rape statute, G.S. 14-27.2(a)(1) (1981), *State v. Ashley*, 54 N.C. App. 386, 283 S.E. 2d 805(1981), *cert. denied*, 305 N.C. 153, 289 S.E. 2d 381 (1982). There is language in *Ashley* in conflict with our holding here and, to that extent, *Ashley* shall not be considered authoritative.

The State also contends that "common practice" supports its position. That is, most people will state their age by giving the number of birthdays celebrated. Hence, one is still twelve until the thirteenth birthday. We agree that most adults state their ages in this manner. This "common practice," however, is based on the fiction that we grow older only at yearly intervals. The truth, of course, is that we grow older a day (or less) at a time. After a child celebrates his twelfth birthday, he is no longer "12 years or less," he is 12 *and more.*

In the case at bar, therefore, defendant McGaha was unlawfully indicted for violating G.S. 14-27.4(a)(1) because an essential element of the offense, the age requirement of the victim, had not been met.

Our decision today is grounded on precedent and the rule that criminal statutes are to be construed strictly against the state and liberally in favor of the defendant. *See State v. Pinyatello*, 272 N.C. 312, 314, 158 S.E. 2d 596, 597 (1968). If the legislature intends to extend the protection of G.S. 14-27.4(a)(1) to children who have passed their twelfth birthday but have not yet reached their thirteenth birthday, as the State argues, then the language of the statute must explicitly state that intention. This Court is not at liberty to amend the statute. The General Assembly previously has indicated unambiguously the class of people included in the purview of its statutes. For example, G.S. 7A-524 (1981) provides, "[w]hen the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or *until he reaches his eighteenth birthday.*" (Emphasis added.) The legislature's use of the juvenile's "birthday" provides an exact point of reference from which to determine the class of people to whom the statute applies. Our legislature may wish to amend several criminal statutes which use language similar to that which we have interpreted here and substitute the precise language employed in G.S. 7A-524.

In his brief before this Court, defendant requests that we arrest judgment in this case. A motion in arrest of judgment is directed to some fatal defect appearing on the face of the record. *State v. Davis*, 282 N.C. 107, 117, 191 S.E. 2d 664, 670 (1972). It has been held that such a motion may be made for the first time on appeal in the Supreme Court. *State v. Sellers*, 273 N.C. 641, 645, 161 S.E. 2d 15, 18 (1968).

> A motion in arrest of judgment is proper when it is apparent that no judgment against the defendant could be lawfully entered because of some fatal error appearing in (1) the organization of the court, (2) the charge made against the defendant (the information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment. (Citations omitted.)

State v. Perry, 291 N.C. 586, 589, 231 S.E. 2d 262, 265 (1977).

Here, the fatal defect appearing on the face of the record is in the second category noted above. Judgment must be arrested when the indictment fails to charge a criminal offense or fails to charge an essential element of the offense. *State v. Benton*, 275

N.C. 378, 381-82, 167 S.E. 2d 775, 777 (1969); *State v. Coppedge*, 244 N.C. 590, 591, 94 S.E. 2d 569, 570 (1956).

For the reasons stated, we must arrest the judgment.

Judgment arrested.

Justice MARTIN dissenting.

I respectfully dissent. The majority relies upon *Green v. Patriotic Order Sons of America, Inc.*, 242 N.C. 78, 87 S.E. 2d 14 (1955), which I do not find persuasive. *Green* involved the interpretation of the bylaws of a funeral association. The phrase in question in *Green* was "not less than sixteen years of age nor over fifty years." The portion of the statute we are faced with is "a child of the age of 12 years or less." An applicant in *Green* could not qualify for insurance if "over fifty years," that is, after his fiftieth birthday. In the statute before us, children are protected during the period that they are "of the age of 12 years." A child is "of the age of 12 years" during the period between his twelfth birthday and thirteenth birthday. *See People ex rel. Makin v. Wilkins*, 22 A.D. 2d 497, 257 N.Y.S. 2d 288 (1965). Other courts faced with the issue in *Green* have resolved it contrary to *Green*. In *Wilson v. Mid-Continental Life Ins. Co.*, 159 Okla. 191, 14 P. 2d 945 (1932), the court held that "over the age of 65 years" meant until the sixty-sixth birthday. *Green*, although it may be correct as applied to its fact situation, is not dispositive of the issue before us. It is concerned with determining the contractual intent of private parties in the light of the specific setting and the interpretive objective therein sought.

On the other hand, we are concerned with a question of public policy to be reconciled by statutory construction. We must seek the intent of the legislature. The intent of the legislature controls the interpretation of statutes. *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975).

> "Of course criminal statutes must be strictly construed. [Citations omitted.] But this does not mean that a criminal statute should be construed stintingly or narrowly. It means that the scope of a penal statute may not be extended by implication beyond the meaning of its language so as to include offenses not clearly described. [Citations omitted.] Even so,

> an interpretation which leads to a strained construction or to a ridiculous result is not required and will not be adopted. *State v. Pinyatello*, 272 N.C. 312, 158 S.E. 2d 596 [1968]. 'While a criminal statute must be strictly construed, the courts must nevertheless construe it with regard to the evil which it is intended to suppress. And the rule that statutes will be construed to effectuate the legislative intent applies also to criminal statutes.' . . ."

Id. at 80-81, 213 S.E. 2d at 295 (citations omitted) (quoting *State v. Spencer*, 276 N.C. 535, 547, 173 S.E. 2d 765, 773-74 (1970)).

In construing amended statutes it is presumed that the legislature intended either to change the substance of the original act or to clarify the meaning of it. *Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E. 2d 481 (1968).

The rape and sex offense laws were recodified in 1979 when our legislature adopted article 7A of chapter 14 of the General Statutes of North Carolina. The 1979 act defined new crimes of first and second degree sexual offenses and also rewrote the rape statute. In so doing, the legislature provided that the language with respect to the age of the victim in first degree sexual offense, N.C.G.S. 14-27.4(a)(1), and first degree rape, N.C.G.S. 14-27.2(a)(1), would be identical. The present language of both sections was established by the 1981 amendment effective 1 July 1981. The new rape section replaces former N.C.G.S. 14-21 (Supp. 1975). Therefore, we may look to the changes in the rape statute in determining the intention of the legislature in adopting the age provision common to it and N.C.G.S. 14-27.4(a)(1).

N.C.G.S. 14-21, with respect to the age of a child victim, read "any female child *under* the age of twelve years." (Emphasis added.) Under this statute, if the victim had reached her twelfth birthday, she was not protected by the statute. *Cf. State v. Wade*, 224 N.C. 760, 32 S.E. 2d 314 (1944). N.C.G.S. 14-27.2(a)(1) applies if the victim "is a child of the age of 12 years or less."

Why did the legislature change the wording of the statute in 1979 and 1981? Any material change in the language of the original act indicates a change in legal rights. The logical inference is that the legislature wanted to extend the protection of the statute to children who had not attained their thirteenth

birthdays. Otherwise, there is no reasonable basis for the deletion of "under" and the use of the phrase "of the age of 12 years." This phrase has a particular meaning: it means "while a child is 12 years old," or "during the period that a child is 12 years of age." If the legislature intended the protection of the statute to terminate at the instant of a child's twelfth birthday, it would have used language such as "a victim who has attained his 12th birthday or less." The words "of the age of 12 years" denote a continuing condition until the child's thirteenth birthday. The use of the verb "is" with the phrase "of the age," rather than "has attained" or similar language, denotes a continuing or existing condition. The phrase "or less" immediately following "of the age of 12 years" indicates that the legislature intended to include the entire period that a child was twelve years of age and also the period before the child becomes twelve years of age. The deletion of the word "under" clearly manifests the intent to extend the protection of the statute. *State v. Ashley*, 54 N.C. App. 386, 283 S.E. 2d 805 (1981), *cert. denied*, 305 N.C. 153, 289 S.E. 2d 381 (1982).

In *Wilkins*, *supra*, 22 A.D. 2d 497, 257 N.Y.S. 2d 288 (1965), the New York court was faced with a similar question on facts close to those in the case before us. There, the court interpreted the amendment of a sex offense statute. The original act made it a felony to carnally abuse a child "ten years or under." The legislature amended the companion statute to make it a misdemeanor to carnally abuse a child "over the age of ten years." The court held that the felony act applied where the victim was ten years and three months of age. By the amendment, the legislature intended to change the legal rights affected by the act. The court stated that a child "of the age of 10 years" was one who has reached the tenth birthday but has not reached the eleventh birthday. By so doing, the court expanded the protection of the felony statute to children in this age bracket. The reasoning in *Wilkins* is equally applicable to the case before us.

Moreover, one of the primary purposes of a criminal statute is to put the public on notice as to what they can or cannot lawfully do. The legislature must inform the citizen with reasonable precision what acts it intends to prohibit so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid. *State v. Lowry and State v.*

Mallory, 263 N.C. 536, 139 S.E. 2d 870 (1965). The aim of the criminal statute is to notify a person of ordinary understanding and intelligence of the conduct that is prohibited. *State v. Hales*, 256 N.C. 27, 122 S.E. 2d 768 (1961). The words "of the age of 12 years" mean to the average person of ordinary understanding and intelligence that the victim has passed her twelfth birthday but has not reached her thirteenth birthday. The legislature intends that its statutes be understandable by the general public as well as English scholars.

In recodifying former N.C.G.S. 14-21 and in prohibiting a broader range of sexual offenses, the legislature intended to expand the protection of children from such assaults. I find the indictment to be lawful and proper. Defendant had a fair trial, free of prejudicial error.

Justices EXUM and MITCHELL join in this dissent.

JAMES J. RORIE, GUARDIAN AD LITEM FOR CHICO RORIE, MINOR SON; RACHEL L. RORIE, DECEASED, EMPLOYEE PLAINTIFF v. HOLLY FARMS POULTRY COMPANY, EMPLOYER AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 181A82

(Filed 5 October 1982)

1. **Master and Servant § 57— workers' compensation—interpretation of "willful intent to injure another"—fight between employees**

The bar to recovery, set forth in G.S. 97-12(3) of the Workers' Compensation Act, applies when a general willful intent to inflict some injury is established by the evidence. Therefore, where the evidence showed that two employees exchanged angry words at work, expressed threats towards one another to co-workers, that plaintiff's mother waited for the other employee outside the plant where they argued again, that plaintiff's mother followed the other employee to the other employee's car, that a fight ensued and that plaintiff's mother was stabbed and killed, there was ample evidence to support the Industrial Commission's finding that plaintiff's mother acted with the willful intent to injure another.

2. **Master and Servant § 56— workers' compensation—fight between employees—proximate cause**

Under G.S. 97-12, for the claimant's injuries to be proximately caused by her actions, the willful intention of the claimant must be more than *a* cause of

her injuries; however, it need not be the *sole* cause. The claimant's injuries must be the result of a natural and continuous sequence of events, unbroken by a new independent cause, stemming from the claimant's willful intention to injure himself or another, and it is necessary that *some* injury be foreseeable from the claimant's action.

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

APPEAL as a matter of right, pursuant to G.S. 7A-30(2), from the decision of the Court of Appeals, one judge dissenting, reported at 56 N.C. App. 331, 289 S.E. 2d 78 (1982). The plaintiff appealed from the Opinion and Award of the North Carolina Industrial Commission filed 29 August 1980 denying the plaintiff's claim for compensation. The Court of Appeals vacated and remanded the award of the Commission in an opinion by *Judge*, now *Justice, Harry C. Martin* with *Judge Wells* concurring and *Judge Arnold* dissenting.

F. D. Poisson, Jr. and Larry E. Harrington, for plaintiff appellee.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Philip R. Hedrick, James F. Wood, III and Hatcher B. Kincheloe and McElwee, McElwee, Cannon & Warden, by William C. Warden, Jr. for defendant appellants.

MITCHELL, Justice.

The plaintiff brought this action before the Industrial Commission seeking death benefits under the Workers' Compensation Act. The Deputy Commissioner found that the decedent's death was accidental and arose out of and in the course of the employment but that the compensation must be denied under the terms of G.S. 97-12(3) because the death was proximately caused by the willful intention of the decedent to injure another. By a two to one vote the Full Commission upheld the opinion of the Deputy Commissioner, and the plaintiff appealed to the Court of Appeals. The Court of Appeals, with one judge dissenting, vacated the Commissioner's award and allowed recovery. For the reasons stated herein, we reverse.

The decedent, Rachel L. Rorie, was stabbed to death on 19 April 1979 by a co-worker, Beverly Thompson, in the parking lot

of defendant-employer's poultry processing plant. Both women worked in the labeling department weighing and labeling chickens. They were working the second shift which began at 5:00 p.m. and continued until the work was finished at approximately 2:00 or 3:00 a.m.

The two women did not know each other before they began working at the poultry plant. Thompson testified that they did not talk to each other often, but that whenever they did speak they were hostile. Thompson stated that the cause of their frequent arguments was "[Rorie] said I was talking about her, and ought to stay home with my husband." There was also evidence that Rorie was angry because she believed that Thompson had caused packing boxes to fall off the chute and strike Rorie. On the night of her death, Rorie yelled to Thompson that she was "tired of you hitting me with these boxes."

During the shift on April 19th the two women argued and exchanged angry words. Rorie told a co-worker that she was "going to get" Thompson. As she was leaving, she challenged Thompson to "settle this, once and for all." Rorie, who was one of the first to leave, waited on the steps outside the plant until Thompson, who was one of the last to leave, emerged. The two began arguing, and a friend of Rorie's urged her to leave.

After a brief argument, the women walked across the property towards the parking lot. Rorie's car was parked to the left of the gate leading to the parking lot and Thompson's car was parked to the right. Rorie followed Thompson to Thompson's car and blocked her access to the driver's side of the car. Thompson walked to the passenger side, unlocked the door and was only able to open the door enough to put her wrap, pocket book, and keys in the car. According to Thompson, when she turned around, Rorie "was on me in my face, fussing, and she had my back pinned up against the car." Thompson pushed Rorie and a fight ensued. A knife "was produced" and "ended up" in Thompson's hand and she stabbed Rorie at least ten times, causing her death.

One witness stated that Thompson had the knife behind her back when the two women were arguing on the steps. Thompson testified that Rorie "came down at me with a knife" and that she was able to get it away from her. She does not remember stab-

bing Rorie. No other witness could corroborate either of these conflicting versions.

The parties stipulated that the parking lot where Rorie was killed was leased by the defendant Holly Farms for the use of its employees. The Deputy Commissioner found as fact and concluded as a matter of law that the accidental death of Rachel Rorie arose out of and in the course of her employment with Holly Farms Poultry Company. He ruled, however, that pursuant to G.S. 97-12(3) no compensation was payable because the death was proximately caused by the willful intention of the decedent to injure another.

[1] This is a case of first impression involving the construction of G.S. 97-12(3), which provides that, "No compensation shall be payable if the injury or death to the employee was proximately caused by: . . . (3) His willful intention to injure or kill himself or another." The statute presents an affirmative defense to a claim under the Workers' Compensation Act. It requires a finding that the claimant had the willful intention to injure or kill himself or another and that this intention was the proximate cause of the claimant's injuries. Since G.S. 97-12(3) is an affirmative defense, the burden of proof is on the employer to show that compensation should be denied notwithstanding the fact that the injury arose out of and in the course of the employment.

The purpose of the Workers' Compensation Act is twofold. It was enacted to provide swift and sure compensation to injured workers without the necessity of protracted litigation. *Barnhardt v. Cab Company*, 266 N.C. 419, 146 S.E. 2d 479 (1966). This Court has long held that the Act "should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretations." *Johnson v. Hosiery Company*, 199 N.C. 38, 40, 153 S.E. 591, 593 (1930). The Act, however, also insures a limited and determinate liability for employers, and the court cannot legislate expanded liability under the guise of construing a statute liberally. *Barnhardt v. Cab Company*, 266 N.C. 419, 146 S.E. 2d 479 (1966). The rule of statutory construction is to give the legislative intent full effect when interpreting the language of the statute. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). While the Act should be liberally construed to benefit the employee, the plain and unmistakable

language of the statute must be followed. *Hardy v. Small*, 246 N.C. 581, 99 S.E. 2d 862 (1957).

In order for the affirmative defense provided by G.S. 97-12(3) to apply there must have been a willful intention to injure. A willful act is done intentionally and purposely, rather than accidentally or inadvertently. *See* BLACK'S LAW DICTIONARY, 1434 (5th ed. 1979). The willful intention must be directed toward injury to the actor or to another. Neither acts by the claimant, nor mere words spoken by the claimant and unaccompanied by any overt act, will be sufficient to bar compensation unless the willful intent to injure is apparent from the context and nature of the physical or verbal assault. However, no intent to inflict "serious" injury must be shown before the statutory bar to recovery will apply. The bar to recovery, set forth in G.S. 97-12(3), applies when a general willful intent to inflict some injury is established by the evidence.

The intent of the actor must be discerned by a careful examination of the evidence presented. Intent is usually proved by circumstantial evidence and is therefore reserved for the trier of fact. A finding by the trier of fact of intent, or the lack thereof, will not be disturbed unless there is no evidence to support such a finding. *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272 (1965). This is true even though the evidence may support a contrary finding of fact. *Rice v. Chair Company*, 238 N.C. 121, 76 S.E. 2d 311 (1953).

Although Rorie may not have struck the first blow, there is ample evidence to support the Industrial Commission's finding that she acted with the willful intention to injure another. There was uncontradicted evidence that the two women were frequently arguing with each other and that they had exchanged blows a few months earlier. In the previous fight, Rorie had struck the first blow. During the evening of the fatal fight, Rorie stated that she was "going to get" Thompson and that they would "settle this once and for all." Rorie was one of the first to leave that night, but she waited outside the plant for Thompson, who was one of the last to leave. After a brief argument, Rorie followed Thompson to the parking lot. Rorie walked in the opposite direction of her own car to Thompson's car and blocked Thompson's path. She was arguing and "cussing" and "in [Thompson's] face" and pinned

Thompson to her car. Following these actions, Thompson pushed Rorie and the fatal fight ensued.

Although the evidence conflicts as to which woman produced the knife, the resolution of this issue is not essential to the disposition of this appeal. The crucial question is whether Rorie had a willful intention to injure Thompson. The fact that Thompson may have produced the knife and therefore escalated the fight is immaterial. Rorie may not have intended to kill or even seriously injure Thompson, but G.S.97-12(3) does not require that any such intent be shown before recovery will be denied. There was clear evidence that Rorie intended some injury. To hold that the extent of the injury must have been intended or foreseeable would result in a denial of compensation if Rorie had suffered a bloody nose or a sprained ankle, while awarding compensation because she was killed. The evidence supports the finding that the defendant carried its burden of proving that Rorie's actions demonstrated her willful intention to injure Thompson.

[2] Once willful intention has been established, in order to deny recovery it is necessary to find that the claimant's injuries were "proximately caused by" an act resulting from such intent. The Court of Appeals applied the *sole* proximate cause test that was first used in *Inscoe v. Industries, Inc.*, 30 N.C. App. 1, 226 S.E. 2d 201 (1976), *affirmed on other grounds*, 292 N.C. 210, 232 S.E. 2d 449 (1977). In reviewing *Inscoe*, this Court held that it was not necessary to reach the question of proximate cause. We now hold that the sole proximate cause standard is inapplicable to G.S. 97-12.

Inscoe interpreted the former G.S. 97-12. In 1977, the General Assembly passed an amendment to the Act which changed the language from a denial of compensation if the injury was "occasioned by" the claimant's acts to a denial if the injury was "proximately caused by" claimant's willful acts. For the claimant's injuries to be proximately caused by her actions, the willful intention of the claimant must be more than *a* cause of her injuries. However, it need not be the *sole* cause. Rather, a cause in fact standard is required.

G.S. 97-12 was designed to be an exception to the general rule that the employee would receive compensation for an injury arising out of and in the course of employment. *Vause v. Equip-*

ment Company, 233 N.C. 88, 63 S.E. 2d 173 (1951). To utilize a "sole" cause standard would virtually vitiate the statute and defeat the express will of the General Assembly. Whenever an employee intends to injure another, that employee will usually not be injured unless the intended victim retaliates. The actions of the intended victim could always be considered *a* cause of the claimant's injuries, and therefore the willful intention of the claimant would rarely if ever be the sole cause.

Using a cause in fact standard, the claimant's injuries must be the result of a natural and continuous sequence of events, unbroken by a new independent cause, stemming from the claimant's willful intention to injure himself or another. *See*, 9 Strong's N.C. Index 3d, Negligence, § 8. It is also necessary that *some* injury be foreseeable from the claimant's actions, although the extent or nature of the injury suffered need not have been foreseen. The determination of the proximate cause of the claimant's injuries is a question for the finder of fact. *Osborne v. Ice Company*, 249 N.C. 387, 106 S.E. 2d 573 (1959). The Deputy Commissioner found that the deceased had the willful intention to injure another and that this intent was the proximate cause of her death. There is sufficient evidence to support this finding.

