NORTH CAROLINA REPORTS

VOLUME 307

SUPREME COURT OF NORTH CAROLINA

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1. Appointed Judge 29 September 1983 to succeed Peter W. Hairston who retired 31 August 1983.

2. Appointed Judge 29 June 1983 to succeed Lacy H. Thornburg who resigned 28 February 1983.

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---

1. Appointed Judge 23 September 1983 to succeed E. Alex Erwin III who resigned 31 July 1983.
2. Appointed Judge 1 August 1983 to succeed James Ezzell, Jr. who resigned 31 July 1983.
3. Resigned April 1983.
4. Appointed Judge 23 May 1983 to succeed Gary B. Tash who resigned 30 April 1983.
5. Appointed Judge 8 August 1983 to succeed Robert A. Mullinax who resigned 31 July 1983.
6. Appointed Judge 12 April 1983 to succeed Walter H. Bennett, Jr. who resigned 20 February 1983.
7. Appointed Chief Judge 18 May 1983.
8. Appointed Judge to succeed Arnold Max Harris who died 1 May 1983.
9. Appointed Judge 27 May 1983.

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

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FRANK CALDWELL LANEY ..... Spring Hope
GREGORY PHILIP LUCK ..... North Wilkesboro
RODERIC GREGG MAGIE ..... Pensacola, Florida
VERONICA M. MAHANGER-MACPHEE ..... Durham
JOHN KNOX MCGILL ..... Kings Mountain
KEVIN GREGORY MCLAIN ..... Pleasantville, New York
LINDA ANNE MORRIS ..... Raleigh
JAMES KEVIN MORTON ..... Washington
BRADLEY DUNCAN MURCHISON ..... Bethesda, Maryland
WANDA MARRILYN NAYLOR ..... Plymouth
THOMAS ROBERTS JERNIGAN NEWBERN ..... Ahoskie
JOHN STEPHEN NOBLE ..... Salisbury
PENELOPE ORR ..... Zanesville, Ohio
MICHAEL GERARD PANZARELLA ..... Charlotte
SUSAN THEODOSIA PARKE ..... Greenwood, South Carolina
SILAS MARK PAYNE ..... Burlington
THOMAS RANDOLPH PERKINS ..... Asheville
BRUCE COLLIER PHILLIPS ..... Richmond, Virginia
HAROLD GRADY POPE ..... Whiteville
GREGORY DOUGLAS PORTER ..... Durham
ELIZABETH PAGE POTTER ..... Chicago, Illinois
GARY LESTER PRESNELL ..... Burnsville
MARJORIE ANNE PUTNAM ..... Raleigh
RANDOLPH ALLAN REDPATH ..... Winston-Salem
JEAN CAROL ROBERTS ..... Asheville
MICHELLE FRANCES ROBERTSON ..... Savannah, Georgia
JESSE B. ROUSE III ..... Fayetteville
ERIC CHARLES ROWE ..... Asheville
SUSAN BETH SCHOETTLER ..... Matthews
SUSAN K. SEAHORN ..... Jefferson City, Tennessee
JOSEPH DARRELL SHEALY ..... Salisbury
BILL SHUFORD, JR. ..... Miami, Florida
RUTH MARIE SIDES ..... Chapel Hill
CHRISTINE BARLOW SIMPSON ..... Arlington, Virginia

THADDEUS BYRON SMITH ..... Durham
RICHARD J. SNIDER, JR. ..... Cleveland, Ohio
ROBERT THOMAS SPEED ..... Louisburg
MARGARET THOMAS STOPP ..... Binghamton, New York
JOHN ROBERT TAMM ..... Franklin
RENITA OLIVIA THOMPKINS ..... Winston-Salem
RICHARD MAURICE TOOMES ..... Randleman
JOSEPH CHARLES WEINBERGER, JR. ..... Winston-Salem
WILLIAM MARION WILCOX IV ..... Charlotte
DONNA LEE WILKINS ..... Spring Lake
F. CRAIG WILLIS ..... Morehead City
ROBERT JAMES WILLIS ..... Tryon

Given over my hand and Seal of the Board of Law Examiners this the 20th day of April, 1983.

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

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

On April 8, 1983, the following individual was admitted:

CARL P. CHANDLER II ..... Cary

Given over my hand and Seal of the Board of Law Examiners this the 20th day of April, 1983.

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

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

On April 8, 1983, the following individuals were admitted:

WILLIAM HAROLD DOWDY ... Winston-Salem, applied from the District of Columbia
NANCY STAPLER ELIAS ..... Carrboro, applied from the State of Pennsylvania
SHIRLEY J. LINN ..... Charlotte, applied from the State of New York First Department
MICHAEL MURCHISON ..... Wilmington, applied from the District of Columbia
MARY URSULA MUSACCHIA ..... Chapel Hill, applied from the State of Maryland
ANDREW JAMES O'ROURKE ..... Greensboro, applied from the State of New York Fourth Department
WILLIAM LEE SCHWENN ..... Greensboro, applied from the State of Virginia

Given over my hand and Seal of the Board of Law Examiners this the 20th day of April, 1983.

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

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

On July 27, 1983, the following individuals were admitted:

ROBERT GEORGE CONWAY, JR. . Jacksonville, applied from the State of Pennsylvania
FRANK X. FRONCEK ..... Raleigh, applied from the State of Pennsylvania
JAMES R. GLOVER ..... Chapel Hill, applied from the State of Wisconsin
PETER A. HILL ..... Southern Pines, applied from the State of Virginia
DALE E. SPORLEDER ..... Durham, applied from the State of Iowa

Given over my hand and Seal of the Board of Law Examiners this the 10th day of August, 1983.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. BRUCE GILBERT HAGEMAN

No. 206A82

(Filed 3 November 1982)

1. **Criminal Law § 150— misdemeanor and felony cases—unanimous Court of Appeals decision in misdemeanor case—dissent in felony case—no right to appeal misdemeanor case to Supreme Court**

Where misdemeanor and felony charges were consolidated for trial in the superior court, separate verdicts were returned and separate judgments were entered, the cases were joined together in an appeal to the Court of Appeals, the Court of Appeals rendered a unanimous decision in the misdemeanor case, and there was a dissent in the Court of Appeals in the felony case, defendant was not entitled to appeal the misdemeanor case to the Supreme Court as a matter of right under G.S. 7A-30(2).

2. **Criminal Law § 4— attempt to commit felony—misdemeanor**

Absent statutory provisions to the contrary, an attempt to commit a felony is a misdemeanor. The portion of the holding in *State v. Parker*, 224 N.C. 524 (1944) which, without qualification, makes an attempt to commit a felony punishable as a felony is erroneous and is no longer authoritative.

3. **Criminal Law § 4; Receiving Stolen Goods § 1.2— attempt to receive stolen goods—misdemeanor**

An attempt to receive stolen goods is not punishable as a felony pursuant to G.S. 14-3(b) but is punishable only as a misdemeanor.

4. **Receiving Stolen Goods § 1.1— recovered goods not stolen goods**

When stolen property is recovered, it loses its character or status as stolen property. Therefore, when the police recovered stolen silver flatware prior to its delivery to defendant, it lost its status or character as stolen property, and defendant could not be convicted of receiving stolen goods in connection with the silver flatware. However, a ring which one of the thieves offered to surrender to the police but which the police never actually recovered did not lose its character or status as stolen property.

5. Criminal Law § 4; Receiving Stolen Goods § 1.2— recovered stolen property—conviction of attempt to receive stolen property

When a defendant has the specific intent to commit a crime and under the circumstances as he reasonably saw them did the acts necessary to consummate the substantive offense, but, because of facts unknown to him essential elements of the substantive offense were lacking, he may be convicted of an attempt to commit the crime. Therefore, defendant could be convicted of an attempt to receive stolen property although the property in question had been recovered by the police and had lost its status as stolen property before it was delivered to defendant.

6. Receiving Stolen Goods § 6— attempt to receive stolen goods—instructions on criminal intent

The trial court's instructions adequately stated the law pertinent to an attempt to receive stolen property, including the requirement that the jury find criminal intent in order to convict, and correctly applied the facts to that law.

7. Receiving Stolen Goods § 1.2— elements of attempted receipt of stolen property

The elements which must be proven to support a conviction for attempted receipt of stolen property are: (1) guilty knowledge or a reasonable belief that the property was stolen at the time received; and (2) the commission of some overt act with the intent to commit the major offense.

8. Receiving Stolen Goods § 5.1— attempted receipt of stolen goods—sufficiency of evidence

In a prosecution for attempted receiving of a stolen ring and stolen silverware, the State's evidence was sufficient to permit the jury reasonably to infer that defendant had guilty knowledge or a reasonable belief that the ring and silverware which he purchased were stolen property and that he received the property with a dishonest purpose where it tended to show that the thief told defendant that he had lost the ring he offered for sale along with other property when he was "getting away" and that he later retrieved the ring; the thief assured defendant that there would be no identifying marks on the ring and told defendant that he had used a false name in their dealings; the thief flatly told defendant that the silverware was "hot" and that it was not initialed; at the time of the silverware transaction, defendant expressed his fears concerning the police; after purchasing the ring, defendant sold it having knowledge or reason to believe it was stolen; and after defendant purchased the silverware, he answered negatively when he was specifically asked by a police officer if he had purchased any silver that day.

9. Criminal Law § 169.7; Receiving Stolen Goods § 4— exclusion of evidence—subsequent admission of similar evidence

Even if the trial court in a prosecution for attempted receipt of stolen property improperly excluded testimony by defendant (1) that customers came into his metal purchasing business and jokingly told him that they had stolen property to sell to him, which was offered to negative guilty knowledge, and (2) that he received telephone calls threatening his and his family's life, which was offered to corroborate his testimony that he feared the seller of the stolen

property posed a threat to him and his family, any possible prejudice to defendant was cured by the court's subsequent admission of substantially the same testimony.

10. Criminal Law § 112.4— circumstantial evidence relating to intent—instruction on circumstantial evidence not required

Where there is direct evidence of other elements of the crime, it is not necessary to give an instruction on circumstantial evidence when it relates to intent even if the only evidence of criminal intent is circumstantial.

11. Criminal Law §§ 85.1, 117— acts of good conduct—inadmissibility to negate motive, intent, knowledge or criminal plan

The trial court did not err in refusing to give the jury an instruction which would have permitted the jury to consider specific acts as relevant to negate motive, intent, knowledge and criminal plan, since permitting defendants to introduce specific acts of "good conduct" under the guise of negating motive, intent, knowledge or criminal plan would amount to an erosion of the established rule that good character may not be shown by specific acts.

12. Criminal Law § 121— instructions on entrapment—failure to use the word "predisposed"

In a prosecution for attempted receipt of stolen property, the trial court's instruction on entrapment that it must appear that an agent of law enforcement officers "used persuasion or trickery to cause the defendant (to attempt) to receive stolen goods, which he was not otherwise willing to do" adequately conveyed the import of the defense of entrapment without the use of the word "predisposed" since there was no significant difference between the word "willing" used by the trial court and the word "predisposed."

13. Criminal Law § 7— evidence of entrapment—no shifting of burden of proof

Defendant has the burden to prove the defense of entrapment to the satisfaction of the jury, and once defendant has presented evidence of entrapment, the burden does not then shift to the prosecution to prove predisposition beyond a reasonable doubt.

14. Criminal Law § 7— defense of entrapment—when available

The defense of entrapment is available when there are acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime and when the origin of the criminal intent lies with the law enforcement agencies.

15. Criminal Law § 7— sale of stolen property to defendant by police agent—no entrapment as matter of law

In this prosecution for attempted receipt of stolen property, the evidence did not disclose that the actions of police officers and their agent amounted to entrapment as a matter of law but permitted an inference by the jury that defendant was ready and willing to enter the illegal transactions when merely afforded the opportunity to do so where it tended to show: officers had reasonable grounds to believe that defendant was receiving stolen property on the basis of statements made by an arrested thief; the police made an agree-

ment with the thief to recommend a lesser sentence in exchange for his agreement to wear a microphone and transmitter into defendant's place of business and to offer to sell a stolen ring and stolen silverware to defendant; defendant purchased the ring after the thief told him that he had been involved in stealing property and that he had lost the ring while attempting to "get away" but was able to go back and find it; the thief told defendant that he did not want to sign his real name on the form which was provided to him when defendant bought the ring; after receiving this damaging information, defendant proceeded to purchase and resell the ring; later, when the thief returned with the silverware, he told defendant that the silverware was stolen and defendant proceeded to buy it; defendant then called on the police "hotline" and asked what had been reported as stolen; he was furnished a list of items and was told that there was a report of stolen silverware; an officer asked defendant if he had bought any silver flatware that day, and defendant replied in the negative; and defendant testified that he bought the stolen items because he was afraid for his own safety.

APPEAL by defendant pursuant to G.S. 7A-30(2) from decision of the Court of Appeals (reported in 56 N.C. App. 274, 289 S.E. 2d 89 (1982)), finding no error in part, and error in part, in judgments entered by *Mills, J.*, at the 30 March 1981 Session of FORSYTH Superior Court.

Defendant was charged in case number 80CR51100 with the misdemeanor offense of receiving stolen property, a jade ring. After conviction and judgment in District Court, he appealed to Superior Court where the misdemeanor case was consolidated for trial with an indictment in case number 80CR52198 charging defendant with the felony of receiving stolen property, namely sterling silver flatware. The offenses allegedly occurred on 18 December 1980.

Evidence presented by the State tended to show:

On 18 December 1980, defendant was the operator of an outlet of the Metal Mart, a company established to purchase scrap gold and silver from various sellers, including the public. On 5 December 1980, Tyrone Oliver and Stephon Johnson broke into the home of Ms. Prince in Winston-Salem and stole certain silverware, rings, jewelry, and watches. Johnson testified that he took a watch, several rings, and some coins taken from the Prince home to the Metal Mart in Winston-Salem and sold them to defendant for $61. On 6 December, Johnson and Oliver were arrested when they attempted to sell some of the stolen property in Greensboro. Johnson returned to defendant's outlet and asked

defendant if he would loan him money to arrange for Oliver's bail. Defendant refused this request.

Johnson's preliminary hearing was scheduled for 17 December 1980. Between Johnson's arrest and hearing, the Winston-Salem police took possession of the silver taken from Ms. Prince's home. Johnson's girlfriend had possession of a ring stolen from that home. Johnson testified that he obtained the ring from his girlfriend and offered to surrender it to the police. The police refused to accept the ring but made an agreement with Johnson to recommend a lesser sentence in exchange for his agreeing to wear a microphone and transmitter into the Metal Mart offering to sell the stolen silverware and ring to defendant.

Pursuant to this arrangement, Johnson went into the Metal Mart and discussed the proposed sale with defendant. Johnson first entered the Mart with the ring and sold it to defendant for ten dollars. While he was in the Mart, Johnson made several statements about the stolen silverware, telling defendant that he would return with it. On the same day, Johnson returned and sold the silver to defendant. Shortly thereafter, the police entered the Mart and arrested defendant. A detailed account of a recorded conversation between defendant and Johnson is hereinafter set forth in the opinion.

Defendant's evidence tended to show that he possessed a reputation for good character in his community. Defendant testified that he did not recall Johnson's telling him the jade ring was stolen and that initially he did not believe Johnson's statement that the silverware was "hot." After he purchased the silverware, defendant called the "hot line," a police telephone number which connected defendant's place of business with the police department, established to help precious metals dealers determine whether property was stolen. Defendant asked Officer Reaves, who was operating the line, to identify items reported stolen within the preceding twelve to twenty-four hours. The list Officer Reaves read to defendant had no information concerning the watch, the ring or the silver flatware defendant had purchased. Defendant requested that Reaves call him to give details regarding other items Reaves mentioned as having been reported stolen. Defendant did not specifically mention the ring or silver he had purchased.

In case number 80CR51100, the jury found defendant guilty of attempted nonfelonious receiving of stolen property, the ring; and in case number 80CR52198, it found him guilty of attempted felonious receiving of stolen property, the silver. The court entered judgments imposing consecutive prison terms, and defendant appealed.

In case number 80CR51100, attempted receipt of stolen property, the jade ring, the Court of Appeals found no error. In case number 80CR52198, attempted receipt of stolen property, silverware, the Court of Appeals concluded that defendant was guilty of a misdemeanor, vacated the judgment, and remanded the cause to Superior Court for resentencing.

Judge Becton dissented to that part of the Court of Appeals' decision relating to case number 80CR52198, and defendant gave notice of appeal to this Court pursuant to G.S. 7A-30(2).

Rufus L. Edmisten, Attorney General, by Robert L. Hillman, Assistant Attorney General, for the State.

William B. Gibson for defendant-appellant.

BRANCH, Chief Justice.

[1] Initially, we note a procedural question regarding defendant's right to appeal to this Court. Defendant was charged in two separate cases, one a misdemeanor and the other a felony. After he appealed his misdemeanor conviction to the Superior Court, the cases were consolidated for trial. Nevertheless, they remained two separate cases in which separate verdicts were returned and separate judgments were entered.

The Court of Appeals treated the cases separately. In a unanimous decision, it found no error in the original misdemeanor case, number 80CR51100. It was in case number 80CR52198 that Judge Becton dissented.

G.S. 7A-30 provides for a right of appeal to this Court from a decision of the Court of Appeals "rendered in a *case* . . . in which there is a dissent." (Emphasis ours.) In *Hendrix v. Alsop*, 278 N.C. 549, 180 S.E. 2d 802 (1971), this Court, after reviewing the legislative history of G.S. 7A-30(2) held that:

> It is apparent . . . the General Assembly of North Carolina intended to insure a review by the Supreme Court of questions on which there was a division in the intermediate appellate court; no such review was intended for claims joined or consolidated in the lower appellate court and on which that court rendered unanimous decision.

278 N.C. at 554, 180 S.E. 2d at 806.

Although *Hendrix* was a civil case, we hold that the same rule applies to a criminal case. *See, State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972).

We conclude that defendant did not have the right to appeal to this Court in case number 80CR51100. However, since the principal question presented in the case in which Judge Becton dissented might also apply to the other case, we elect to treat the attempted appeal in the misdemeanor case as a petition for discretionary review and allow the petition.

The first question presented by this appeal is whether attempted receiving stolen property can be a felony.

In case number 80CR52198, receiving stolen property, sterling silver flatware, the trial judge submitted possible verdicts of attempted felonious receipt of stolen goods or attempted nonfelonious receipt of stolen goods. The jury returned a verdict of guilty of attempted felonious receiving stolen property.

G.S. 14-3 provides:

> (a) Except as provided in subsection (b), every person who shall be convicted of any misdemeanor for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term not exceeding two years, or by both, in the discretion of the court.
>
> (b) If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H. felony.

In vacating that part of the trial court's judgment punishing defendant as a felon, the Court of Appeals held that an attempt to

receive stolen goods was not within the purview of G.S. 14-3(b). We agree.

[2] It is well established in this State that absent statutory provisions to the contrary, an attempt to commit a felony is a misdemeanor. *State v. Hare*, 243 N.C. 262, 90 S.E. 2d 550 (1955); *State v. Spivey*, 213 N.C. 45, 195 S.E. 1 (1938); *State v. Stephens*, 170 N.C. 745, 87 S.E. 131 (1915); *State v. Jordan*, 75 N.C. 27 (1876). In *State v. Parker*, 224 N.C. 524, 31 S.E. 2d 531 (1944), defendants were convicted of the offense of "an attempt to feloniously receive stolen property knowing it to be stolen." This Court finding no error stated:

> An unlawful attempt to feloniously receive stolen property, knowing it to have been stolen, is composed of two essential elements: (1) guilty knowledge at the time that the property had been stolen, and (2) the commission of some overt act with the intent to commit the major offense. (Citations omitted.)

224 N.C. at 525, 31 S.E. 2d at 531.

The opinion in *Parker* did not consider the now well-established rule that absent statutory provisions to the contrary, attempt to commit a felony is a misdemeanor. *State v. Hare, supra; State v. Spivey, supra; State v. Stephens, supra; State v. Jordan, supra.*

We, therefore, are of the opinion that the portion of the holding in *Parker* which, without qualification, makes an attempt to commit a felony punishable as a felony is erroneous and is no longer authoritative.

We further note that this Court has held that attempted burglary, *State v. Surles*, 230 N.C. 272, 52 S.E. 2d 880 (1949), attempted common law robbery, *State v. McNeely*, 244 N.C. 737, 94 S.E. 2d 853 (1956), attempted armed robbery, *State v. Parker*, 262 N.C. 679, 138 S.E. 2d 496 (1964), and an attempt to commit a crime against nature, *State v. Spivey, supra; State v. Mintz*, 242 N.C. 761, 89 S.E. 2d 463 (1955); *State v. Harward*, 264 N.C. 746, 142 S.E. 2d 691 (1965), all constitute misdemeanors which are infamous, done in secret and malice or with deceit and intent to defraud, and are punishable as felonies under G.S. 14-3(b). Also, the Court of Appeals has held that an attempt to obtain property

by false pretenses is a crime done with deceit and intent to defraud, squarely within the purview of G.S. 14-3(b). *State v. Page*, 32 N.C. App. 478, 232 S.E. 2d 460, *disc. review denied*, 292 N.C. 643, 235 S.E. 2d 64 (1977).

[3] We have not specifically considered whether attempted receipt of stolen property falls within the class of misdemeanors punishable under G.S. 14-3(b). We now turn to that question. In our analysis of this issue, we must bear in mind the general rule of statutory construction that criminal statutes are to be strictly construed against the State. *State v. Ross*, 272 N.C. 67, 157 S.E. 2d 712 (1967); *State v. Brown*, 264 N.C. 191, 141 S.E. 2d 311 (1965); *State v. Jordon*, 227 N.C. 579, 42 S.E. 2d 674 (1947). This Court held in *State v. Surles, supra*, that an attempted burglary was infamous because it was an act of depravity, involving moral turpitude, revealing a heart devoid of social duties and a mind fatally bent on mischief. The Court reasoned that in light of the statute which made infamous misdemeanors punishable as felonies, the meaning of infamous must be determined with reference to the degrading nature of the offense and not the measure of punishment.