The decision of the Court of Appeals is reversed and this cause is remanded to the Court of Appeals with directions that the order of the Industrial Commission be reinstated.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. RALPH RANKIN

No. 179A81

(Filed 5 October 1982)

1. Criminal Law § 40.2— mistrial—denial of transcript at retrial—violation of equal protection

An indigent defendant's Fourteenth Amendment equal protection rights were violated by the trial court's denial of his motion that he be provided a

free transcript of his first trial which ended in a mistrial on the ground that the motion was not timely made because preparation of the transcript would take six weeks and the district attorney expected to retry defendant's case in three to four weeks since (1) the court indicated that defendant would have been entitled to a free transcript upon a timely request; (2) the second trial had not even been rescheduled, and a denial of the motion as being untimely was improper since it could only have been based on speculation; (3) the trial court could have continued the case until the transcript was prepared; and (4) the court's offer to make the court reporter and her notes of the first trial available to defense counsel during the retrial did not constitute the substantial equivalent of a transcript.

Justice EXUM concurs in the result.

APPEAL of right by defendant pursuant to G.S. 7A-27(a) from *Long, J.*, at the 28 September 1981 Criminal Session, GUILFORD Superior Court, Greensboro Division. Defendant received a life sentence for first degree sexual offense.

Defendant was charged in separate bills of indictment, proper in form, with the crimes of common law robbery and first degree sexual offense in violation of G.S. 14-27.4. The defendant pleaded not guilty to both of the charges and was tried at the 29 June 1981 Criminal Session of Superior Court. This case was consolidated for trial with the case against Thomas Braswell, who likewise was charged with first degree sexual assault. On 4 July 1981 the jury announced its inability to reach a unanimous verdict in either of the cases. Thereupon, Judge Long declared a mistrial in each of the cases and continued them for the session.

Defendant filed a motion requesting the court to provide him a free transcript of the earlier trial and subsequent mistrial. This motion was heard 6 August 1981 before Judge Long in Guilford Superior Court, Greensboro Division. Although the case had not been placed on a specific docket at the time of the hearing the district attorney had stated that he planned to try the case in three or four weeks. The State argued the motion was not timely made since, as the trial court found, it would take at least six weeks to prepare the transcript. The defendant, in response to this argument by the State, told the court that he waited until he was sure the case would be retried before making his request in order to avoid a possible waste of judicial resources. Judge Long denied defendant's motion as being not timely made reasoning, "[T]hat under the circumstances, even a solvent defendant could not obtain a transcript within the time available . . ." before trial.

Both cases against the defendant were tried at the 28 September 1981 Criminal Session of Guilford Superior Court, Greensboro Division. The trial began 28 September 1981 and ended 2 October 1981 with a jury verdict finding the defendant guilty of first degree sexual offense and not guilty of common law robbery.

At the second trial the State's evidence based largely on the testimony of the prosecuting witness, tended to show the following: Defendant and prosecuting witness, Jerry Dean Franklin, were incarcerated in a four-man cell with two other prisoners in the Guilford County Jail on the morning of 3 April 1981. After breakfast, while the prisoners were locked in their cells, the defendant, aided by the two other prisoners present in the cell, performed a forcible sexual offense upon Franklin. The attack, along with an alleged robbery of $45.00, was reported to the jailor on duty. A thorough medical examination revealed the presence of spermatozoa in Franklin's rectum and trauma around his anus, both of which are consistent with the claim of anal rape. A search of defendant's cell uncovered $50.00 in cash and a jar of hair tonic which contents, when analyzed, proved to be the same substance found in the underpants of the prosecuting witness. The State also produced notes written by defendant to other prisoners present in Guilford County Jail on the day of the alleged assault in which he instructed them about the things they should forget and the things to remember.

Defendant testified at trial that he was not present in the cell at the time of the alleged assault and, through the testimony of Larry Wayne Poole, he claimed Franklin faked the entire incident. Poole testified that he showed Franklin how to stage a sexual assault and then use it as leverage against the State in order to gain a plea bargain.

Upon presentation of all the evidence, the jury found the defendant guilty of first degree sexual offense. Other facts pertinent to the decision of this case will be discussed in the opinion.

Attorney General Rufus L. Edmisten, by Assistant Attorneys General Archie W. Anders and Thomas B. Wood, for the State.

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

COPELAND, Justice.

Our review of the factual circumstances of this record and the law applicable thereto discloses prejudicial error requiring a new trial.

Defendant contends the trial court erred in denying his motion for a free transcript of the record. The motion was denied 6 August 1981 as not timely made. In support of the contention, defendant relies on *Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed. 2d 400 (1971) in which the Supreme Court of the United States held that indigents were to be provided free transcripts of prior proceedings if the trial court determines it necessary for an effective *defense*. (Emphasis added.) In *Britt, supra*, the Court extended the scope of its holding in *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), which had provided to indigents a free transcript if necessary for an effectual *appellate review*. (Emphasis added.)

The effect of *Britt v. North Carolina, supra*, is to make available to an indigent defendant those tools available to a solvent defendant which are necessary for preparing an equally effective defense. That purpose, founded on the equal protection clause of the Fourteenth Amendment of the United States Constitution, has been frustrated in this case. A solvent defendant would have been free to attempt a purchase of the transcript which might be prepared in time for trial. And even if the transcript had not been prepared the solvent defendant could have asked for a continuance which we believe the trial judge would have found hard to deny. However this defendant, denied any opportunity to receive a transcript, was severely handicapped by the court's offer of only limited access to the court reporter and her notes for use *during* the course of the trial. Thus, if the defendant was entitled to a free transcript, the court's ruling prevented him from having the same opportunity to receive a transcript which could have been available to a solvent defendant. As Justice Black stated in *Griffin*, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin*, 251 U.S. at 19, 76 S.Ct. at 591, 100 L.Ed. at 899.

In a case where the second trial has not even been rescheduled, denial of defendant's motion as being untimely is improper

because such a holding could only have been based on speculation. The district attorney had hoped to try this case within four weeks of the time of the hearing but it was in fact not tried for more than seven weeks. Unfortunately, such delays are common in our overcrowded courts and, as in this case, may very well have provided enough time for this defendant to receive a fully prepared stenographic transcript. At any rate it certainly was within the judge's power to delay the trial until the transcript had been prepared.

Under *Britt, supra*, a free transcript need not always be provided. Instead, availability is determined by the trial court through the implementation of a two step process which examines (1) whether a transcript is necessary for preparing an effective defense and (2) whether there are alternative devices available to the defendant which are substantially equivalent to a transcript. *Britt, supra.* If the trial court finds there is either no need of a transcript for an effective defense or there is an available alternative which is "substantially equivalent" to a transcript, one need not be provided and denial of such a request would not be prejudicial. *Britt, supra.*

By ruling that defendant's motion was untimely, the trial court did not have to make findings of fact on the issue of need. However, the court indicated that upon a timely request, defendant would have been entitled to a free transcript. After reviewing the record we agree that the defendant was entitled to either a free transcript or its substantial equivalent.

As for the second step of the *Britt, supra*, analysis, concerning alternatives substantially equivalent to a transcript, we find the judge's offer to make the court reporter available to the defense during trial clearly insufficient. In a case very similar in facts to the one at hand, the Second Circuit Court of Appeals rejected a similar offer as, "too little, too late" and "a breeder of delay and confusion." *United States ex rel. Wilson v. McMann*, 408 F. 2d 896, 897 (2d Cir. 1971). As was the case in *Britt, supra*, the facts of this case are very important in determining whether the defendant needs a transcript in order to prepare an effective defense. However, unlike the circumstances in *Britt, supra* where the court found no reversible error because the reporter was available to read his notes of the record back to the defendant's

counsel long before the second trial, giving counsel for the defendant the opportunity to use them in preparing his defense, counsel for this defendant was never given the opportunity to use the reporter's notes in preparation for trial. These facts distinguish the present case from *Britt, supra.*

We believe that since there was no alternative available to the defendant which was substantially equivalent to a transcript, the defendant was entitled to a free transcript and therefore its denial was error. The ruling by the trial court that defendant's request was untimely violated his rights under the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Defendant also maintains that he was denied a fair trial when the district attorney asked him a question on cross-examination as to whether he had been involved in a similar incident some seven years before the alleged assault for which the charges were dismissed. The exact language of the question was as follows: Q. "And I will ask you if it isn't a fact on the 31st day of July, 1974, you along with 5 other people and at knife point assaulted a man by the name of Jerry Don Shelton by forcing him at knife point to remove his pants and allowing you to enter his rectum and continued that crime against his will?" A *voir dire* examination was conducted prior to the question being asked in the presence of the jury. During this examination the defendant flatly denied any involvement in the alleged misconduct. Before the jury returned to the courtroom, the district attorney was advised by Trial Judge Long that any objection to the question would be sustained. Nevertheless, the district attorney defied the obvious intent of the trial court's instruction by asking the question in the presence of the jury.

Defendant contends it was improper for the district attorney to question him about a prior charge which had been dismissed. The rule in this jurisdiction is that a district attorney may not ask a defendant if he has been accused, indicted or arrested for a specific crime. *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972); *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). However, this Court is not now and has never been squarely faced with whether the prosecutor's cross-examination may include questions about charges which have been dismissed.

The question at issue was phrased in a manner that only asked whether the defendant had been involved in a specific prior act of misconduct and made no mention of an arrest or subsequent trial. Such a question is within the acknowledged rule in this jurisdiction that once a defendant takes the witness stand he may be asked, "disparaging questions concerning collateral matters relating to his criminal and degrading *conduct*." (Emphasis added.) *State v. Williams*, 279 N.C. at 675, 185 S.E. 2d at 181. Although there are limitations to what a district attorney may cover on cross-examination, this Court has held that questions asked by a prosecutor are presumed in good faith unless the record indicates it was asked in bad faith. *State v. Spaulding*, 288 N.C. 397, 219 S.E. 2d 178 (1975). It is unnecessary for this Court to determine whether the district attorney's question was proper under the limitations set out in *State v. Williams, supra*, since any potential error was removed by the trial court's instruction that the jury not consider the question in its deliberation.

The other assignment of error will probably not recur at retrial and we do not discuss it.

For these reasons we order a new trial on the defendant's first assignment of error but find no error in the second assignment of error.

New trial.

Justice EXUM concurs in result.

STATE OF NORTH CAROLINA v. ROBERT LEE POWELL

No. 174A81

(Filed 5 October 1982)

1. Criminal Law § 73.1— hearsay statement by expert—not prejudicial

The court erred in allowing an expert in the field of forensic serology to testify that someone at R. J. Reynolds Company told him that a figure of a small pine tree found on a cigarette butt found at the crime scene was "a registered trademark for their products." However, given the overwhelming evidence pointing to defendant's guilt, defendant failed to show that there was a reasonable possibility that had the error not occurred the result would have

been different and therefore that he was prejudiced by the admission of this one statement. G.S. 15A-1443(a).

2. Rape and Allied Offenses § 1— first degree rape—employment of deadly weapon

G.S. § 14-27.2 simply necessitates a showing that a dangerous or deadly weapon was employed or displayed in the course of a rape. Therefore, where the prosecuting witness weighed 98 pounds, was four months pregnant, defendant weighed 170 to 180 pounds, brandished a five to six inch knife blade to her throat, warned the prosecuting witness not to resist, and shortly thereafter forced her to submit to a sexual act, the evidence was sufficient to find that a dangerous or deadly weapon was employed in a manner consistent with that contemplated by G.S. § 14-27.2.

3. Criminal Law § 117.2— possible bias of witness—instruction concerning proper

There was no violation of G.S. § 15A-1222 in the trial court's charge to the jury on the possible interest, bias, or prejudice of all the witnesses.

APPEAL by defendant from a judgment entered by *Seay, J.* at the 26 August 1981 Criminal Session of the Superior Court, GUILFORD County, High Point Division.

Defendant was tried upon a bill of indictment charging him with the first degree rape of Cheryl Lee. He was found guilty and sentenced to life imprisonment. Pursuant to G.S. § 7A-27(a), defendant appeals his conviction to this Court, presenting for our consideration three assignments of error—the admission of hearsay testimony, insufficiency of the evidence respecting the "dangerous weapon" element of the offense, and what he deems to be an expression of opinion by the court in its charge to the jury. Based on the record before us, we find no error sufficient to warrant the granting of a new trial and therefore affirm defendant's conviction.

Rufus L. Edmisten, Attorney General, by Blackwell M. Brogden, Jr., Assistant Attorney General, for the State.

Wallace C. Harrelson, Public Defender, and Joseph E. Bruner, Assistant Public Defender, for Defendant-Appellant.

MEYER, Justice.

Defendant was accused of raping Cheryl Lee on 30 March 1981. Ms. Lee testified that she was employed as the manager of the Hunting Valley apartment complex in Guilford County. She arrived at her office in the model apartment at 10:00 a.m. The

defendant arrived as a visitor at 11:30 a.m. They had a brief conversation concerning the availability of an apartment, and toured the model apartment, including the upstairs bedrooms. Defendant followed Ms. Lee downstairs and as she approached her office, he grabbed her from behind. Putting a knife to her throat, the defendant told Ms. Lee to be quiet, stated that he wouldn't hurt her if she did what he said, and ordered her to an upstairs bedroom. Ms. Lee, in an effort to dissuade defendant, informed him that she was pregnant. Once upstairs, the defendant ordered her to remove her clothes and, against her will, had sexual intercourse with her. He left immediately, driving a light blue Pinto station wagon.

Other evidence against the defendant consisted of the following:

1. A maintenance man noticed a "baby blue" Pinto station wagon parked in front of the apartment complex on the morning of 30 March. Defendant admitted that he was driving a light blue Pinto station wagon belonging to the Greensboro Daily News, for which he worked, on 30 March 1981, and that he took this car out at approximately 10:30 a.m.

2. Defendant's girlfriend, Mary Mims, identified a red sweater as belonging to the defendant. Ms. Lee identified the same sweater as the one defendant was wearing when he entered the model apartment on the morning of 30 March.

3. Ms. Lee identified the defendant from a photographic line-up, and identified him at trial as her assailant.

4. An analysis of a semen sample taken from Ms. Lee's underpants matched defendant's blood grouping.

5. Saliva samples taken from a cigarette which defendant allegedly left in the kitchen sink of the model apartment matched defendant's blood grouping. The cigarette butt was a Salem Ultra Light brand. Defendant smoked Salem Ultra Light cigarettes.

Defendant took the stand on his own behalf and denied ever having intercourse with Ms. Lee. He did not state where he was or what he was doing on the morning of 30 March.

[1] Defendant assigns as error the admission of certain testimony by Jed Taub, an SBI agent found by the court to be an expert

in the field of forensic serology. Taub testified that after examining the cigarette butt which was found in the sink of the model apartment and noticing a white cover bearing two bands and the figure of a small green pine tree, he telephoned the R. J. Reynolds Company, which produces Salem Ultra Light cigarettes, to inquire about which brand bore the figure of a small green pine tree. Over defendant's objection, he testified that "they told me that it is a registered trademark for their products." He then compared the figure on the cigarette butt taken from the crime scene to the figure on a Salem Ultra Light and they matched. The defendant contends that the agent's testimony as to what "they" told him on the phone is inadmissible hearsay.

The State puts forth the argument that Special Agent Taub was testifying as an expert and that personal knowledge of an expert is not limited to knowledge derived solely from matters personally observed, but also includes inherently reliable information provided by others. *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979). While this is an accurate statement of the law, it is inapposite to these facts. Special Agent Taub's expertise was in the field of forensic serology, not in the field of trademarks used to identify cigarette brands.

Since no violation of rights under the United States Constitution is alleged here, the test of whether the error is "prejudicial," *i.e.* reversible error, is set forth very specifically in G.S. § 15A-1443(a) as follows:

> (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.

In discussing the issue of whether error constitutes prejudice to a defendant Justice Exum in *State v. Easterling* correctly stated the test:

> Such prejudice will normally be deemed to be present, in cases relating to rights arising other than under the Federal Constitution, *only* "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ."

> G.S. 15A-1443(a). Furthermore, the burden of showing that such a possibility exists rests upon the defendant.

300 N.C. 594, 609, 268 S.E. 2d 800, 809 (1980). *See State v. Jordan*, 305 N.C. 274, 277, 287 S.E. 2d 827, 829 (1982).

Assuming arguendo that the testimony complained of was inadmissible hearsay, given the overwhelming evidence pointing to defendant's guilt, he has failed to show that there is a reasonable possibility that had the error not occurred the result would have been different and therefore has not shown that he was prejudiced by the admission of this one statement.

[2] Defendant next assigns as error the trial court's denial of his motion for dismissal at the conclusion of the State's evidence and at the conclusion of all the evidence. The thrust of defendant's argument is that there was no testimony at trial that defendant "employed" or "displayed" a deadly or dangerous weapon in order to effectuate the rape. Ms. Lee testified on cross-examination that after leaving the kitchen, she did not see the knife and did not know what had happened to it.

Our Court has recently addressed this question in *State v. Sturdivant*, 304 N.C. 293, 283 S.E. 2d 719 (1981). In *Sturdivant*, this Court first pointed out that prior to the enactment of G.S. § 14-27.2, it was necessary for the State to show specifically that the weapon was used to overcome the victim's resistance or to procure her submission. The current statute, however, simply necessitates a showing that a dangerous or deadly weapon was employed or displayed in the course of a rape. 304 N.C. at 299, 283 S.E. 2d at 724-25. The Court went on to note that:

> 1. We perceive that the Legislature intended to make implicit in G.S. 14-27.2 a matter of ordinary common sense: that the use of a deadly weapon, in any manner, in the course of a rape offense, always has some tendency to assist, if not entirely enable, the perpetrator to accomplish his evil design upon the victim, who is usually unarmed.

Id. at 299, 283 S.E. 2d at 725.

We find that the facts of this case fall squarely within the spirit and intent of G.S. § 14-27.2(a)(2)(a) which provides as follows:

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

. . . .

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon;

. . . .

Ms. Lee weighed 98 pounds. She was four months pregnant. Defendant was described as a 5'11" black male weighing 170 to 180 pounds. Brandishing a five to six inch knife blade held to her throat, defendant warned Ms. Lee not to resist. Shortly thereafter, in an upstairs bedroom and without her consent, she was forced to submit to the sexual act. Under these circumstances, we hold that the State presented sufficient evidence that a dangerous or deadly weapon was employed in a manner consistent with that contemplated by G.S. § 14-27.2 to accomplish the offense.

[3] Defendant excepts to the following portion of the trial court's charge to the jury:

> Now, the Court instructs you: That when you come to consider the testimony of the various witnesses, it's your duty, members of the jury, to carefully consider and scrutinize the testimony of the Defendant, and of those who are closely related to him, taking into consideration the interests that they have in the outcome of this trial.

This, he argues, constituted an expression of opinion on the part of the court "since the court made no similar charge concerning the witnesses for the state and since the court had earlier charged that it was for the members of the jury to consider any interest, bias, or prejudice that any of the witnesses might have." This same argument, put forth in *State v. Bracey*, 303 N.C. 112, 124, 277 S.E. 2d 390, 398 (1981), was described as "meritless." The record before us does not disclose, nor does defendant suggest, that he requested a charge on interested witnesses who testified

for the State. *State v. Eakins*, 292 N.C. 445, 233 S.E. 2d 387 (1977). In fact, our reading of *Eakins* leads us to the conclusion that defendant defeats his argument by pointing out that the trial court had previously charged the jury on the possible interest, bias, or prejudice of *all* the witnesses. We find no violation of G.S. § 15A-1222 in this portion of the jury charge.

Defendant had a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JOE LOUIS HARRIS

No. 85A81

(Filed 5 October 1982)

1. **Criminal Law § 120— insanity defense—instruction concerning proper**

In a prosecution for murder where the defendant used the insanity defense, an instruction that if defendant was acquitted by reason of insanity, he would not be released but would be held in custody until a hearing could be held to determine whether he should be confined to a state hospital was an instruction which was in sufficient detail to meet the requirements of prior case law and G.S. 122-84.1.

2. **Criminal Law § 113.3— instruction on consequences of insanity defense proper**

The trial judge did not abuse his discretion by instructing on the consequences of acquitting defendant by reason of insanity without request by defendant.

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

DEFENDANT appeals from judgments of *Hobgood, J.*, entered at the 20 August 1979 Criminal Session of Superior Court, WAKE County.

Defendant was indicted and convicted of four charges of murder in the first degree. The cases had been previously tried at the 6 October 1975 Session of Wake County Superior Court. On appeal from that trial, a new trial was ordered because the lesser included offense of murder in the second degree had not been submitted to the jury. The opinion is reported in 290 N.C. 718, 228 S.E. 2d 424 (1976), and reference is made to it for a full statement of the facts.

From the judgments of life imprisonment, defendant appeals to this Court.

Rufus L. Edmisten, Attorney General, by Elizabeth C. Bunting, Assistant Attorney General, for the state.

C. D. Heidgerd for defendant appellant.

MARTIN, Justice.

[1] Defendant raises two issues on this appeal. First, he submits that the trial court erred in its instructions to the jury concerning the effect of a verdict of not guilty by reason of insanity.[1] In both of his trials, defendant relied upon the defense of insanity. During the course of its charge on insanity, the court gave these instructions:

> When you, the jury, consider your verdict, I instruct you that you shall first consider the first issue on the first page which I have handed each of you a copy of . . . . As follows: Was the defendant, Joe Louis Harris, on January the 9th, 1975, at the time of the alleged offenses by reason of a defect of reason or disease of the mind incapable of knowing the nature and quality of the act which he is charged with having committed, or if he did know this, was he by reason of such defect or disease incapable of distinguishing between right and wrong in relation to such act.
>
> If you answer this "yes," as I have heretofore told you, do not answer anything further. Of course, if you answer it "yes," then I will direct a verdict of not guilty in all four cases. If you answer this "no," then you will proceed to consider your answer on page 3 to the possible verdicts you'll find on page 2.
>
> [If you answer this issue "yes" and I then thereafter direct a verdict of not guilty because of that answer in each of these cases, I will order the defendant held in custody until such time as a hearing can be held to see whether or not he will be confined to a state hospital, at first for a period of

1. Defendant did not object to the charge at the time it was given. However, the contemporaneous objection rule, N.C.R. App. P. 10(b)(2), became effective 1 October 1981, after the trial of this case.

not more than ninety days and then another hearing will be held in reference thereafter to see whether or not he will continue to be held in the State Hospital as involuntary committed mental patient from time to time.]

Defendant excepted to the bracketed portion of this instruction.

He contends that the instruction is erroneous because it fails to detail how and when the involuntary commitment procedures would be administered. He would require the judge to detail the involuntary commitment procedures in his instructions, including the time and place of hearing, the standards to be applied, whether by judge or jury, and the rules respecting burden of proof.

We reject defendant's argument and hold that the challenged instructions do not constitute reversible error. In *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976), the Court held that "upon request, a defendant who interposes a defense of insanity to a criminal charge is entitled to an instruction by the trial judge setting out in substance the commitment procedures outlined in G.S. 122-84.1, applicable to acquittal by reason of mental illness."[2] *Id.* at 15, 224 S.E. 2d at 604. *Hammonds* did not set forth the precise instruction to be given, resulting in a case by case determination of whether there has been substantial compliance with the rule.

The Court in *State v. Bundridge*, 294 N.C. 45, 239 S.E. 2d 811 (1978), gave further guidance in determining whether there has been substantial compliance with the rule. In *Bundridge*, defendant requested that the jury be instructed " 'of the existence of commitment procedures under North Carolina law applicable to a defendant acquitted by reason of mental illness.' " *Id.* at 53, 239 S.E. 2d 817. The trial court did not limit its instructions to the existence of commitment procedures, but further instructed the jury on the procedures. This Court held that "[t]he gist of G.S. 122-84.1 is that the trial judge shall hold a defendant who is ac-

2. N.C.G.S. 122-84.1 was repealed effective 1 July 1978. Post verdict procedures in cases of not guilty by reason of insanity are now controlled by N.C.G.S. 15A-1321 and article 5A of chapter 122 of the General Statutes of North Carolina. The first Harris trial was held in October 1975 and the present trial was held in August 1979. Insofar as this case is concerned, the differences in former N.C.G.S. 122-84.1 and the present statutes are immaterial.

quitted on the grounds of insanity for further hearings to determine whether he is imminently dangerous to himself or others." *Id.* The Court further held that the failure to give such instruction might tend to cause the jury to return a verdict of guilty to ensure that the defendant would be incarcerated for the safety of the public and for his own safety; that by giving the gist of N.C.G.S. 122-84.1, the court removes this confusion and puts the trial back upon an even keel; and that giving a more detailed instruction than requested by defendant did not result in prejudicial error. 294 N.C. 45, 239 S.E. 2d 811.

In the present case, defendant argues the reverse of *Bundridge*, that is, he claims that the court did not give the instructions in sufficient detail. We hold that the instructions substantially comply with the requirements of *Hammonds* and *Bundridge*. Judge Hobgood gave the jury the central meaning of the statute: that if defendant was acquitted by reason of insanity, he would not be released but would be held in custody until a hearing could be held to determine whether he should be confined to a state hospital. This was sufficient to remove any hesitancy of the jury in returning a verdict of not guilty by reason of insanity, engendered by a fear that by so doing they would be releasing the defendant at large in the community.

[2] Next, defendant takes an opposite position and argues that because he did not request such instruction, the giving of the instruction was prejudicial error. His argument is that if he requests the charge, he is entitled to it. Ergo, if he does not request the charge, it is error for the court to give the instruction.

Defendant's argument has no merit. He cannot prohibit the giving of an instruction to the jury by failing to request the instruction. Regardless of requests by the parties, a judge has an obligation to fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence. *State v. Ward*, 300 N.C.150, 266 S.E. 2d 581 (1980). The trial judge may in his discretion also instruct on the subordinate and nonessential features of a case without requests by counsel. The purpose of a charge is to give a clear instruction which applies the law to the evidence in such a manner as to assist the jury in understanding the case and in reaching a correct verdict. *State v. Williams*, 280 N.C. 132, 184 S.E. 2d 875

(1971). The trial judge has wide discretion in presenting the issues to the jury. *State v. Mundy,* 265 N.C. 528, 144 S.E. 2d 572 (1965). This responsibility cannot be delegated to or usurped by counsel.

The giving of the challenged instruction in this case assisted the jury in understanding the case and in reaching a correct verdict. *Williams, supra.* We find no abuse of discretion by the trial judge in so doing.

A careful consideration of the entire record on appeal discloses that defendant received a fair trial, free of prejudicial error.

No error.

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

NORWOOD GLENN POWERS, EMPLOYEE, PLAINTIFF v. LADY'S FUNERAL HOME, EMPLOYER. AND AMERICAN EMPLOYERS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 326A82

(Filed 5 October 1982)

Master and Servant §§ 55.6, 62— workers' compensation—journey to and from work—special errand—errand not completed upon return to own property

Where plaintiff mortician was injured when his automobile rolled over him once he had returned to his home after completing a special errand for his employer, his injury was covered under the Workers' Compensation Act. After embalming a body, plaintiff was required by his employer to shower and change his clothes in preparation for another call. This requirement was a condition of and incident to his employment and, because shower and change facilities were not available on the premises, this requirement necessitated his returning home from time to time to remove the embalming fluid odor from his person. Under these circumstances, plaintiff's personal appearance was intimately related to his employment and, at least until such time as he had completed his preparations for another call, he remained on duty.

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

CLAIMANT appeals pursuant to G.S. § 7A-30(2) from a decision of the North Carolina Court of Appeals, 57 N.C. App. 25, 290

S.E. 2d 720 (1982), affirming the Industrial Commission's denial of an award of compensation for injuries he sustained while returning to his home from a late night call made on behalf of his employer. The sole question presented for our determination is whether this claimant's injury arose out of and in the course of his employment. We hold that it did.

Williams, Willeford, Boger, Grady & Davis, P.A. by Brice J. Willeford, Jr., Samuel F. Davis, Jr., and Dan A. Boone, Attorneys for plaintiff-appellant.

Hedrick, Feerick, Eatman, Gardner & Kincheloe by Hatcher Kincheloe, Attorney for defendant-appellees.

MEYER, Justice.

The facts of the case are not in dispute. The claimant, Norwood Glenn Powers, was employed by Lady's Funeral Home as a mortician and embalmer. On 29 July 1978, Mr. Powers began his employment at 8:00 a.m. He was to remain at the Funeral Home or on call at home until 8:00 a.m., the following morning. His duties included visiting the families of the deceased, making funeral arrangements, and embalming bodies. Apart from a one-hour break for supper, Mr. Powers worked at the Funeral Home until 10:30 p.m. on 29 July, when the night man arrived. The night man was not an embalmer. Thus during the remainder of Mr. Powers' shift, he was required to remain at home ready to respond should his services be necessary during the night. During this time he could not leave home, was to respond immediately to a phone call from the Funeral Home and, according to his employer, his "duties would not have ceased on this occasion until 8:00 the next morning . . . . "

Mr. Powers received a call from the night man at about midnight. He immediately dressed, drove to the Funeral Home where he picked up the Funeral Home vehicle, and called on the family of the deceased. He then returned to the Funeral Home to embalm the body. He arrived back at his home at approximately 2:30 a.m. and parked his automobile in the driveway which inclined toward the back door of his home. The automobile rolled down the incline and struck him as he approached the house, knocking him through the door, breaking both of his legs and crushing his ankles.

At the hearing before the Deputy Commissioner, Mr. Powers testified, and the Commissioner found as facts, that after embalming a body it was necessary for Mr. Powers to change clothes and shower; that there were no facilities available at the Funeral Home for this purpose; and that "[u]pon completion of embalming the decedent, the claimant left the funeral home in his personal vehicle in order to return home, shower and await any further calls."

In denying the award, the Deputy Commissioner found that the claimant's injury was sustained by accident, but that, although the journey in response to the call qualified as a special errand, "the journey itself only begins from the time the claimant physically leaves his property or premises . . . and [the journey] only continues thereafter until the claimant physically returns to his property or premises upon completion of his duties, in this case at the time he actually left the public street or highway located adjacent to his residence and was again physically present on his property." The Full Commission affirmed, with one commissioner dissenting. The dissent by Commissioner Coy Vance concluded that "[p]laintiff was on a mission for his employer and had not completed said mission by showering after embalming the body." In an opinion by the Court of Appeals, a majority of the panel adopted the reasoning of the Deputy Commissioner who made the initial findings, conclusions, and award, and affirmed the Full Commission.

In order to justify an award of compensation, a claimant must prove that his injury was caused by an accident; that the injury arose out of the employment; and that it occurred in the course of the employment. G.S. § 97-2(6). A claimant is injured in the course of employment when the injury occurs during the period of employment at a place where an employee's duties are calculated to take him, and under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business. *Clark v. Burton Lines*, 272 N.C. 433, 158 S.E. 2d 569 (1968); *Hardy v. Small*, 246 N.C. 581, 99 S.E. 2d 862 (1957); *Hinkle v. Lexington*, 239 N.C. 105, 79 S.E. 2d 220 (1953).

It is a general rule in this and other jurisdictions that an injury by accident occurring en route from the employee's

residence to his workplace or during the journey home is not one that arises out of or in the course of employment. *Humphrey v. Quality Cleaners*, 251 N.C. 47, 110 S.E. 2d 467 (1959); *Hardy v. Small*, 246 N.C. 581, 99 S.E. 2d 862; *McLamb v. Beasley*, 218 N.C. 308, 11 S.E. 2d 283 (1940). Equally as well recognized as the general rule is the "special errand" exception, *see Massey v. Board of Education*, 204 N.C. 193, 167 S.E. 695 (1933), and 1A Larson, The Law of Workmen's Compensation § 16.10 (1978), which permits coverage of the employee from "portal to portal."

Our research discloses no North Carolina case in which this Court has addressed or interpreted the portal to portal rule,[1] nor do we find it necessary under the present facts to do so here. We hold that while Mr. Powers' journey qualified as a special errand on this particular occasion, his duties did not end at the conclusion of his journey. After embalming a body, claimant was required by his employer to shower and change his clothes in preparation for another call. This requirement was a condition of and incident to his employment and, because shower and change facilities were not available on the premises, this requirement necessitated his returning home from time to time (irrespective of whether the embalming occurred during regular working hours or in response to a night call) to remove the embalming fluid odor from his person. *Gowan v. Harry Butler & Sons Funeral Home*, 204 Kan. 210, 460 P. 2d 606 (1969). Not only did the nature of his embalming work give rise to the odor, but the nature of his responsibilities to the family and friends of a deceased made it imperative that he be free of the odor.

Under the circumstances, Mr. Powers' personal appearance was intimately related to his employment and, at least until such time as he had completed his preparations for another call, he remained on duty. The injury by accident occurred in the course of his employment and because the conditions and obligations of the employment required this claimant to be at a place where the accident occurred, subjecting him to additional risks incident

1. Judge (now Justice) Harry C. Martin, in his dissenting opinion in the case before us, rejected the "bright line" interpretation of the portal to portal rule, whereby "certainty is achieved at the expense of justice." 57 N.C. App. 25, 31, 290 S.E. 2d 720, 724. This view was subsequently adopted by the Court of Appeals in *Felton v. Hospital Guild*, 57 N.C. App. 33, 291 S.E. 2d 158 (1982), in an opinion authored by Judge Martin.

thereto, the injury arose out of the employment. *Clark v. Burton Lines*, 272 N.C. 433, 158 S.E. 2d 569; *Hardy v. Small*, 246 N.C. 581, 99 S.E. 2d 862. Claimant has satisfied the conditions entitling him to an award of compensation. We therefore reverse the decision of the Court of Appeals and remand to that court for further remand to the Industrial Commission for a determination of an appropriate award.

Reversed and remanded.

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

OLLIE ALLEN v. INVESTORS HERITAGE LIFE INSURANCE COMPANY

No. 319A82

(Filed 5 October 1982)

APPEAL as of right pursuant to G.S. § 7A-30(2) by plaintiff from a decision of a divided panel of the Court of Appeals affirming the judgment of *Ellis, D. J.* granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment entered on 9 June 1981 in District Court, WAYNE County. The opinion of the Court of Appeals, reported at 57 N.C. App.133, 290 S.E. 2d 728 (1982), is by *Arnold, J.* with *Webb, J.* concurring and *Clark, J.* dissenting.

This is a civil action by plaintiff to recover the proceeds of an insurance policy issued by the defendant on the life of John Jackson, the plaintiff's uncle. Until 1951 Mr. Jackson, who was mentally retarded though apparently never judicially determined to be incompetent, lived with plaintiff's grandmother. The plaintiff always had a close relationship with his uncle and helped care for him. After the grandmother died in 1951, plaintiff's mother, who was Mr. Jackson's closest living relative, took him in to live in plaintiff's home. There plaintiff continued to care for his uncle and considered him to be "like an older brother." After plaintiff's mother died, Mr. Jackson's condition was such that he had to be placed in a rest home. Plaintiff felt personally responsible for Mr.

Jackson. He spent his personal funds to get him into a rest home and obtained public assistance for him.

Feeling a personal responsibility for his uncle and believing himself to have a moral responsibility to bury him in the event of his death, plaintiff spoke to an agent of the defendant company about a policy of life insurance on the uncle's life in an amount sufficient to bury him (apparently about $1,800).

The agent came to plaintiff's house while plaintiff and his wife were still married and living together. Plaintiff informed the agent fully of the situation and the purpose of the policy. The agent asked the wife to sign Mr. Jackson's name on the policy application. Defendant company issued the policy on 1 November 1975 with John Jackson as owner and plaintiff as beneficiary.

Mr. Jackson had never married, was disabled, had never been employed and had no living relative except the plaintiff. After plaintiff and his wife separated, plaintiff demanded that his wife surrender the policy to him but she refused.

In 1976 plaintiff's wife, after they had separated but while still legally married, without plaintiff's knowledge executed a form purportedly requesting a change of beneficiary from the then beneficiary, plaintiff, to herself as the new beneficiary. In actuality, the signature purporting to request a change in beneficiary appears on the form in the space designated for a request of name change, designed to accommodate the beneficiary's change of name as a result of marriage, divorce, court order, or merely to correct an error. Plaintiff's estranged wife signed Mr. Jackson's name as the insured on the request form and submitted it without the consent or knowledge of either Mr. Jackson or the plaintiff.

Mr. Jackson died on 23 August 1978 and defendant company paid the policy proceeds to plaintiff's estranged wife. Plaintiff paid the funeral and burial expenses from his personal funds. Learning that defendant had paid the policy proceeds in the amount of $1,897.96 to his estranged wife, plaintiff brought suit against the defendant insurance company which filed answer and joined plaintiff's estranged wife, Estelle Allen, as a third party defendant. Both plaintiff and defendant moved for summary judgment and filed affidavits in support thereof. The third party

defendant filed no response nor any affidavits. At a hearing on 8 June 1981 the trial judge granted defendant's motion and denied plaintiff's. Plaintiff appealed and the Court of Appeals, with Clark, J. dissenting, affirmed.

Duke and Brown, by John E. Duke, Attorney for plaintiff-appellant.

John W. Dees, Attorney for defendant-appellee.

PER CURIAM.

For the reasons stated by Clark, J. in his dissent we find that summary judgment for the defendant was erroneously allowed and that summary judgment for the plaintiff was properly denied.

The decision of the Court of Appeals and the judgment of the trial court entered 9 June 1981 are vacated without prejudice to either party to again move for summary judgment if the facts are further developed. The cause is remanded to the Court of Appeals for further remand to the District Court, Wayne County for further proceedings not inconsistent with this opinion.

Vacated and remanded.

STATE OF NORTH CAROLINA v. FREDDY MURPHY

No. 274A82

(Filed 5 October 1982)

APPEAL by defendant pursuant to G.S. 7A-30(2) of the decision of the Court of Appeals (*Judge Harry Martin*, with *Judge Robert Martin* concurring, and *Judge Whichard* dissenting) reported at 56 N.C. App. 771, 290 S.E. 2d 408 (1982), finding no error in judgments entered against Freddy Murphy by *Washington, Judge*, at the 7 May 1981 Criminal Session of Superior Court, CASWELL County.

Defendant, Freddy Murphy, was charged in indictments, proper in form, with: (1) robbery with a firearm against Sally Sherrill and (2) robbery with a firearm against James Sherrill on

19 December 1980 in violation of G.S. 14-87. Defendant entered pleas of not guilty and the jury found the defendant guilty of the armed robbery of James and Sally Sherrill. Judge Washington sentenced defendant Freddy Murphy to 20 years for the armed robbery of Sally Sherrill and 10-20 years, to run consecutively, for the armed robbery of James Sherrill. Defendant appealed the judgments to the Court of Appeals.

The evidence for the State tended to show the following: On the evening of 19 December 1980, at approximately 7:30 p.m. the defendant was seen carrying a rifle along the road near the Sherrill home. Around 7:30 p.m. the Sherrills were home watching television when the defendant knocked on the door. James Sherrill stepped outside to see who was knocking on the door, but was forced back into the house by the defendant who was pointing a rifle at Mr. Sherrill's stomach. The rifle was covered with a piece of white cloth and the defendant's head was covered with a plastic-like material. After turning out the light, Mr. Sherrill was ordered by the defendant to sit by his wife and look at the floor. At this time defendant took one dollar and ten cents plus food stamps valued at twenty-eight dollars from Sally Sherrill and he took one dollar and forty-five cents plus food stamps valued at twenty-seven dollars plus one billfold valued at ten dollars from James Sherrill. Defendant then fled the premises. Although neither victim was able to get a good look at the assailant, Sally Sherrill was able to recognize the defendant's build and make a positive voice identification. In addition, Mrs. Sherrill described the assailant's clothing as including a green army-type jacket. Other witnesses testified that the defendant was wearing a green army-type jacket on the evening of the robbery.

At the close of the State's evidence, defendant moved for a dismissal of the charges on the grounds that the State failed to prove the robbery was committed with a deadly weapon. The motion was denied. The defendant also moved for a dismissal of the charges on the grounds that the State's evidence did not sufficiently prove that the defendant was the person who robbed the Sherrills. This motion was also denied. Defendant then presented evidence of an alibi which tended to show that he was with various members of his family during the robbery. During argument to the jury, defense counsel emphasized the State's failure to present any kind of statement or confession made by the de-

fendant. In response to defense counsel's reference to the State's failure to present any statement or confession by the defendant, the district attorney argued to the jury that the reason there was no statement was because the defense had objected to its introduction. Defendant, while not objecting at the time of the district attorney's statement, assigned as error the trial court's failure to intervene to prevent a gross injustice.

Upon hearing all the evidence, the jury returned verdicts of guilty of both charges against defendant.

Of the several assignments of error, the Court of Appeals, in its opinion, addressed four and held: (1) The trial court did not err in finding sufficient the evidence that the armed robberies were committed with a deadly weapon, (2) the trial court did not err in finding sufficient the evidence that defendant was the perpetrator of the crime, (3) there was no gross impropriety upon the record which would require the trial court to intervene *ex mero motu* and (4) the trial court neither improperly commented on defendant's failure to testify nor did it improperly state the law as it applies to this case.

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

George B. Daniel and Ronald M. Price for defendant appellant.

PER CURIAM.

We hereby adopt the reasoning of the Court of Appeals' opinion and affirm its decision in all respects.

Affirmed.

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

IN THE MATTER OF: CHARLES T. CIANFARRA, CLAIMANT v. N.C. DEPARTMENT OF TRANSPORTATION, EMPLOYER AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 177A82

(Filed 5 October 1982)

APPEAL by defendants pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals affirming judgment of *Rouse, J.*, at the April, 1982, session of NEW HANOVER Superior Court. The decision of the Court of Appeals by *Judge Arnold* with *Judge Whichard* concurring and *Judge Clark* dissenting was reported in 56 N.C. App. 380, 289 S.E. 2d 100 (1982).