We also agree with that part of the dissent in *Surles* where Justice Ervin wrote:

> When the Legislature used the words "done in secrecy and malice, or with deceit and intent to defraud," to describe the second and third classes of aggravated offenses included in the statute now codified as G.S. 14-3, its manifest purpose was to describe offenses in which either secrecy and malice, or the employment of deceit with intent to defraud are elements necessary to their criminality as defined by law.

230 N.C. at 284, 52 S.E. 2d at 888 (1949). (Ervin, J., dissenting.) We do not perceive that attempting to receive stolen property is a crime of the same degree as attempted robbery, attempted burglary and an attempt to commit a crime against nature. Nor does the crime of attempted receipt of stolen property include secrecy, malice, deceit or intent to defraud as necessary elements.

In *State v. Grant*, 261 N.C. 652, 135 S.E. 2d 666 (1964), we held that an attempt to break and enter was a misdemeanor punishable under G.S. 14-3(a). Certainly the crime of attempted

breaking and entering would more readily support a finding that it was an infamous misdemeanor than would the offense of attempting to receive stolen property. Therefore, relying on *Grant*, we hold that the Court of Appeals acted properly in vacating the trial judge's judgment sentencing defendant as a felon in case number 80CR52198 and remanding the case to the Superior Court of Forsyth County for punishment pursuant to G.S. 14-3(a).

By his fifth, sixth, seventh, and eighth assignments of error, defendant contends that once stolen goods have been recovered by the police, they lose their character as stolen property. Thereafter, it becomes impossible for a person to commit the crime of receiving stolen goods or attempting to receive stolen goods. He argues that in the case before us, the silver had been recovered by the police before it was purchased by defendant; that the ring had been constructively recovered by the police when Johnson offered it to them; and that since Johnson acted as their agent, the police were in constructive possession of the ring.

We first consider whether the stolen property lost its stolen character when it was recovered by the police prior to its delivery to defendant. Our research discloses no North Carolina authority decisive of the questions here presented, and we, therefore, turn to other jurisdictions of the United States for enlightenment.

The weight of authority is that once stolen property is recovered, it loses its status as stolen property. In considering a situation similar to the one before us, the court in *United States v. Cohen*, 274 F. 596 (3rd Cir. 1921), stated:

> When the actual, physical possession of stolen property has been recovered by the owner or his agent, its character as stolen property is lost and the subsequent delivery of the property by the owner or agent to a particeps criminis, for the purpose of entrapping him as the receiver of stolen goods, does not establish the crime, for in a legal sense he does not receive stolen property.

274 F. at 599. *Accord, United States v. Monasterski*, 567 F. 2d 677 (6th Cir. 1977); *United States v. Dove*, 629 F. 2d 325 (4th Cir. 1980); *Felker v. State*, 254 Ark. 185, 492 S.W. 2d 442 (1973); *Bandy v. State*, 575 S.W. 2d 278 (Tenn. 1979); *Booth v. State*, 398 P. 2d

863 (Okl. Cr. 1964); *State v. Vitale*, 23 Ariz. App. 37, 530 P. 2d 394 (1975); *State v. Tropiano*, 154 N.J. Super. 452, 381 A. 2d 828 (1977); *Darnell v. State*, 92 Nev. 680, 558 P. 2d 624 (1976); *People v. Rojas*, 55 Cal. 2d 252, 358 P. 2d 921 (1961).

[4] We believe that the *Cohen* rule is sound and, therefore, hold that when stolen property is recovered, it loses its character or status as "stolen property." Thus, when the Winston-Salem police recovered the silver flatware, it lost its status or character as stolen property.

The ring, however, was not recovered by the police. We agree with the Court of Appeals that it never lost its character or status as stolen property.

[5] There nevertheless remains defendant's contention that since it is legally impossible for him to have committed the crime of receiving stolen property, it is also legally impossible for him to be convicted of an attempt to receive stolen property.

Defendant asks this Court to adopt the rationale of *People v. Jaffe*, 185 N.Y. 497, 78 N.E. 169 (1906). In *Jaffe* stolen property had been recovered by the police. After its recovery, the property was delivered to Jaffe pursuant to a prearranged plan. Jaffe was charged and convicted of attempting to receive stolen property. Noting that the property was not stolen property when it was received by Jaffe, the court reasoned:

> If all which an accused person intends to do would if done constitute no crime it cannot be a crime to attempt to do with the same purpose a part of the thing intended. (1 Bishop's Crim. Law [7th ed.], sec. 747.)

185 N.Y. at 501, 78 N.E. at 170. Jaffe's conviction was overturned.

The New York Court of Appeals attempted to distinguish *Jaffe* from a line of so-called "pickpocket cases." *People v. Moran*, 123 N.Y. 254, 25 N.E. 412 (1890); *State v. Wilson*, 30 Conn. 500 (1862). In those cases, the defendants' convictions for attempted larceny were sustained even though the targeted pockets were devoid of anything which could be the subject of larceny. The court noted that those cases hold that "one may be convicted of an attempt to commit a crime notwithstanding the existence of facts unknown to him which would have rendered the complete

perpetration of the crime itself impossible." 185 N.Y. at 499, 78 N.E. at 169.

It is true that there is a factual difference between *Jaffe* and the "pickpocket" cases in that in the "pickpocket" cases it was factually impossible to commit the crime because the targeted pockets were empty. In *Jaffe* the court relied upon the theory of legal impossibility, the theory being that since, as a matter of law, the property had lost its status as stolen property there could be no conviction of receiving stolen property or attempting to receive stolen property. The *Jaffe* rule and the so-called "pickpocket" cases are not distinguishable. The reasoning and results of the respective courts are simply in direct conflict. Had the facts permitted the application of either of the impossibility rules, it is evident that the reasoning of the courts would have dictated the same contrary results. On this question of first impression in this jurisdiction, we must adopt the rationale of one of these lines of cases and reject the other.

The specific question before this Court was addressed by the California Supreme Court in *People v. Rojas, supra.* In *Rojas,* stolen property recovered by the police was sold to Rojas according to a prearranged plan. The court held that the property lost its status as stolen property which precluded a finding of guilt for receiving stolen property. Even so, the court held that Rojas could be convicted of attempted receipt of stolen property.

Noting that the *Jaffe* rule had been the subject of criticism, the court refused to apply a legal impossibility analysis or concern itself with the fine distinction between legal and factual impossibility; instead, the court considered the controlling factor to be the specific intent of the actor to commit a substantive offense. In reaching its decision, Justice Schauer, speaking for the court, stated:

> Intent is in the mind; it is not the external realities to which intention refers. The fact that defendant was mistaken regarding the external realities did not alter his intention, but simply made it impossible to effectuate it.
>
> * * *
>
> In the case at bench the criminality of the attempt is not destroyed by the fact that the goods, having been recovered

> by the commendably alert and efficient action of the Los Angeles police, had unknown to defendants, lost their "stolen" status. . . . In our opinion the consequences of intent and acts such as those of defendants here should be more serious than pleased amazement that because of the timeliness of the police the projected criminality was not merely detected but also wiped out.

55 Cal. 2d at 257, 258, 358 P. 2d at 924. *Accord, Darnell v. State, supra; State v. Tropiano, supra; Bandy v. State, supra; State v. Vitale, supra; State v. Carner,* 25 Ariz. App. 156, 541 P. 2d 947 (1975). *See also, State v. Rios,* 409 So. 2d 241 (Fla. App. 1982), where it was held that the defendant could be convicted of attempted receipt of stolen property even though the property involved *never* had been stolen.

We reject the *Jaffe* rule. To adopt this rule would be to provide a technical escape mechanism for one charged with an attempt to commit a crime who had clearly demonstrated his criminal intent and who has taken all steps to complete the crime. We do not believe that either legal or factual impossibility should be used as a shield in such cases.

We agree with the reasoning of *Rojas* and its progeny. Accordingly, we hold that when a defendant has the specific intent to commit a crime and under the circumstances as he reasonably saw them did the acts necessary to consummate the substantive offense, but, because of facts unknown to him essential elements of the substantive offense were lacking, he may be convicted of an attempt to commit the crime. Here defendant was charged with two counts of receiving stolen property. Under these indictments, defendant could be convicted of attempted receipt of stolen property. *State v. Parker, supra;* G.S. 15-170. Defendant was properly convicted in case number 80CR52198 inasmuch as the fact that the silver flatware had lost its character or status as "stolen property" does not preclude a conviction for attempted receipt of stolen property. Defendant was properly convicted in case number 80CR51100 of attempted receipt of stolen property since the ring never lost its character or status as "stolen property."

[6] By his 11th assignment of error, defendant avers that the trial judge erred in failing to properly instruct the jury on the

crime of attempt to receive stolen property. He argues that the instruction given did not require the jury to consider his contention that evidence of criminal intent was lacking.

In order for the State to prove that defendant attempted to receive stolen property, it is necessary to establish two elements: (1) guilty knowledge or a reasonable belief that the property was stolen at the time received; and (2) the commission of some overt act with the intent to commit the major offense. *State v. Parker*,[1] *supra.*

In this case, Judge Mills instructed the jury as follows:

> Members of the jury, I charge that for you to find the defendant guilty of an attempt to feloniously receive stolen goods, the State must prove five things beyond a reasonable doubt. First, that a quantity of sterling silver flatware, marked State's Exhibit No. 2 had been stolen by someone other than the defendant, Bruce Hageman. Second, that this property had been stolen following a breaking or entering. Breaking or entering is the breaking into another's building without his consent. Third, that the State must prove that the defendant received the property, that is received the silver flatware. Fourth, that the defendant received this property with a dishonest purpose. The intent to permanently deprive the—permanently depriving the owner of his property is a dishonest purpose. A person acts intentionally for purposes of this crime when it is his intent to permanently deprive the owner of his property and convert it to his own use. Intent is a mental attitude seldom provable by direct

1. In our discussion of whether the attempted receipt of stolen property constituted a crime punishable as a felony under G.S. 14-3(b), we overruled that part of *Parker* which seems to stand for the proposition that a person could be convicted of a felonious attempt to receive stolen property. We do believe, however, that *Parker* stated the proper rule as to the elements of attempted receipt of stolen property. We modify the elements which were given by that court, (1) guilty knowledge at the time that the property had been stolen; and (2) the commission of some overt act with the intent to commit the major offense, to include a reasonable belief, at the time the property was received, that the property was stolen. This conforms with the 1975 amendment to G.S. 14-71 which permits a conviction for receiving stolen property when the State proves that the defendant had a reasonable belief that property was stolen at the time he received it. Under the prior law, the State had to prove actual or implied knowledge. A reasonable belief was insufficient. *State v. Burchfield*, 30 N.C. App. 128, 226 S.E. 2d 384 (1976); *State v. Miller*, 212 N.C. 361, 193 S.E. 388 (1937).

evidence. It must ordinarily be proved by circumstances from which it may be inferred. An intent to permanently deprive another of property may be inferred from the conduct of the defendant and other relevant circumstances. And fifth, that the defendant at the time he received this property knew or had reasonable grounds to believe it was stolen following a breaking or entering.

In the other case, members of the jury, the defendant has also been charged with attempted nonfelonious receiving stolen goods. Now, I charge for you to find the defendant guilty of attempted nonfelonious receiving stolen goods, in this case the State must prove four things beyond a reasonable doubt. First, that one gold ring was stolen by someone other than the defendant. Now, stealing is also called larceny, and it's defined as follows: It is the taking and carrying away of the personal property of another without his consent intending at that time to deprive him of its use permanently, knowing that he was not entitled to take it. Second, that the defendant received that property. Third, that the defendant at the time he received that property knew or had reasonable grounds to believe it had been stolen. And fourth, that the defendant received that property with a dishonest purpose. Permanently depriving the owner of his property is a dishonest purpose.

The trial judge's instructions contained all of the elements of an attempt to receive stolen property including the requirement that the jury must find criminal intent in order to convict.

We hold that the instructions given adequately stated the law pertinent to an attempt to receive stolen property and correctly applied the facts to that law.

Defendant assigns as error the trial judge's denial of his motions for dismissal, nonsuit and to set aside the verdict as being against the greater weight of the evidence.

The essence of the familiar rule governing the judge's consideration of the evidence upon motion for judgment as of nonsuit is that the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference which may be drawn from the evidence ad-

mitted, whether it be competent or incompetent. *State v. Lee*, 294 N.C. 299, 240 S.E. 2d 449 (1978); *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975).

[7] As hereinabove stated, the elements which must be proven to support a conviction for attempted receipt of stolen property are: (1) guilty knowledge, or a reasonable belief, at the time the property was received that the property was stolen, and (2) the commission of some overt act with the intent to commit the major offense. *State v. Parker, supra.*

[8] The State's most telling evidence on the question of defendant's guilt was the testimony of Stephon Johnson and the tape recording of his conversation with the defendant which illustrated and corroborated his testimony. We quote pertinent parts of this conversation:

MR. JOHNSON: Hey man, what 'cha been up to?

MR. HAGEMAN: Not much, how about you? Sticking in there?

MR. JOHNSON: Well, I'll let you know. Check it out man, I got a ring, man, it ain't got no kind of identification. I mean, no kind of signs on it. One that you know, I went back and found that one. I lost a lot of stuff man, when I was trying to get away, you know.

MR. HAGEMAN: Okay.

MR. JOHNSON: But that was still there. I got some silver if you want it, man.

MR. HAGEMAN: Yeah, we need, you know, anything silver or anything. This is 10 carat gold.

MR. JOHNSON: Right, how much can I get for it?

MR. HAGEMAN: Okay, see we have to pop the stone out in order to give you the gold price.

MR. JOHNSON: All right. How you been doing?

MR. HAGEMAN: Hanging in there. Believe it or not, I'm probably the same place you are. I've got to hustle and come up with some money. Spend most of my time hustling.

MR. JOHNSON: Right. Well, I've got some silver, man, but I just don't want the police bothering me, you know how they is.

MR. HAGEMAN: Oh, sure.

MR. JOHNSON: Yeah, it's hot.

MR. HAGEMAN: Man, I don't know, I'd rather not.

MR. JOHNSON: Check it out, check it out. I mean it's marked sterling, it ain't got nobody's initials on it.

MR. HAGEMAN: Yeah, but still man, the police are sly people, man I—

MR. JOHNSON: They won't know nothing, man, they won't know nothing.

MR. HAGEMAN: Didn't you sell some pocket watches?

MR. JOHNSON: Yeah.

MR. HAGEMAN: They caught a friend?

MR. JOHNSON: They did, they caught a friend, they still got him, they got him in Greensboro.

MR. HAGEMAN: He hasn't fessed up to it or anything?

MR. JOHNSON: He hasn't fessed up to it. Naw, man, he said he wouldn't say nothing. He ain't going to say nothing no way. They didn't catch us with the stuff on us. So once you get a lawyer—my mother came down there and got me out of it, a $12,000 bond so I can get everything fixed. So once we get a lawyer, man, we're scot-free.

MR. HAGEMAN: How much does a $12,000 bond cost?

MR. JOHNSON: $1,800.

MR. HAGEMAN: $1,800?

MR. JOHNSON: And if you get a lawyer, then we're scot-free cause they didn't catch us with nothing on us. How much is that worth?

MR. HAGEMAN: Okay, okay, it's not worth a whole lot, it's not real heavy. Let's see.

MR. JOHNSON: I've been doing all right for the last—soon as I got out of jail, man, but I got to go to court next week, cause my lawyer says as long as they didn't catch us with nothing, we're scot-free.

MR. HAGEMAN: Right.

MR. JOHNSON: So we're scot-free.

MR. HAGEMAN: Right, well, that's good, that's good, man. It's not worth the hassle, I mean I hope for you you don't ever get caught.

MR. JOHNSON: Hey, I'm going to be all right, you know, I'll be all right, you know, I'm gonna still—Winston-Salem.

MR. HAGEMAN: You're all right, you're okay. Well, all right, you've got $10.00.

MR. JOHNSON: Look, I give you a false name this time, you gotta—

MR. HAGEMAN: Don't tell me that.

MR. JOHNSON: Okay, okay, how much is that?

MR. HAGEMAN: That'll give you 10, 10 bucks.

MR. JOHNSON: Okay.

MR. HAGEMAN: It's lightweight, here feel it. You'll understand that.

MR. JOHNSON: Yeah, I can understand that. But I'm gonna bring the silver back, is that all right?

MR. HAGEMAN: Well—

MR. JOHNSON: They ain't gonna catch up with that silver, man.

MR. HAGEMAN: I don't know, it's—I just feel funny.

MR. JOHNSON: Hey, you can get rid of it, right?

MR. HAGEMAN: You got a friend, don't ya? Send him on in.

MR. JOHNSON: All right if I can find him.

MR. HAGEMAN: Okay, I need your signature and your social security—

MR. JOHNSON: All right. It's Christmas, man, I ain't got my mom nothing for Christmas yet, you know.

MR. HAGEMAN: I know. I know. There's $10.00 and your receipt.

MR. JOHNSON: If I can't find him, I'll come back myself, okay?

MR. HAGEMAN: Okay.

* * *

MR. HAGEMAN: What you got?

MR. JOHNSON: I got some silver.

MR. HAGEMAN: Okay, let me weigh it up.

MR. JOHNSON: This be where I broke in the house and took it.

MR. HAGEMAN: Oh, don't tell me nothing.

MR. JOHNSON: Okay, so this is where I broke in a house so you gotta watch out, right?

MR. HAGEMAN: Right.

MR. JOHNSON: Okay, I gotta another box. I got a friend who will be up here in about one hour on the dot with the box of it, you know.

MR. HAGEMAN: Right. This stuff isn't marked sterling.

MR. JOHNSON: Well, ya know, test it out, test it out, put a test on it, test it.

MR. HAGEMAN: Okay, I'll test it.

MR. JOHNSON: When I broke in the house, there's some that I hid. I got another box. I gotta a friend gonna bring it. I can get another friend to bring it a little bit more at a time if you want it that way. I just gotta make sure it cools down. All of it's silver, man. I sold some to your man up there yesterday.

MR. HAGEMAN: Where? Here?

MR. JOHNSON: Right up there. You're not the only person I know.

MR. HAGEMAN: Yeah.

MR. JOHNSON: I know a whole lot of um, you know. All of it's silver, man.

MR. HAGEMAN: Man, I got a kind of funny feeling now, I don't know.

MR. JOHNSON: You'll be all right, man, you'll be all right.

* * *

MR. JOHNSON: Well, I might could take them probably somewhere else and sell um, that ain't no good, might be try to get over on somebody, go find me a dummy, ya know.

MR. HAGEMAN: Yeah, there's a lot of dummies out there. These here they're no good.

MR. JOHNSON: I'll put these back in the bag. I might take these home and use them. You didn't write my name down last time, did ya?

MR. HAGEMAN: No, we got rid of that ticket.

MR. JOHNSON: All right. You don't know me and I don't know you.

MR. HAGEMAN: Hey, that's it, man, and if you ever come back here and you're caught, I don't know you, understand?

MR. JOHNSON: Right. You ain't gonna call the police on me soon as I leave, are you?

MR. HAGEMAN: No, cause I know too much already.

MR. JOHNSON: On who, me?

MR. HAGEMAN: No, I mean I know too much, in other words, you know, if I buy it I can get—but even if I call the police down here, they'll still say, well, Mr. Hageman, you gave him some money.

MR. JOHNSON: Right, right, so you can't do nothing. They'll get you for buying stolen goods. But they won't know it's stolen, man, just go on and do what you did with the watches, you know the watches and stuff, do them like you did the watches and it will be all right. In about exactly 45 minutes I got a guy coming down here, you want him to bring the

whole box or just a little bit at a time? I can get another guy to come too.

MR. HAGEMAN: Well, I don't want to know who they are, okay?

MR. JOHNSON: You ain't got to know who they are, they just gonna walk in here, show them to you and it's just like me and you, you know?

MR. HAGEMAN: Right.

MR. JOHNSON: Oh, I got—you ain't waiting on no police, are you?

MR. HAGEMAN: No, man, I'm just worried, that's all.

MR. JOHNSON: You all right, you all right cause where I broke in the place, man, the lady dropped the charges and s--t man, and then didn't show up in court yesterday. Know what I mean? She dropped the charges. She didn't need all that back. All she wanted was her insurance, that's all.

MR. HAGEMAN: Hey, I got a lot of friends at the police force and man, if this ever got out.

MR. JOHNSON: They don't know anything, man.

MR. HAGEMAN: That will come to $45.

MR. JOHNSON: All right, all right. Don't call the police on me.

MR. HAGEMAN: That's it.

MR. JOHNSON: Oh, you can't use them neither?

MR. HAGEMAN: You see, this is stainless steel here.

MR. JOHNSON: How much is this?

MR. HAGEMAN: $45. This is a quarter of an ounce here, and this here is—let me show you what I mean.

MR. JOHNSON: $45, but you didn't give me nothing for them?

MR. HAGEMAN: I counted it in as a weight. See this?

MR. JOHNSON: O yeah, yeah, yeah.

MR. HAGEMAN: The same thing with this man, when I break this open, see? But I allowed for weight, okay. Good enough.

I think my wife just pulled up in that blue car across the street. I think we'll go to lunch.

MR. JOHNSON: Okay, you gonna go to lunch, right? Why don't you hold off for about 30 minutes. I'm gonna have another guy down here. You'll be all right, okay. Don't call the police on me. That your wife right there?

MR. HAGEMAN: Right.

Defendant contends that there was no evidence that the ring was stolen or that he received it with a dishonest purpose.

As to the silverware, it is defendant's contention that even though he might have had reasonable grounds to believe it was stolen, he did not receive that property with a dishonest purpose.

Johnson, in substance, told defendant that he had lost the ring he offered for sale along with other property when he was "getting away" and that he later retrieved the ring. He assured defendant that there were no identifying marks on the ring and told defendant that he had used a false name in their dealings. Although defendant testified that he had not known Johnson prior to the time he purchased the ring, his questions of Johnson at that time concerning a previous sale of watches and the involvement of a "friend" of Johnson's belies that assertion. Johnson flatly told defendant that the silverware was "hot," and that it was not initialed. At the time of the silverware transaction, defendant expressed his fears concerning the police.