Rufus L. Edmisten, Attorney General, by Blackwell M. Brogden, Jr., Assistant Attorney General, for appellant Department of Transportation.

T. S. Whitaker, Acting Chief Counsel, Thelma M. Hill and V. Henry Gransee, Jr., Staff Attorneys, for appellant Employment Security Commission of North Carolina.

Nelson, Smith & Hall, by Mary E. Lee and Alexander M. Hall, for appellee.

PER CURIAM.

The facts of this case are adequately stated in the majority decision of the Court of Appeals. We conclude that the rationale and supporting authorities set forth in Judge Clark's dissent constitute an accurate statement of the law and a correct application of that law to the facts. For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is vacated and this cause is remanded to the Court of Appeals with direction that it remand to the Superior Court of New Hanover County with an order vacating the judgment of Rouse, J., entered in Superior Court of New Hanover County on 7 April 1981 and ordering that the cause be remanded to the Employment Security Commission of North Carolina for findings as to whether claimant was discharged for misconduct.

Vacated and remanded with directions.

WAYLAND HENRY CAVINESS, PLAINTIFF v. ADMINISTRATIVE OFFICE OF THE COURTS, DEFENDANT

No. 254A82

(Filed 5 October 1982)

APPEAL by defendant pursuant to N.C.G.S. 7A-30(2) from a decision of the Court of Appeals reversing an order of the Industrial Commission entered 19 January 1981. The opinion of the Court of Appeals by *Judge Becton*, with *Judge Hill* concurring and *Judge Hedrick* dissenting, is reported in 56 N.C. App. 542, 289 S.E. 2d 853 (1982).

Rufus L. Edmisten, Attorney General, by Ralf F. Haskell and Elisha H. Bunting, Jr., Assistant Attorneys General, for appellant.

Ottway Burton for appellee.

PER CURIAM.

The facts of this case are adequately stated in the majority opinion of the Court of Appeals. We conclude that the rationale in Judge Hedrick's dissenting opinion is an accurate statement of the law as it applies to this case. We adopt the dissenting opinion, and the opinion of the Court of Appeals is reversed and this case is remanded to the Court of Appeals with directions that it enter an order affirming the order of the Industrial Commission.

Reversed.

BARBARA PAGE v. WILLIAM WENTING TAO

No. 255A82

(Filed 5 October 1982)

APPEAL as of right pursuant to G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals which reversed the trial court's order granting the defendant's motion for judgment notwithstanding the verdict and remanding the case for entry of judgment on the jury verdict for the plaintiff and against the defendant. The opinion of the Court of Appeals, reported at 56 N.C. App. 488, 289 S.E. 2d 910 (1982), is by *Judge Becton* with *Judge Hill* concurring and *Judge Hedrick* concurring in part and dissenting in part.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave, by Alonzo B. Coleman, Jr. and Douglas Hargrave, for plaintiff appellee.

Newsome, Graham, Hedrick, Murray, Bryson & Kennon, by E. C. Bryson, Jr. and Lewis A. Cheek, for defendant appellant.

PER CURIAM.

The facts are fully and accurately stated in the opinion of the Court of Appeals. For the reasons given in that opinion, the decision of the Court of Appeals is

Affirmed.

CARPENTER v. COOKE

No. 510P82.

Case below: 58 N.C. App. 381.

Petition by plaintiffs for writ of certiorari to North Carolina Court of Appeals denied 5 October 1982. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 5 October 1982.

DEVELOPMENT CORP. v. JAMES

No. 517P82.

Case below: 58 N.C. App 506.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 October 1982.

FIRST CITIZENS BANK v. POWELL

No. 462PA82.

Case below: 58 N.C. App. 229.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 21 September 1982.

HARRELL v. WILSON COUNTY SCHOOLS

No. 500P82.

Case below: 58 N.C. App. 260.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 5 October 1982. Motion by defendants to dismiss appeal for lack of significant public interest allowed 5 October 1982.

HARRIS v. HARRIS

No. 424PA82.

Case below: 58 N.C. App. 314.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 21 September 1982.

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

HELVY v. SWEAT

No. 474P82.

Case below: 58 N.C. App. 197.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 21 September 1982.

HOFLER v. HILL

No. 456PA82.

Case below: 58 N.C. App. 201.

Petition by defendants Hill for discretionary review under G.S. 7A-31 allowed 5 October 1982.

HOFLER v. HILL

No. 457PA82.

Case below: 58 N.C. App. 201.

Petition by defendants Hill for discretionary review under G.S. 7A-31 allowed 5 October 1982.

HORNE v. TRIVETTE

No. 515P82.

Case below: 58 N.C. App. 77.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 October 1982.

IN RE COLLINS

No. 494P82.

Case below: 58 N.C. App. 568.

Petition by Mary Lee Collins for discretionary review under G.S. 7A-31 denied 21 September 1982.

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

IN RE KASIM

No. 473P82.

Case below: 58 N.C. App. 36.

Petition by Mary Kay Yorio Kasim for discretionary review under G.S. 7A-31 denied 21 September 1982.

IN RE McELWEE

No. 461P82.

Case below: 51 N.C. App. 163.

Petition by Taxpayers for discretionary review under G.S. 7A-31 denied 21 September 1982.

JAMES v. JAMES

No. 501P82.

Case below: 58 N.C. App. 371.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 October 1982.

MARTIN v. MARS MFG. CO.

No. 531P82.

Case below: 58 N.C. App. 577.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 5 October 1982.

McCOLLUM v. GROVE MFG. CO.

No. 505PA82.

Case below: 58 N.C. App. 283.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 5 October 1982.

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

MELTON v. WAGNER

No. 475P82.

Case below: 58 N.C. App. 239.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 21 September 1982.

MENDLOVITZ v. MENDLOVITZ

No. 483P82.

Case below: 58 N.C. App. 413.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982.

MILLER MACHINE CO. v. MILLER

No. 492P82.

Case below: 58 N.C. App. 300.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 21 September 1982.

NORTHWESTERN BANK v. HAMRICK

No. 401P82.

Case below: 57 N.C. App. 600.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982.

POWELL v. SHULL

No. 464P82.

Case below: 58 N.C. App. 68.

Petition by defendants for discretionary review under G.S. 7A-31 denied 21 September 1982.

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

RHODES v. BOARD OF EDUCATION

No. 468P82.

Case below: 58 N.C. App. 130.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 21 September 1982. Appeal dismissed 21 September 1982.

SCALLON v. HOOPER

No. 493P82.

Case below: 58 N.C. App. 551.

Petition by defendants for discretionary review under G.S. 7A-31 denied 21 September 1982.

SHORTT v. KNOB CITY INVESTMENT CO.

No. 472P82.

Case below: 58 N.C. App. 123.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982.

SIZEMORE v. RAXTER

No. 467P82.

Case below: 58 N.C. App. 236.

Petition by defendants for discretionary review under G.S. 7A-31 denied 21 September 1982.

STATE v. ATKINS

No. 450P82.

Case below: 58 N.C. App. 146.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 21 September 1982.

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

STATE v. COLTRANE

No. 459PA82.

Case below: 58 N.C. App. 210.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 21 September 1982.

STATE v. CRAWFORD

No. 479P82.

Case below: 58 N.C. App. 160.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982. Motion by Attorney General to dismiss appeal for lack of significant public interest allowed 21 September 1982.

STATE v. CRAWFORD

No. 369P82.

Case below: 57 N.C. App. 371.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982.

STATE v. DAVIS

No. 458P82.

Case below: 58 N.C. App. 330.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982.

STATE v. EASTERLING

No. 480P82.

Case below: 58 N.C. App. 239.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982.

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

STATE v. GRAY

No. 427P82.

Case below: 58 N.C. App. 102.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982.

STATE v. HARRIS

No. 476P82.

Case below: 58 N.C. App. 239.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982.

STATE v. HARRIS

No. 463P82.

Case below: 58 N.C. App. 239.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982.

STATE v. JAMES

No. 421P82.

Case below: 58 N.C. App. 239.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1982.

STATE v. JUSTICE

No. 471P82.

Case below: 58 N.C. App. 240.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 21 September 1982.

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

STATE v. KNIGHT

No. 477P82.

Case below: 58 N.C. App. 240.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1982.

STATE v. KORNEGAY

No. 534P82.

Case below: 56 N.C. App. 258.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 5 October 1982.

STATE v. LANG

No. 438P82.

Case below: 58 N.C. App. 117.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 5 October 1982.

STATE v. LANG

No. 438P82.

Case below: 58 N.C. App. 117.

Cross-petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1982.

STATE v. LINDSEY

No. 485P82.

Case below: 58 N.C. App. 606.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1982.

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

STATE v. LOYE

No. 199A82.

Case below: 56 N.C. App. 501.

Motion by defendant to dismiss the appeal allowed 21 September 1982.

STATE v. MACKEY

No. 503P82.

Case below: 58 N.C. App. 385.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 5 October 1982. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 5 October 1982.

STATE v. MELVIN

No. 444P82.

Case below: 57 N.C. App. 503.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 21 September 1982.

STATE v. PERRY

No. 437P82.

Case below: 57 N.C. App. 710.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1982. Motion by Attorney General to dismiss appeal for lack of significance to the jurisprudence of the State allowed 5 October 1982.

STATE v. PETERSON

No. 469P82.

Case below: 58 N.C. App. 240.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982.

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

STATE v. PISCIOTTA

No. 470P82.

Case below: 57 N.C. App. 710.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982.

STATE v. PROCTOR

No. 520P82.

Case below: 58 N.C. App. 631.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982.

STATE v. PROCTOR

No. 504P82.

Case below: 58 N.C. App. 413.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1982.

STATE v. RICHARDSON

No. 553PA82.

Case below: 58 N.C. App. 822.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 5 October 1982.

STATE v. SELLERS

No. 481P82.

Case below: 58 N.C. App. 43.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 21 September 1982.

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

STATE v. SOUHRADA

No. 536P82.

Case below: 57 N.C. App. 710.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 5 October 1982.

STATE v. TATE

No. 507P82.

Case below: 58 N.C. App. 494.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1982. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 October 1982.

STATE v. WASHINGTON

No. 436P82.

Case below: 57 N.C. App. 666.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 21 September 1982.

STATE v. WHITLEY

No. 526P82.

Case below: 58 N.C. App. 539.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 October 1982. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 October 1982.

STATE v. WILKERSON & WILKERSON

No. 478P82.

Case below: 58 N.C. App. 240.

Petition by defendants for discretionary review under G.S. 7A-31 denied 21 September 1982.

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

STATE v. WILLIAMS & GRIFFIN

No. 498P82.

Case below: 58 N.C. App. 607.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 September 1982.

STATE ex rel. UTILITIES COMMISSION v. PUBLIC STAFF

No. 529PA82.

Case below: 58 N.C. App. 480.

Petition by Public Staff for writ of certiorari and petition by CP&L for writ of certiorari allowed 21 September 1982.

STEED v. FIRST UNION NATIONAL BANK

No. 513P82.

Case below: 58 N.C. App. 189.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 5 October 1982.

TASTINGER v. TASTINGER

No. 465P82.

Case below: 58 N.C. App. 240.

Petition by defendant for discretionary review under G.S. 7A-31 denied 21 September 1982.

TAYLOR v. GREENSBORO NEWS CO.

No. 363PA82.

Case below: 57 N.C. App. 426.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 21 September 1982. Motion of defendant to dismiss appeal for lack of substantial constitutional question denied 21 September 1982.

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

TOWN OF ATLANTIC BEACH v. YOUNG

No. 516PA82.

Case below: 58 N.C. App. 597.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 5 October 1982.

WHEDON v. WHEDON

No. 522P82.

Case below: 58 N.C. App. 524.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 October 1982.

WHITE v. PATE

No. 511PA82.

Case below: 58 N.C. App. 402.

Petition by plaintiffs for writ of certiorari to North Carolina Court of Appeals allowed 5 October 1982.

WILKIE v. WILKIE

No. 509P82.

Case below: 58 N.C. App. 624.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 October 1982.

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

PETITIONS TO REHEAR

DEESE v. LAWN AND TREE EXPERT CO.

No. 16PA82.

Case below: 306 N.C. 275.

Petition by plaintiffs to rehear denied 21 September 1982.

WACHOVIA BANK v. RUBISH

No. 54A81.

Case below: 306 N.C. 417.

Petition by plaintiff to rehear denied 21 September 1982.

APPENDIXES

AMENDMENTS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

AMENDMENTS TO RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

AMENDMENT TO INTERNAL OPERATING PROCEDURES MIMEOGRAPHING DEPARTMENT

ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

MEMBERS AND OFFICERS OF THE NORTH CAROLINA SUPREME COURT, DIRECTORS OF THE ADMINISTRATIVE OFFICE OF THE COURTS, AND ATTORNEYS GENERAL OF NORTH CAROLINA

INDEX TO MEMOIRS

AMENDMENTS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 26(g) of the North Carolina Rules of Appellate Procedure, 304 NC 591, is hereby amended to read as follows:

(g) FORM OF PAPERS; COPIES. Papers presented to either appellate court for filing shall be letter size (8½ x 11") with the exception of wills and exhibits. Documents filed in the trial division prior to July 1, 1982 may be included in records on appeal whether they are letter size or legal size (8½ x 14"). Papers shall be prepared on white paper of 16-20 pound substance in pica type so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 5 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, *i.e.*, cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record.

Rule 28(i) of the North Carolina Rules of Appellate Procedure, 287 NC 671, 743-744, is hereby amended to read as follows:

(i) *Amicus Curiae Briefs.* A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that Court on its own initiative.

A person desiring to file an amicus curiae brief shall present to the Court a motion for leave to file, served upon all parties, within ten days after the appeal is docketed. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the questions of law to be addressed in the amicus curiae brief and the applicant's position on those questions.

Unless otherwise ordered by the Court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the Court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. In all cases where amicus curiae briefs are permitted by a court, the clerk of the court at the direction of the court will notify all parties of the times within which they may file reply briefs. Such reply briefs will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.

A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

The Appendix of Tables and Forms to the North Carolina Rules of Appellate Procedure, 287 NC 671, 763-789, is hereby repealed and the following Appendixes A through F are adopted in its stead:

APPENDIXES

Appendix A: Timetables for Appeals

Appendix B: Format and Style

Appendix C: Arrangement of Record on Appeal

Appendix D: Forms

Appendix E: Content of Briefs

Appendix F: Fees and Costs

APPENDIX A

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THESE RULES

Action	**Time (Days)**	**From date of**	**Rule Reference**
Taking Appeal (civil)	10	entry of judgment (unless tolled)	3(c)
Taking Appeal (criminal)	10	entry of judgment (unless tolled)	4(a)(2)
Filing and serving proposed record on appeal	30	Taking appeal	11(b)
Filing and serving objections or proposed alternative record	15	Service of proposed record	11(c)
Requesting judicial settlement of record	10	Last day within which last appellee served could file objections, etc.	11(c)
Settlement of record by judge	15	Receipt by judge of request for settlement	11(c)
Certification of record by clerk	10	Record on appeal settled	11(e)
Filing record on appeal in appellate court	10	Certification by clerk (but not more than 150 days from taking appeal)	12(a)
Filing appellant's brief	20	Clerk's Mailing of Printed Record	12(b), 13(a)
Filing appellee's brief	20	Service of appellant's brief	13(a)
Oral argument	30 (usual *minimum*)	Filing appellant's brief	29
Certification or Mandate	20	Issuance of Opinion	32
Petition for Rehearing (civil action only)	20	Mandate	31(a)

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THESE RULES

Action	Time (Days)	From date of	Rule Reference
Petition for Discretionary Review Prior to Determination	15	Docketing appeal in Court of Appeals	15(a)
Notice of Appeal	15	Mandate (or from order of Court of Appeals denying petition for rehearing)	14(a)
Cross-Notice of Appeal	10	Filing of first Notice	14(a)
Petition for Discretionary Review	15	Mandate (or from order of Court of Appeals denying petition for rehearing)	15(a)
Response to Petition for Discretionary Review	10	Service of Petition	15(d)
Appellant's Brief	20	Docketing Case	14(d), 15(a)
Appellee's Brief	20	Service of Appellant's Brief	14(d), 15(g)
Oral Argument	30 (usual minimum)	Filing Appellant's Brief	29
Certification or Mandate	20	Issuance of Opinion	32
Petition for rehearing (civil action only)	20	Mandate	31(a)

NOTE: All of the critical time intervals here outlined except those for taking an appeal and petitioning for discretionary review may be extended by order of the Court wherein the appeal is docketed at the time. However, the time for filing the record on appeal may be extended past 150 days from the date of taking appeal only by order of the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21)

APPENDIX B

Format and Style

All documents for filing in either appellate court are prepared on 8½ x 11 inch, white paper of 16 to 20 pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format.

Papers shall be prepared using pica (10 pitch) type and spacing, so as to produce a clear, black image. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be 60 spaces wide and 57 lines long. Tabs are located at the following spaces from the left margin: 5, 10, 15, 20, 30 (center), and 40.

Captions of Documents

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the Clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and, again, on the first textual page of the document.

No. _____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA	)	
or	)	
(Name of Plaintiff)	)	From (Name) County
	)	No. _____
v	)	
	)	
(Name of Defendant)	)	

****

(TITLE OF DOCUMENT)

****

The caption should reflect the title of the action (all parties named) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative position of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the Trial Division should include directly below the name of the county and indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents except for a petition for writ of certiorari or other petitions and motions where no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals' docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, *e.g.*, PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is to be entitled NEW BRIEF.

Indexes

A brief or petition which is long or complex or which treats multiple issues, and all Appendixes to briefs (Rule 28) and Records on Appeal (Rule 9) must contain an index to the contents.

The index should be indented ten spaces from *each* margin, providing a 40-space line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record) **INDEX**

Request for Jury Instructions 101
*Charge to the Jury 102
Jury Verdict 108
Order or Judgment 109
Appeal Entries 110
Order Extending Time 110
Assignments of Error 112
Certificate of Service 113
Stipulation of Counsel 114
Names and Addresses of Counsel 115

Use of the Transcript of Evidence with Record on Appeal

Those portions asterisked (*) in the sample index above would be omitted if the transcript option were selected under Appellate Rule 9(c). In their place in the record, counsel should place a statement in substantially the following form:

> "Per Appellate Rule 9(c) the complete stenographic transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of pages) pages, numbered (1) through (last page#), and bound in (# of volumes) volumes is filed contemporaneously with this record. The transcript has been certified by (name), (deputy) (ass't) Clerk of the Superior Court of (name) County."

The transcript should be prepared with a clear, black image on 8½ x 11 paper of 16-20 pound substance. Enough copies should be reproduced to assure the parties of a reference copy, file one copy in the appellate court, and provide the Clerk of the Superior Court with a copy if required. In criminal appeals, the District Attorney is responsible for conveying a copy to the Attorney General (App. Rule 9(c)).

The transcript should not be inserted into the record on appeal, but, rather, should be separately bound and submitted for filing in the proper appellate court with the record. Transcript pages inserted into the record on appeal will be treated in the manner of a narration and will be printed at the standard page charge. Counsel should note that the separate transcript will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

Table of Cases and Authorities

Immediately following the index and before the inside caption, all briefs, petitions, and motions greater than five pages in

length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to *A Uniform System of Citation* (13th ed.).

Format of Body of Document

The body of the document should be single spaced with double spaces between paragraphs and triple spaces before topical headings.

Adherence to the margins is important since the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented 10 spaces from the left margin and about five spaces from the right. The citation should immediately follow the quote.

References to the record on appeal should be made through a parenthetical entry in the text. (R pp 38-40) References to the transcript, if used, should be made in similar manner. (T p 558)

Topical Headings

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented five spaces from the left margin.

Numbering Pages

The cover page containing the caption of the document (and the index in Records on Appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lower case roman numerals, *e.g.*, i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, *e.g.* —4—.

An appendix to the brief should be separately numbered in the manner of a brief.

Signature and Address

All original papers filed in a case will bear the original signature of at least one counsel participating in the case. The name, address, and telephone number of the person signing, together with the capacity in which he signs the paper will be included. Counsel participating in argument must have signed the brief in the case prior to that argument.

APPENDIX C

ARRANGEMENT OF RECORD ON APPEAL

Only those items listed in the following tables which are required by Rule 9(b) in the particular case should be included in the record. See Rule 9(b)(5) for sanctions against including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the record proper if the transcript option of Rule 9(c) is used, and there exists a transcript of the items.