The State's evidence also showed that after purchasing the ring, defendant sold it having knowledge, or reason to believe it was stolen. Shortly thereafter defendant bought silver which he knew or had reason to believe was stolen. The evidence showed that after defendant purchased the silver flatware, he was specifically asked by Officer Reaves if he had purchased any silver that day. defendant answered in the negative.

We hold that there was ample evidence offered to permit the jury to reasonably infer that defendant had guilty knowledge or a reasonable belief that the ring and silverware which he purchased were stolen property, and that he received the property with a dishonest purpose.

The trial court properly overruled defendant's motions for dismissal and nonsuit.

Neither do we find any merit in defendant's argument that the trial judge erred in denying his motion to set aside the verdict. This motion was directed to the sound discretion of the trial judge. *State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979), *cert. denied*, 446 U.S. 911, 100 S.Ct. 1841, 64 L.Ed. 2d 264 (1980). No abuse of discretion is shown.

[9] Defendant next argues that the trial judge erroneously excluded testimony (1) that customers came into the Metal Mart and jokingly told him that they had stolen property to sell him, and (2) that he received telephone calls threatening his and his family's life. The first evidence was offered to negate guilty knowledge, and the evidence relating to telephone calls was offered to corroborate his testimony that he feared that Johnson posed a threat to him and his family.

Subsequent to the offer of this excluded evidence, defendant was permitted to testify as follows:

> He mentioned again that it was hot and to gain his confidence I said I don't want to hear it. At this point I was suspicious but confused. How could a man admit that it was stolen. I frequently have heard customers say this and due to newspaper stories, it is a common remark to make. . . . I get drunks, potheads, stock brokers, clergy, et cetera all kidding that they stole stuff, et cetera, because of all the fuss in the papers.
>
> * * *
>
> I felt there was a chance that he may not have had stolen goods but he was playing around with my life. I couldn't see any weapon. He had a coat on. He had not threatened me with a weapon, not at that point, but he might have threatened me with telephone calls earlier.
>
> * * *
>
> I said, "Man, I got kind of a funny feeling, I don't know." I still didn't call the police, didn't say "Wait here, I'll be back in a minute" and go back there and call them. I felt my life

was in danger, and my family's. I didn't know if he had a gun. He had a coat on.

It is well settled in this jurisdiction that no prejudice arises from the erroneous exclusion of evidence when the same or substantially the same testimony is subsequently admitted into evidence. *State v. Matthews*, 299 N.C. 284, 261 S.E. 2d 872 (1980); *State v. King*, 225 N.C. 236, 34 S.E. 2d 3 (1945). Here it is obvious that the testimony subsequently admitted into evidence was substantially the same as that excluded and which is the subject of this assignment of error. Assuming, *arguendo*, that the evidence was improperly excluded, any possible prejudice to defendant was cured by the subsequent admission of substantially the same testimony.

[10] Defendant assigns as error the denial of his request that the court instruct the jury on circumstantial evidence.

The law in this State is that the trial court is not required to instruct the jury on the law of circumstantial evidence in a criminal action involving direct and circumstantial evidence if the State primarily relies on direct evidence, and if the direct evidence is sufficient to warrant the conviction of the accused. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Bennett*, 237 N.C. 749, 76 S.E. 2d 42 (1953); *State v. Hicks*, 229 N.C. 345, 49 S.E. 2d 639 (1948).

In the cases cited above, the circumstantial evidence related to the *corpus delicti* and the identity of the accused, and not criminal intent, and in *Covington* and *Bennett*, there was no specific request for the instruction. However, the general rule in other jurisdictions is that where there is direct evidence of other elements of the crime, it is not necessary to give an instruction on circumstantial evidence when it relates to intent. This is so even if the only evidence of criminal intent is circumstantial. *State v. Lapoint*, 87 Vt. 115, 88 A. 523 (1913); *State v. Moehlis*, 250 N.W. 2d 42 (Iowa 1977); *Phillips v. State*, 604 S.W. 2d 904 (Tex. Crim. App. 1979); *Brown v. State*, 233 A. 2d 445 (Del. 1967); *People v. Schoeneck*, 42 Ill. App. 3d 711, 356 N.E. 2d 417 (1976); 23A C.J.S., *Criminal Law* § 1250 (1961); 75 Am. Jur. 2d, *Trials*, § 845 (1974).

[11] Defendant also contends that the trial court erred by denying his request to instruct as follows:

> Evidence has been received tending to show that the defendant had on several occasions in the conduct of his business helped the police recover stolen merchandise and in some cases arrest the thieves, as in the incident involving M. G. Burke's ring. Defendant also has offered evidence that he became a public figure in the debate over the ordinance regulating the conduct of precious metals deals, to include speaking out at the meeting of the Public Safety Committee of the Board of Aldermen and responding to inquiries by members of the local newspaper and broadcast media. Defendant has further testified that during this debate he proposed that the telephone hot line be set up, and that his proposal was put into effect. This evidence was received solely for the purpose of negating four things: 1. That the defendant had a motive for the commission of the crime charged in this case; 2. that the defendant had the intent which is a necessary element of the crime charged in this case; 3. that the defendant had the knowledge which is a necessary element of the crime charged in this case; 4. that there existed in the mind of the defendant a plan, scheme, system or design involving the crime charged in this case.
>
> If you believe this evidence you may consider it, but only for the limited purpose for which it was received.

This instruction would have permitted the jury to consider specific acts as relevant to negate motive, intent, knowledge, and criminal plan. The specific acts referred to in the requested instruction were irrelevant for this purpose. We are of the opinion that allowing defendants to introduce specific acts of "good conduct" under the guise of negating motive, intent, knowledge or criminal plan would amount to an erosion of the established rule that good character may not be shown by specific acts. *State v. Handsome*, 300 N.C. 313, 266 S.E. 2d 670 (1980); *State v. Vaughn*, 296 N.C. 167, 250 S.E. 2d 210 (1978), *cert. denied*, 441 U.S. 935, 99 S.Ct. 2060, 60 L.Ed. 2d 665 (1979). We hold that the trial judge properly declined to give the requested instructions. We express no opinion as to whether this or a similar instruction would have been required had defendant requested the court to instruct the jury that these acts tended to negate *predisposition* to engage in criminal activity.

[12] Defendant's fourteenth assignment of error is that the court's instructions to the jury on entrapment were erroneous. The court in part charged:

> . . . It must appear that Stephon Johnson used persuasion or trickery to cause the defendant (to attempt) to receive stolen goods, which he was not otherwise willing to do . . . .

Defendant argues that the instruction was erroneous because it should have included the phrase *that is, the defendant was not "predisposed" to commit the offense.* Even though the word "predisposed" was omitted, the jury was required to consider whether defendant was willing to attempt to receive stolen property. The instruction given adequately conveys the import of the defense of entrapment. It required the jury to consider whether the criminal intent originated with Stephon Johnson's trickery and deception, or with defendant himself. We do not see any significant difference between the trial court's use of the word "willing" rather than "predisposed." "Willing" is a synonym of the word "predisposed." Laird, WEBSTER'S NEW WORLD THESAURUS (Collins World, 1971) p. 468. Instructions in which the word "willing" was used have been approved in *United States v. Harrell,* 458 F. 2d 655 (5th Cir.), *cert. denied,* 409 U.S. 846, 93 S.Ct. 49, 34 L.Ed. 2d 86 (1972), (if the defendant were ready and willing to commit the offense charged when the opportunity presented itself); *United States v. Braver,* 450 F. 2d 799 (2d Cir. 1971), *cert. denied,* 405 U.S. 1064, 92 S.Ct. 1493, 31 L.Ed. 2d 794 (1972); (the second issue is whether the defendant was ready and willing to commit the crime without persuasion); *United States v. Berger,* 433 F. 2d 680 (2nd Cir. 1970), *cert. denied,* 401 U.S. 962, 91 S.Ct. 970, 28 L.Ed. 2d 246, *reh. denied, sub nom, Levy v. United States,* 402 U.S. 925, 91 S.Ct. 1367, 28 L.Ed. 2d 665 (1971). We hold that the instruction as given was adequate.

[13] The more serious question presented in this assignment is whether it was error for the trial judge to fail to instruct that once defendant presented evidence of entrapment, the burden shifted to the State to prove beyond a reasonable doubt that defendant was predisposed to commit the crime with which he was charged. We disagree with defendant's contention that the question presented is one of constitutional magnitude. We interpret *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d

508 (1975), and *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed. 2d 281 (1977), to permit states to impose the burden of raising and proving affirmative defenses on the defendant unless doing so requires the defendant to negate an essential element included in the definition of the offense with which he is charged. Predisposition is not an element included in the definition of attempted receipt of stolen property. Rather, it relates to defendant's propensity in general to attempt to receive stolen property. The State was required to prove that defendant received the property with a dishonest purpose, to wit, the intent to deprive the true owner of her property. While evidence of this intent may tend to show defendant's predisposition, such evidence does not make predisposition an element of the crime. We agree with the reasoning of the New York Court of Appeals in *People v. Laietta*, 30 N.Y. 2d 68, 281 N.E. 2d 157, *cert. denied*, 407 U.S. 923, 92 S.Ct. 2471, 32 L.Ed. 2d 809 (1972), that entrapment is not a defense which negates an essential element of crime but is a defense in the nature of confession and avoidance.

The rule in some federal courts is that once the defendant produces evidence that he has been induced to commit a crime, the burden shifts to the prosecution to show beyond a reasonable doubt that the defendant was predisposed to engage in the crime charged. *United States v. Berger, supra.* Others simply state the rule as being that once the defense of entrapment is raised, the government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped. *United States v. Gurule*, 522 F. 2d 20 (10th Cir. 1975), *cert. denied*, 425 U.S. 976, 96 S.Ct. 2177, 48 L.Ed. 2d 800 (1976). *See* Annot., 28 A.L.R. Fed. 767 (1976). A substantial number of states also follow this view. *People v. Dennis*, 94 Ill. App. 3d 448, 418 N.E. 2d 479 (1981); *Henry v. State*, 269 Ind. 1, 379 N.E. 2d 132 (1978); *State v. Talbot*, 71 N.J. 160, 364 A. 2d 9 (1976); *State v. Jones*, 598 S.W. 2d 209 (Tenn. 1980); *State v. Hinkle*, 286 S.E. 2d 699 (W.Va. 1982). However, in this State, we have traditionally placed the burden of production and persuasion on defendants who seek to avail themselves of affirmative defenses. *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976); *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980), *insanity; State v. Cook*, 263 N.C. 730, 140 S.E. 2d 305 (1965); *State v. Wilkins*, 34 N.C. App. 392, 238 S.E. 2d 659, *disc. review denied*, 294 N.C. 187, 241 S.E. 2d 516 (1977); *State v. Braun*, 31 N.C. App. 101, 228 S.E.

2d 466, *disc. review denied, appeal dismissed,* 291 N.C. 449, 230 S.E. 2d 766 (1976), *entrapment.* We reaffirm our Court's holdings that the defendant has the burden to prove the defense of entrapment to the satisfaction of the jury. Once defendant presented evidence of entrapment, the burden did not shift to the prosecution to prove predisposition beyond a reasonable doubt.[2] The instructions given were proper. *Accord, Rhoades v. State,* 270 Ark. 962, 607 S.W. 2d 76 (1980), *cert. denied,* 452 U.S. 915, 101 S.Ct. 3048, 69 L.Ed. 2d 417 (1981); *People v. Dickerson,* 270 Cal. App. 2d 352, 75 Cal. Rptr. 828 (1969); *People v. Calvano,* 30 N.Y. 2d 199, 282 N.E. 2d 322 (1972); *Brown v. State,* 310 A. 2d 870 (Del. 1973).

Defendant's final argument is that the court erred in denying his motion to dismiss on the grounds of entrapment as a matter of law.

[14] The defense of entrapment is available when there are acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime and when the origin of the criminal intent lies with the law enforcement agencies. *State v. Walker,* 295 N.C. 510, 246 S.E. 2d 748 (1978); 21 Am. Jur. 2d *Crim. Law* § 202 (1981). We note that this is a two step test and a showing of trickery, fraud or deception by law enforcement officers alone will not support a claim of entrapment. The defendant must show that the trickery, fraud or deception was *"practiced upon one who entertained no prior criminal intent."* (Emphasis original.) *State v. Stanley,* 288 N.C. 19, 28, 215 S.E. 2d 589, 595 (1975), (quoting *State v. Love,* 229 N.C. 99, 101, 47 S.E. 2d 712, 714 (1948)). Entrapment may occur through action of law enforcement officers *or their agents. State*

2. Some States have held that entrapment is an affirmative defense which must be proved by the defendant without specifically answering the question which has been presented to this Court. *See, Lisby v. State,* 82 Nev. 183, 414 P. 2d 592 (1966); *State v. Kamrud,* --- Mont. ---, 611 P. 2d 188 (1980); *State v. Little,* 121 N.H. 765, 435 A. 2d 517 (1981); *State v. Hsie,* 36 Ohio App. 2d 99, 303 N.E. 2d 89 (1973). Some States that have adopted the objective application of entrapment, which does not measure the predisposition of the defendant, have placed the burden of proof of the defense of entrapment on the defendant. *See, Batson v. State,* 568 P. 2d 973 (Alaska 1977); *State v. Anderson,* 58 Haw. 479, 572 P. 2d 159 (1977); *People v. D'Angelo,* 401 Mich. 167, 257 N.W. 2d 655 (1977); *Commonwealth v. Jones,* 242 Pa. Super. 303, 363 A. 2d 1281 (1976); *State v. Hoffman,* 291 N.W. 2d 430 (N.D. 1980).

v. Walker, supra. In this case, Johnson was clearly acting as an agent of the law enforcement officers.

The reason for recognizing the defense of entrapment is that it is improper and unfair for police agencies to instigate criminal intent in the minds of the innocent, inducing them to commit a crime for the purpose of instituting a criminal proceeding against them. *State v. Stanley, supra.*

A leading case in the development of the defense is *Butts v. United States,* 273 F. 35 (8th Cir. 1921), where the court held:

> 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. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.

273 F. at 38.

We have held that the defense of entrapment is available when the criminal intent originates with the law enforcement agencies and such intent is placed in the mind of the defendant by law enforcement officials so that he was tricked, induced or incited to commit a crime, which he would not have otherwise committed. *State v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191 (1955); *State v. Stanley, supra.* We recognize that there are limits to the permissible bounds of police detection of crime and realize that without appropriate safeguards innocent citizens might become ensnared in the government's efforts to create crime to punish. It is equally true that undercover activities of law enforcement agencies are legitimate and are often the sole means of combating the spiraling crime rate.

It is well settled that the defense of entrapment is not available to a defendant who has a predisposition to commit the crime independent of governmental inducement and influence.

The fact that governmental officials merely afford opportunities or facilities for the commission of the offense is, standing alone, not enough to give rise to the defense of entrapment. *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932).

In *State v. Burnette, supra*, Justice Parker (later Chief Justice) wrote for this Court:

> It seems to be the general rule in those cases where the doing of a particular act is a crime regardless of the consent of anyone, that entrapment is not available as a defense to a person, who has the intent and design to commit a crime originating in his own mind, and who does in fact commit all the essential elements constituting it, merely because an officer of the law, or another, in his effort to secure evidence against him for a prosecution, affords him an opportunity to commit the criminal act, or purposely places facilities in his way or aids and encourages him in the perpetration of the crime which had its genesis in his own mind. (Citations omitted.)

242 N.C. at 170, 87 S.E. 2d at 195.

[15] Defendant asks this Court to hold that he was the victim of entrapment as a matter of law. Ordinarily, the issue of whether a defendant has been entrapped is a question of fact which must be resolved by the jury. *State v. Stanley, supra; State v. Campbell*, 110 N.H. 238, 265 A. 2d 11 (1970). It is only when the undisputed evidence discloses that an accused was induced to engage in criminal conduct that he was not predisposed to commit that we can hold as a matter of law that he was entrapped.

In *State v. Stanley, supra*, the defense of entrapment was not raised; however, we, acting under our supervisory powers, held that the defendant was entrapped as a matter of law. There the evidence was undisputed that a police undercover agent became a "big brother" figure to the defendant based upon false representations and repeatedly asked defendant to purchase drugs for him. When the defendant complied, he was charged by the agent with felonious possession of a controlled substance. The evidence clearly demonstrated that the criminal design originated with the undercover agent, and there was not a scintilla of evidence indicating that the teenaged defendant was predisposed to engage in possession or distribution of drugs.

Here, unlike *Stanley*, the police had reason to believe that defendant was engaged in receiving stolen property. Detective Holyfield testified that after his arrest, Stephon Johnson told him that he believed Bruce Hageman would purchase stolen property if offered the opportunity to do so. Johnson told Detective Holyfield that he had been in the Metal Mart on the day he and an accomplice stole property from Ms. Prince's home. Johnson also told Holyfield that he had been in the Metal Mart on prior occasions and sold property to Hageman. Holyfield testified that this was the reason why he chose the Metal Mart as the establishment to which Johnson was sent to try and sell stolen property. We believe that, based on Johnson's statements, the Winston-Salem police had reasonable grounds to suspect that defendant was receiving stolen property. *See Childs v. United States*, 267 F. 2d 619 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 948, 79 S.Ct. 730, 3 L.Ed. 2d 680 (1959), holding that probable cause is not required before police can conduct undercover activities against a suspect. *See also United States v. Williams*, 487 F. 2d 210 (9th Cir. 1973), *cert. denied*, 416 U.S. 958, 94 S.Ct. 1973, 40 L.Ed. 2d 308 (1974); *People v. Wells*, 25 Ill. 2d 146, 182 N.E. 2d 689 (1962); *State v. Burrow*, 514 S.W. 2d 585 (Mo. 1974), which stand for the proposition that the police need not even have a reasonable suspicion before they set the stage to provide a defendant with the opportunity to commit a crime.

In order to determine whether defendant was entrapped as a matter of law, we must consider the particular elements of entrapment and apply the facts of this case to that law. We look first to the question of predisposition. The crucial element in deciding this case is whether defendant was predisposed to commit the crime.

Predisposition may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where the police merely afford the defendant an opportunity to commit the crime. *People v. Hall*, 25 Ill. 2d 297, 185 N.E. 2d 143 (1962); *People v. Gonzales*, 25 Ill. 2d 235, 184 N.E. 2d 833 (1962); *Story v. State*, 355 So. 2d 1213 (Fla. App.), *cert. denied*, 364 So. 2d 893 (Fla. 1978); *State v. Whitney*, 157 Conn. 133, 249 A. 2d 238 (1968); *State v. Talbot, supra; United States v. Becker*, 62 F. 2d 1007 (2d Cir. 1933); *Trice v. United States*, 211 F. 2d 513 (9th Cir.), *cert. denied*, 348 U.S. 900, 75 S.Ct. 222, 99 L.Ed. 707 (1954).

The facts in this case show that defendant purchased the jade ring after Johnson told him that he had been involved in stealing property and that he had lost the ring while attempting to "get away" but was able to go back and find it. Johnson told defendant that he did not want to sign his real name on the form which was provided to him when defendant bought the ring. After receiving this damaging information, defendant proceeded to purchase and resell the ring. Later, when Johnson returned with the silver, he told defendant that the silver was stolen and Hageman proceeded to buy it. Defendant then called on the police "hot line" and asked what had been reported as being stolen. He was furnished a list of items and was told that there was a report of stolen silver. Officer Reaves testified that he talked with defendant but did not tell him the pattern of the silverware which was reported as being stolen. He further testified that during their conversations he asked defendant if he had bought any silver flatware that day, and defendant replied in the negative.

Defendant, on the other hand, testified that he was afraid for his own safety and admitted that he did not mention this to the police officer or tell the officer that Johnson was going to return with more stolen property. The testimony and the recording offered into evidence shows that defendant bought the silver flatware, hesitating only briefly after indicating to Johnson that he was worried about the police. We note at this point that defendant's hesitancy might well have been the exercise of the natural caution that could be expected from one engaged in illegal conduct rather than conduct tending to negate predisposition. *People v. McSmith*, 23 Ill. 2d 87, 178 N.E. 2d 641 (1961). Assuming, *arguendo*, that there was fraud, trickery or deceit, the jury could reasonably infer from defendant's conduct that he was ready and willing to enter the illegal transaction when merely afforded the opportunity to do so.

The question of whether the evidence was sufficient to require an instruction on entrapment is not before us. The only question regarding entrapment is whether the actions of the police officers and their agent amounted to entrapment as a matter of law. There was a conflict in the evidence concerning predisposition and the facts were sufficient to permit but not require the jury to find that defendant was entrapped. The trial judge submitted the defense of entrapment to the jury and the

jury chose to find that defendant was not entrapped. We hold that the facts of this case do not compel a holding that defendant was entrapped as a matter of law.

The decision of the Court of Appeals is

Affirmed.

JACQUELINE B. SIMMONS v. QUICK STOP FOOD MART, INC.

No. 144PA82

(Filed 3 November 1982)

1. Partnership § 2— conveyance of property from partner to partnership—partnership property held in names of partners

A conveyance of property by one of the partners of a partnership, Wood, to "Johnny L. Wood and Oscar Harold Simmons d/b/a Wood and Simmons Investments, a partnership," resulted in the property being held as partnership property in the names of Johnny L. Wood and Oscar Harold Simmons. The property was not held in the partnership's name. G.S. § 59-38(a) and G.S. 59-40.

2. Partnership § 2— conveyance of partnership property by one partner—view towards dissolution of partnership—partnership bound by conveyance

Where a tract of land was held in the name of "Johnny L. Wood and Oscar Harold Simmons d/b/a Wood and Simmons Investments, a partnership," when Johnny L. Wood signed the deed conveying one-half interest in the land to Simmons *and* a stranger, Simmons' wife, he was acting as an agent of the partnership, conveying partnership property. G.S. § 59-34(c). Simmons, as the only other partner of the partnership, impliedly authorized and ratified the conveyance by his acceptance of the deed, and the partnership was bound by Wood's conveyance of partnership property to Simmons and his wife. G.S. 59-37(b) and G.S. 59-34(c). When Simmons, pursuant to a separation agreement, conveyed the tract of land completely to his wife, he conveyed his personally owned interest in the property and he also transferred to plaintiff the other half-interest as a partner conveying the partnership's remaining half-interest in the property. G.S. 59-65(a)(1) and G.S. 59-39(b). Mrs. Simmons then owned both of the one-half interests in the property, and she held fee simple title. G.S. 59-40(e).

3. Registration § 4— recordation of deed prior to recordation of options to renew lease—priority of deed

Where plaintiff recorded her deed to a piece of property on 5 November 1979, and defendant recorded its options to renew a lease on the property on 26 November 1980, because defendant's lease was not recorded prior to the

date on which plaintiff recorded her deed, plaintiff did not take the deed subject to the lease. G.S. 47-18(a).

ON discretionary review of the decision of the Court of Appeals, 56 N.C. App. 105, 286 S.E. 2d 807 (1982), affirming summary judgment for defendant entered by *Cherry, J.*, at the 23 February 1981 Session of District Court, CUMBERLAND County.

In this action for summary ejectment, defendant is in possession of land and a building under a ten-year lease, dated 28 May 1970, which was executed by a predecessor in title of the plaintiff. All deeds in plaintiff's chain of title were recorded before 26 November 1980, the date defendant first recorded two options to renew the lease. The lease itself was never recorded. Plaintiff claims that as a bona fide purchaser for valuable consideration of the property, she is entitled to priority of possession as against a lessee claiming under the later recorded options. Defendant contends that because of certain conveyances by the initial grantors of the lease, plaintiff's title to the property at issue is defective and that the recordation of the options after plaintiff allegedly acquired fee simple title gives defendant priority as to possession of the property.

In chronological order, the relevant events and transactions in this case are as follows:

21 May 1970. Johnny L. Wood ("Wood") and Oscar Harold Simmons ("Simmons") executed a partnership agreement creating a partnership known as "Wood and Simmons Investments." This agreement was never recorded.

21 May 1970. Wood conveyed the property to "Johnny L. Wood and Oscar Harold Simmons d/b/a Wood and Simmons Investments, a partnership." This was recorded on 25 May 1970.

28 May 1970. The lease to the defendant corporation, through which it claims priority as to possession, was executed by Wood and by Simmons. The grantor in the lease was set forth as "Johnny L. Wood and Oscar Harold Simmons d/b/a Wood and Simmons Investments, a partnership." It was signed by Wood and Simmons individually. This lease was for ten years with two five-year options to renew. The lease was never recorded, although the two options were recorded 26 November 1980.

30 June 1976. Pursuant to an agreement between Wood and Simmons to dissolve the partnership, "Johnny L. Wood and wife, Zula Wood" conveyed to "Oscar Harold Simmons and wife, Jacqueline B. Simmons" "all of their one-half undivided interest" in the property at issue by warranty deed. This was recorded 16 July 1976.

15 February 1979. Defendant exercised one of its options to renew the lease by mailing notice of renewal to "Johnny L. Wood and Oscar Harold Simmons d/b/a Wood and Simmons Investments, a partnership." This and the second option were recorded 26 November 1980.

5 November 1979. Simmons and the plaintiff (then his wife) executed a separation agreement which provided that he would convey to her the property and she would convey to him certain other tracts of land.

5 November 1979. Simmons conveyed the property to the plaintiff. This was recorded 5 November 1979.

Plaintiff argues that the conveyance of the property by Wood to "Johnny L. Wood and Oscar Harold Simmons d/b/a Wood and Simmons Investments, a partnership" conveyed title to Johnny L. Wood and Oscar Harold Simmons individually, as tenants in common. Thus, when Wood and his wife conveyed their one-half undivided interest in the property to Simmons and his wife on 30 June 1976, Simmons and his wife acquired fee simple title to the property. Therefore, when Simmons conveyed title to his wife on 5 November 1979, she became the fee simple owner and, having recorded the deed on 5 November 1979, is now entitled to priority because defendant did not record the lease or its options until 26 November 1980.

Alternatively, plaintiff argues that if the property had been conveyed by Wood to the partnership on 21 May 1970 *and* it was held in the partnership name, plaintiff acquired fee simple title because the conveyance of 30 June 1976 resulted in Simmons owning the entire fee. To support this argument, plaintiff contends that an exception to the general rule of N.C.G.S. 59-55(b)(2), that a partner's interest in specific partnership property is not assignable except in connection with the assignment of all the

partners' rights in it, allows one partner to assign his interest in real property owned by the firm to his sole copartner, thus making the partnership property owned solely by the other partner as an individual. By this route Simmons would have acquired fee simple title on 30 June 1976 and thus conveyed fee simple title to the plaintiff on 5 November 1979.

The defendant appellee argues that the deed of 21 May 1970 conveyed title to the partnership in the partnership name and that since there never has been a conveyance out in the partnership name, title still remains in the partnership name. N.C. Gen. Stat. § 59-38(c) (1975). Although the partnership may have dissolved when Wood withdrew, the partnership never wound up its affairs and thus continued to exist. N.C. Gen. Stat. § 59-60 (1975). Therefore, because the partnership still held title to the property and the partnership never wound up, defendant has priority to possession under the lease.

J. Gates Harris and Thomas H. Finch, Jr., for plaintiff appellant.

Ervin I. Baer and Christopher B. Godwin for defendant appellee.

MARTIN, Justice.

The first question this Court must decide is whether the Court of Appeals erred in concluding that Wood's conveyance of the property to "Johnny L. Wood and Oscar Harold Simmons d/b/a Wood and Simmons Investments, a partnership," conveyed title to the partnership in the partnership name. We find that it did so err, and we reverse.

On 21 May 1970, Wood and Oscar Harold Simmons created a partnership by executing a partnership agreement. On the same day Wood conveyed the property at issue in this case to the partnership. As Mr. Simmons stated, "I agreed with Johnny L. Wood to form with him this partnership, to be known as 'Wood and Simmons Investments.' My capital contributions to the partnership were a lot in Bonnie Doone and three mobile homes. Johnny L. Wood's capital contribution was this lot on Highway 87 [the property at issue here]." Testimony by Mr. Wood was also to the effect that the property was conveyed to the partnership and not to

Wood and Simmons as tenants in common. Further, the deed's granting clause provided:

> That said parties of the first part, in consideration of other good and valuable consideration and the sum of Ten --- Dollars to them paid by *party* of the second part the receipt of which is hereby acknowledged have bargained and sold, and by these presents do grant, bargain, sell and convey to said party of the second part, its successors, heirs and assigns, a certain parcel of land . . . [Emphasis ours.]

In addition, the deed's habendum clause provided: "TO HAVE AND TO HOLD the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said *party* of the second part, *its* successors, heirs and assigns, to *its* only use and behoof forever." (Emphases added.) The emphasized language of the habendum clause just quoted indicates that the grantor intended the partnership entity, rather than the partners as individuals, to be the grantee. "All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property." N.C. Gen. Stat. § 59-38(a) (1975).

[1] Under North Carolina's Uniform Partnership Act, title to real property owned by a partnership may be held either in the partnership name or in the name of some or all of the partners. *See* N.C. Gen. Stat. § 59-40 (1975). On the particular facts before us, we hold that Wood's conveyance of 21 May 1970 to "Johnny L. Wood and Oscar Harold Simmons d/b/a Wood and Simmons Investments, a Partnership," resulted in the property being held as partnership property in the names of Johnny L. Wood and Oscar Harold Simmons. We note that other partnership property was held in the partnership's name. E.g., a deed to another tract was held in the name of "Wood and Simmons Investments, a partnership," with no mention of Wood and Simmons individually, that deed being recorded in Deed Book 2218, page 589, in the office of the Register of Deeds for Cumberland County. A later deed out of this partnership property listed "Wood and Simmons Investments, a partnership," as grantor, this deed being recorded in Deed Book 2554, page 374. Had Wood and Simmons intended the partnership property at issue to be held in the partnership's name, they would have put it in the partnership's name. In this

case, however, the partnership property was held in the names of the two partners. Thus, the Court of Appeals erred in finding that the partnership property was held in the partnership's name.

[2] We must next determine whether plaintiff's rights in the property are superior to defendant's rights under its lease. A week after the day on which the partnership was created and on which Wood transferred the property at issue to the partnership, the partnership executed a lease of the property to the defendant. The lease, whose grantor was "Johnny L. Wood and Oscar Harold Simmons d/b/a Wood and Simmons Investments, a partnership," was a lease of partnership property to the lessee through Wood and Simmons as agents of the partnership. *Oil Co. v. Furlonge*, 257 N.C. 388, 126 S.E. 2d 167 (1962). Rental payments under the lease were paid to the account of the partnership until the partnership dissolved, and the lessor listed in the granting clause of the lease was identical to the grantee listed in the 21 May 1970 deed to the partnership of the same property. The lease, however, was never recorded.

On 30 June 1976, pursuant to an agreement to dissolve the partnership, Wood and his wife purported to transfer their interest in the partnership property which is the subject of this litigation to Simmons and his wife. Listed as grantors were "Johnny L. Wood and wife, Zula Wood," conveying "[a]ll of their one-half undivided interest" in the real property to "Oscar Harold Simmons and wife, Jacqueline B. Simmons." The effects of this conveyance are not as simple as would initially appear.

In a partnership governed by the provisions of the Uniform Partnership Act, each partner has three property rights: "(1) His right in specific partnership property, (2) His interest in the partnership, and (3) His right to participate in the management [of the partnership]." N.C. Gen. Stat. § 59-54 (1975). As regards his right in specific partnership property, each partner is deemed a co-owner with his other partners as tenants in partnership. N.C. Gen. Stat. § 59-55(a) (1975). One incident of a tenancy in partnership is that "[a] partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all of the partners in the same property." N.C. Gen. Stat. § 59-55(b)(2) (1975). In construing this section of the Uniform Partnership Act, the Supreme Court of Pennsylvania held that it did

not apply to a conveyance by a withdrawing partner to the sole surviving partner. *Goldberg v. Goldberg*, 375 Pa. 78, 99 A. 2d 474 (1953). *Cf. Oil Co. v. Furlonge*, 257 N.C. at 394, 126 S.E. 2d at 172. It can be contended in this case, however, that the principle in *Goldberg* is not applicable because Wood conveyed the interest in the partnership property to the sole remaining partner *and* a stranger to the partnership, Mrs. Simmons. Therefore, we look to the principles of agency to determine the import of the deed of 30 June 1976.

The evidence shows that in early 1976 Wood told Simmons that he wanted to dissolve the partnership. The two then decided to terminate their business relationship and to sell the assets of the partnership, one of which was the real property at issue here. The value of this property was set at $60,000, and the two agreed that Simmons would be given the option to buy at that price. Simmons decided to buy, and the conveyance of 30 June 1976 was executed. On the same date an additional tract of partnership property was conveyed to Simmons from the partnership. Because this second tract was held in the name of "Wood and Simmons Investments," the deed was from Wood and Simmons Investments, as grantor, to Oscar Harold Simmons and wife, Jacqueline B. Simmons, grantees. Just as the partnership conveyed partnership property held in the name of the partnership to Simmons and his wife on 30 June 1976, the partnership, through Wood as its agent, also conveyed partnership property that was held in the name of the individual partners to Simmons and his wife on 30 June 1976. Thus, when Johnny L. Wood signed the deed conveying one-half interest in the land at issue here to Simmons and his wife, he was acting as an agent of the partnership, conveying partnership property. N.C. Gen. Stat. § 59-34(c) (1975).

Generally, "[w]here the title to real property is in the name of one or more or all [of] the partners . . . a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of subsection (a) of G.S. 59-39." N. C. Gen. Stat. § 59-40(d) (1975). N.C.G.S. 59-39(a) states that:

> Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the ex-

> ecution in the partnership name of any instrument, *for apparently carrying on in the usual way the business of the partnership* of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(Emphasis ours.) Because the conveyance at issue here was not "for apparently carrying on in the usual way the business of the partnership," but was with a view to the immediate dissolution of the partnership, neither N.C.G.S. 59-40(d) nor N.C.G.S. 59-39(a) applies. Instead, N.C.G.S. 59-39(b) applies: "An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners." The conveyance by Wood, as partner, of a one-half interest in this tract of partnership property to Simmons and his wife was not in the ordinary course of partnership business. Simmons, however, as the only other partner of the partnership, impliedly authorized and ratified the conveyance by his acceptance of the deed. Therefore, the partnership was bound by Wood's conveyance of partnership property to Simmons and his wife. N.C. Gen. Stat. § 59-39(b) (1975). "The law of agency shall apply under [the Uniform Partnership Act]." N.C. Gen. Stat. § 59-34(c) (1975).

Upon Mr. Wood's request, the partnership was dissolved in June 1976. "The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." N.C. Gen. Stat. § 59-59 (1975). Simmons testified that "[a]fter these conveyances [of 30 June 1976] the partnership was dissolved and the relationship between me and Johnny L. Wood was terminated." *See* N.C. Gen. Stat. 59-61(1)(b) (1975).

Mere dissolution does not terminate a partnership however; the partnership continues after dissolution until the winding up of partnership affairs is completed. N.C. Gen. Stat. § 59-60 (1975); *Oil Co. v. Furlonge, supra.* Winding up generally involves the settling of accounts among partners and between the partnership and its creditors. *See* N.C. Gen. Stat. § 59-70 (1975). In the pres-

ent case, apparently the partners assumed that the dissolution agreement and the conveyances of 30 June 1976 served to wind up the partnership. Wood testified that upon dissolution Simmons assumed the only debt the partnership owed, which was a note on one of the buildings on the disputed land. Wood also testified that he had understood that Simmons had assumed the lease with Quick Stop as part of the dissolution agreement.[1]

However, the partnership did not complete winding up: one-half interest in the partnership property involved here was still owned by the partnership after the partnership conveyed one-half interest to Simmons and his wife on 30 June 1976. Immediately before the conveyance of 5 November 1979, Simmons and his wife owned one-half interest in the property and the partnership owned the other half.

On 5 November 1979, Simmons and the plaintiff (then his wife) executed a separation agreement which provided that he would convey this property to her in consideration for her transfer to him of certain other tracts of land. Although the title to the property from Mr. Simmons to Mrs. Simmons was transferred by one deed, the conveyance must be analyzed as follows: one-half interest in the property was owned by Simmons and his wife as individuals; the other half-interest was held by the dissolved but incompletely wound-up partnership. Mr. Simmons's conveyance to plaintiff transferred his personally owned interest in the property to plaintiff directly; however, he also transferred to plaintiff the other half-interest as a *partner* conveying the *partnership's* remaining half-interest in the real property. "After dissolution a partner can bind the partnership . . . [b]y any act appropriate for winding up partnership affairs. . . ." N.C. Gen. Stat. § 59-65(a)(1) (1975). *See* N.C. Gen. Stat. § 59-63(2) (1975). The sale of partnership assets upon dissolution is an act appropriate for winding up partnership affairs. Although "[a]n act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners," N.C.G.S. 59-39(b), at the time he made the conveyance to Mrs. Simmons from the partnership, Mr. Simmons was the only remaining partner. Therefore, the

1. Apparently the lessee defendant believed that too, since after 1976 the defendant made rental payments payable solely to Oscar Harold Simmons.

partnership was bound by the conveyance because he authorized it, and Mrs. Simmons acquired good title to the half-interest in the property formerly owned by the partnership. *See* N.C. Gen. Stat. § 59-40(e) (1975). Since Mrs. Simmons then owned both of the one-half interests in the property, she held fee simple title.

[3] Mrs. Simmons recorded her deed to the property on 5 November 1979, and the defendant recorded its options to renew the lease on 26 November 1980. It is well settled in this state that only actual prior recordation of an interest in land will serve to put a bona fide purchaser for value or a lien creditor on notice of an intervening interest or encumbrance on real property. Because defendant's lease was not recorded prior to the date on which plaintiff recorded her deed, plaintiff did not take the deed subject to the lease. *Beasley v. Wilson*, 267 N.C. 95, 147 S.E. 2d 577 (1966); *Bourne v. Lay & Co.*, 264 N.C. 33, 140 S.E. 2d 769 (1965); N.C. Gen. Stat. § 47-18(a) (1976). Therefore, Mrs. Simmons is entitled to possession, and summary judgment on the issue of summary ejectment should have been entered for the plaintiff. *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972).

The opinion of the Court of Appeals is reversed. The cause is remanded to that court for entry of an order reversing the summary judgment for defendant and remanding the cause to the district court for the entry of an order granting summary judgment for the plaintiff.

Reversed and remanded.

STATE OF NORTH CAROLINA v. TOMMIE HOWARD WHITE

No. 22A82

(Filed 3 November 1982)

1. Criminal Law §§ 66.9, 66.16— photographic identification procedures not impermissibly suggestive—independent origin of in-court identification

In a prosecution for felonious assault, kidnapping and first degree sexual offense, two photographic lineups shown to the victim the day after the crimes occurred were not impermissibly suggestive because the victim had described his assailant as wearing a white T-shirt and defendant was the only person in

the lineups wearing a white T-shirt where the photographs were presented to the victim in separate bundles without any suggestive comment by police officers present at the time; the first lineup contained eight color photographs and the second contained ten black-and-white photographs; different photographs of defendant were used in each lineup; several of the other photographs in each lineup showed black males wearing other kinds of white shirts; and the victim immediately selected defendant's photograph at each lineup without any prompting. Furthermore, even if the photographic procedures were impermissibly suggestive, the evidence supported the trial court's determination that the victim's in-court identification of defendant was of independent origin and was therefore admissible where it showed that, before the assault, the victim had paid particular attention to his assailant through the window of an arcade because he thought the assailant might be awaiting an opportunity to steal his bicycle; the area was well-lit and the moon was full; when defendant stopped the victim in the street, there was sufficient light for the victim to identify the assailant as the man he had seen at the arcade; upon escape from the alley in which he had been assaulted, the victim immediately gave to the police a detailed account of a man fitting defendant's description; at trial, the victim pointed out the defendant without any hesitation as his assailant; and the victim testified that his in-court identification of defendant was based upon his observation of him at the crime scene rather than on the photographs he viewed.

2. **Kidnapping § 1.2— removal to commit first degree sexual offense—sufficiency of evidence**

The State's evidence in a first degree kidnapping case was sufficient to support a finding by the jury that defendant forced the victim into an alley for the purpose of committing a first degree sexual offense as alleged in the indictment rather than merely to interrogate him as to the whereabouts of a third person where it tended to show: defendant forced the victim into an alley by use of an ice pick, interrogated the victim briefly as to the whereabouts of a third person, struck him with his hands and then ordered him to remove all of his clothes; when the victim was nude, defendant made him get down on his hands and knees; while in this position, the victim heard the sound of a package tearing and then felt defendant's penis touch him; defendant committed anal intercourse on the victim twice and forced the victim to commit an oral sexual act on him; and investigators later found lubrication jelly, a condom, and a foil condom pack in the alley near the victim's trousers.

3. **Assault and Battery § 14.5— assault with deadly weapon with intent to kill inflicting serious injury—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of assault with a deadly weapon with intent to kill inflicting serious bodily injury where it tended to show that defendant stabbed the victim over 20 times in the neck and chest with an ice pick and then announced that he was going to kill the victim with a switchblade knife, and that the victim managed to escape only when defendant was reaching for the knife and found that his wallet was missing.

4. **Criminal Law § 89.2— exclusion of corroborating testimony on collateral matter**

In a prosecution for felonious assault, kidnapping and first degree sexual offense, the trial court did not err in the exclusion of testimony of a defense witness offered to corroborate testimony by defendant's father on cross-examination that a third person, rather than defendant, had yelled to him that "someone just got stabbed to death over there," since the trial court had the discretion to control how far the parties could go in corroborating a witness on collateral matters at the trial. Furthermore, defendant was not prejudiced by the exclusion of such testimony.

5. **Criminal Law § 102.3— jury argument—waiver of objection**

A defendant in a non-capital case waived objection to the prosecutor's jury argument by failing to object thereto at the trial.

ON appeal by defendant from judgments of *Rouse, J.*, entered at the 14 September 1981 Session of Superior Court, CARTERET County.

Defendant was charged in separate indictments, proper in form, with assault with a deadly weapon with intent to kill inflicting serious injury, kidnapping in the first degree, and sexual offense in the first degree. He was sentenced to life imprisonment for the sexual offense, imprisonment for forty years for kidnapping (to run concurrently with the life sentence), and imprisonment for twenty years for assault with a deadly weapon with intent to kill inflicting serious injury (to run consecutively to the life sentence).

Evidence presented by the state tended to show that on 15 July 1981, James E. LuPardus, Jr., a sixteen-year-old boy, left work at the Sanitary Restaurant at 9:30 or 10:00 p.m. and rode his bicycle to the Wheelhouse and Galley Arcade in Morehead City. Because he was concerned that his bicycle might be stolen, he watched it through a window from the inside of the arcade. The area outside was well-lit and he saw the defendant, Tommie White, staring at him through the window. Approximately an hour after he had arrived, LuPardus left the arcade on his bicycle.

When he was about a block and a half away from the arcade, a man stepped off the curb and told LuPardus to stop. The area was lighted well enough that LuPardus could recognize the man as being the person he had seen through the window at the ar-

cade. The defendant told LuPardus he was looking for a man named Larry who worked at the Sanitary Restaurant. After talking for a few minutes, the defendant pulled out an ice pick and used it to force LuPardus into a dead-end alley. There he demanded that LuPardus tell him the names of everyone who worked at the Sanitary Restaurant, apparently in an effort to track down Larry, who the defendant said had stolen some drugs from him. As LuPardus attempted to think of the names of people working at the restaurant, the defendant hit him twice across the side of his face with his hand.

The defendant then forced LuPardus to undress, to submit to anal intercourse twice, and to commit an oral sexual act on the defendant. After these assaults and while LuPardus was lying on the ground, the defendant kicked the victim's glasses off and began striking him in the neck and chest with the ice pick. He told LuPardus that he was going to cut his throat with a switchblade knife. Reaching around to get the knife from his pocket, the defendant noticed that his wallet was missing. As he began to look for it, LuPardus managed to distract him by throwing his own wallet in the vicinity of the defendant's search and was then able to escape.

Additional facts relevant to the decision will be discussed below.

Rufus L. Edmisten, Attorney General, by Daniel F. McLawhorn, Assistant Attorney General, for the State.

Donald C. Hicks III for defendant appellant.

MARTIN, Justice.