Table 1

SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(b)(1)(i)
3. Statement of organization of trial tribunal, per Rule 9(b)(1)(ii)
4. Statement of record items showing jurisdiction, per Rule 9(b)(1)(iii)
5. Complaint
6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pre-trial order

*10. Plaintiff's evidence, with any evidentiary rulings assigned as error

*11. Motion for directed verdict, with ruling thereon

*12. Defendant's evidence, with any evidentiary rulings assigned as error

*13. Plaintiff's rebuttal evidence, with any evidentiary rulings assigned as error

14. Issues tendered by parties
15. Issues submitted by court

*16. Court's instructions to jury, per Rule 9(b)(1)(vi)

17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)

19. Judgment
20. Appeal entries, per Rule 9(b)(1)(ix)
21. Assignments of error, with pertinent exceptions, per Rule 10
22. Entries showing settlement of record on appeal, extension of time, etc.
23. Clerk's certification of record on appeal
24. Names, office addresses, and telephone numbers of counsel for all parties to appeal

Table 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(b)(2)(i)
3. Statement of organization of superior court, per Rule 9(b)(2)(ii)
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(b)(2)(iii)
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all items from administrative proceeding filed for review in superior court, including evidence

*8. Evidence taken in superior court, in order received

9. Copies of findings of fact, conclusions of law, and judgment of superior court
10. Appeal entries, per Rule 9(b)(2)(viii)
11. Assignments of error, with pertinent exceptions, per Rule 9(b)(2)(ix)
12. Entries showing settlement of record on appeal, extension of time, etc.
13. Clerk's certification of record on appeal
14. Names, office addresses, and telephone numbers of counsel for all parties to appeal

Table 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(b)(3)(i)
3. Statement of organization of trial tribunal, per Rule 9(b)(3)(ii)
4. Warrant
5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. Voir dire of Jurors

*10. State's evidence, with any evidentiary rulings assigned as error

11. Motions at close of state's evidence, with rulings thereon (* if oral)

*12. Defendant's evidence, with any evidentiary rulings assigned as error

13. Motions at close of defendant's evidence, with rulings thereon (* if oral)

*14. State's rebuttal evidence, with any evidentiary rulings assigned as error

15. Motions at close of all evidence, with rulings thereon (* if oral)

*16. Court's instructions to jury, per Rules 9(b)(3)(vi), 10(b)(2)

17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries
21. Assignments of error, with pertinent exceptions, per Rule 10
22. Entries showing settlement of record on appeal, extension of time, etc.
23. Clerk's certification of record on appeal
24. Names, office addresses and telephone numbers of counsel for all parties to appeal

Table 4

EXCEPTIONS SET OUT IN RECORD ON APPEAL

A. Examples related to evidentiary rulings

1. Evidence admitted

Q. Did you hear D. call a name?

A. Yes.

Q. Whose name did he call?

Objection.

Objection overruled.

EXCEPTION No. 7.

A. The name of E. F.

2. Evidence excluded

Q. Did you hear D. call a name?

A. Yes.

Q. Whose name did he call?

Objection.

Objection sustained.

(Witness would have testified: "The name of E. F.")

EXCEPTION No. 8.

B. To ruling on motion for directed verdict

At the close of all the evidence the defendant renewed his motion for directed verdict on the stated grounds that the plaintiff's evidence established as a matter of law his contributory negligence.

Motion denied.

EXCEPTION No. 9.

C. To refusal of court to submit issue tendered by defendant

Issues tendered by the defendant:

. . .

2. If so, did the plaintiff by his own negligence contribute to his injuries, as alleged in the answer?

. . .

The court refused to submit issue No. 2.

EXCEPTION No. 10.

D. Examples related to judge's instructions to jury

1. Instruction erroneously given

(Enclose in brackets portion of instructions to which exception is directed, followed by entry:)

EXCEPTION No. 11.

2. Law not explained, as required by N.C.R.Civ.P. 51

(Entry to be made at end of instructions given by court:)

The court failed to instruct the jury on the doctrine of last clear chance.

EXCEPTION No. 12.

3. Law not applied to evidence, as required by N.C.R.Civ.P. 51

(Entry to be made at end of instructions given by court.)

The court failed in instructing the jury to apply the doctrine of last clear chance to plaintiff's evidence, Record pp. 80-90.

EXCEPTION No. 13.

Table 5

ASSIGNMENTS OF ERROR

A. Examples related to pre-trial rulings in civil action

Defendant assigns as error:

1. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(2) to dismiss for lack of jurisdiction over the person of the defendant, on the grounds (that the uncontested affidavits in support of the motion show that no grounds for jurisdiction existed) (or other appropriately stated grounds).

EXCEPTION No. 1, R p. 4.

2. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(6) to dismiss for failure of the complaint to state a claim upon which relief can be granted, on the ground that the complaint affirmatively shows that the plaintiff's own negligence contributed to any injuries sustained.

EXCEPTION No. 2, R p. 7.

3. The court's denial of defendant's motion requiring the plaintiff to submit to physical examination under N.C.R.Civ. P. 35, on the ground that on the record before the court, good cause for the examination was shown.

   EXCEPTION No. 3, R p. 10.

4. The court's denial of defendant's motion for summary judgment, on the ground that there was no genuine issue of fact that the statute of limitations had run and defendant was therefore entitled to judgment as a matter of law.

   EXCEPTION No. 4, R p. 15.

B. Examples related to civil jury trial rulings

Defendant assigns as error the following:

1. The court's admission of the testimony of the witness E.F., on the ground that the testimony was hearsay.

   EXCEPTION No. 7, R p. 29.

   EXCEPTION No. 8, R p. 30.

2. The court's denial of the defendant's motion for directed verdict at the conclusion of all the evidence, on the ground that plaintiff's evidence as a matter of law established his contributory negligence.

   EXCEPTION No. 8, R p. 45.

3. The court's instructions to the jury, R pp. 50-51, explaining the doctrine of last clear chance, on the ground that the doctrine was not correctly explained.

   EXCEPTION No. 10, R p. 51.

4. The court's instructions to the jury, R pp. 53-54, applying the doctrine of sudden emergency to the evidence, on the ground that the evidence referred to by the court did not support application of the doctrine.

   EXCEPTION No. 11, R p. 54.

5. The court's denial of defendant's motion for a new trial for newly discovered evidence, on the ground that on the uncontested affidavits in support of the motion the court abused its discretion in denying the motion.

   EXCEPTION No. 9, R p. 80.

C. Examples related to civil non-jury trial

Defendant assigns as error:

1. The court's refusal to enter judgment of dismissal on the merits against plaintiff upon defendant's motion for dismissal made at the conclusion of plaintiff's evidence, on the ground that plaintiff's evidence established as a matter of law that plaintiff's own negligence contributed to the injury.

   EXCEPTION No. 1, R p. 20.

2. The court's Finding of Fact No. 10 on the ground that there was insufficient evidence to support it.

   EXCEPTION No. 2, R p. 25.

3. The court's Conclusion of Law No. 3, on the ground that there are no findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.

   EXCEPTION No. 3, R p. 27.

APPENDIX D

FORMS

Captions for all documents filed in the Appellate Division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

1. **Notices of Appeal**

a. **to Court of Appeals from Trial Division**
Appropriate in all appeals of right from district or superior courts, except appeals from criminal judgments imposing sentences of death or of imprisonment for life.

(Caption)

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

(Plaintiff) (Defendant) (NAME OF PARTY) hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment) (from the order) entered on (date) in the (District) (Superior) Court of (name) County, (describing it).

Respectfully submitted this _____ day of _____ 19____.

s/ _____
Attorney for (Plaintiff) (Defendant)
(Address and Telephone)

b. **to Supreme Court from a Judgment of the Superior Court Including a Sentence of Life Imprisonment or Death**

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment, entered by (name of Judge), in the Superior Court of (name) County on (date), which judgment included a sentence of (death) (imprisonment for life).

Respectfully submitted this _____ day of _____ 19 ____.

s/ _____
Attorney for Defendant-Appellant
(Address and Telephone)

c. **to the Supreme Court from a Judgment of the Court of Appeals**

Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under G.S. 7A-30. The appealing party shall enclose a certified copy of the opinion of the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff) (Defendant) (name of party) hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describing it), which judgment . . .

(**Constitutional question** — G.S. 7A-30(1)) . . . directly involves substantial questions arising under the Constitution(s) (of the United States) (and) (or) (of the State of North Carolina) as follows:

(here describe the specific issues, citing Constitutional provisions under which they arise, and showing how such issues were timely raised below and are set out in the record on appeal, *e.g.*:)

"Question 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's assignment of error to the denial of his Motion to Suppress Evidence Obtained by a Search Warrant, thereby depriving the defendant of his Constitutional right to be secure in his person, house, papers, and effects, against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without probable cause and warrants not supported by evidence. This constitutional issue was timely raised in the trial tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp 7 thru 10). Exception No. 11 (R p 136). This constitutional issue was determined erroneously by the Court of Appeals."

(**dissent** — G.S. 7A-30(2)) . . . was entered with a dissent by Judge (name).

(**rate-making** — G.S. 7A-30(3)) . . . was entered upon review of a decision of the North Carolina Utilities Commission in a general rate-making case.

Respectfully submitted this ____ day of _____ 19____.

s/_____
Attorney for (Plaintiff) (Defendant)-Appellant
(Address and Telephone)

2. **Appeal Entries**

The appeal entries are appropriate as a ready means of providing in composite form for the record on appeal:

1) the entry required by App. Rule 9(b) showing appeal duly taken by oral notice under App. Rule 3(a)(1) or 4(a)(1);

2) judicial approval of the undertaking on appeal required by App. Rule 6; and

3) the entry required by App. Rule 9(b) showing any judicial extension of time for serving proposed record on appeal under App. Rule 27(c).

These entries of record may also be made separately.

Where appeal is taken by filing and serving written notice, a copy of the notice with filing date and proof of service is appropriate as the record entry required.

Per Tables 1, 2, and 3 of Appendix C, such "appeal entries" are appropriately included in the record on appeal following the judgment from which appeal is taken.

The judge's signature, while not technically required, is traditional, and serves as authentication of the substance of the entries.

(Defendant) gave due notice of appeal to the (Court of Appeals) (Supreme Court). Appeal bond in the sum of $_____ adjudged to be sufficient. (Defendant) is allowed _____ days in which to serve proposed record on appeal, and (Plaintiff) is allowed _____ days thereafter within which to serve objections or a proposed alternative record on appeal.

This _____ day of _____ 19____.

s/_____
Judge Presiding

3. **Petition for Discretionary Review Under G.S. 7A-31**

To seek review of the opinion and judgment of the Court of Appeals where appellant contends case involves issues of public interest or jurisprudential significance. May also be filed as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant considers that such appeal lies of right due to substantial constitutional questions under G.S. 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from G.S. 7A-31 which provide the basis for the petition). In support of this petition, (Plaintiff) (Defendant) shows the following:

Facts

(Here state first the procedural history of the case through the trial division and the Court of Appeals.

Then set out factual background necessary for understanding the basis of the petition.)

Reasons Why Certification Should Issue

(Here set out factual and legal argument to justify certification of the case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should be to show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is one significant to the jurisprudence of the State or one which offers significant public interest. If the Court is persuaded to take the case, then the appellant may deal thoroughly with the substantive issues in the new brief.)

Respectfully submitted this _____ day of _____ 19____.

s/ _____
Attorney for (Plaintiff) (Defendant)
(Address and Telephone)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in the case.

4. **Petition for Writ of Certiorari**

To seek review 1) of the judgments or orders of trial tribunals in the appropriate appellate court when the right to prosecute an appeal has been lost or where no right to appeal exists; 2) by the Supreme Court of the decisions and orders of the Court of Appeals where no right to appeal or to petition for discretionary review exists or where such right has been lost by failure to take timely action.

(Caption)

****

TO THE HONORABLE (SUPREME COURT) (COURT OF APPEALS) OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the N.C. Rules of Appellate Procedure to review the (judgment) (order) (decree) of the (Honorable (name), Judge Presiding, (name) County (Superior) (District) Court) (North Carolina Court of Appeals), dated (date) (here describe the judgment, order, or decree appealed from); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of petition: *e.g.* failure to perfect appeal by reason of circumstances constituting excusable neglect; nonappealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from reporter, statement should include estimate of date of availability, and supporting affidavit from the Court Reporter.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument to justify issuance of writ: *e.g.*, reasons why interlocutory order makes it impractical for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed assignments of error; etc.)

Attachments

Attached to this petition for consideration by the Court are certified copies of the (judgment) (order) (decree) sought to be

reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition.)

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the (Superior Court of (name) County) (North Carolina Court of Appeals) to permit review of the (judgment) (order) (decree) above specified, upon errors (to be) assigned in the record on appeal constituted in accordance with the Rules of Appellate Procedure; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, this the _____ day of _____, 19____.

s / _____
Attorney for Petitioner
(Address and Telephone)

(Verification by petitioner or counsel)
(Certificate of service upon opposing parties)
(Attach a clear copy of the opinion, order, etc. which is the subject of the petition and other attachments as described in petition.)

5. **Petition for Writ of Supersedeas under Rule 23 and Motion for Temporary Stay**

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Appellate Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, *e.g.*, fines, are stayed automatically pending an appeal of right).

A motion for temporary stay is appropriate to show good cause for immediate stay of execution on an ex parte basis pending the Court's decision on the Petition for Supersedeas or the substantive petition in the case.

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS) (SUPREME COURT) OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution) (enforcement) of the (judgment) (order) (decree) of the (Honorable

_____, Judge Presiding, (Superior) (District) Court of _____ County) (North Carolina Court of Appeals), dated _____, pending review by this Court of said (judgment) (order) (decree) which (here describe the judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding basis of petition and justifying its filing under Rule 23: *e.g.*, trial judge has vacated the entry upon finding security deposited under G.S. Section _____ inadequate; or that trial judge has refused to stay execution upon motion therefor by petitioner; or that circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument for justice of issuing writ: *e.g.*, that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if he is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

Attachments

Attached to this petition for consideration by the court are certified copies of the (judgment) (order) (decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the ((Superior) (District) Court of _____ County) (North Carolina Court of Appeals) staying (execution) (enforcement) of its (judgment) (order) (decree) above specified, pending issuance of the mandate to this Court following its review and determination of the (Appeal) (discretionary review) (review by extraordinary writ) (now pending) (the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, this the _____ day of _____, 19____.

s/_____
Attorney for Petitioner
(Address and Telephone)

(Verification by petitioner or counsel.)
(Certificate of Service upon opposing party.)

Rule 23(e) provides that in conjunction with such a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included in the main petition as part of it or filed separately.

Motion for Temporary Stay

(Plaintiff) (Defendant) respectfully applies to the Court for an order temporarily staying (execution) (enforcement) of the (judgment) (order) (decree) which is the subject of (this) (the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this Application, movant shows that (here set out legal and factual argument for the issuance of such a temporary stay order; *e.g.*, irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

Motion for Stay of Execution

In death cases, the Supreme Court uses an order for stay of execution of death sentence in lieu of the writ of supersedeas. Counsel should promptly apply for such a stay after the judgment of the Superior Court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the defendant, (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable _____, Judge Presiding, Superior Court of _____ County, sentenced the defendant to death, execution being set for (date of execution).

2. That pursuant to G.S. 15A-2000(d)(1), there was an automatic appeal of this matter to the Supreme Court of North Carolina, and that defendant's notice of appeal was given (describe the circumstances).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the scheduled date for execution.

WHEREFORE, the defendant prays the Court to enter an Order staying the execution pending judgment and further orders of this Court.

Respectfully submitted, this the _____ day of _____, 19____.

s/_____
Attorney for Defendant
(Address and Telephone)

(Certificate of Service on
Attorney General, District Attorney,
and Warden of Central Prison)

APPENDIX E

CONTENT OF BRIEFS

Caption

Briefs should use the caption as shown in Appendix B. The Title of the Document should reflect the position of the filing party both at the trial level and on the appeal, *e.g.*, DEFENDANT-APPELLANT'S BRIEF, PLAINTIFF-APPELLEE'S BRIEF, or BRIEF FOR THE STATE. A brief filed in the Supreme Court in a case decided by the Court of Appeals is captioned a "New Brief" and the position of the filing party before the Supreme Court should be reflected, *e.g.*, DEFENDANT-APPELLEE'S NEW BRIEF (where the State has appealed from the Court of Appeals in a criminal matter).

The cover page should contain only the caption of the case. Succeeding pages should present the following items, in order.

Index of the Brief

Each brief should contain a topical index beginning at the top margin of the first page following the cover, in substantially the following form:

INDEX

* * * * *

Table of Cases and Authorities

This table should begin at the top margin of the page following the Index. Page reference should be made to the first citation of the authority in each question to which it pertains.

TABLE OF CASES AND AUTHORITIES

* * * * *

Questions Presented

The inside caption is on "page 1" of the brief, followed by the questions presented. The phrasing of the questions presented

need not be identical with that set forth in the assignments of error in the Record; however, the brief may not raise additional questions or change the substance of the questions already presented in those documents. The appellee's brief need not restate the questions unless the appellee desires to present additional questions to the Court.

QUESTIONS PRESENTED

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION?

* * *

Statement of the Case

If the Questions Presented carry beyond page 1, the Statement of the Case should follow them, separated by the heading. If the Questions Presented do not carry over, the Statement of the Case should begin at the top of page 2 of the brief.

Set forth a concise chronology of the course of the proceedings in the trial court and the route of appeal, including pertinent dates. For example:

STATEMENT OF THE CASE

The defendant, John Q. Public, was convicted of first degree rape at the October 5, 1981, Criminal Session of the Superior Court of Bath County, the Honorable I. M. Wright presiding, and received the mandatory life sentence for the Class B felony. The defendant gave notice of appeal in open court to the Supreme Court of North Carolina at the time of the entry of judgment on October 8, 1981.

A motion to extend the time for serving and filing the record on appeal was allowed by the Supreme Court on January 22, 1982. The record was filed and docketed in the Supreme Court on April 5, 1982.

Statement of the Facts

The facts constitute the basis of the dispute or criminal charges and the procedural mechanics of the case if they are significant to the questions presented. The facts should be stated objectively and concisely and should be limited to those which are relevant to the issue or issues presented.

Do not include verbatim portions of the record or other matters of an evidentiary nature in the statement of the facts. Summaries and record or transcript citations should be used. No appendix should be compiled simply to support the statement of the facts.

The appellee's brief need contain no statement of the case or facts if there is no dispute. The appellee may state additional facts where deemed necessary, or, if there is a dispute of the facts, may restate the facts as they objectively appear from the appellee's viewpoint.

Argument

Each question will be set forth in upper case type as the party's contention, followed by the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages in the printed record on appeal or in the transcript at which they appear, and separate arguments pertaining to and supporting that contention, *e.g.*,

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.

ASSIGNMENT OF ERROR NO. 2 (R p 45)

EXCEPTION NOS. 5 (R p 23), 6 (T p 366), and 7 (T pp 367-390)

Parties should feel free to summarize, quote from, or cite to the record or transcript during the presentation of argument. If the transcript option is selected under Appellate Rule 9(c), the Appendix to the Brief becomes a consideration, as described in Appellate Rule 28 and below.

Where statutory or regulatory materials are cited, the relevant portions should be quoted in the body of the argument.

Conclusion

State briefly and clearly the specific objective or relief sought in the appeal. It is not necessary to restate the party's contentions, since they are presented both in the index and as headings to the individual arguments.

Signature and Certificate of Service

Following the conclusion, the brief must be dated and signed, with the attorney's mailing address and telephone number, all indented to the third tab.

The Certificate of Service is then shown with centered, upper case heading, the certificate itself, describing the manner of service upon the opposing party, with the complete mailing address of the party or attorney served blocked on the first tab, followed by the date and the signature of the person certifying the service.

Appendix to the Brief under the Transcript Option

Appellate Rules 9(c) and 28 require additional steps to be taken in the brief to point the Court to appropriate excerpts of the transcript considered essential to the understanding of the arguments presented.

Counsel is encouraged to cite, narrate, and quote freely within the body of the brief. However, if because of length a verbatim quotation is not included in the body of the brief, that portion of the transcript and others like it shall be gathered into an appendix to the brief which is situated at the end of the brief, following all signatures and certificates. Counsel should *not* compile the entire transcript into an appendix to support issues involving a directed verdict, sufficiency of evidence, or the like.

The appendix should be prepared so as to be clear and readable, distinctly showing the transcript page or pages from which each passage is drawn. Counsel may reproduce transcript pages themselves, clearly indicating those portions to which attention is directed.

The Appendix should include a table of contents, showing the issue from the brief, followed by the pertinent contents of the appendix, the transcript or appendix page reference and a reference back to the page of the brief citing the appendix. For example:

CONTENTS OF APPENDIX

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.

Voir Dire Direct Examination of John Q. Public (T pp 17-24) (Brief p. 8) 1

Voir Dire Cross-Examination of John Q. Public (T pp 24-28) (Brief p. 8) 8

* * *

The appendix will be printed with the brief to which it is appended; however, it will not be retyped, but run as is. Therefore, clarity of image is extremely important.

APPENDIX F

Fees and Costs

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. There is no fee for filing a motion in a cause; other fees are as follows, and should be submitted with the document to which they pertain, made payable to the Clerk of the appropriate appellate court:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas—docketing fee of $10.00 for each document, *i.e.*, docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

Certification fee of $10.00 (payable to Clerk, Court of Appeals) where review of judgment of Court of Appeals is sought in Supreme Court by notice of appeal or by petition.