[1] The defendant's first assignment of error is that the trial judge erred in overruling his objection to LuPardus's in-court identification of him as the assailant. He claims that his due process rights were violated because of circumstances surrounding two photographic lineups shown to the victim the morning and afternoon after the crimes were committed. We have carefully reviewed this assignment of error and find it without merit.

Identification evidence must be excluded as violating a defendant's rights to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is

a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247 (1968); *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982); *State v. Thompson*, 303 N.C. 169, 277 S.E. 2d 431 (1981); *State v. Wilson*, 296 N.C. 298, 250 S.E. 2d 621 (1979). In the present case the victim was shown two pretrial photographic lineups the day after the crimes occurred. The photographs were presented to him in separate bundles without any suggestive comment by police officers present at the time. The first lineup contained eight color photographs and the second contained ten black-and-white photographs. Different photographs of the defendant were used in each lineup. Although in both lineups the defendant was the only person shown wearing a white T-shirt, several other photographs showed black males wearing other kinds of white shirts. At each lineup, LuPardus immediately selected the defendant's photograph without any prompting. The night before he was shown the photographs, LuPardus had described his assailant to police detectives as wearing dark pants and a white T-shirt. Defendant claims that by showing the witness a photograph of the defendant wearing a white T-shirt, the police induced the witness to pick out defendant's photographs from the two lineups.

The facts in *State v. Thompson, supra*, are similar. In *Thompson*, defendant argued that a pretrial photographic lineup was impermissibly suggestive because he was the only individual photographed wearing a red shirt and the witness who was shown the lineup had previously described the perpetrator of the crime as a man dressed in a red shirt. The trial judge conducted a voir dire hearing and found that the photographic identification was not so impermissibly suggestive as to give rise to an irreparable mistaken identification. In our case, several of the photographs were of males with white shirts, although defendant's photograph was the only one in which a male was wearing a white T-shirt. As in *Thompson*, after voir dire hearing, the court concluded that the photographic identification was not so impermissibly suggestive as to give rise to an irreparable mistaken identification. *State v. Leggett, supra.* A trial court's findings entered upon a voir dire hearing are conclusive and binding on appeal if supported by competent evidence. *State v. Lake*, 305 N.C. 143, 150, 286 S.E. 2d 541, 545 (1982). We find nothing in

the record before us that would lead us to conclude that these findings must be disturbed.

Even if the photographic lineup procedures could be found impermissibly suggestive, we find more than adequate evidence in the record to support the trial court's decision to hold LuPardus's in-court identification admissible as being of independent origin. Before the assault, LuPardus had paid particular attention to the man standing outside the arcade, thinking that he was awaiting an opportunity to steal his bicycle. The area was well-lit and the moon was full. When the defendant stopped him in the street, there was also sufficient light for LuPardus to identify him as the man he had seen at the arcade. Upon escape from the alley in which he had been assaulted, LuPardus immediately gave a detailed account of a man fitting White's description to the police. He repeated the description the next day without variance. At trial, he pointed out the defendant without any hesitation as having been his assailant. LuPardus testified that his in-court identification of defendant was based upon his observation of him at the crime scene, rather than on the photographs he viewed. As stated in *Thompson, supra:*

> The factors to be considered in determining whether the in-court identification of defendant is of independent origin include the opportunity of the witness to view the accused at the time of the crime, the witness' degree of attention at the time, the accuracy of his prior description of the accused, the witness' level of certainty in identifying the accused at the time of the confrontation, and the time between the crime and the confrontation.

303 N.C. at 172, 277 S.E. 2d at 434. *See also Neil v. Biggers,* 409 U.S. 188, 34 L.Ed. 2d 401 (1972); *State v. Headen,* 295 N.C. 437, 245 S.E. 2d 706 (1978). Considering the victim's identification of White in light of all the circumstances, we hold that the identification procedures did not give rise to a substantial likelihood of irreparable misidentification, and the trial court's admission of LuPardus's in-court identification of White was not error.

[2] The defendant next assigns as error the trial court's failure to dismiss the charges of kidnapping in the first degree and assault with a deadly weapon with intent to kill inflicting serious

injury. With regard to the first charge, N.C.G.S. 14-39(a)(2) states in relevant part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony . . . .

The indictment in the present case listed the felony of sexual offense in the first degree as the purpose for which White forced LuPardus into the alley. The defendant claims that his motive for taking LuPardus into the alley was not to commit a sexual assault, but merely to interrogate the victim concerning the whereabouts of Larry. He contends that the state failed to prove he had forced LuPardus into the alley for the purpose of committing a sexual offense in the first degree as alleged in the indictment and that it was error for the trial judge to deny his motion to dismiss the kidnapping charge.

When an indictment alleges an intent to commit a particular felony, the state must prove the particular felonious intent alleged. *State v. Faircloth*, 297 N.C. 388, 255 S.E. 2d 366 (1979); *State v. Friddle*, 223 N.C. 258, 25 S.E. 2d 751 (1943). Intent, or the absence of it, may be inferred from the circumstances surrounding the event and must be determined by the jury. *State v. Accor and State v. Moore*, 277 N.C. 65, 73, 175 S.E. 2d 583, 588 (1970) (quoting *State v. Thorpe*, 274 N.C. 457, 464, 164 S.E. 2d 171, 176 (1968)). When ruling on a motion to dismiss on grounds of insufficiency of the evidence, a trial court must view the evidence in the light most favorable to the state, drawing all reasonable inferences in the state's favor. *State v. Cox*, 303 N.C. 75, 277 S.E. 2d 376 (1981). In the present case, the following evidence was sufficient to show that the purpose of the removal was to commit a sexual offense in the first degree and required the submission of the charge to the jury: LuPardus testified that White had forced him into the alley, interrogated him briefly, struck him with his hands, and then ordered him to remove all of his clothes. When LuPardus was nude, White made him get down on his hands and

knees. While in this position, LuPardus heard the sound of a package tearing and then felt the defendant's penis touch him. White committed anal intercourse on the victim twice and forced LuPardus to commit an oral sexual act on him. Later, investigators found lubrication jelly, a condom, and a foil condom pack in the alley near the victim's trousers. From this evidence the jury could have found that because the defendant was prepared to commit a sexual assault on LuPardus when he forced him into the alley and did in fact sexually assault him, he had taken LuPardus there for that purpose. We find no error in the trial judge's denial of the defendant's motion to dismiss the kidnapping charge.

[3] The defendant also claims that the evidence does not support the charge of assault with a deadly weapon with intent to kill inflicting serious bodily injury. The mere proof of an assault with a deadly weapon inflicting serious injury does not by itself establish an intent to kill. *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972). However, the nature of the assault, the manner in which it was made, the weapon, if any, used, and the surrounding circumstances are all matters from which an intent to kill may be inferred. *Id.* In the present case the evidence shows that after stabbing LuPardus over twenty times in the neck and chest with the ice pick, White announced that he was going to kill him with a switchblade knife. It was only when White was reaching for the knife and found his wallet missing that LuPardus managed to escape. We find that this evidence was sufficient to support the charge in the indictment. Defendant's assignment of error is without merit.

[4] The defendant next contends that the trial court erred in refusing to allow one of his witnesses to corroborate the testimony of a previous witness. The record before us shows that defendant's father, John T. White, testified at trial that on the night of the assault he had been at home in a room he rented at the Wheelhouse and Galley and had heard Jeff Shephard yell to him from the second floor that "someone just got stabbed to death over there." He denied having told a police investigator on the morning after the assault that it had been his son, Tommie, who had been the one who told him that someone had been stabbed. The defendant then called Connie Lewis, a maid at the Wheelhouse and Galley, for the purpose of corroborating John T.

White's testimony. When defense counsel asked her, "Do you recall anything unusual happening in reference to those people that you have described?" the court sustained an objection by the state and a voir dire hearing was held to determine whether Lewis's testimony would be admissible. At voir dire the court also sustained an objection by the state to the question, "Miss Lewis, did you hear anything said by those people you described?" Her answer, in the absence of the jury, was that "[t]hey hollered down and said that some—they cursed—and some, that somebody died over there." Although defense counsel explained that he had been hoping to offer her answer to corroborate the earlier testimony, he did not request the trial court to review its ruling on the objection. He did enter an exception to the ruling, however. Therefore, we must determine whether the trial court erred in sustaining the state's objection to the line of questioning.

Defendant offered the testimony of Lewis for the purpose of corroborating the testimony of the witness John T. White as to what he heard someone else say about the killing. White's testimony was brought out on cross-examination. The state was attempting to show that White had said that the defendant made the statement rather than Jeff Shephard. The cross-examination of John T. White and the subsequent testimony of Lewis were only competent to impeach or corroborate White.

The trial judge has discretion to control how far the parties may go in impeaching and corroborating witnesses on collateral matters in a trial. *Gibson v. Whitton*, 239 N.C. 11, 79 S.E. 2d 196 (1953); 1 Brandis on North Carolina Evidence § 42 (1982). Conceivably, in the case at bar, the state could have offered a witness to testify that Connie Lewis was not present at the time, and so on ad infinitum. To allow contradiction or corroboration of collateral facts by other evidence is generally not permitted, as its only effect is to show that the witness is capable of error on immaterial points and to allow it would confuse the issues and unduly prolong the trial. Brandis, *supra*, § 47. It must be remembered that Lewis was not attempting to corroborate White by testifying that White had made a similar statement at a prior time.

Moreover, assuming the exclusion of the answer was error, it was harmless beyond a reasonable doubt. Miss Lewis's statement

that someone said that "somebody died over there" is a far cry from corroborating John White's testimony that someone yelled "someone just got stabbed to death." Defendant must show not only error but prejudice as well. Defendant has failed to show that a different result would have ensued had the evidence been admitted. *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979). It is not conceivable that this comparatively inconsequential bit of evidence would have affected the verdict of the jury. *Freeman v. Ponder*, 234 N.C. 294, 67 S.E. 2d 292 (1951).

[5] Defendant's final assignment of error is that the trial court impermissibly allowed the prosecutor to make improper and prejudicial remarks to the jury. The record before us does not show that the defendant objected to any of the remarks of which he now complains. He urges, however, that the trial judge had a duty to intervene ex mero motu to curb the prosecutor's remarks even in the absence of any objections by defense counsel.

We find that because defendant did not object at trial to the prosecutor's argument to the jury, he waived the alleged errors and cannot raise them now on appeal. As this Court stated recently in *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982):

> It is well-settled in this jurisdiction that control of the arguments of counsel rests primarily in the discretion of the presiding judge. *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980). *State v. Thompson*, 293 N.C. 713, 239 S.E. 2d 465 (1977). Ordinarily, objection to the prosecuting attorney's jury argument must be made prior to the verdict for the alleged impropriety to be reversible on appeal. *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978); *State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970) [*death sentence vacated*, 403 U.S. 948, 29 L.Ed. 2d 860 (1971)]. Failure to object waives the alleged error. *Id.*
>
> An exception to this rule is found in capital cases where, because of the severity of the death sentence, this court will review alleged improprieties in the prosecutor's jury argument despite defendant's failure to timely object. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). However, even in death cases the impropriety must be extreme for this court to find that the trial judge abused his discretion in not

recognizing and correcting *ex mero motu* an argument that defense counsel failed to find prejudicial when he heard it. *Id.*

Id. at 536-37, 290 S.E. 2d at 570.

The defendant here was not charged with a capital offense. Because he failed to raise any objections at trial to the prosecutor's jury argument, he has waived them for purposes of this appeal.

Defendant received a fair trial, free of prejudicial error.

No error.

IN RE: THE DENIAL OF APPROVAL TO ISSUE $30,000,000.00 OF SINGLE FAMILY HOUSING BONDS AND $30,000,000.00 OF MULTI-FAMILY HOUSING BONDS FOR PERSONS OF MODERATE INCOME

No. 196PA82

(Filed 3 November 1982)

Constitutional Law § 11; Statutes § 2.6; Taxation § 7.2— bonds to finance single and multi-family housing for persons of moderate income—serves public purpose—valid exercise of tax power

The 1979 amendment to the North Carolina Housing Finance Agency Act, G.S. 122A-54.4, which provided for issuance of bonds to finance single and multi-family housing for persons of moderate income, was enacted for a public purpose, and is, therefore, a valid exercise of the State's power to tax under Article V, Section 2(1) of the North Carolina Constitution.

THIS case was heard before *Bailey, Judge*, at the 1 March 1982 Session of Superior Court, WAKE County. Judgment was entered on 11 March 1982. Defendant appealed and both parties petitioned this Court, under G.S. 7A-31 (1981), for discretionary review before the case was heard by the Court of Appeals. We allowed the petition on 13 July 1982.

The primary question on this appeal is whether the North Carolina Housing Finance Agency's issuance of bonds to finance single and multi-family housing for persons of moderate income serves a public purpose and is, therefore, a valid exercise of the power to tax under article V, section 2(1) of the North Carolina Constitution.

Powe, Porter and Alphin, P.A., by W. Travis Porter, James L. Stuart, and Eugene F. Dauchert, Jr., for plaintiff North Carolina Housing Finance Agency.

Rufus L. Edmisten, Attorney General, by Douglas A. Johnston, Assistant Attorney General, for defendant Local Government Commission.

CARLTON, Justice.

In 1969 the General Assembly enacted the North Carolina Housing Finance Agency Act, G.S. 122A-1 to 122A-23 (1981 & Cum. Supp. 1981), declaring "that the purposes of [the Act] are to provide financing for residential housing construction, new or rehabilitated, for sale or rental to persons and families of *lower* income." G.S. 122A-2 (1981) (emphasis added). This Court, determining that it was enacted for a public purpose, upheld the Act's constitutionality. *Martin v. North Carolina Hous. Corp.*, 277 N.C. 29, 175 S.E. 2d 665 (1970). In 1979 the General Assembly added another provision to the Act in order to extend its reach to "persons and families of *moderate* income." G.S. 122A-5.4 (1981) (emphasis added). In this appeal, a sequel to *Martin*, we determine whether G.S. 122A-5.4, the 1979 amendment to the Act, serves a public purpose and is, therefore, an appropriate exercise of the taxation power under article V, section 2(1) of the North Carolina Constitution.

I.

Plaintiff, the North Carolina Housing Finance Agency, is a public agency and instrumentality of the State of North Carolina. G.S. 122A-4 (1981). It has the power, under the North Carolina Housing Finance Agency Act, to do the following: issue bonds and notes, the proceeds from which may be used to purchase or make mortgages for persons of lower and moderate income so they can buy residential housing; make or participate in the making of development loans to sponsors of housing projects who lease to persons of lower and moderate income. G.S. 122A-1 to 122A-23 (1981 & Cum. Supp. 1981).

The Local Government Commission, defendant, is also an agency of the State. G.S. 159-3 (1976). It is authorized, under G.S. 122A-8 (Cum. Supp. 1981), to determine the rate of interest, price

and manner of sale of plaintiff's bonds with approval of the plaintiff.

The facts in this case are not disputed. Both parties stipulated to the following:

On 16 December 1981 plaintiff's board of directors adopted a resolution calling for the issuance of $30,000,000 worth of mortgage subsidy housing bonds. The proceeds from these bonds were to be used to purchase or make mortgages for persons of moderate income who wished to buy single-family residences. The board also adopted a resolution calling for the issuance of an additional $30,000,000 worth of housing bonds, the proceeds from which were to be used to provide project development loans to builders, sponsors and developers of multi-family residential housing units who would lease their units to persons of moderate income. Plaintiff's board also adopted temporary rules establishing moderate income limits: $23,000 for people living in rural areas and $27,000 for those living in urban areas. In adopting the temporary rules, the board considered: (a) the total income of such persons which would be available to meet their housing needs, (b) the size of the family, (c) the cost and condition of housing facilities available, and (d) the eligibility of such persons for federal housing assistance. G.S. 122A-5.4(c) (1981).

On 14 December 1981, after plaintiff notified defendant that it intended to issue the moderate income housing bonds, defendant requested an opinion from its bond counsel concerning the constitutionality of G.S. 122A-5.4 since this would be the first bond issuance proposed under the new "moderate income" provision of the Act. When this Court earlier had declared the Act constitutional, we did so at a time when the Act authorized assistance to persons of lower income only. *Martin v. North Carolina Hous. Corp.*, 277 N.C. 29, 175 S.E. 2d 665 (1970).

On 15 December 1981 defendant's secretary received an answer from bond counsel containing reservations about the constitutional status of G.S. 122A-5.4; thus, bond counsel indicated it was unable to render an unqualified approving legal opinion with respect to any bond issue of the agency to finance either single family or multi-family housing for persons of moderate income.

On 18 December 1981, after considering the opinion of bond counsel, defendant determined that it could not carry out its

duties in connection with the sale of these bonds under G.S. 122A-8 because the constitutionality of the bond issuance was in doubt. Hence, defendant passed a resolution declining to act on the moderate income housing bonds due to its inability to obtain a clear legal opinion as to the constitutionality of such an issuance, realizing that the State's credit reputation would be harmed if the bonds were to be invalidated after the issuance.

To get its bond issuance approved, plaintiff brought suit against defendant to resolve all doubts concerning the constitutionality of G.S. 122A-5.4, the statute which authorized plaintiff to assist persons of moderate income in acquiring adequate housing.

The matter was heard before Judge Bailey upon the parties' stipulation of facts as set out above. In his written findings of fact the judge stated that plaintiff had the authority to issue bonds, the proceeds from which were to be used to help people with moderate incomes secure adequate housing. However, he noted that under the Act *plaintiff's authority "is specifically conditioned on the unavailability of mortgage loans for the same purposes from private lenders upon reasonably equivalent terms and conditions."* G.S. 122A-5(2) and (3) (Cum. Supp. 1981) (emphasis added).

By implication, Judge Bailey concluded that single family and multi-family housing mortgage loans were not otherwise available from private lenders "upon reasonably equivalent terms and conditions." He did so by expressly noting that as of 16 December 1981 the average mortgage rate for conventional home mortgages in the State of North Carolina was 17%. The mortgages financed under the single family, moderate income bonds would carry a much lower interest rate: about 15%. Similarly, as of 16 December 1981, the average interest rate was 19% for project development loans to builders, sponsors and developers of multi-family housing units in the State. The project development loans financed through the multi-family moderate income housing bonds would also carry a much lower interest rate: about 15 1/2%.[1] Mortgage loans from private lenders, thus, were not available on "reasonably equivalent terms and conditions."

1. Plaintiff determined that the proposed bonds, if marketed in the national bond market, would carry an interest rate of about 14 1/2%.

In addition, the judge found that a survey of lending institutions indicated that substantial demand existed throughout the State for bond proceeds which would be used to provide mortgages for housing for persons of moderate income; and that the proceeds from the bonds would have been fully utilized and exhausted by lenders in the State or by the agency itself if the issuance of plaintiff's bonds had been approved and marketed.

Based on the foregoing findings of fact, Judge Bailey concluded as a matter of law that the issuance and sale of the housing bonds was for a lawful public purpose; was in accordance with the authority granted to plaintiff under G.S. 122A-5.4; and was not in conflict with article V, sections 2, 4 or 5 or any other applicable provisions of the Constitution of North Carolina.

From the foregoing, defendant gave notice of appeal to the Court of Appeals. As stated above, both parties petitioned this Court to bypass the Court of Appeals; we allowed the motion on 13 July 1982.

II.

The North Carolina Constitution, article V, section 2(1) provides that "[t]he power of taxation shall be exercised in a just and equitable manner, *for public purposes only*, and shall never be surrendered, suspended, or contracted away." (Emphasis added.) In *Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 159 S.E. 2d 745 (1968), Justice Sharp wrote,

> The power to appropriate money *from* the public treasury is no greater than the power to levy the tax which put the money in the treasury. Both powers are subject to the constitutional proscription that tax revenues may not be used for private individuals or corporations, no matter how benevolent. *Horner v. Chamber of Commerce*, 231 N.C. 440, 57 S.E. 2d 789.

Id. at 143, 159 S.E. 2d at 749-50 (emphasis in original).

The critical question on this appeal, therefore, is whether G.S. 122A-5.4, the new provision of the North Carolina Housing Finance Agency Act which extends the Act's benefits to persons of "moderate income," is constitutional because it is an appropria-

tion of money from the public treasury[2]—a use of the State's power to tax—that serves a public purpose, not merely private interests.

In *Mitchell* and *Martin*, this Court reviewed in detail the applicable principles to be used in determining whether particular legislation serves a public purpose. We note the salient, relevant principles to be applied on review: The presumption is in favor of the constitutionality of an act, *State v. Furmage*, 250 N.C. 616, 621, 109 S.E. 2d 563, 567 (1959). All doubts must be resolved in favor of the Act, *Wells v. Hous. Auth. of Wilmington*, 213 N.C. 744, 749, 197 S.E. 693, 696 (1938). The Constitution is a restriction of powers and those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly, *id.*; therefore, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision, *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E. 2d 888, 891-92 (1961). "The General Assembly, exercising the police power of the State, may legislate for the protection of the public health, safety, morals and general welfare of the people," *Martin v. North Carolina Hous. Corp.*, 277 N.C. at 45, 175 S.E. 2d at 674. "The General Assembly has the right to experiment with new modes of dealing with old evils, except as prevented by the Constitution," *Redev. Comm'n of Greensboro v. Sec. Nat'l Bank of Greensboro*, 252 N.C. 595, 612, 114 S.E. 2d 688, 700 (1960). Justice Sharp aptly summarized our judicial task as follows:

> The initial responsibility for determining what is and what is not a public purpose rests with the legislature, and its findings with reference thereto are entitled to great weight. If, however, an enactment is in fact for a private purpose, and therefore unconstitutional, it cannot be saved by legislative declarations to the contrary. When a constitutional question is properly presented, it is the duty of the court to ascertain and declare the intent of the framers of the Constitution and to reject any legislative act which is in conflict therewith. *State v. Felton*, 239 N.C. 575, 80 S.E. 2d 625; *Nash*

2. In *Martin*, it is noted that $500,000 was appropriated from the General Fund of the State to implement the Act. 277 N.C. at 42, 175 S.E. 2d at 672.

v. Town of Tarboro, 227 N.C. 283, 42 S.E. 2d 209; 1 Strong, N.C. Index, Constitutional Law § 10 (1957).

Mitchell v. North Carolina Indus. Dev. Fin. Auth., 273 N.C. at 144, 159 S.E. 2d at 750.

In the 1979 amendment to the North Carolina Housing Finance Agency Act extending the Act's benefits to people of "moderate income," G.S. 122A-5.4, the General Assembly stated in clear and concise terms its declaration as to public purpose:

> (a) The General Assembly hereby finds and determines that there is a serious shortage of decent, safe and sanitary housing which persons and families of moderate income in the State can afford; that it is in the best interests of the State to encourage home ownership by persons and families of moderate income; that the assistance provided by this section will enable persons and families of moderate income to acquire existing decent, safe and sanitary housing without undue financial hardship and will encourage private enterprise to sponsor, build and rehabilitate additional housing for such persons and families; and that the Agency in providing such assistance is promoting the health, welfare and prosperity of all citizens for the State and is serving a public purpose for the benefit of the general public.
>
> (b) The terms "persons and families of lower income" and "persons of lower income" wherever they appear in this Chapter, except where they appear in G.S. 122A-2 and 122A-3(11), shall be deemed to include "persons and families of moderate income" as defined in clause (c) of this section.
>
> (c) "Persons and families of moderate income" means persons and families deemed by the Agency to require the assistance made available by this Chapter on account of insufficient personal or family income taking into consideration, without limitation, (i) the amount of the total income of such persons and families available for housing needs, (ii) the size of the family, (iii) the cost and condition of housing facilities available and (iv) the eligibility of such persons and families for federal housing assistance of any type predicated upon a moderate or low and moderate income basis.

This Court noted in *Martin* that when

> the constitutionality of a statute . . . depends on the existence or non-existence of certain facts and circumstances, the existence of such facts and circumstances will generally be presumed for the purpose of giving validity to the statute, . . . if such a state of facts can reasonably be presumed to exist, and if any such facts may be reasonably conceived in the mind of the court.

277 N.C. at 44, 175 S.E. 2d at 673, citing 16 C.J.S. Constitutional Law § 100b, pp. 454-55.

The legislature made its public purpose crystal clear in the added statute. That the facts giving rise to the amendment, and stated in the statute, do exist is hardly a matter for debate in the present state of the nation's economy. Indeed, the stipulation of the parties and the trial court's findings of fact indicated that the need exists in North Carolina for the sort of financing that G.S. 122A-5.4 will help provide. As noted above, the trial court impliedly found that private enterprise is unable to meet the need in this State for housing financing. It is readily apparent from defendant's survey that there were no conventional mortgage loans substantially equivalent to those which would have been available under the proposed bonds. Demand for the bond proceeds would have exceeded the amount available.

In deciding whether the 1979 amendment serves a "public purpose" in directing some of the Act's benefits to those with slightly higher incomes than originally anticipated, we find this statement in *Mitchell* particularly pertinent:

> A slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises, (citation omitted) and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public. (Citation omitted.) Often public and private interests are so co-mingled that it is difficult to determine which predominates. It is clear, however, that for a use

> to be public its benefits must be in common and not for particular persons, interests or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity.

273 N.C. at 144, 159 S.E. 2d at 750.

We find the extensive discussion of Chief Justice Bobbitt in *Martin* articulating the various ways in which the original Act served a valid public purpose equally applicable here. Chief Justice Bobbitt noted that "[u]nquestionably, when construction of residential housing is made possible by the [North Carolina Housing Finance Agency's] assistance, all persons in the building industry benefit . . . ." 277 N.C. at 49, 175 S.E. 2d at 676. More importantly, however, Chief Justice Bobbitt pointed out that "the reason and justification for [the Agency's] existence, is to make available decent, safe and sanitary housing to 'persons and families of lower income' who cannot otherwise obtain such housing accommodations." *Id.*, 175 S.E. 2d at 677. In expanding the Agency's power to help those with "moderate incomes," the legislature is acting with the same public purpose in mind. It is attempting "to make available decent, safe and sanitary housing" to another group "who cannot otherwise obtain such housing accommodations." As noted in *Mitchell* no "slide-rule definition" of public purpose can be formulated: the concept changes with such factors as the condition of the economy. Any casual observer knows that the present economy is drastically different from that existing at the time the Act was originally enacted. Such an observer is equally aware of the serious problems facing those with moderate incomes who wish to acquire decent housing for their families. We agree with the appellee that issuance of the proposed bonds would benefit all the citizens of our State. The infusion of low interest mortgage money into the private construction industry should inevitably lead to more jobs, increased local and state tax revenues, more stable neighborhoods and an enhanced economy generally. The supply of available residential housing ultimately would be increased, thus generally improving the opportunities for our people to obtain better housing. Moreover, as noted in *Martin*, the acquisition of houses by people otherwise unable to afford them provides those same people with a stake in the preservation of our society that they would not have were it not for the Agency's assistance. 277 N.C. at 49-50,

175 S.E. 2d at 677. A lack of adequate housing inevitably engenders slum-like conditions, a situation the legislature obviously sought to eliminate with its proposed bond proceeds.

In summary, we find that the public purpose of the Act has not changed, only the economy has. The legislature has appropriately responded to the changing conditions in the residential housing market, and the benefits flowing from the 1979 amendment to the Act are, in our opinion, benefits for the common good of all the people of the State. The increase in available housing which would result from the proposed bonds would further the aim of promoting the health, safety and general welfare of our people. The Agency's authorized activities respond to a serious need of deep public concern, and do so *only* when the planning, construction and financing of decent residential housing is not otherwise available to those "who cannot otherwise obtain such housing." The definition of those "who cannot otherwise obtain such housing" has been, as noted above, appropriately expanded.

Therefore, we hold that the 1979 amendment to the North Carolina Housing Finance Agency Act, G.S. 122A-5.4 (1981), was enacted for a public purpose, and is, therefore, a valid exercise of the State's power to tax under article V, section 2(1) of the North Carolina Constitution.[3]

III.

In its brief, and in an obvious abundance of caution, appellee calls our attention to other provisions of the North Carolina Constitution which it also contends are not violated by the original Act or the 1979 amendment. Specifically, we are referred to article V, sections 2(3), 4, and 5. We find it unnecessary to discuss the applicability of each of these sections of our Constitution to the case at bar because any argument that could be made that these

3. Decisions from other jurisdictions are in accord with our decision today. *See e.g., Massachusetts Home Mortgage Fin. Agency v. New England Merchants Nat'l Bank*, 376 Mass. 669, 382 N.E. 2d 1084 (1978); *Minnesota Hous. Fin. Agency v. Hatfield*, 297 Minn. 155, 210 N.W. 2d 298 (1973); *Johnson v. Pennsylvania Hous. Fin. Agency*, 453 Pa. 329, 309 A. 2d 528 (1973); Opinion to the Governor, 112 R.I. 151, 308 A. 2d 809 (1973); *Bauer v. South Carolina State Hous. Auth.*, 271 S.C. 219, 246 S.E. 2d 869 (1978); *West v. Tennessee Hous. Dev. Agency*, 512 S.W. 2d 275 (1974); *Infants v. Virginia Hous. Dev. Auth.*, 221 Va. 659, 272 S.E. 2d 649 (1980).

provisions render the Act unconstitutional either have been previously answered in *Martin* or are without merit. *Martin v. North Carolina Hous. Corp.*, 277 N.C. at 53-58, 175 S.E. 2d at 679-82 (determining that the tax-exempt status of bonds issued under the Act does not violate what is now article V, section 2(3) and that this method of financing does not create a debt or pledge of the State's credit so as to violate what is now article V, section 4); G.S. 122A-2 (1981) (sets out the purpose of the Agency and the purpose for which the proceeds are to be used as required by article V, section 5).

The judgment of the trial court dated 11 March 1982 is therefore

Affirmed.

STATE OF NORTH CAROLINA v. VICKIE ANN EARNHARDT AND WILLIAM CARL KELLER

No. 282A82

(Filed 3 November 1982)

1. **Criminal Law § 11 — accessory after the fact of voluntary manslaughter — sufficiency of evidence**

In a prosecution for accessory after the fact of voluntary manslaughter, the trial court properly denied defendant's motion to dismiss at the close of the State's evidence and at the close of all the evidence where the evidence was sufficient to give a reasonable inference that defendant knew exactly what had taken place in that he saw two men fighting with the victim, observed the condition of the victim, and observed that the victim had been left in a dangerous position on the road which led to his death. The evidence also was sufficient to show that defendant rendered assistance to the felons in that he concocted and told a false story to an officer.

2. **Criminal Law § 11 — accessory after the fact of voluntary manslaughter — erroneous instructions — prejudicial error**

In a prosecution for accessory after the fact to voluntary manslaughter where the trial court stated that if defendant "knowing Horne and Lagree or Horne or Lagree *could* have committed the crime of voluntary manslaughter, assisted Horne or Lagree in escaping or attempting to escape detection, arrest or punishment by concocting a story which was not true . . . ," then he should be found guilty, the trial court committed prejudicial error. One item of proof of the crime of accessory after the fact is that the accused *knew* that the

felony had been committed by the person assisted, and "considering all of the circumstances of the case" the error was prejudicial. G.S. 15A-1232.

DEFENDANT William Carl Keller appeals as a matter of right pursuant to G.S. 7A-30(2) (1981) from the decision of the Court of Appeals, 56 N.C. App. 748, 290 S.E. 2d 376 (1982), one judge dissenting, finding no error in the trial before *Walker, Judge,* at the 16 February 1981 Session of Superior Court, ROWAN County. Defendant Keller was tried by a jury and convicted of accessory after the fact of voluntary manslaughter and was given a prison sentence of not less than four nor more than ten years.

We address two issues in this opinion: (1) whether the evidence in this case was sufficient as a matter of law to go to the jury, and (2) whether the trial court correctly instructed the jury on the crime of accessory after the fact of voluntary manslaughter.

Rufus L. Edmisten, Attorney General, by Elisha H. Bunting, Jr., Assistant Attorney General, for the State.

Robert M. Davis for defendant.

CARLTON, Justice.

I.

The Court of Appeals' majority and dissenting opinions present an extensive recitation of the facts; reference is made to those opinions. 56 N.C. App. 748, 290 S.E. 2d 376 (1982). We present a summary of the facts sufficient to understand the contentions addressed.

Evidence for the State tended to show the following:

On the night of 28 June 1980 Donald Lagree and Walter Horne were drinking wine and beer and smoking marijuana at Horne's house when Linda Basinger, Vickie Earnhardt, and two small children came to Horne's house and asked for assistance with their automobile. After the car was driven to an area with more light, Horne and Lagree were able to get the car "running better." The women then bought Horne and Lagree some more beer and wine and the group went to William Carl Keller's house to drink. Defendant Keller was Linda Basinger's boyfriend. It was

about 11 p.m. when they arrived at Keller's home. One or two hours later, Linda Basinger's husband, Clarence Basinger, knocked on Keller's door and told defendant that he wanted to speak to his wife. Linda Basinger went outside but returned shortly thereafter, stating that her husband had hit her. Earnhardt called the sheriff's department. Defendant then went outside, talked with Clarence Basinger and returned, stating that Clarence Basinger said he was sorry he hit his wife and that he wanted to speak with her again. Linda Basinger went back outside; this time defendant accompanied her. Shortly thereafter, the group heard a scream and went outside. They found that Linda Basinger had been cut on the arm and was bleeding profusely. Clarence Basinger then verbally abused Lagree and Horne; the three men then began fighting. Lagree was carrying a belt, Horne had a pocketknife, and Clarence Basinger had a hawkbill knife. When Clarence Basinger fell to the ground he was kicked and stomped. Clarence Basinger started crawling toward the road. He then began yelling that he was going to get his shotgun.

While Clarence Basinger was lying on the road, Lagree and Horne kicked him and stomped him again. Still conscious, he was left on the highway. During this time, defendant was standing in his yard and apparently did nothing.

Horne and Lagree went back into the house. When they returned with Earnhardt they found Clarence Basinger still conscious and moaning. Horne kicked Clarence Basinger again in the head. Within minutes, two cars, approaching from opposite directions, drove towards Clarence Basinger; the Ford Pinto struck him. The driver stopped and called an ambulance and the sheriff's department.

Lagree, testifying pursuant to a plea bargain, and the driver's younger brother stated that defendant told Horne, Lagree and Earnhardt not to tell everything, just the following story: Clarence Basinger had pulled a knife on his wife, Linda Basinger, and was trying to cut her. Defendant then tried to wrestle away the knife. While doing so, he saw two black men, Horne and Lagree, walking up the road and called to them for help. When Clarence Basinger saw the men coming, he ran, but fell down in the road where he was hit by a car. Lagree stated that defendant rehearsed this story about three times. The in-

vestigating officer testified that defendant told him the same story when he talked to defendant about the incident.

Defendant was convicted of being an accessory after the fact of voluntary manslaughter and was sentenced as indicated above. He appealed to the Court of Appeals and that court found no error. Judge Hedrick dissented, believing that the trial court erred in failing to grant defendant's motions to dismiss. Judge Hedrick believed that the evidence was insufficient to show that defendant knew that Horne or Lagree had placed Clarence Basinger on the road or that he knew that they had assaulted Clarence Basinger while he was on or near the road. Hence, Judge Hedrick believed the evidence was insufficient to show that defendant knew that any manslaughter had been committed by anyone. Judge Hedrick also found error in the trial court's instructions.

We agree with the majority that the evidence was sufficient to survive defendant's motions to dismiss. However, we find error in the trial court's instructions, as discussed below, and order a new trial.

II.

We first determine whether the trial court erred in denying defendant's motion to dismiss at the close of the State's evidence and at the close of all the evidence. We first review the salient principles to be applied when testing the sufficiency of the evidence:

(1) A motion for dismissal under G.S. 15A-1227 (1978) is identical to a motion to dismiss the action, or for judgment as in the case of nonsuit, under G.S. 15-173 (1978) in this respect: both statutes allow counsel to make a motion challenging the sufficiency of the evidence at the close of the State's evidence or at the close of all the evidence. Hence, cases dealing with the sufficiency of the evidence to withstand the latter motion made under the older statute, G.S. 15-173, are applicable when ruling on motions made under the more recent statute, G.S. 15A-1227. *State v. Powell*, 299 N.C. 95, 98, 261 S.E. 2d 114, 117 (1980). See also *State v. Mendez*, 42 N.C. App. 141, 146, 256 S.E. 2d 405, 408 (1979).

(2) When a defendant moves for dismissal, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense in-

cluded therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied. *State v. Roseman*, 279 N.C. 573, 580, 184 S.E. 2d 289, 294 (1971).

(3) The issue of whether the evidence presented constitutes substantial evidence is a question of law for the court. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E. 2d 431, 433 (1956). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E. 2d 164, 169 (1980). The terms "more than a scintilla of evidence" and "substantial evidence" are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary. *State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980). 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 to dismiss should be allowed. *State v. Cutler*, 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967). This is true even though the suspicion so aroused by the evidence is strong. *State v. Evans*, 279 N.C. 447, 453, 183 S.E. 2d 540, 544 (1971). In *State v. Johnson*, 199 N.C. 429, 154 S.E. 730 (1930), Chief Justice Stacy wrote the classic statement of the sufficiency of the evidence test:

> It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue. (Citations omitted.) The general rule is that, if there be any evidence tending to prove the fact in issue, or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury.

Id. at 431, 154 S.E. 2d at 731.[1] See also *State v. Summitt*, 301 N.C. 591, 596-97, 273 S.E. 2d 425, 428, *cert. denied*, 451 U.S. 970, 101

1. In *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979), the United States Supreme Court stated the constitutional test for determining the sufficiency of the evidence: "[T]he relevant question is 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." *Id.* at 319, 99 S.Ct. at 2789, 61 L.Ed. 2d at 573 (emphasis in original). The Court, in announcing in a footnote that the above test was "the constitutional minimum required to enforce the due process right," noted that this test "is not novel." In so

S.Ct. 2048, 68 L.Ed. 2d 349 (1981). The trial court's function is to determine whether the evidence allows a *"reasonable inference"* to be drawn as to the defendant's guilt of the crimes charged. *State v. Thomas,* 296 N.C. 236, 244-45, 250 S.E. 2d 204, 209 (1978) (emphasis added). In so doing the trial court should only be concerned that the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence. *State v. McNeil,* 280 N.C. 159, 162, 185 S.E. 2d 156, 157 (1971).

(4) In ruling on a motion to dismiss the trial court is to consider the evidence in the light most favorable to the State. *State v. McKinney,* 288 N.C. 113, 117, 215 S.E. 2d 578, 581-82 (1975). In so doing, the State is entitled to every reasonable intendment and every reasonable inference to be drawn from the evidence; contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve. *Id.* The court is to consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State. *Id.* The defendant's evidence, unless favorable to the State, is not to be taken into consideration. *State v. Jones,* 280 N.C. 60, 66, 184 S.E. 2d 862, 866 (1971). However, when not in conflict with the State's evidence, it may be used to explain or clarify the evidence offered by the State. *Id.* In ruling on the motion, evidence favorable to the State is to be considered as a whole in determining its sufficiency. *State v. Powell,* 299 N.C. at 99, 261 S.E. 2d at 117 (1980).

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doing it approved of the test applied in *United States v. Jorgenson,* 451 F. 2d 516, 521 (10th Cir. 1971), *cert. denied,* 405 U.S. 922, 92 S.Ct. 959, 30 L.Ed. 2d 793 (1972), a test which is comparable to the North Carolina standard: "[W]hether 'considering the evidence in the light most favorable to the government, there is substantial evidence from which a jury might *reasonably find* that an accused is guilty beyond a reasonable doubt,' " 443 U.S. at 319 n. 12, 99 S.Ct. at 2789 n. 12, 61 L.Ed. 2d at 573-74 n. 12 (quoting *United States v. Jorgenson,* 451 F. 2d at 521 (10th Cir. 1971), *cert. denied,* 405 U.S. 922, 92 S.Ct. 959, 30 L.Ed. 2d 793 (1972) (emphasis added by United States Supreme Court)). This standard is no different from the North Carolina rules, articulated above, when read as a whole. In *Jackson,* therefore, the United States Supreme Court has impliedly approved the long-standing rules in North Carolina used to determine the sufficiency of the evidence. *State v. Jones,* 303 N.C. 500, 504-05, 279 S.E. 2d 835, 838 (1981).

Moreover, it is no longer the rule in this jurisdiction that the trial court is required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss. *State v. Burton,* 272 N.C. 687, 689-90, 158 S.E. 2d 883, 885-86 (1968); *State v. Stephens,* 244 N.C. 380, 383-84, 93 S.E. 2d 431, 433 (1956).

(5) The test of the sufficiency of the evidence to withstand the motion to dismiss is the same whether the evidence is direct, circumstantial or both. See *State v. Powell*, 299 N.C. at 99, 261 S.E. 2d at 117 (1980).

[1] We apply the foregoing principles for testing the sufficiency of the evidence to defendant's conviction of accessory after the fact of voluntary manslaughter. In order to prove a person was an accessory after the fact under G.S. 14-7 (1981) three essential elements must be shown: (1) a felony was committed; (2) the accused knew that the person he received, relieved or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felon personally. *State v. Squire*, 292 N.C. 494, 505, 234 S.E. 2d 563, 569, *cert. denied*, 434 U.S. 998, 98 S.Ct. 638, 54 L.Ed. 2d 493 (1977); *State v. Potter*, 221 N.C. 153, 156, 19 S.E. 2d 257, 259 (1942). Defendant contends that the State failed to present sufficient evidence concerning the second and third elements of the crime. He contends first that the evidence is insufficient to show that he knew that Horne or Lagree had committed the felony of manslaughter. We agree with the Court of Appeals that it makes no difference that defendant may not have actually seen the victim, Clarence Basinger, on the road before the automobile struck him. The testimony clearly indicated that before proposing the false story to be told to the authorities defendant knew that Clarence Basinger had fought with Horne and Lagree and had been left either on the road or very near to it. Indeed, when Horne kicked the victim the last time, leaving him on the road, the evidence indicated that defendant was either standing in his yard or on his porch; Lagree testified specifically that defendant stopped Linda Basinger from going out to see her husband who was lying on the road. Finally, the evidence also indicated that defendant knew the victim had been struck and killed by an automobile before he concocted his story.

It is certainly possible, as the State notes, that defendant did not see the victim lying on the road just before the automobile struck him. The totality of the evidence, however, is such to give rise to a *reasonable inference* that defendant knew precisely what had taken place. The evidence clearly indicated that defendant saw the fighting, the people involved, the condition of the victim, and the very dangerous position of the victim which led to his death. The evidence indicated that defendant knew the victim

was dead, lying on the road, after the automobile struck him. As Chief Judge Morris noted in the Court of Appeals' opinion, the evidence "shows that defendant knew a felony had been committed by Horne or Lagree before he concocted the tale, engineered cooperation among those present, and related the story to Deputy Douglas." 56 N.C. App. at 752, 290 S.E. 2d at 379. Indeed, the act of concocting a tale gives rise to the *reasonable inference* that defendant knew of the felony Horne and Lagree had committed.

Defendant also contends that the evidence was not sufficient to establish that he rendered assistance to the felons. He contends that the evidence shows he acted out of fear of Lagree and Horne and not with the intent to aid them. Defendant's contention is strained and clearly without merit. Defendant told the false story to the officer when Lagree and Horne were not present, a time when he would have no reason to fear for his safety. Taking the evidence in the light most favorable to the State, we find nothing to indicate that defendant acted out of fear for his own safety.

We affirm that portion of the Court of Appeals' opinion finding no error in the trial court's denial of defendant's motion to dismiss.

III.

Defendant next contends that the trial court erred in allowing the district attorney to state in his closing argument that those present at defendant's house "were acting like a pack of wolves." We find it unnecessary to discuss this contention. We affirm that portion of the Court of Appeals' opinion finding no error in the district attorney's closing argument and agree with the reasoning given for it. 56 N.C. App. at 752, 290 S.E. 2d at 379.

IV.

[2] Finally, we address defendant's contention that the trial court erred in its instructions to the jury. Indeed, we find error prejudicial to the defendant in one portion of the trial court's instructions.