An appeal bond of $200.00 is required in civil cases per Appellate Rule 6. The bond should be filed contemporaneously with the record in the Court of Appeals and with the notice of appeal in the Supreme Court. The Bond will not be required in cases brought by petition for discretionary review or certiorari unless and until the Court allows the petition.

Costs for printing documents are $4.00 per printed page where the document is retyped and printed; $1.50 per printed page where the Clerk determines that the document is in proper format and can be printed from the original. The Appendix to a brief under the Transcript option of Appellate Rules 9(c) and 28(b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief.

The Clerk of the Court of Appeals requires that a deposit for estimated printing costs accompany the document at filing. The Clerk of the Supreme Court prefers to bill the party for the costs of printing after the fact.

Court costs on appeal total $9.00 and are imposed when a notice of appeal is withdrawn or dismissed and when the mandate is issued following the opinion in a case.

Adopted by the Court in conference this 7th day of December 1982. Rule 28(i) and the Appendixes shall become effective 1 January 1983. Rule 26(g) shall become effective for all documents filed on or after 1 March 1983. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

Martin, J.
For the Court

AMENDMENT TO RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

CERTIFICATION

I, Fred P. Parker III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do hereby certify that following a meeting on October 1, 1982, the Board considered modifications to Rule .0502 of the Rules Governing Admission to the Practice of Law in the State of North Carolina that were suggested by the North Carolina Supreme Court and RESOLVED that Rule .0502 be redrafted to incorporate these changes.

I hereby further certify that attached is a true and accurate copy of the amendment to Rule .0502 of the Rules Governing Admission to the Practice of Law in the State of North Carolina that was adopted by the Board of Law Examiners on June 25, 1982, approved by the Council of the North Carolina State Bar on July 16, 1982, with the modifications suggested by the North Carolina Supreme Court.

Given over my hand and the seal of the Board of Law Examiners, this the 12th day of October, 1982.

BOARD OF LAW EXAMINERS OF THE
STATE OF NORTH CAROLINA

Fred P. Parker III
Executive Secretary

.0502 REQUIREMENTS FOR COMITY APPLICANTS

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, immigrating or who has heretofore immigrated to North Carolina from such jurisdiction, upon written application may, in the discretion of the Board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(1) File with the Secretary, upon such forms as may be supplied by the Board, a typed application in duplicate which will be considered by the Board after at least six (6) months from the date of filing; the application requires:

(a) That an applicant supply full and complete information in regard to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, references, the nature of the applicant's practice of law, and familiarity with the Code of Professional Responsibility as Promulgated by the North Carolina State Bar;

(b) That the applicant furnish the following documentation:

i. Certificates of Moral Character from four (4) attorneys;

ii. A recent photograph;

iii. Two (2) sets of clear fingerprints;

iv. A certification of the Court of Last Resort from the jurisdiction from which the applicant is applying;

v. Transcripts from the applicant's undergraduate and graduate schools;

vi. A copy of all applications for admission to the practice of law that he has filed with any state, territory, or the District of Columbia;

vii. A certificate of his admission to the bar of any state, territory, or the District of Columbia;

viii. A certificate from the proper court or body of every state in which the applicant is licensed therein that he is in good standing and not under pending charges of misconduct;

(2) Pay to the Board with each written application, a fee of $625.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a nonresident, no part of which may be refunded to the applicant whose application is denied;

(3) Be and continuously have been a bona fide resident of the State of North Carolina for a period of at least sixty (60) days immediately prior to the consideration of his application to practice law in the State of North Carolina;

(4) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, the applicant has been for at least four out of the last six years, immediately preceding the filing of his application with the Secretary, actively and substantially engaged in the practice of law. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include:

(a) The practice of law as defined by G.S. 84-2.1; or

(b) Activities which would constitute the practice of law if done for the general public; or

(c) Legal service as a corporate counsel; or

(d) Judicial service in a court of record or other legal service with any local or state government or with the federal government; or

(e) Service as a member of a Judge Advocate General's Department of one of the Military Branches of the United States; or

(f) A full time faculty member in a law school approved by the Council of the North Carolina State Bar.

Employment in North Carolina, when conducted pursuant to a license granted by another jurisdiction, to meet the requirement of this rule is limited to:

(a) Employment as house counsel by a person, firm, association, or corporation engaged in business in this state which business does not include the selling or furnishing of legal advice or services to others; or

(b) Employment as a full time faculty member of a law school approved by the Council of the North Carolina State Bar; or

(c) Employment as a full time member of the faculty of the Institute of Government of the University of North Carolina at Chapel Hill; or

(d) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States.

(5) Satisfy the Board that the state, or territory of the United States, or the District of Columbia in which the applicant is licensed and from which he seeks comity will admit North Carolina attorneys to the practice of law in such state, or territory of the United States, or the District of Columbia without written examination, other than the Multistate Professional Responsibility Examination;

(6) Be in good professional standing in every state, or territory of the United States, or the District of Columbia in which the applicant has been licensed to practice law, and not under pending charges of misconduct.

(7) Be of good moral character and have satisfied the requirements of Section .0600 of this Chapter.

(8) Meet the educational requirements of Section .0700 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971;

(9) Not have taken and failed the written North Carolina Bar Examination within ten (10) years prior to the date of filing the applicant's comity application.

CERTIFICATE OF MEMBER OF COURT OF LAST RESORT

IN THE MATTER OF THE APPLICATION OF: _____
(Name of Applicant)

State of _____

_____
(Name of Court of Last Resort)

I, _____ who am _____ Justice of the _____, Court of the State
(Name of Court of Last Resort)
of _____, said Court of last resort in said State, do hereby certify that _____
(Name of Applicant)
is duly licensed to practice law in the State of _____; and was licensed to practice law in said State on the _____ day of _____, 19_____; that _____ he has been entitled to actively engage in the practice of law in said State for three years or more immediately preceding the date of this certification; that _____ he is in good professional standing with no charge undisposed of against him/her as to professional conduct; that _____ he was certified to be of good moral character when licensed to practice law in said state. I do further certify that persons who have been licensed to practice law in North Carolina may be licensed to practice law in _____
(name of state from
_____ without undergoing a written bar examination.
which applicant comes)

Witness my hand, this the _____ day of _____, 19_____.

_____

Justice of the State of _____

I, Clerk of the _____ Court of the State of _____ do hereby certify that _____ is now and was at the time of signing the foregoing, _____ Justice of the State of _____ and that the foregoing, which purports to be his signature, is genuine.

Witness my hand and seal of said Court, this _____ day of _____, 19_____.

_____

Clerk of_____ Court of the

State of_____

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 10th day of November, 1982.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 10th day of November, 1982.

MARTIN, J.
For the Court

AMENDMENT TO
INTERNAL OPERATING PROCEDURES
MIMEOGRAPHING DEPARTMENT

The Internal Operating Procedures; Mimeographing Department, 295 NC 743-744 are hereby amended as follows:

"8. Until such time as the Court may order further, records, briefs, petitions, and any other documents which may be required by the Rules of Appellate Procedure or by order of the appropriate appellate court to be reproduced, shall be printed at a cost of $4.00 per printed page where the document is retyped and printed and at a cost of $1.50 per printed page where the Clerk determines that the document is in proper format and can be reproduced directly from the original."

By order of the Court in conference this 7th day of December 1982 to become effective 1 January 1983.

MARTIN, J.
For the Court

ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

Effective 18 October 1982, Canon 3A(7) of the Code of Judicial Conduct and Rule 15 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure, published in 276 N.C. at 740, are hereby suspended to and including 18 October 1984, and electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed on an experimental basis, in accordance with the terms of this order.

1. Definition.

The terms "electronic media coverage" and "electronic coverage" are used in the generic sense to include coverage by television, motion picture and still photography cameras, broadcast microphones and recorders.

2. Coverage allowed.

Electronic media and still photography coverage of public judicial proceedings shall be allowed in the appellate and trial courts of this state, subject to the conditions below.

(a) The presiding judge shall at all times have authority to prohibit or terminate electronic media and still photography coverage of public judicial proceedings.

(b) Coverage of the following types of judicial proceedings is expressly prohibited: adoption proceedings, juvenile proceedings, proceedings held before clerks of court, proceedings held before magistrates, probable cause proceedings, child custody proceedings, divorce proceedings, temporary and permanent alimony proceedings, proceedings for the hearing of motions to suppress evidence, proceedings involving trade secrets, and *in camera* proceedings.

(c) Coverage of the following categories of witnesses is expressly prohibited: police informants, minors, undercover agents, relocated witnesses, and victims and families of victims of sex crimes.

(d) Coverage of jurors is prohibited expressly at any stage of a judicial proceeding, including that portion of a proceeding during which a jury is selected. The trial judge shall inform all potential jurors at the beginning of the jury selection process of the restrictions of this particular provision which is designated 2(d).

3. Location of equipment and personnel.

(a) The location of equipment and personnel necessary for electronic media and still photographic coverage of trial proceedings shall be at a place either inside or outside the courtroom in such a manner that equipment and personnel are completely obscured from view from within the courtroom and not heard by anyone inside the courtroom.

(i) If located within the courtroom, this area must be set apart by a booth or other partitioning device constructed therein at the expense of the media. Such construction must be in harmony with the general architectural style and decor of the courtroom and must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(ii) If located outside the courtroom, any booth or other partitioning device must be built so that passage to and from the courtroom will not be obstructed. This arrangement must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(b) Appropriate openings to allow photographic coverage of the proceedings under these rules may be made in the booth or partitioning device, provided that no one in the courtroom will see or hear any photographic or audio equipment or the personnel operating such equipment. Those in the courtroom are not to know when or if any such equipment is in operation.

(c) Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the courtroom.

(d) Media personnel shall not exit or enter the booth area once the proceedings are in session except during a court recess or adjournment.

(e) Electronic media equipment and still photography equipment shall not be taken into the courtroom or removed from the designated media area except at the following times:

(i) prior to the convening of proceedings;

(ii) during the luncheon recess;

(iii) during any court recess with the permission of the trial judge; and

(iv) after adjournment for the day of the proceedings.

4. Official representatives of the media.

(a) This Court hereby designates the North Carolina Association of Broadcasters, the Radio and Television News Directors Association of the Carolinas, and the North Carolina Press Association, as the official representatives of the news media. The governing boards of these associations shall designate one person to represent the television media, one person to represent the radio broadcasters, and one person to represent still photographers in each county in which electronic media and still photographic coverage is desired. The names of the persons so designated shall be forwarded to the Senior Resident Superior Court Judge, the Director of the Administrative Office of the Courts, and the county manager or other official responsible for administrative matters in the county or municipality in which coverage is desired. Thereafter, these persons shall conduct all negotiations with the appropriate officials concerning the construction of the booths or partitioning devices referred to above. Such persons shall also be the only persons authorized to speak for the media to the presiding judge concerning the coverage of any judicial proceedings.

(b) It is the express intent and purpose of this rule to preclude judges and other officials from having to "negotiate" with various representatives of the news media. Since these rules require pooling of equipment and personnel, cooperation by the media is of the essence and the designation of three media representatives is expressly intended to prevent presiding judges from having to engage in discussion with others from the media.

5. Equipment and personnel.

(a) Not more than two television cameras shall be permitted in any trial or appellate court proceedings.

(b) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes, shall be permitted in any proceeding in a trial or appellate court.

(c) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup for all media purposes shall be accomplished with existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility,

microphones and related wiring essential for media purposes may be installed and maintained at media expense. The microphones and wiring must be unobtrusive and shall be located in places designated in advance of any proceeding by the Senior Resident Superior Court Judge of the judicial district in which the court facility is located. Such modifications or additions must be approved by the governing body of the county or municipality which owns the facility.

(d) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

(e) In no event shall the number of personnel in the designated area exceed the number necessary to operate the designated equipment or which can comfortably be secluded in the restricted area.

6. Sound and light criteria.

(a) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with the television camera.

(b) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with a still camera.

7. Courtroom light sources.

With the concurrence of the Senior Resident Superior Court Judge of the judicial district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense and provided such modifications or additions are approved by the governing body of the county or municipality which owns the facility.

8. Conferences of counsel.

To protect the attorney-client privilege and the right to counsel, there shall be no audio pickup or broadcast of con-

ferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, between adverse counsel, or between counsel and the presiding judge held at the bench.

9. Impermissible use of media material.

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent and collateral thereto, or upon any retrial or appeal of such proceedings.

This order shall be published in the Advance Sheets of the Supreme Court and of the Court of Appeals.

ADOPTED BY THE COURT IN CONFERENCE this 21st day of September, 1982.

Martin, J.
For the Court

MEMBERS AND OFFICERS OF THE NORTH CAROLINA SUPREME COURT, DIRECTORS OF THE ADMINISTRATIVE OFFICE OF THE COURTS, AND ATTORNEYS GENERAL OF NORTH CAROLINA

The following lists of additional members and officers of the North Carolina Supreme Court, Directors of the Administrative Office of the Courts, and Attorneys General of North Carolina supplement lists found in 270 N.C. 750-754.

Chief Justices

R. Hunt Parker 1966-1969
William H. Bobbitt 1969-1974
Susie M. Sharp 1975-1979
Joseph Branch 1979-

Associate Justices

William H. Bobbitt 1954-1969
Carlisle W. Higgins 1954-1974

* * *

Susie M. Sharp 1962-1975
I. Beverly Lake 1965-1978
J. Will Pless, Jr. 1966-1968
Joseph Branch 1966-1979
J. Frank Huskins 1968-1982
Dan K. Moore 1969-1978
J. William Copeland 1975-
James G. Exum, Jr. 1975-
David M. Britt 1978-1982
Walter E. Brock 1979-1980
J. Phil Carlton 1979-1983
Louis B. Meyer 1981-
Burley B. Mitchell, Jr. 1982-
Harry C. Martin 1982-
Henry E. Frye 1983-

Appellate Division Reporters

John M. Strong 1967-1968
Wilson B. Partin, Jr. 1968
Ralph A. White, Jr. 1968-

Clerks

Adrian J. Newton 1941-1976
John R. Morgan 1976-1981
J. Gregory Wallace 1981-

Marshals

Raymond Mason Taylor 1964-1977

Librarians

Raymond Mason Taylor 1964-1977
Frances H. Hall 1977-

Directors, Administrative Office of the Courts

J. Frank Huskins 1965-1968
Bert M. Montague 1968-1981
Franklin E. Freeman, Jr. 1981-

Attorneys General

Thomas Wade Bruton 1960-1969
Robert Morgan 1969-1974
James H. Carson, Jr. 1974-1975
Rufus L. Edmisten 1975-

INDEX TO MEMOIRS

This is the third Index to Memoirs found in the North Carolina Reports. Earlier indexes are printed at 206 NC 938 (1934) and 266 NC 807 (1966).

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

§ 4. Procedure, Hearings and Orders of Administrative Boards and Agencies

A report prepared by defendant agency's medical advisor evaluating plaintiff's medical evidence was admissible in an administrative hearing to determine whether defendant was entitled to Medicaid disability benefits. *Lackey v. Dept. of Human Resources*, 231.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability

The trial court's order allowing summary judgment for fewer than all of the defendants affected a substantial right of plaintiff and was immediately appealable because of the possibility of inconsistent verdicts in separate trials. *Bernick v. Jurden*, 435.

§ 6.3. Appeals Based on Jurisdiction

The denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable. *Teachy v. Coble Dairies, Inc.*, 324.

ARBITRATION AND AWARD

§ 1. Arbitration Agreements

In the absence of court proceedings, parties may settle their disputes as to alimony, custody and child support by arbitration, but once the issues are brought into court, the court may not delegate its duty to resolve those issues to arbitration. *Crutchley v. Crutchley*, 518.

ARREST AND BAIL

§ 3.4. Legality of Arrest for Narcotics Offense

The Court of Appeals erred in relying on the presumption of regularity of search warrants not introduced into evidence in holding the defendant's motion to suppress should have been denied since defendant challenged the initial seizure of his person. *S. v. Lombardo*, 594.

ARSON AND OTHER BURNINGS

§ 2. Indictment

Defendant could properly be indicted under G.S. 14-62 for the burning of a tobacco barn and a tobacco storage building rather than under the provisions of G.S. 14-64 relating to the burning of a tobacco house. *S. v. Vickers*, 90.

§ 4.1. Cases Where Evidence Sufficient

Common law arson results from the burning of a dwelling even though its occupants are temporarily absent at the time of the burning. *S. v. Vickers*, 90.

The trial court erred in denying defendant's motion to dismiss the charge of wantonly and willfully burning her dwelling house at the close of all the evidence since there was no substantial evidence of willfulness and wantonness. *S. v. Brackett*, 138.

AVIATION

§ 2. Liabilities in Operation of Airport

Inverse condemnation is the sole remedy for recovery by a landowner harmed by aircraft overflights involving an airport owned and operated by a city or county. *Long v. City of Charlotte*, 213.

Recovery in an inverse condemnation action is not limited to those property owners residing directly beneath aircraft flight paths. *Ibid.*

The measure of damages in an inverse condemnation action is the difference in the fair market value of the property immediately before and immediately after the taking. *Ibid.*

Evidence of plaintiffs' stress, anxiety, fear, annoyance and loss of sleep would be admissible in an inverse condemnation action to prove the cause and extent of the diminution in value of their real property. *Ibid.*

Trial court properly struck allegations as to punitive damages in an inverse condemnation action against a municipality. *Ibid.*

Trial court properly denied defendant city's motion to dismiss plaintiffs' inverse condemnation action for failure to comply with the provisions of G.S. 136-111. *Ibid.*

The trustee and holder of a note secured by a deed of trust on the property in question were necessary parties in an inverse condemnation action. *Ibid.*

BAILMENT

§ 3.1. Actions Against Bailee Generally

In a bailor's action to recover damages for the theft of his motorcycle from a bailee's premises, the trial court erred in giving the jury instructions which implied that the absence of a statutory duty requiring defendant to take particular security measures or establishing a standard of care was relevant in determining whether defendant had met his duty of care under negligence principles. *Smith v. McRary*, 664.

§ 3.3. Sufficiency of Evidence in Action Against Bailee

Plaintiff bailor of a motorcycle failed to offer sufficient evidence of an express or implied contract that defendant bailee would repair and store his motorcycle only in his main building so as to render defendant liable under a contract theory for the loss of plaintiff's motorcycle by theft from a smaller building behind the main building. *Smith v. McRary*, 664.

BASTARDS

§ 10. Civil Paternity Suit

There is no *per se* constitutional right to appointed counsel for an indigent defendant in a civil paternity suit; however, when an indigent defendant moves for the appointment of counsel in a certain civil paternity suit, the trial judge shall determine in the first instance what true fairness requires in light of all the circumstances. *Carrington v. Townes*, 333.

BILLS OF DISCOVERY

§ 6. Discovery in Criminal Cases

In a prosecution for first degree murder in which four witnesses testified that a ring found in one victim's body belonged to defendant, the trial court did not err

CRIMINAL LAW — Continued

§ 15.1. Venue

Trial court did not abuse its discretion in the denial of defendant's motion for a change of venue based upon pretrial newspaper publicity. S. v. Dobbins, 342.

§ 21.1. Preliminary Hearing

Defendant's arraignment was not illegal because the proceedings were remanded for findings of fact by the district court concerning the reasons for the continuance of his probable cause hearing, and defendant's rights were not violated by the elimination of the probable cause hearing because of an imminent indictment. *S. v. Brown*, 151.

§ 22. Arraignment

Defendant was not denied a fair trial because he did not personally sign the written waiver of formal arraignment in accordance with G.S. 15A-945. *S. v. Andrews*, 144.

§ 26.3. Plea of Former Jeopardy; Same Offense

A defendant who took money belonging to an ABC store and money belonging to the store manager by threatening the life of the manager with a firearm could lawfully be convicted of the armed robbery of either the store or the manager but not both. *S. v. Beaty*, 491.

§ 26.5. Former Jeopardy; Same Acts Violating Different Statutes

Double jeopardy considerations do not prohibit the punishment of a defendant for both larceny and possession of the same stolen property. *S. v. Andrews*, 144.

Even if the acts of defendant violated both the child abuse statute and the assault with a deadly weapon inflicting serious injury statute, neither crime is a lesser included offense of the other, and a conviction or acquittal of one will not support a plea of former jeopardy against a charge for a violation of the other. *S. v. Walden*, 466.

§ 26.8. Former Jeopardy; Nolle Prosequi or Mistrial

A note from the foreman of the jury to the trial judge stating that the jury was deadlocked seven to five in favor of a verdict of guilty of second degree murder did not constitute an implied acquittal of defendant of first degree murder so as to prohibit the retrial of defendant on that charge under double jeopardy principles. *S. v. Booker*, 302.

§ 34. Evidence of Defendant's Guilt of Other Offenses; Inadmissibility

In a prosecution for armed robbery, the trial court erred in admitting evidence relating to defendant's commission of a crime other than the one for which he was being tried. *S. v. Breeden*, 533.

§ 34.5. Other Offenses to Show Identity of Defendant

In a prosecution of defendant as an aider and abettor for assault on her child, evidence that the actual assailant had committed other attacks against defendant's children in the presence of defendant was competent to show the identity of the child's attacker and to make out the res gestae. *S. v. Walden*, 466.

§ 40.2. Defendant's Motion for Transcript of Prior Trial

An indigent defendant's Fourteenth Amendment equal protection rights were violated by the trial court's denial of his motion that he be provided a free transcript of his first trial which ended in a mistrial on the ground that the motion was not timely made. *S. v. Rankin*, 712.

CRIMINAL LAW — Continued

§ 43.4. Gruesome or Inflammatory Photographs

The admission of two photographs of a rape victim's genitalia to illustrate testimony concerning the victim's injuries was not prejudicial to defendant. *S. v. Dobbins*, 342.

§ 53. Medical Expert Testimony in General

A doctor's testimony concerning what was observed on stain slides made from liquid from the prosecuting witness's vagina and from a liquid discharge from defendant's penis was hearsay and was not admissible to show the basis for the doctor's opinion. *S. v. Wood*, 510.

A medical expert was properly permitted to give his opinion concerning injuries to a child based on facts which he himself had observed during his examination of the child. *S. v. Walden*, 466.

§ 58. Evidence in Regard to Handwriting

The trial court properly permitted the jury to compare known samples of defendant's handwriting with the signature on a charter agreement without the aid of competent opinion testimony to determine whether defendant signed the charter agreement. *S. v. LeDuc*, 62.

§ 61.2. Evidence Concerning Footprints or Shoeprints

An officer was properly permitted to give lay opinion testimony concerning the similarity of shoeprints found at the crime scene and the design on the sole of the tennis shoes defendant was wearing at the time of his arrest. *S. v. Pratt*, 673.

§ 62. Lie Detector Tests

The trial court erred in admitting into evidence the results of a polygraph examination administered to defendant since a stipulation authorizing the examination was not complied with. *S. v. Meadows*, 683.

Where evidence of a polygraph examination was admitted into evidence, the trial court erred in stating to the jury that it "may consider it along with all the other facts and circumstances in determining the defendant's guilt or innocence . . . ." *Ibid.*

§ 64. Evidence as to Intoxication

In a prosecution for first degree murder, the trial court properly excluded questions which were not competently framed to elicit a witness's opinion about defendant's general intoxication. *S. v. Pinch*, 1.

§ 66.1. Identity by Sight; Opportunity of Witness for Observation

Trial court's findings of fact were sufficient to show that a reasonably credible identification of defendant by a rape and robbery victim was possible. *S. v. Dobbins*, 342.

A robbery victim had a sufficient opportunity to observe defendant so that his in-court identification of defendant was of independent origin and not tainted by any unnecessarily suggestive pretrial photographic identification. *S. v. Beaty*, 491.

§ 66.4. Lineup Identification

Defendant had no right under G.S. 15A-281 to demand a lineup when the State had taken a voluntary dismissal of the charges against him. *S. v. Jackson*, 642.

§ 66.12. Confrontation in Courtroom

A "confrontation" when two State's witnesses saw defendant being led in handcuffs from the lockup beside the courtroom down a hall did not taint subsequent

CRIMINAL LAW -- Continued

photographic and physical lineup identifications by those two witnesses. *S. v. Jackson*, 642.

§ 66.18. Voir Dire to Determine Competency of In-Court Identification

The trial court erred in summarily denying defendant's motions to suppress the in-court identification by three witnesses. *S. v. Breeden*, 533.

The trial court erred in denying defendant's motion to suppress the in-court identification by a witness, who defendant contended had given a pretrial identification as the result of impermissibly suggestive out-of-court identification procedures, for failure of proof. *Ibid.*

§ 68. Other Evidence of Identity

The trial court properly admitted expert testimony that pubic hairs taken from a rape victim and pubic hair samples obtained from defendant were "microscopically consistent." *S. v. Pratt*, 673.

§ 73.1. Admission of Hearsay Statement as Harmless Error

The court erred in allowing an expert in the field of forensic serology to testify that someone at R. J. Reynolds Company told him that a figure of a small pine tree found on a cigarette butt found at a crime scene was "a registered trademark for their products"; however, given the overwhelming evidence pointing to defendant's guilt, it was not prejudicial. *S. v. Powell*, 718.

§ 75. Voluntariness of Confession in General

Failure to advise a defendant of the nature of the charge about which he is being questioned does not render his confession inadmissible. Neither is a defendant's statement inadmissible on the ground that it was written by an officer and merely signed by the defendant. *S. v. Schneider*, 351.

§ 75.1. Effect on Confession of Delay in Arraignment

Defendant's confession was not inadmissible on the ground that he was not taken before a judicial official without unnecessary delay pursuant to G.S. 15A-501(2) since that statute is predicated upon an "arrest," and defendant was not arrested until after he confessed. *S. v. Beaty*, 491.

§ 75.2. Effect of Promises, Threats or Other Statements of Officers

An interrogating officer's statement that defendant "would feel better if he got it off his chest" did not constitute an improper inducement which rendered defendant's confession inadmissible. *S. v. Booker*, 302.

Defendant's confession was not rendered involuntary by the length of time he was questioned absent some deprivation or abuse. *Ibid.*

Defendant's confession was not improperly coerced and rendered involuntary by the fear that his father would be implicated in the theft under investigation. *S. v. Branch*, 101.

An officer's statement that "we would talk with the District Attorney if he made a statement which admitted his involvement" did not render defendant's confession involuntary. *Ibid.*

§ 75.3. Effect of Confronting Defendant With Evidence

Defendant was not improperly induced to confess by being confronted with the results of a ballistics test which tended to show that the fatal shots were fired from a pistol which had been in his possession. *S. v. Booker*, 302.

CRIMINAL LAW — Continued

§ 75.8. Warnings of Constitutional Rights Before Resumption of Questioning

Defendant's confession to an officer after he had previously been questioned by another officer who had given him the Miranda warnings was not rendered involuntary and inadmissible by reason of the failure of the second officer to repeat the Miranda warnings before questioning defendant. *S. v. Branch*, 101.

§ 75.11. Waiver of Constitutional Rights During Interrogation

Where defendant was advised of his constitutional rights and, during a general conversation on the way to jail, a deputy sheriff commented that he could not understand why defendant did it, defendant in effect waived his right to counsel when he stated that "these people down here in this community have been wanting to get rid of me for a long time, so I thought I'd give them a reason." *S. v. Vickers*, 90.

§ 75.14. Mental Capacity to Confess

The evidence was sufficient to support the trial court's determination that defendant had the mental capacity to waive his constitutional rights and to make incriminating statements, although the evidence did indicate that defendant had a history of psychiatric treatment. *S. v. Vickers*, 90.

§ 76.5. Voir Dire Hearing for Confession; Necessity for Findings

The trial court in a prosecution for first degree murder and armed robbery erred in failing to make findings of fact resolving the conflicting voir dire testimony concerning alleged improper actions by officers during interrogation. *S. v. Booker*, 302.

§ 80.1. Records and Other Writings

In a prosecution for first degree rape, a doctor's testimony that stain slides taken from samples provided by the prosecuting witness and the defendant revealed the presence of gonococcus bacteria was not admissible under the business records exception. *S. v. Wood*, 510.

§ 84. Evidence Obtained by Unlawful Means

The Court of Appeals erred in relying on the presumption of regularity of search warrants not introduced into evidence in holding the defendant's motion to suppress should have been denied since defendant challenged the initial seizure of his person. *S. v. Lombardo*, 594.

§ 86.5. Impeachment of Defendant; Particular Questions and Evidence as to Specific Acts

Cross-examination of defendant as to whether he had robbed other liquor stores and whether he had admitted those robberies to law officers was not tantamount to a suggestion that he had been arrested or indicted for such offenses and was admissible for impeachment purposes. *S. v. Beaty*, 491.

§ 87.2. Leading Questions

A question asked by the State's attorney on direct examination of a rape victim was not impermissibly leading. *S. v. Thompson*, 526.

§ 89.4. Impeachment of Witness by Prior Inconsistent Statements

In a rape case in which the prosecutrix testified in district court that she had sex on the night of the alleged rape with defendant's roommate, the rape victim shield statute did not prohibit defendant from impeaching the credibility of the prosecutrix by cross-examining her about a prior inconsistent statement she had

CRIMINAL LAW — Continued

made to the examining physician that she was sexually active with a boyfriend and last had sex one month prior to the alleged crime. *S. v. Younger*, 692.

§ 91. Speedy Trial

An offense of child abuse and an assault were not a "series of acts" or a "single scheme or plan" within the meaning of G.S. 15A-701(a)(1) so as to require the assault trial to take place within 120 days of the original child abuse charge, and the assault trial properly began within 120 days of the indictment on that charge. *S. v. Walden*, 466.

§ 91.4. Continuance Generally

The trial court did not err in failing to grant defendant's motion for continuance made after the jury was selected but prior to impanelment where the reason for the motion was that defendant should have a neurological examination. *S. v. Schneider*, 351.

§ 91.4. Continuance on Ground of Absence of Counsel

The trial court did not abuse its discretion in denying the defendant's motion to continue based upon the absence of one of defendant's two attorneys for the closing arguments. *S. v. Weaver*, 629.

§ 91.7. Continuance on Ground of Absence of Witness

The trial court did not abuse its discretion in the denial of defendant's belated motion for a continuance until certain witnesses could be contacted. *S. v. Branch*, 101.

§ 97.1. Permitting Additional Evidence

The trial court did not abuse its discretion in allowing the State to reopen its case to present further testimony after defendant's argument to the jury. *S. v. Jackson*, 642.

§ 99.9. Examination of Witnesses by Court

The trial court did not express an opinion in asking questions to clarify the testimony of a salesman at a business where a robbery occurred concerning the ownership of money taken from his possession during the robbery. *S. v. Jackson*, 642.

§ 102.1. Scope of Argument to Jury

The district attorney's remarks to the jury concerning (1) defendant's pleasure in killing, (2) what defendant must have been thinking before he shot the victims, and (3) "comparisons" between defendant and animals were either entirely warranted by the evidence or not prejudicial. *S. v. Pinch*, 1.

§ 102.6. Particular Comments in Argument to Jury

In a prosecution for first degree murder, the district attorney correctly conveyed the substance of the law and the evidence of defendant's intoxication defense to the jury. *S. v. Pinch*, 1.

§ 106.2. Nonsuit Where There Is Circumstantial Evidence

In circumstantial evidence cases inferences may not be built upon inferences in order for the fact-finder to reach the ultimate facts upon which guilt must be premised. *S. v. LeDuc*, 62.

CRIMINAL LAW — Continued

§ 111. Form of Instructions in General

In a prosecution for first degree murder, the trial court did not err by failing to submit its charge to the jury in writing as requested by defendant. *S. v. Brown*, 151.

§ 113.3. Charge on Subordinate Feature; Request for Instructions Required

The trial judge did not abuse his discretion by instructing on the consequences of acquitting defendant by reason of insanity without request by defendant. *S. v. Harris*, 724.

§ 114.3. No Expression of Opinion in Instructions

The trial court did not impermissibly express its opinion by refusing to grant the defendant's request that he be referred to by his name and not as "the defendant." *S. v. Brown*, 151.

§ 117. Charge on Character Evidence

Where the defendant did not introduce character evidence, but only offered several witnesses' personal opinions of the defendant, the trial court did not err in failing to charge the jury on the issue of his good character. *S. v. Brown*, 151.

§ 117.2. Charge on Interested Witnesses

There was no violation of G.S. § 15A-1222 in the trial court's charge to the jury on the possible interest, bias, or prejudice of all the witnesses. *S. v. Powell*, 718.

§ 120. Instruction on Consequences of Verdict

In a prosecution for murder where the defendant used the insanity defense, an instruction that if defendant was acquitted by reason of insanity, he would not be released but would be held in custody until a hearing could be held to determine whether he should be confined to a state hospital was an instruction which was in sufficient detail to meet the requirements of prior case law and G.S. 122-84.1. *S. v. Harris*, 724.

§ 121. Instructions on Entrapment

In a prosecution for felonious possession of a stolen automobile which was sold by defendant to a police-organized undercover fencing operation, defendant was not entitled to an instruction on the defense of entrapment by an agent of the police where an unwitting third party, presented with an opportunity to commit the offense by an undercover police officer, induced defendant's participation in the offense without specific direction of the officer. Nor was defendant entitled to the general entrapment instruction for the reason that the evidence established that he was not an innocent victim without predisposition to commit the crime. *S. v. Luster*, 566.

§ 126.2. Inquiry to Clarify Verdict

The Supreme Court will not adopt a rule requiring the trial court to determine whether the jury had voted unanimously for acquittal on any of the included offenses when the jury indicates to the court that it cannot reach a unanimous verdict. *S. v. Booker*, 302.

§ 134.2. Time and Procedure for Imposition of Sentence Generally

Where defendant was convicted of a first-degree sexual offense and first-degree burglary and where defendant could not have received a shorter sentence, he was not prejudiced by the failure to postpone sentencing for a pre-sentence

CRIMINAL LAW — Continued

diagnostic study, neurological examination, and a full scale plenary hearing. *S. v. Schneider*, 351.

§ 135.3. Exclusion of Veniremen Opposed to Death Penalty

The trial court properly excused eight prospective jurors for cause due to their stated opposition to the death penalty. *S. v. Pinch*, 1.

§ 135.4. Sentence in First Degree Murder Cases

In a prosecution for first degree murder in which defendant was tried and convicted on the basis of premeditation and deliberation, the trial court did not err in submitting the aggravating circumstances that the murders were "especially heinous, atrocious and cruel." *S. v. Brown*, 151.

The trial court did not err in refusing to submit mitigating circumstances that (1) the defendant did not act in a calculated manner, (2) the defendant did not act for pecuniary gain, and (3) the defendant was under the influence of mental or emotional disturbance. *Ibid.*

Testimony by a fellow prisoner that defendant told the prisoner that he had murdered two people using a knife and that he did not understand why his ring was not given back to him was admissible at the sentencing phase of defendant's trial even though it had not been presented during the guilt determination phase of the case. *Ibid.*

The trial court did not err in the sentencing phase of a trial for first degree murder by refusing to allow the defendant to question the assistant district attorney on voir dire concerning promises made by the State to the witnesses who testified only at the sentencing phase. *Ibid.*

In the sentencing phase of a trial for first degree murder, where the jury, after some deliberation, inquired of the court concerning the chances for parole from the life sentence, the court properly instructed the jury that "the question of eligibility for parole is not a proper matter for you to consider in recommending punishment." *Ibid.*

The trial court's submission of each of the two killings for which defendant had been tried as an aggravating circumstance for the other under the "course of conduct" provision of G.S. 15A-2000(e)(11) did not violate double jeopardy. *Ibid.*

The trial court did not commit prejudicial error by submitting an aggravating circumstance which was not listed by the State in its response to defendant's motion for a bill of particulars. *Ibid.*

The trial court did not err in instructing the jury that it *must* recommend that defendant be sentenced to death if it found that the aggravating circumstances outweighed the mitigating circumstances. *Ibid.*

The trial court did not err in denying defendant's request to charge that a sentence of life imprisonment would be imposed in the event that the jury failed to reach a unanimous agreement on the proper sentence. *Ibid.*

Upon reviewing the record as required by G.S. 15A-2000(d)(2), the Court concluded that the sentence of death imposed was not disproportionate or excessive considering both the crime and the defendant. *Ibid.*

The trial court did not commit prejudicial error by excluding testimony about defendant's current feelings of remorse over the victims' deaths, about the circumstances of defendant's various hospitalizations for drug overdoses, and testimony concerning defendant's ability to adjust to life in prison in defendant's sentencing hearing after being convicted of two first degree murders. *S. v. Pinch*, 1.

CRIMINAL LAW — Continued

In order for a defendant to demonstrate reversible error in the trial court's omission or restriction of a statutory or timely requested mitigating circumstance in a capital case, he must affirmatively establish three things: (1) that the particular factor was one which the jury could have reasonably deemed to have mitigating value; (2) that there was sufficient evidence of the existence of the factor; and (3) that the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant. *Ibid.*

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). *Ibid.*

The statutes do not require the jury to specify in the sentencing phase of a trial which mitigating circumstances it found. *Ibid.*

The trial court correctly advised the jury that it had a duty to recommend a death sentence if it found three enumerated things and that it had a duty to recommend a sentence of life imprisonment if it did not find any one of those three things. *Ibid.*

The trial court correctly instructed the jury upon the statutory aggravating circumstance of G.S. 15A-2000(e)(9) that the murders were "especially heinous, atrocious, or cruel." *Ibid.*

In a prosecution for first degree murder, the sentence of death was not, as a matter of law, "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Ibid.*

§ 141.1. Sentence for Repeated Offenses; Manner of Determining Prior Convictions

Statutes requiring a special indictment charging defendant with a previous conviction to be filed with the principal pleading and requiring that defendant be arraigned on the special indictment prior to the close of the State's case did not apply in an armed robbery case since the armed robbery statute made no distinction between first and second offenders in terms of the punishment they might receive. *S. v. Jackson*, 642.

§ 143. Revocation of Probation

G.S. 15A-1343(b)(15) does not extend to prohibit evidence obtained from an unlawful search from being admitted into evidence at a probation revocation hearing. *S. v. Lombardo*, 594.

§ 143.5. Competency of Evidence in Probation Revocation Hearing

The Court expressly overruled State v. McMilliam, 243 N.C. 775 (1956) and held that evidence which does not meet the standards of the Fourth and Fourteenth Amendments to the United States Constitution may be admitted in a probation revocation hearing. *S. v. Lombardo*, 594.

§ 157.2. Effect of Omission of Necessary Part of Record

In a prosecution for first degree murder, the trial court erred in not allowing a witness to answer for the record a question concerning the number of people who may have seen the victim alive after a certain time. *S. v. Brown*, 151.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

In light of conflict in identification testimony by the State's witness and testimony by defendant's witnesses which corroborated defendant's assertion that he was not the guilty party, a doctor's testimony that fluid samples taken shortly

EMINENT DOMAIN — Continued

§ 5.10. Entitlement to Interest

Where the condemnor in a Chapter 40 condemnation proceeding voluntarily chose not to pay the amount of the commissioner's award into court, respondents are entitled to interest on the jury award from the date the commissioner's report was filed to the date the condemnor paid the amount of the judgment entered on the jury verdict. *Airport Authority v. Irvin*, 263.

§ 13. Actions by Owner for Compensation

Inverse condemnation is the sole remedy for recovery by a landowner harmed by aircraft overflights involving an airport owned and operated by a city or county. *Long v. City of Charlotte*, 187.

Recovery in an inverse condemnation action is not limited to those property owners residing directly beneath aircraft flight paths. *Ibid.*

The trustee and holder of the note secured by a deed of trust on the property in question were necessary parties in an inverse condemnation action. *Ibid.*

§ 13.3. Pleadings in Action by Owner

Trial court properly struck allegations as to punitive damages in an inverse condemnation action against a municipality. *Long v. City of Charlotte*, 187.

Trial court properly denied defendant city's motion to dismiss plaintiffs' inverse condemnation action for failure to comply with the provisions of G.S. 136-111. *Ibid.*

§ 13.4. Evidence in Action by Owner

Evidence of plaintiffs' stress, anxiety, fear, annoyance and loss of sleep would be admissible in an inverse condemnation action to prove the cause and extent of the diminution in value of their real property. *Long v. City of Charlotte*, 187.

ESTOPPEL

§ 4.6. Conduct of Party Asserting Estoppel; Reliance

A state governmental unit which hired a CETA employee and paid workers' compensation premiums for the employee, and the insurance carrier which accepted payment of those premiums, will be estopped from denying coverage of the CETA employee's work-related accident. *Godley v. County of Pitt*, 357.

§ 4.7. Sufficiency of Evidence of Estoppel

In an action stemming from a 1960 lease of undeveloped land which was entered into by defendant and the deceased for whom plaintiff bank is executor of his estate, the trial court erred in submitting the theory of equitable estoppel as an issue for the jury's consideration in determining whether defendant properly exercised an option to extend the lease. *Wachovia Bank v. Rubish*, 417.

EVIDENCE

§ 11.8. Waiver of Right to Rely on Dead Man's Statute

In an action stemming from a lease between defendant and deceased for whom plaintiff is executor of his estate, the Dead Man's Act, G.S. 8-51, did not preclude defendant from testifying about certain "personal transaction[s]" he had with deceased since plaintiff first "opened the door" by offering evidence about certain transactions between defendant and deceased. *Wachovia Bank v. Rubish*, 417.

EXECUTORS AND ADMINISTRATORS

§ 3. Appointment of Ancillary Administrators

Where the original pleading in a wrongful death action instituted by a foreign administratrix who had not qualified locally gave notice of the transactions and occurrences upon which the claim was based, plaintiff was entitled to file a supplemental pleading to show due qualification locally as ancillary administratrix occurring after the statute of limitations had run and to have the pleading relate back to the commencement of the action so that the claim was not time barred. *Burcl v. Hospital*, 214.