As noted above, one item of proof for the crime of accessory after the fact is that the accused *knew* that the felony had been committed by the person assisted. In its charge to the jury, the

trial court stated that if defendant, "knowing Horne and Lagree or Horne or Lagree *could* have committed the crime of voluntary manslaughter, assisted Horne or Lagree in escaping or attempting to escape detection, arrest or punishment by concocting a story which was not true . . . ," then he should be found guilty. The Court of Appeals agreed with defendant's contention that this portion of the trial court's instructions represented a misstatement of the law but held that the instructions were not improper when read as a whole. 56 N.C. App. at 754, 290 S.E. 2d at 380.

We must disagree. G.S. 15A-1232 (1978) specifically requires that, "[i]n instructing the jury, the judge *must* declare and explain the law arising on the evidence." (Emphasis added.) This statute declares the rule well established in this jurisdiction that the trial judge must charge the essential elements of the offense and that when he undertakes to define the law, he must state it correctly. If he does not, it is prejudicial error sufficient to warrant a new trial. *State v. Hairr*, 244 N.C. 506, 509, 94 S.E. 2d 472, 474 (1956).

Clearly, the trial court's instructions violated the rule stated above. We can understand the Court of Appeals' reluctance to order a new trial on the basis of this single error. However, we agree with Judge Hedrick's comment in dissent that "considering all of the circumstances of the case" the error was "too prejudicial to be hidden by the familiar rule that the charge must be considered contextually as a whole. . . ." 56 N.C. App. at 758, 290 S.E. 2d at 383. Whether defendant actually knew that the others had committed the felony was an essential element of the offense for which defendant was tried, and, thus, there must be no confusion in the jurors' minds as to the definition of the element. In light of the questions raised and discussed in Section II of this opinion concerning the sufficiency of the evidence on this element—that is, whether defendant actually knew that Horne and Lagree had committed the felony—we find it absolutely crucial that this element of the crime with which defendant was charged be correctly explained to the jurors.

We hasten to note that under a recent amendment to Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure, 303 N.C. 713, 716-17 (1981) (amending 287 N.C. 669, 699 (1975)), defendant is able to assign this error only because his trial was held

before the change in the rule took effect. Rule 10(b)(2) now requires in pertinent part that, "[n]o party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection. . . ." The amendment, which this Court adopted on 10 June 1981, is applicable to all cases tried on or after 1 October 1981. The record discloses that defendant's trial was conducted during the 16 February 1981 Session of Superior Court, Rowan County. Hence, the rule is not applicable to defendant's trial.

Having found error in the portion of the trial court's instructions discussed above, it is unnecessary for us to discuss other challenges to the instructions. Such errors, if any, are not likely to recur on retrial.

In summary, we agree with the Court of Appeals that the trial court properly denied defendant's motions to dismiss and we agree with that court that the district attorney's comments on closing arguments were not improper. However, for the reasons stated above, we find error in the trial court's instructions to the jury; a new trial must be ordered. Accordingly, the decision of the Court of Appeals is reversed and a new trial is ordered.

Reversed.

STATE OF NORTH CAROLINA v. JOHNNIE SPARKS

No. 210A82

(Filed 3 November 1982)

Criminal Law § 86.5— impeachment of defendant—prior misconduct—improper questions

In a prosecution for a first degree sexual offense, the prosecutor erred in asking defendant: "Now isn't it a fact, Mr. Sparks, that during the period of time that you were incarcerated that you became acquainted with the use of anal intercourse as a manner of sexual release for men in prison?" Although the question implies that defendant personally engaged in anal intercourse for his sexual release while in prison, it does not refer to a specific act of misconduct on defendant's part and it fails to state the specific time, place or victim of any alleged misconduct. Further, the prosecutor's argument to the jury that defendant had been exposed to anal intercourse in prison should not have been

made because there was no evidence to support it. The combined errors, the questions and the argument, when taken together, warranted a new trial.

DEFENDANT was found guilty of first degree sex offense before *Judge Lane* and a jury at the 7 December 1981 Criminal Session of GUILFORD Superior Court. He was sentenced to a term of life imprisonment. He appeals pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by T. Buie Costen, Special Deputy Attorney General, for the State.

Wallace C. Harrelson, Public Defender, and Frederick G. Lind, Assistant Public Defender, for defendant appellant.

EXUM, Justice.

Defendant contends the trial court committed prejudicial error in refusing to sustain his objections to a question asked him on cross-examination by the prosecutor, and to the prosecutor's argument to the jury based on information in the question even though defendant had answered it negatively. The question asked of defendant was: "Now, isn't it a fact, Mr. Sparks, that during the period of time that you were incarcerated that you became acquainted with the use of anal intercourse as a manner of sexual release for men in prison?" Defendant answered, after his objection was overruled: "No, sir." The prosecutor went on to argue to the jury that defendant had been exposed to acts of consensual anal intercourse in prison. We agree with defendant that this question was an improper attempt to impeach defendant, argument based on the question should not have been permitted, and the combined effect of the question and argument was highly prejudicial. We order, therefore, that defendant receive a new trial.

Dwayne Thomas, defendant's eight-year-old son, was the key witness for the state. He testified that while defendant was living with Dwayne's mother in 1981, defendant had forcible anal intercourse with him. This occurred at least twice while his mother was at work; Dwayne did not tell his mother because he was afraid she might punish him. The last time the anal intercourse allegedly occurred was the day before the family moved to Dwayne's grandmother's house, 25 June 1981.

Subsequently, on a family vacation, Dwayne told his aunt about his father's actions. His aunt, Sonja Jean Simmons, corroborated Dwayne's testimony, and testified that she relayed to Dwayne's mother, her sister, what Dwayne had told her.

Dwayne was examined by a physician on 21 July 1981. The assistant district attorney and defendant's attorney stipulated that the doctor's "examination did not reveal any evidence of anal entry although it is his medical opinion that due to the length of time between the alleged incident and his examination that he could not say whether or not there had been anal entry."

The other witnesses for the state, Dwayne's mother and the investigating detective, essentially corroborated Dwayne's testimony.

Defendant testified in his own defense. He denied ever having anal intercourse with Dwayne. Defendant testified Dwayne knew he was his real father, and they seemed to get along well together.

Defendant admitted he had been convicted of breaking and entering, felonious larceny, and unlawful possession of mail. He served eighteen months in federal prison in Lompoc, California, and had been in the custody of the Berkeley, California, jail and the North Carolina Department of Correction.

In the course of the assistant district attorney's cross-examination of defendant, the following exchanges took place:

> Q. Now, on three separate occasions then, it would be your testimony that you have been incarcerated in Berkeley, California, in the North Carolina Department of Correction, and in the federal penitentiary in Lompoc, California, is that correct?
>
> A. Yes, sir.
>
> Q. Now, isn't it a fact, Mr. Sparks, that during the period of time that you were incarcerated that you became acquainted with the use of anal intercourse as a manner of sexual release for men in prison?
>
> MR. LIND: Objection.
>
> THE COURT: Overruled.

A. No, sir.

Q. Isn't it a fact—

MR. LIND: Motion to strike and motion for mistrial.

THE COURT: Motion to strike is denied. The objection is overruled.

MR. LIND: Motion for mistrial too, Judge.

THE COURT: Denied.

EXCEPTION NO. 8

In closing arguments, the prosecutor went on to argue as follows:

Now, I argue to you that the defendant served time in prisons in California, in North Carolina, and I argue to you that a form of sexual relief in prison for men—

MR. LIND: Objection to this line of argument.

THE COURT: Overruled.

MR. COMAN: These are acts of consensual anal intercourse and even though it may be—

MR. LIND: Move to strike.

THE COURT: Denied.

MR. COMAN: Even though it may be repugnant to all of us, it is a fact of life.

I argue and I contend to you that during those periods of time he was exposed to that, and I argue and I contend to you—

MR. LIND: Objection.

THE COURT: Overruled.

EXCEPTION NO. 11

MR. COMAN: I argue and I contend to you that when he came to Greensboro in 1980 in December of that year, he had the opportunity to do it with his son and he did it with his son, and I think when you take all the evidence and draw it

together, it certainly points to that as abominable as it may appear to all of us.

Defendant has assigned as error the trial judge's overruling of his objections in each of these instances.

In *State v. Purcell*, 296 N.C. 728, 732, 252 S.E. 2d 772, 775 (1979), the Court summarized this jurisdiction's rules regarding impeachment of a criminal defendant:

> [A] criminal defendant who takes the stand may be cross-examined for purposes of impeachment concerning any prior *specific acts* of criminal and degrading conduct on his part. Such acts need not have resulted in a criminal conviction in order to be appropriate subjects for inquiry. The scope of inquiry about particular acts is, however, within the discretion of the trial judge, and questions concerning them must be asked in good faith. It is not permissible to inquire for purposes of impeachment as to whether a defendant has previously been arrested or indicted for or accused of some unrelated criminal or degrading act.

(Emphasis added.) *See also State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982); *State v. Mason*, 295 N.C. 584, 248 S.E. 2d 241 (1978), *cert. denied*, 440 U.S. 984 (1979); 1 Brandis on N.C. Evidence §§ 111-12 (2d rev. ed. of Stansbury's N.C. Evidence 1982).

Thus, the first test of the permissibility of a question asked on cross-examination for impeachment purposes is whether it identifies a *specific instance* of criminal or degrading conduct *on the part of the defendant.* This Court has repeatedly held questions that fail to pinpoint a specific act of misconduct by the defendant to be improper. Most recently, in *State v. Shane, supra*, 304 N.C. at 649, 285 S.E. 2d at 817, the following exchange was reviewed:

> Q. You resigned from the intelligence unit because of sexual improprieties, didn't you?
>
> . . .
>
> WITNESS: I resigned from the intelligence police department because a prostitute downtown made allegations against me; and for the betterment of the department and myself, I resigned.

. . .

MR. RAND: In resigning, you told [police officer] Mr. Bill Johnson, did you not, about this incident?

. . .

MR. RAND: You told Mr. Johnson, did you not, about this matter; that you just weren't thinking; that all you were doing was getting a shot of cock, didn't you?

. . .

WITNESS: I did not sir.

This Court held that the prosecutor's query about sexual improprieties failed to identify a specific act of misconduct. The Court stated, 304 N.C. at 651-52, 285 S.E. 2d at 818-19:

> A legitimate inference of foul play does not invariably arise from the mere act of resigning from employment. Moreover, the term 'improprieties' is overly broad because an improper act does not necessarily connote a breach of moral or legal mores, and the plural form of the word suggests the commission of several acts without particularizing a single, specific event for the jury to consider in evaluating credibility. *See State v. Purcell, supra; State v. Mason, supra.* Defendant Shane was never asked outright whether he had engaged in an earlier sexual misdeed with a prostitute. Instead, Shane was interrogated about his prior *conversations* with another police officer about the incident and his *knowledge* of the content of the prostitute's allegations. Thus, we conclude that the prosecutor's cross-examination of Shane was not competently tailored to elicit his affirmance or denial of 'some identifiable specific act' by means of a *detailed* reference to 'the time or the place or the victim or any of the circumstances of defendant's alleged prior misconduct.' *State v. Purcell, supra,* 296 N.C. at 732-33, 252 S.E. 2d at 775; *see State v. Herbin,* 298 N.C. 441, 451, 259 S.E. 2d 263, 270 (1979).

In *State v. Purcell, supra,* 296 N.C. at 729-30, 252 S.E. 2d at 773, the prosecutor asked the defendant, over objection, these questions: "You have killed somebody, haven't you, Mr. Purcell?" and, "Well, it was known all around town that you killed

somebody weren't it?" The first question was held to be improper "because it did not inquire about some identifiable specific act on defendant's part." *Id.* at 732, 252 S.E. 2d at 775. The Court stated, *id.* at 733, 252 S.E. 2d at 775:

> The purpose of permitting inquiry into specific acts of criminal or degrading conduct is to allow the jury to consider these acts in weighing the credibility of a witness who has committed them. For this purpose to be fulfilled, the questions put to the witness must enlighten the jury in some degree as to the nature of the witness' act. Questions so loosely phrased as the one here give the jury no clear indication about the witness' credibility.

The second question was held to be improper because it essentially required the "defendant to repeat informal accusations that had been made against him in the community." *Id.* A question so framed had been disapproved in *State v. Williams,* 279 N.C. 663, 675, 185 S.E. 2d 174, 181 (1971), in which the Court emphasized that questions relating to criminal or degrading conduct must "relate to matters *within the knowledge of the witness,* not to accusations of any kind made by others." (Emphasis original.)

In *State v. Mason, supra,* 295 N.C. at 592, 248 S.E. 2d at 247, the defendant assigned error to the trial court's sustaining the prosecutor's objection to a question asked during cross-examination of one of its witnesses. Defense counsel asked the witness, for impeachment purposes "Were you involved in what you call street gang operations in New York?" This Court held the state's objection to be properly sustained because this question did not "concern a *particular act* of misconduct, but rather is a general and oblique allusion to a class of activities." *Id.* at 593, 248 S.E. 2d at 247 (emphasis original).

In light of this precedent, it is clear that the question to which defendant objected in the instant case was improper. The prosecutor asked: "Now isn't it a fact, Mr. Sparks, that during the period of time that you were incarcerated that you became acquainted with the use of anal intercourse as a manner of sexual release for men in prison?" The prosecutor clearly implies that defendant personally engaged in anal intercourse for his sexual release while in prison. But this question does not refer to a specific act of misconduct on defendant's part; it fails to state the

specific time, place or victim of any alleged misconduct. *Compare, State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977) (manner of assault, *i.e.*, shooting, specified); *State v. Black*, 283 N.C. 344, 196 S.E. 2d 225 (1973) (manner of assault and victim's name specified); *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972) (dates and specific criminal activities mentioned).

Indeed, this question is broader than any of those previously condemned by this Court in *State v. Shane, supra*, *State v. Purcell, supra*, and *State v. Mason, supra*. It does not ask if *defendant* had ever engaged in anal intercourse in prison, or even if he had witnessed such activities between other prisoners. Rather, he was asked whether he became "acquainted with," *i.e.*, gained "knowledge of" or became "familiar with," such activities while in prison. *See* Webster's Third New International Dictionary 18 (1976). This inquiry could in no way give the jury a basis for judging defendant's credibility—the purpose for which impeachment through questions about prior misconduct is permitted. The trial court clearly erred in not sustaining defendant's objection to the question and not allowing his motion to strike.

The prosecutor's argument to the jury that defendant had been exposed to anal intercourse in prison should not have been made because there was no evidence to support it. As stated in *State v. Monk*, 286 N.C. 509, 516, 212 S.E. 2d 125, 131 (1975), G.S. 84-14 permits counsel to "argue to the jury 'the whole case as well of law as of fact.' Even so, argument is not without its limitations. The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. [Citations omitted.]" Furthermore, "counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence." *State v. Britt*, 288 N.C. 699, 711, 220 S.E. 2d 283, 291 (1975). Defendant's objections to this line of argument by the prosecutor should have been sustained.

We conclude the errors made, when taken together, warrant a new trial. The jury in this case was essentially asked to compare the weight and credibility of Dwayne's testimony with that of defendant's. Although the state put on several witnesses, their

testimony served only to corroborate Dwayne's testimony at trial. The examining physician could not offer an opinion on whether there had been any anal entry of Dwayne. Because the case essentially turned on whether the jury believed Dwayne or defendant, any inferences the jury might have drawn from the prosecutor's improper question and argument weighed heavily against defendant. We conclude that "there is a reasonable possibility" that had these errors not been made "a different result would have been reached" at trial. G.S. 15A-1443. Thus the failure to sustain defendant's objection to the prosecutor's question and argument was reversible error. *See, e.g., State v. Purcell, supra,* 296 N.C. at 734, 252 S.E. 2d at 775-76; *State v. Britt, supra,* 288 N.C. 699, 220 S.E. 2d 283; *State v. Stimpson,* 279 N.C. 716, 185 S.E. 2d 168 (1972).

We do not address defendant's other assignments of error because they are unlikely to arise upon retrial.

New trial.

STATE OF NORTH CAROLINA v. ERNEST THOMAS "PETE" CORN

No. 21A82

(Filed 3 November 1982)

1. **Criminal Law § 87.3— autopsy report—past recollection recorded**

An entire autopsy report could have been read to the jury by the pathologist who conducted the autopsy as past recollection recorded where the pathologist dictated the entire report while he conducted the autopsy. Therefore, selected passages of the report could also be read to the jury by the pathologist as past recollection recorded.

2. **Criminal Law § 86.6— impeachment of defendant—prior degrading conduct—good faith questions**

In a prosecution for second degree murder, the prosecutor's cross-examination of defendant as to whether he had told a named person that he considered it a thrill to kill people and whether he had told two other persons that he was going to kill deceased if he didn't quit taking his marijuana was proper for impeachment purposes where the record failed to show that the questions were not asked in good faith.

3. Homicide § 19.1— self-defense—inadmissibility of criminal records of deceased

In a prosecution for second degree murder in which defendant contended that he acted in self-defense, records of prior convictions of the deceased for assault on his mother and injury to personal property belonging to his mother were not admissible for the purpose of establishing deceased's reputation for violence or for the purpose of showing what the defendant knew about the deceased's violent behavior.

4. Criminal Law § 86.8— impeachment of State's witness—improper question

The trial court did not err in refusing to permit defendant to impeach the State's eyewitness by questioning the witness about an incident in which he gave a false name and address to a woman after driving his truck into her yard where defense counsel failed to phrase his question in a manner designed to elicit information concerning the alleged false statement.

5. Homicide § 28— self-defense—show of force unnecessary—sufficiency of instructions

The instructions given the jury in a second degree murder case, when read as a whole, adequately stated in substance that the circumstances must be viewed from defendant's perspective and that a show of force was not necessary in order to find that defendant acted in self-defense, and the trial court did not err in refusing to give defendant's requested instruction that "A show of force by the deceased is not, however, necessary under the circumstances."

DEFENDANT appeals from judgment of *Owens, J.*, entered 22 October 1981 at the October 1981 Criminal Session of Superior Court, TRANSYLVANIA County.

Defendant was tried upon an indictment, proper in form, issued March 1980, charging him with the murder of Lloyd F. Melton on 20 November 1979. On 16 October 1981 the jury found defendant guilty of second degree murder. From the trial court's judgment sentencing him to life imprisonment, defendant appeals as a matter of right pursuant to G.S. 7A-27(a).

Originally, defendant was tried upon an indictment charging him with first degree murder and was so convicted of that charge on 24 March 1980. This Court reversed the conviction of first degree murder on the basis that the State failed to present sufficient evidence to show premeditation and deliberation and remanded the case for a new trial to determine whether defendant was guilty of second degree murder, voluntary manslaughter or not guilty. *State v. Corn*, 303 N.C. 293, 278 S.E. 2d 221 (1981). This appeal arises from that new trial.

The State's evidence tended to show that Lloyd F. Melton arrived at defendant's house on the morning of 20 November 1979. Defendant and Roy Ward were present at the house when Melton arrived. Shortly thereafter Melton, Ward and defendant left in Ward's truck and bought a fifth of Vodka and some grapefruit juice. They returned to defendant's house and drank some of the Vodka and grapefruit juice. Melton and Ward then left defendant's house and drove around Transylvania County for several hours, continuing to drink alcoholic beverages as they traveled.

At approximately 5:00 that afternoon they returned to defendant's home. Ward testified that defendant opened the door and looked out as they arrived. When Ward and Melton entered the house, defendant was lying on the couch in the living room with his hands behind his head. Melton sat down on the couch where defendant was lying and began to argue with him. During the argument defendant jumped up from the couch, shouted an obscenity, pulled a .22 caliber, semiautomatic rifle, from a crack between the couch cushion and the back of the couch, and shot Melton eight to ten times across the chest, killing him instantly. Ward left defendant's house immediately after the shooting and contacted law enforcement officers at the Brevard Police Department and at the Transylvania County Sheriff's Department. Several officers testified that upon arriving at defendant's house to investigate the shooting, they found the defendant in the yard, repeatedly stating that he "killed the son-of-a-bitch." Melton's body was discovered on the floor beside the couch in the living room.

Defendant testified in his own behalf, claiming that he shot Melton in self-defense. He stated that when Melton and Ward arrived at his home at about 5:00 p.m. on 20 November 1979, Melton walked over to the couch on which defendant was lying, grabbed defendant, jerked him around and attempted to hit him. During the altercation the parties exchanged vulgarities and defendant was thrown to the floor. Ward, who had entered the house immediately before Melton, arose from the chair in which he was sitting and moved toward the defendant with clenched fist. With both Melton and Ward advancing on him, defendant reached under the couch and grabbed the fully loaded .22 caliber rifle which he normally kept in that location. In an attempt to halt the

advance of Melton and Ward, defendant shot at Melton's leg but when Melton kept moving toward him, defendant shot Melton repeatedly in the chest. After the shooting, defendant walked across the street and called the Brevard Police Department. He then returned home and waited for law enforcement officers to arrive. Several officers testified that defendant was calm and cooperative during their investigation of the incident.

Defendant's evidence further tended to show that he was five feet seven inches tall and weighed approximately 140 pounds. Melton was five feet ten inches tall and weighed approximately 200 pounds. The evidence also indicated that Melton had a propensity to commit violent acts after drinking alcoholic beverages and that defendant was aware of this tendency. Roy Ward testified that he was six feet two inches tall and weighed 251 pounds. Defendant also stated that he feared Ward because Ward had said the night before the shooting that he had a black belt in Karate.

At the end of all the evidence the trial court instructed the jury that they could find defendant guilty of second degree murder, voluntary manslaughter, or not guilty. The jury found defendant guilty of second degree murder, sentencing him to life imprisonment.

Rufus L. Edmisten, Attorney General, by Archie W. Anders, Assistant Attorney General, for the State.

Marc D. Towler, Assistant Appellate Defender for defendant.

COPELAND, Justice.

[1] The defendant first assigns as error the trial court's refusal to strike the entire testimony of Dr. Lacy, the pathologist who conducted the autopsy on the body of Lloyd Melton. In support of this argument, defendant contends that since Dr. Lacy testified on cross-examination that he had no recollection of the autopsy independent of the written report, his entire testimony was incompetent as either present recollection refreshed or past recollection recorded. We find no merit in this claim.