FRAUDS, STATUTE OF

§ 1. Nature and Operation Generally

In an action stemming from a lease for an initial period of 10 years but with options to extend that period for 6 additional 5-year periods, the trial court erred in excluding the testimony of several witnesses that the owner of the property had said defendant had a "40-year lease" on the ground that it was barred by the statute of frauds. *Wachovia Bank v. Rubish*, 417.

HOMICIDE

§ 15. Competency of Evidence Generally

In a prosecution for first degree murder, the trial court properly excluded questions which were not competently framed to elicit a witness's opinion about defendant's general intoxication. *S. v. Pinch*, 1.

§ 18. Evidence of Premeditation and Deliberation

In a prosecution for first degree murders, the nature and number of the victims' wounds were one circumstance from which inference of premeditation and deliberation could be drawn. *S. v. Brown*, 151.

§ 19.1. Evidence of Character or Reputation

Trial court properly refused to permit defense counsel to cross-examine a State's witness concerning a murder victim's reputation for violence where defendant did not know the victim prior to the altercation in question. *S. v. Cooke*, 117.

§ 20.1. Photographs

In a prosecution for first degree murder, the trial court properly admitted into evidence ten photographs of the victims' bodies to illustrate the testimony of a forensic pathologist who had performed autopsies on the bodies. *S. v. Pinch*, 1.

§ 21.1. Sufficiency of Evidence Generally

The evidence was sufficient to overcome defendant's motion to dismiss the charge of attempted murder. *S. v. Gilley*, 125.

§ 21.7. Sufficiency of Evidence of Second Degree Murder

The State's evidence was sufficient in a prosecution of defendant for second degree murder by stabbing the victim with a knife. *S. v. Cooke*, 117.

§ 24.2. Defendant's Burden of Overcoming Presumption of Malice

The trial court did not err in its final instructions by stating that the elements of malice and unlawfulness were implied in an intentional killing with a deadly weapon where the defendant conceded his guilt of the second degree murders and admitted "the intentional killing and the malice involved in" the murders. *S. v. Pinch*, 1.

HOMICIDE — Continued

§ 28.3. Instructions on Self-Defense; Use of Excessive Force

The trial court in a homicide prosecution sufficiently charged the jury on defendant's imperfect right of self-defense. *S. v. Cooke*, 117.

JURY

§ 6. Voir Dire Examination; Practice and Procedure

Defendant's contention that in a capital case an individual voir dire of the jury should be allowed in order for defendant to receive a fair trial was overruled. *S. v. Brown*, 151.

§ 7.13. Number of Peremptory Challenges

A defendant charged with two capital offenses should not be given additional peremptory challenges. *S. v. Brown*, 151.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

The evidence including a positive voice identification of defendant, was sufficient for the jury to find that defendant was the perpetrator of two kidnappings. *S. v. Pratt*, 673.

Defendant did not qualify for mitigated punishment under G.S. 14-39(b) for two kidnappings where the trial court found that defendant sexually assaulted the female victim and that the male victim was not released by defendant in a safe place. *Ibid.*

In a prosecution for kidnapping, among other crimes, the trial judge properly denied defendant's motion to dismiss at the close of the State's evidence. *S. v. Thompson*, 526.

LARCENY

§ 1. Elements of the Crime

The Legislature did not intend to punish a defendant for both larceny and possession of the same stolen property. *S. v. Andrews*, 144.

LIMITATION OF ACTIONS

§ 4.1. Accrual of Tort Cause of Action

For products liability claims to which the six-year statute of repose of G.S. 1-50(6) applies, the plaintiff must prove the condition precedent that the cause of action was brought no more than six years after the date of initial purchase of the product and must also meet the time limitation of the applicable procedural statute of limitations. However, the legislature did not intend the statute to be retrospectively applied to causes of action that had accrued before its effective date of 1 October 1979. *Bolick v. American Barmag Corp.*, 364.

§ 4.6. Accrual of Cause of Action for Particular Contracts

The time of accrual of plaintiff hockey player's claims for breach of warranties of an allegedly defective mouthguard was governed by former G.S. 1-15(b), and the period from accrual within which to bring the action was three years as provided in G.S. 1-52(1). *Bernick v. Jurden*, 435.

MASTER AND SERVANT

§ 50. Independent Contractors

In a workers' compensation proceeding where plaintiff received an injury while repairing a truck he both leased to defendant and drove for defendant, the injury was compensable as arising out of and in the course of employment. *Hoffman v. Truck Lines, Inc.*, 502.

§ 51. Employees of the State and Political Subdivisions

A state governmental unit which hired a CETA employee and paid workers' compensation premiums for the employee, and the insurance carrier which accepted payment of those premiums, will be estopped from denying coverage of the CETA employee's work-related accident. *Godley v. County of Pitt*, 357.

§ 55.6. Injury in the Course of Employment

Where plaintiff mortician was injured when his automobile rolled over him once he had returned to his home after completing a special errand for his employer, his injury was covered under the Workers' Compensation Act. *Powers v. Lady's Funeral Home*, 728.

§ 56. Causal Relation Between Employment and Injury

Under G.S. 97-12, for the claimant's injuries to be proximately caused by her actions, the willful intention of the claimant must be more than *a* cause of her injuries; however, it need not be the *sole* cause. *Rorie v. Holly Farms*, 706.

§ 57. Willful Act of Injured Employee

In a workers' compensation case there was ample evidence to support the Industrial Commission's finding that plaintiff's mother acted with the willful intent to injure another which barred recovery. *Rorie v. Holly Farms*, 706.

§ 60. Injuries While Performing Service Outside Regular Duties

The Industrial Commission erred in determining decedent's accident involving a forklift did not arise out of and in the course of the deceased employee's employment where the employee's election to disobey a prior given order did not break the causal connection between his employment and his fatal injury since the disobedient act was reasonably related to the accomplishment of the task for which he was hired. *Hoyle v. Isenhour Brick and Tile Co.*, 248.

§ 62. Injuries on Way to or from Work

Where plaintiff mortician was injured when his automobile rolled over him once he had returned to his home after completing a special errand for his employer, his injury was covered under the Workers' Compensation Act. *Powers v. Lady's Funeral Home*, 728.

§ 68. Occupational Diseases

The Commission and the Court of Appeals erred in finding as fact and concluding as law that the respiratory surfaces of the lungs are not "external contact surfaces" of the body within the meaning of the version of G.S. 97-53(13) in effect at the time plaintiff was disabled on 5 January 1963. *Taylor v. Cone Mills*, 314.

§ 79. Persons Entitled to Compensation Payment

G.S. 97-38 does not require a reapportionment of the entire amount of payable death benefits among the remaining dependent children in equal shares as each child reaches the age of 18 after the expiration of the initial compensation period of 400 weeks. *Deese v. Lawn and Tree Expert Co.*, 275.

MORTGAGES AND DEEDS OF TRUST

§ 15. Transfer of Mortgaged Property

Provisions in a note and deed of trust on residential property constituted a valid due-on-sale clause which could properly be used by the lender to require a transferee of the security property to pay an increased rate of interest in order to assume the loan on the property. *In re Foreclosure of Bonder*, 451.

MUNICIPAL CORPORATIONS

§ 2.1. Compliance With Statutory Annexation Requirements

G.S. § 160A-47(3) requires municipalities to include in their annexation reports plans to extend into the area proposed to be annexed only those municipal services specifically enumerated in the statute, and the statute does not require inclusion of plans for the extension of transit service and CATV service into an area proposed for annexation. *Cockrell v. City of Raleigh*, 479.

§ 2.3. Other Annexation Requirements

In order to establish noncompliance with G.S. § 160A-36(d), petitioners had to show two things: (1) that the boundary of the annexed area did not follow natural topographic features, and (2) that it would have been practical for the boundary to follow such features. *Greene v. Town of Valdese*, 79.

§ 2.4. Remedies to Attach Annexation

Petitioners had no standing to question the constitutionality of the town's agreement with two corporations concerning a delay in annexation of their property where petitioners failed to allege some direct injury in fact. *Greene v. Town of Valdese*, 79.

§ 2.6. Extension of Utilities to Annexed Area

The failure of the City of Raleigh to comply with its own policy for extending water service did not invalidate an annexation. *Cockrell v. City of Raleigh*, 479.

The trial court properly found that a town's plan for extending sewer services to an annexed area complied with the statutory requirements. *Greene v. Town of Valdese*, 79.

NARCOTICS

§ 4. Sufficiency of Evidence of Narcotics Offenses

The State's evidence was insufficient to support a jury verdict finding defendant guilty of conspiracy to possess 22.4 pounds of marijuana where a finding of defendant's guilt required inferences upon inferences. *S. v. LeDuc*, 62.

NEGLIGENCE

§ 27.1. Evidence of Insurance

In plaintiff bailor's action to recover damages for the theft of his motorcycle from defendant bailee's premises, plaintiff's testimony that defendant, on an occasion before the instant bailment, told him that he had insurance to cover any theft was properly excluded by the trial court. *Smith v. McRary*, 664.

PARENT AND CHILD

§ 1. Creation and Termination of Relationship

The provisions of G.S. 7A-289.32(2) and (3), and G.S. 7A-278(4) are not unconstitutionally vague. *In re Moore*, 394.

In a proceeding to terminate parental rights, the evidence showing that the children were "neglected" as that term is defined by G.S. 7A-517(21) was overwhelming. *Ibid.*

In a proceeding to terminate parental rights, the trial court properly found that respondent willfully left the children in foster care for more than two years and substantial progress was not made to the court's satisfaction in correcting the conditions which led to the removal of the children. *Ibid.*

In a proceeding to terminate parental rights, the trial court properly found that respondent had failed for a period of six months to pay a reasonable portion of the cost of her children's care. *Ibid.*

§ 2.1. Liability of Parent for Injury to Child

A mother could be found guilty of assaulting her child on a theory of aiding and abetting solely on the basis that she was present when her child was assaulted but failed to take reasonable steps to prevent the assault. *S. v. Walden*, 466.

§ 2.2. Child Abuse

Even if the acts of defendant violated both the child abuse statute and the assault with a deadly weapon inflicting serious injury statute, neither crime is a lesser included offense of the other, and a conviction or acquittal of one will not support a plea of former jeopardy against a charge for a violation of the other. *S. v. Walden*, 466.

§ 8. Liability of Parent for Torts of Child

The parent of an unemancipated child may be held liable in damages for failing to exercise reasonable control over the child's behavior if the parent had the ability and the opportunity to control the child and knew or should have known of the necessity for exercising such control. *Moore v. Crumpton*, 618.

Summary judgment was properly entered in favor of defendant parents in an action to recover damages for their unemancipated son's rape of plaintiff after he had used alcohol and drugs. *Ibid.*

PARTIES

§ 2.1. Real Party in Interest

When the original plaintiff in an action to declare certain subdivision restrictive covenants unenforceable against plaintiff's lot lost her status as a real party in interest by the sale of her lot, and the new owners of the lot were joined as parties plaintiff, the original plaintiff should have been dismissed from the case. *Crowell v. Chapman*, 540.

RAPE AND ALLIED OFFENSES

§ 1. Elements of the Offense

G.S. § 14-27.2 simply necessitates a showing that a dangerous or deadly weapon was employed or displayed in the course of a rape. *S. v. Powell*, 718.

RAPE AND ALLIED OFFENSES — Continued

§ 4. Competency of Evidence

The trial court properly admitted expert testimony that pubic hairs taken from a rape victim and pubic hair samples obtained from defendant were "microscopically consistent." *S. v. Pratt*, 673.

§ 4.3. Character of Prosecuting Witness

In a prosecution for a first degree sexual offense and other crimes, the trial court properly instructed the jury to give no consideration to the following question asked of the victim: "Isn't it true, Mr. Simpson, that you are a homosexual?" *S. v. Gilley*, 125.

In a rape case in which the prosecutrix testified in district court that she had sex on the night of the alleged rape with defendant's roommate, the rape victim shield statute did not prohibit defendant from impeaching the credibility of the prosecutrix by cross-examining her about a prior inconsistent statement she had made to the examining physician that she was sexually active with a boyfriend and last had sex one month prior to the alleged crime. *S. v. Younger*, 692.

An alleged rape victim's sexual activity with defendant's roommate one week after the date of the alleged rape did not constitute evidence of a distinct pattern of behavior similar to defendant's version of the incident so as to be admissible under the rape victim shield statute. *Ibid.*

§ 5. Sufficiency of Evidence

In a prosecution for first degree rape and first degree sexual offense, the evidence was sufficient to prove that defendant aided and abetted a codefendant in the commission of both crimes. *S. v. McKinnon*, 288.

The evidence, including a positive voice identification of defendant, was sufficient for the jury to find that defendant was the perpetrator of a rape. *S. v. Pratt*, 673.

§ 6. Instructions Generally

In a prosecution for first degree rape where the indictment charged that defendant raped and committed a sexual offense upon the victim "with the use of deadly weapons, to wit: a rifle, a shotgun and a pistol," a statement in the instructions that the deadly weapon element of these offenses would be met if the victim reasonably believed a fake gun to be a dangerous or deadly weapon did not change the theory alleged in the indictment. *S. v. McKinnon*, 288.

It was not error for the trial court to fail to set forth anew all the elements of the underlying offenses of rape and sexual offense in the final mandate. *Ibid.*

§ 6.1. Instructions on Lesser Degrees of Crime

In a prosecution for first degree rape and first degree sexual offense where the evidence indicated that defendant and a codefendant each raped separate victims, if the defendant was guilty of the crimes committed against the victim his codefendant raped, he was guilty as an aider and abettor and, therefore, was guilty of first degree offenses or nothing at all. As to those offenses to which the defendant was the actual perpetrator, he was not entitled to have the lesser degrees of the offenses submitted to the jury. *S. v. McKinnon*, 288.

In a prosecution for second degree rape and second degree sexual offense, the trial court properly failed to instruct on the lesser-included offenses of attempted second degree rape and attempted second degree sexual offense. *S. v. Thompson*, 526.

RAPE AND ALLIED OFFENSES — Continued

Taking indecent liberties with a child under the age of sixteen, assaulting a child under the age of twelve and assault on a female by a male over eighteen are not lesser included offenses of first-degree rape of a child under the age of twelve. *S. v. Weaver*, 629.

§ 9. Indictment for Carnal Knowledge of Female Under Twelve Years of Age

A judgment finding defendant guilty of committing a first-degree sexual offense for engaging in a sexual act with a victim who was twelve years and eight months old must be arrested where the statute forbids such conduct with children "of the age of twelve years or less." *S. v. McGaha*, 699.

RECEIVING STOLEN GOODS

§ 1. Nature and Elements of the Offense

The Legislature did not intend to punish a defendant for both larceny and possession of the same stolen property. *S. v. Andrews*, 144.

REFORMATION OF INSTRUMENTS

§ 7. Sufficiency of Evidence

In plaintiff's action to have a deed reformed on the basis of fraud by defendant, the trial court erred in dismissing plaintiff's claim. *Dorsey v. Dorsey*, 545.

ROBBERY

§ 1.1. Elements of Armed Robbery

A defendant who took money belonging to an ABC store and money belonging to the store manager by threatening the life of the manager with a firearm could lawfully be convicted of the armed robbery of either the store or the manager but not both. *S. v. Beaty*, 491.

§ 4.1. Variance Between Indictment and Proof

There was no merit to defendant's contention that there was a fatal variance in an armed robbery case on the ground that the indictment charged that defendant took property belonging to the Furniture Buyers Center and the evidence showed that he took property belonging only to a salesman of that business. *S. v. Jackson*, 642.

§ 4.3. Armed Robbery Cases Where Evidence Sufficient

The State's evidence was sufficient for the jury in a prosecution of defendant for the armed robbery of a furniture sales business. *S. v. Jackson*, 642.

The evidence, including a positive voice identification of defendant, was sufficient for the jury to find that defendant was the perpetrator of two armed robberies. *S. v. Pratt*, 673.

In a prosecution for two armed robberies, there was no merit to defendant's contention that the trial court erred in submitting to the jury the offenses of armed robbery and common law robbery of the female victim on the ground that there was no evidence of a taking of any property belonging to her. *Ibid.*

RULES OF CIVIL PROCEDURE

§ 14. Third-Party Practice

The State may be joined as a third-party defendant, whether in an action for contribution or for indemnification, in a tort action brought in the courts of North Carolina. *Teachy v. Coble Dairies, Inc.*, 324.

§ 15.1. Discretion of Court to Grant Amendment

Trial court did not abuse its discretion in denying plaintiff's motion to amend his complaint made about three months before trial where the proposed amendment could not withstand a motion to dismiss for failure to state a claim. *Smith v. McRary*, 664.

§ 21. Procedure Upon Misjoinder and Nonjoinder

Trial court properly denied defendant's motion to dismiss for failure to join necessary parties and properly ordered the joinder of the parties. *Long v. City of Charlotte*, 187.

§ 56. Summary Judgment

Any error in the trial court's entry of summary judgment for defendants before defendants had complied with a prior order directing them to make discovery was harmless. *Moore v. Crumpton*, 618.

SALES

§ 5. Express Warranties

Plaintiff hockey player's claim for breach of an express warranty that a mouthguard provided the "maximum protection to the lips and teeth" was not barred on the ground that plaintiff did not rely on or read the express warranty. *Bernick v. Jurden*, 435.

§ 8. Parties Liable on Warranties

Plaintiff hockey player's claim for breach of implied warranty of a mouthguard was not barred by lack of privity. *Bernick v. Jurden*, 435.

§ 14.1. Actions for Breach of Warranty

The time of accrual of plaintiff hockey player's claims for breach of warranties of an allegedly defective mouthguard was governed by former G.S. 1-15(b), and the period from accrual within which to bring the action was three years as provided in G.S. 1-52(1). *Bernick v. Jurden*, 435.

§ 22. Actions for Personal Injuries from Defective Goods

For products liability claims to which the six-year statute of repose of G.S. 1-50(6) applies, the plaintiff must prove the condition precedent that the cause of action was brought no more than six years after the date of initial purchase of the product and must also meet the time limitation of the applicable procedural statute of limitations. However, the legislature did not intend the statute to be retrospectively applied to causes of action that had accrued before its effective date of 1 October 1979. *Bolick v. American Barmag Corp.*, 364.

SEARCHES AND SEIZURES

§ 8. Search and Seizure Incident to Warrantless Arrest

A search of defendant's car and a gym bag found inside the car fell within the constitutional boundaries established by a U.S. Supreme Court case permitting the

SEARCHES AND SEIZURES — Continued

warrantless search of the passenger compartment of a vehicle, including any containers therein, as a contemporaneous incident of the lawful arrest of an occupant of that vehicle. *S. v. Andrews*, 144.

§ 10. Search and Seizure on Probable Cause

The evidence supported the trial court's conclusion that a warrantless search of defendant's suitcase at an airport while it was in the possession of defendant's companion was unlawful. *S. v. Cooke*, 132.

§ 13. Search and Seizure by Consent

Where the State obtained a search warrant subsequent to obtaining defendant's consent to search his apartment, the obtaining of the warrant did not negate the consent originally given. *S. v. Brown*, 151.

§ 14. Voluntariness of Consent

In a prosecution for first degree murder, the evidence fully supported the trial court's conclusion that defendant's consent to the search of his home was voluntarily given free from coercion. *S. v. Brown*, 151.

§ 15. Standing to Challenge Lawfulness of Search

The State's contention that defendant abandoned a suitcase and thereby forfeited any reasonable expectation of privacy regarding its contents so that a warrantless search of the suitcase was lawful could not be raised for the first time on appeal. *S. v. Cooke*, 132.

§ 23. Sufficiency of Application for Warrant

The evidence was sufficient for the issuing magistrate to conclude that probable cause existed that some stolen items remained in defendant's car two weeks after the crimes were committed. *S. v. McKinnon*, 288.

§ 39. Execution of Search Warrant

Failure of the officer who executed a search warrant to swear to the inventory of seized items and the return did not constitute a substantial violation of statutes relating to search warrants so as to require suppression of the seized evidence. *S. v. Dobbins*, 342.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1. Generally

Where a report prepared by defendant agency's medical advisor evaluating plaintiff's medical evidence was the only evidence supporting a denial of Medicaid disability benefits to plaintiff and was contrary to all the other medical evidence, the report did not constitute substantial evidence to support a decision denying such benefits to plaintiff. *Lackey v. Dept. of Human Resources*, 231.

Medical reports and opinions need not be supported by x-rays or other "objective" tests in order to establish disability under the Social Security Act. *Ibid.*

STATE

§ 4. Actions Against the State; Sovereign Immunity

The State may be joined as a third-party defendant, whether in an action for contribution or for indemnification, in a tort action brought in the courts of North Carolina. *Teachy v. Coble Dairies, Inc.*, 324.

WORD AND PHRASE INDEX

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