The rule in this jurisdiction is that a witness may be aided in his testimony by either (1) present recollection refreshed, *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977), or (2) past recollection recorded. *State v. Wright*, 282 N.C. 364, 192 S.E. 2d 818 (1972).

Under present recollection refreshed the witness' memory is refreshed or jogged through the employment of a writing, diagram, smell or even touch. *Smith, supra.* 1 Brandis on North Carolina Evidence § 32 (2d rev. ed., 1982). When a witness' recollection is refreshed the testimony comes from his memory and not from the writing or diagram. Under past recollection recorded the witness is unable to testify from memory even after reviewing writings, diagrams, or any other stimuli which might refresh his memory. 1 Brandis on North Carolina Evidence § 33 (2d rev. ed. 1982). Under past recollection recorded, since the witness cannot testify from memory, the facts being elicited must be put into evidence by means of the writing. This can be done by having the witness read the writing to the jury. *Johnson v. Johnson,* 23 N.C. App. 449, 209 S.E. 2d 420 (1974), *cert. denied,* 286 N.C. 335, 211 S.E. 2d 212 (1974).

Although these two forms of recollection have distinct definitions, in practice the two differ only in degree. *United States v. Riccardi,* 174 F. 2d 883 (1949), *cert. denied,* 337 U.S. 941 (1949); 1 Brandis on North Carolina Evidence § 32 (2d rev. ed. 1982). After reviewing the transcript, we see no reason why the record of the autopsy could not have been introduced into evidence as past recollection recorded since Dr. Lacy dictated the entire report while he conducted the autopsy. *State v. Wright,* 282 N.C. 364, 192 S.E. 2d 818 (1972). We are equally confident that Dr. Lacy, the authenticating witness, could have read the entire autopsy report to the jury. *Cooper v. R.R.,* 170 N.C. 490, 87 S.E. 322 (1915). Since the transcript indicates that Dr. Lacy testified directly from his notes, we conclude that his testimony was nothing more than selected readings from his notes. Therefore, if the entire report may be admitted as past recollection recorded, then selected passages must also be admitted as past recollection recorded. Therefore we find no error in the doctor's testimony.

[2] In his second assignment of error, defendant asserts that the district attorney acted in bad faith by cross-examining him with the following two questions:

(1) Q. Mr. Corn, did you relate to Kathy Fowler that you considered it a thrill to kill people?

Mr. Hudson [defense counsel] objection.

Court: Objection overruled.

A. No sir.

Defendant's Exception No. 13.

(2) Q. Mr. Corn, did you make, did you tell, just shortly before the Melton boy was killed, did you sometime shortly before that tell Jack Orr and Martha McKinney that you were going to kill Lloyd Melton if he didn't quit pinching or taking your pot or marijuana. . . ?

Mr. Hudson: Objection.

Q. That he was going to pinch it one time too many, did you say that in their presence?

A. No sir.

The rule in this jurisdiction is that a defendant may be impeached on cross-examination by asking "disparaging questions concerning collateral matters relating to his criminal or degrading conduct." *State v. Williams*, 279 N.C. 663, 675, 185 S.E. 2d 174, 181 (1971); *State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981). However, the scope of such a cross-examination is limited by (1) the trial court's discretion and (2) by a requirement that the questions be asked in good faith. *Williams, supra.*

The defendant alleges that the district attorney did not ask the two questions, set out above, in good faith. However, "the rule in this jurisdiction is that the questions of the prosecutor will be considered proper *unless the record shows* that the question was asked in bad faith." *State v. Dawson*, 302 N.C. 581, 586, 276 S.E. 2d 348, 352 (1981). (Emphasis added.) The record of this case does not reveal any bad faith on the part of the district attorney. Even though defendant produced several affidavits which, standing alone, might suggest that the questions were not asked in good faith, these affidavits, when read with the record of the trial, do not show the questions were asked in bad faith. In fact, in response to defendant's objection to the first question, the district attorney claimed he had several reliable sources, identities of which he was willing to reveal to the court. No such offer was made for the second question since the objection was quickly overruled. As a result we feel the record does not reveal bad faith on the part of the prosecutor and therefore no error was committed.

[3] As a third assignment of error, defendant claims the court erred by preventing his introduction into evidence of the records of the prior convictions of the deceased. Those convictions concerned an assault with a gun on the victim's mother and injury to personal property belonging to the victim's mother. As in this case, when self defense is raised as a defense, the defendant may produce evidence of the victim's character tending to show, "(1) that the victim was the aggressor or (2) that defendant had a reasonable apprehension of death or bodily harm, or both." 1 Brandis on North Carolina Evidence, § 106 (2d rev. ed. 1982). If defendant seeks to offer evidence for the purpose of showing the victim was the aggressor, it must be done through testimony concerning the victim's general reputation for violence, "but this rule does not render admissible evidence of specific acts of violence which have no connection with the homicide." *State v. LeFevers*, 221 N.C. 184, 185, 19 S.E. 2d 488, 489 (1942). *State v. Morgan*, 245 N.C. 215, 95 S.E. 2d 507 (1956). The excluded conviction records are clearly not evidence of the victim's reputation. Likewise, the records are not evidence of what the defendant actually knew. Therefore the records can be offered neither for the purpose of establishing the victim's reputation for violence nor for the purpose of showing what the defendant knew about the victim's violent behavior.

In addition, the conviction records are not admissible for the purpose of bolstering defendant's credibility. The evidence indicates that the records would have at best only partially supported what defendant said and would have clearly highlighted the fact that defendant was testifying only to what he knew and not to what was in fact true. Therefore, there was no error committed when the trial court excluded the victim's criminal records.

[4] Defendant next assigns as error the trial court's refusal to allow him to impeach the State's only eyewitness. There is no doubt in this jurisdiction that a witness' credibility may be impeached by questions concerning specific acts of criminal or degrading conduct. *State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981). Defendant contends the court did not allow him to question the eyewitness concerning an incident in which the witness gave a false name and address to a woman after driving his truck into her yard. However, defense counsel failed to phrase his question

in a manner designed to elicit information concerning the alleged false statement. Even the district attorney made it clear that he would have no objection to questions dealing with the alleged false statement. The defense counsel refused to rephrase the question and requested the original question be answered into the record. We feel the original question was properly excluded and therefore no error was committed.

[5] In his final assignment of error, defendant contends the trial court improperly instructed the jury on the issue of self defense by failing to submit, in substance at least, specifically requested instructions. When instructing the jury, the trial court has the duty to, "declare and explain the law arising on the evidence." G.S. 15A-1232; *State v. Ferdinando*, 298 N.C. 737, 260 S.E. 2d 423 (1979). Although a trial judge is not required to give requested instructions verbatim, *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973), he is required to give the requested instruction at least in substance if it is a correct statement of the law and supported by the evidence. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976).

Specifically, defendant argues the trial court's instruction deprived him of the defense of self defense by failing to state that, "A show of force by the deceased is not, however, necessary under the circumstances." We disagree with defendant's position. The instructions given the jury, when read as a whole, as they must be, adequately state in substance that the circumstances must be viewed from defendant's perspective and that a show of force was not necessary in order to find he acted in self defense. Unlike *State v. Francis*, 252 N.C. 57, 112 S.E. 2d 756 (1960), where the instructions virtually eliminated the defendant's right to self defense, the instructions given in this case preserved the defense of self defense. Therefore we find no error.

After examining the record and each of defendant's assignments of error, we conclude that defendant's trial was free from reversible error.

No error.

STATE OF NORTH CAROLINA v. WALTER D. BOYKIN, JR. AND WILLIE JAMES BOYKIN

No. 91A81

(Filed 3 November 1982)

Criminal Law § 92— consolidating charges against two defendants for trial improper—antagonistic positions

The trial court erred in consolidating two different defendants' trials for murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury where there was no doubt that the position of one defendant, Walter, was antagonistic toward the position of defendant Willie since the presence of defendant Walter, as a codefendant, denied Willie the opportunity to introduce evidence which would have explained his admissions, some of the State's strongest evidence against him. The denial of such evidence left the jury with the impression that defendant Willie had spoken out of both sides of his mouth without any reasonable explanation. G.S. 15A-926(b)(2)(a) and G.S. 15A-927(c)(2)(a)(b).

DEFENDANTS appeal from judgment of *Peel, J.*, entered at the 1 June 1981 Criminal Session of Superior Court of SAMPSON County.

The defendants, Willie James Boykin and his brother Walter Dal Boykin, Jr. were indicted 13 April 1981. Defendant, Willie James Boykin, was indicted for the murder of James Ray Lamb and was also indicted for assault with a deadly weapon with intent to kill inflicting serious bodily injury upon Tommy William Fennell. The defendant, Walter Dal Boykin, Jr., like his brother Willie, was indicted for the murder of James Ray Lamb. In addition, Walter was indicted for assault with a deadly weapon with intent to kill inflicting serious bodily injury on Azariah Fennell. Both defendants entered pleas of not guilty on all charges. The jury found defendant Willie James Boykin guilty of second degree murder of James Ray Lamb and guilty of assault with a deadly weapon with intent to kill inflicting serious injuries on Tommy William Fennell. Defendant Walter Dal Boykin, Jr., was found guilty of second degree murder of James Ray Lamb and guilty of assault with a deadly weapon inflicting serious injuries on Azariah Fennell.

Trial Judge Peel sentenced Willie James Boykin to a term of not less than seventeen nor more than twenty years on his murder conviction and for a term of not less than seventeen nor

more than twenty years on the assault conviction to run concurrently with the murder sentence. The trial court sentenced Walter Dal Boykin, Jr., to a term of life imprisonment on the murder conviction and to a term of ten years on the assault conviction to run concurrently with the life sentence. Each defendant appealed his conviction on both charges. We bypassed the Court of Appeals for the assault convictions and for Willie James Boykin's murder conviction in order that all the cases against these defendants could be consolidated for the purpose of appeal.

The State's evidence tended to show that on the evening of 25 December 1980 a large number of people had congregated at Ras's Place, a local night spot, near Harrells in Sampson County. At some point during the evening the decedent, James Ray "Pap" Lamb, began arguing with the defendant Willie James Boykin. This argument escalated into a fist fight in which defendant Willie James Boykin quickly gained the upperhand by beating the decedent in the head with a cue ball which he obtained from a nearby pool table. After the defendant Willie James Boykin began choking the decedent on the floor, members of the victim's family interceded by grabbing defendant Willie. At this time the defendant Walter Dal Boykin, Jr. entered the fray and succeeded in freeing his brother, Willie, from the grasps of "Pap" Lamb's family.

At some point, towards the end of this scuffle, a shot was fired, although not everyone present heard it. In reaction to this gunshot many people began to leave the inside of the building. It was at this time that Tommy Fennell fell against the front door and exclaimed, "I've been shot!" In response to this exclamation defendant Willie Boykin told Tommy Fennell, "I shot you but I did not intend to do it."

After the shooting both defendants left the inside of the building. Some of the State's evidence shows that shortly thereafter Walter Dal Boykin came back in the direction of Ras's Place with a rifle in hand and that Walter fired several rounds in the direction of the building, one of which mortally wounded the deceased, James Ray "Pap" Lamb. In response to the rifle shots and seeing Walter Boykin with a rifle in his right hand, Azariah Fennell attempted to grab defendant Walter Boykin. During the scuffle, although he was not immediately aware of it, Azariah Fennell was shot in the side.

The State's evidence further shows that defendant Willie James Boykin was seen later that evening with a .22 caliber rifle in his possession and that he told several persons that he had shot James Ray Lamb. Defendant Walter Dal Boykin, Jr. surrendered to the authorities. At the time he surrendered, Walter had a .22 caliber pistol in his possession.

The testimony of the medical examiner established the cause of death as being loss of blood from the victim's aorta as the result of a gunshot wound in the abdomen. The medical examiner stated that the bullet recovered from the decedent, "Pap" Lamb, did not come from the pistol which defendant Walter Dal Boykin, Jr. had in his possession at the time of his arrest. Instead, the fatal wound was the result of a .22 caliber bullet which was fired from a rifle manufactured by the Marlin Firearms Company.

The evidence for the defendant Willie James Boykin was to the effect that he and "Pap" Lamb had some words on the evening of the shooting with reference to going with a woman. Willie James Boykin further stated that he knew that "Pap" carried a pistol and when "Pap" made a motion like he was pulling something from under his shirt that he, the defendant Willie James Boykin, attacked "Pap" Lamb in self defense and that several of "Pap's" relatives interceded.

The defendant Willie James Boykin then said that he heard some shots fired and that "Pap" Lamb fell to the floor and that Tommy Fennell fell against him. He said that he told Tommy Fennell that he was sorry about what had happened.

Willie James Boykin gave further evidence that tended to show that he heard four shots and when he went out of the building he saw "Pap" Lamb kneeling in front of a car parked near the door and that "Pap" had a pistol in his hand and that Walter Dal Boykin, Jr. had a rifle in his hand.

Willie James Boykin said that "they were tussling there" and that he took the gun away from Walter Dal Boykin, Jr., and ran back into the building holding the gun by the barrel and told the people running the bar that they had better close up before somebody else got hurt. Willie James Boykin then said that he took the rifle and put it in his car and drove away.

Defendant Walter Dal Boykin, Jr. offered no evidence in his own behalf. The jury convicted both defendants on all charges and they were sentenced as earlier indicated.

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

John R. Parker for defendant Walter Dal Boykin, Jr.

William M. Bacon, III for defendant Willie James Boykin.

COPELAND, Justice.

Defendant Walter Dal Boykin, Jr. presented three assignments of error and defendant Willie James Boykin presented five assignments of error for our consideration on appeal.

We find merit in the first assignment of error of defendant Willie James Boykin and remand the case of this defendant to the trial court for a new trial. Although defendant Walter Dal Boykin, Jr. did not raise on appeal an assignment of error corresponding to defendant Willie James Boykin's first assignment of error, we remand the case of defendant Walter Dal Boykin, Jr. for a new trial. We remand the case of Walter Dal Boykin, Jr. under our supervisory power pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure in order to prevent a manifest injustice to defendant Walter Dal Boykin, Jr.

In his first assignment of error, defendant Willie James Boykin argues that the trial court erred in consolidating the cases against him with the cases against his brother, Walter Dal Boykin, Jr.

It is a well settled rule of law in this jurisdiction that the decision whether to try the defendants separately or jointly is ordinarily within the sound discretion of the trial judge and, absent an abuse of that discretion, will not be overturned on appeal. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976); *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976); *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968). However, where the defendants' defenses are antagonistic, as they were here, or where it is impossible for one defendant to receive a fair trial, it has been held error to allow a joint trial over the objection of the defendant. *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222 (1976).

In this case, defendant, Willie James Boykin was prejudiced by the court's consolidation of cases because he was prevented from testifying as to his motive in making his "false confessions." The record discloses numerous admissions made by defendant Willie James Boykin to the effect that he had shot "Pap" Lamb and Tommy Fennell. The court permitted the State to introduce each of these admissions into evidence. However, since Walter Dal Boykin, Jr. was a co-defendant in the murder charge, the trial court did not permit defendant Willie James Boykin to explain that the admissions were intended to protect Walter, his brother, who had previously been convicted of murder. The only explanation the defendant was able to give the jury for those admissions was that he was drunk. In addition, Willie James Boykin was prejudiced when the trial court prevented him, on the cross-examination of Deputy Sheriff Spell, from eliciting that his co-defendant, Walter Dal Boykin, Jr., had also confessed to shooting the deceased. This left the jury with the mistaken impression that Willie James Boykin was the only defendant who had made a statement confessing to the shooting.

The impact of unexplained admissions, like the ones in this case when combined with other evidence which suggested that the only rifle present during the shooting was in the hands of the co-defendant Walter Dal Boykin, Jr., leads us to conclude that Willie James Boykin did not receive a fair trial. As Justice Exum stated in *State v. Nelson*, 298 N.C. 573, 587, 260 S.E. 2d 629, 640 (1979), cert. denied, 446 U.S. 929 (1980), "[t]he test is whether the conflict in defendants' respective positions at trial is of such a nature that, *considering all of the other evidence* in the case, defendants were denied a fair trial." (Emphasis added.) See also G.S. 15A-927(c)(2).

"One of the statutory bases for joining two or more defendants for trial is that each defendant is sought to be held accountable for the same crime or crimes. G.S. 15A-926(b)(2)(a). In such cases public policy strongly compels consolidation as the rule rather than the exception." *State v. Nelson*, 298 N.C. at 586, 260 S.E. 2d at 639. This strong public policy was perhaps best summarized by the Ninth Circuit Court of Appeals that consolidation

> "expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the

> burden upon citizens who must sacrifice both time and money to serve upon juries and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once."

Parker v. United States, 404 F. 2d 1193, 1196 (9th Cir. 1968), *cert. denied*, 394 U.S. 1004, 89 S.Ct. 1602, 22 L.Ed. 2d 782 (1969). However, no matter how appealing such public policy may be, it must not stand in the way of "a fair determination of . . . guilt or innocence. . . ." G.S. 15A-927(c)(2)(a)(b). Whether there is to be a joinder of cases must depend upon the circumstances of each case. *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966).

Under the facts in this case there is no doubt that the position of Walter Dal Boykin, Jr. was antagonistic toward the position of defendant Willie James Boykin. The presence of defendant Walter Dal Boykin, Jr. as a co-defendant, denied Willie James Boykin the opportunity to introduce evidence which could have explained his admissions, some of the State's strongest evidence against him. In effect, the denial of such evidence left the jury with the impression that defendant Willie James Boykin had spoken out of both sides of his mouth without any reasonable explanation.

We believe that there was enough evidence to go to the jury in either case, but we feel that justice requires a separate trial for these two defendants under the facts of this case. Therefore we grant a new trial to defendant Willie James Boykin.

Walter Dal Boykin, Jr. did not make a motion for severance nor did he make a motion against consolidation. Nevertheless, in view of our action as to Willie James Boykin, we feel justice requires the same treatment for defendant Walter Dal Boykin, Jr. Accordingly, we grant a new trial to defendant Walter Dal Boykin, Jr. under our supervisory powers pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure in order to prevent manifest injustice to Walter Dal Boykin, Jr.

The defendants' remaining assignments of error are unlikely to recur at retrial, therefore we deem it unnecessary to discuss these at this time.

For the reasons stated above, this case is remanded to the Superior Court of Sampson County, in order that each defendant may receive new and separate trials.

New trial.

RONALD L. PURDY v. WALTER THOMAS BROWN

No. 243PA82

(Filed 3 November 1982)

Costs § 3; Rules of Civil Procedure § 68— offer of judgment—exclusion of attorney's fees—recovery of less than offer—liability for attorney's fees after offer

An offer of judgment for $5,001.00, together with all the costs accrued "except any attorneys' fees," complied with the requirements for a valid offer under G.S. 1A-1, Rule 68, since attorney's fees were not part of the "costs then accrued" when defendant made his offer to plaintiff because defendant's offer was beyond the $5,000 limitation of G.S. 6-21.1 and attorney's fees could not properly have been taxed against defendant at that time. Therefore, where plaintiff's recovery at trial was only $3,500.00, plaintiff had to bear the costs incurred after the offer of judgment was made, including expert witness fees and attorney's fees incurred after the offer of judgment. However, the trial court did have the discretion under G.S. 6-21.1 to order defendant to pay the attorney's fees incurred by plaintiff prior to the date the offer was made.

ON discretionary review, pursuant to G.S. 7A-31, of the decision of the Court of Appeals, 56 N.C. App. 792, 290 S.E. 2d 397 (1982), affirming an award of attorney's fees and expert witness fees to plaintiff Ronald L. Purdy.

On 25 April 1979, plaintiff filed a complaint alleging that he had suffered severe and permanent injuries on 14 October 1978 as a result of defendant's negligence in colliding with an automobile in which plaintiff was a passenger. Plaintiff prayed for the recovery of $2,514.35 for medical expenses, lost wages of $381.25 per week from the time of the collision until final adjudication of the claim, $150,000 for permanent injuries and mental and physical suffering, both past and future, court costs, and $150,000 in punitive damages.

Defendant filed an answer to plaintiff's complaint on 24 May 1979. Three months later, on 29 August 1979, defendant filed and

served on plaintiff an offer of judgment pursuant to G.S. 1A-1, Rule 68, Rules of Civil Procedure. Defendant offered to allow judgment to be taken against him "for the sum of $5,001.00, together with the costs, *except any attorneys' fees*, accrued at the time the offer is filed." (Emphasis added.) Plaintiff did not respond to the offer.

The case was tried during the week of 15 June 1981. Defendant stipulated negligence, thus, the only issue presented to the jury concerned the amount of damages to be awarded plaintiff. The jury returned a verdict of $3,500.

Prior to the entry of judgment, plaintiff filed a motion for attorney's fees as part of the court costs, citing G.S. 6-21.1. On 18 June 1981, Judge Collier granted this motion and awarded plaintiff $1,200 in attorney's fees. Judge Collier also ordered defendant to pay, as part of the costs, expert witness fees to four medical witnesses testifying for plaintiff.

The Court of Appeals (Whichard, J., with Webb, J., and Wells, J., concurring) affirmed the orders allowing attorney's fees and expert witness fees. On 13 July 1982, we allowed defendant's petition for discretionary review.

Marquis D. Street for plaintiff-appellee.

Smith, Moore, Smith, Schell & Hunter, by Robert A. Wicker, for defendant-appellant.

BRANCH, Chief Justice.

The issue dispositive of this appeal is whether an offer of judgment for $5,001, together with all costs accrued *except attorneys' fees*, complies with the requirements for a valid offer under Rule 68 of the Rules of Civil Procedure.

Rule 68 provides, in pertinent part, that "a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, *with costs then accrued.*" G.S. 1A-1, Rule 68. (Emphasis added.) The Rule further provides that if the offer is not timely accepted and the judgment finally obtained is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

The Court of Appeals held that defendant's offer was ineffective because it did not include all "costs then accrued." The court noted that the jury's award to plaintiff was only $3,500. By statute, the presiding judge may, in a personal injury suit where the judgment is $5,000 or less, allow a reasonable attorney's fee to the party obtaining the judgment, "to be taxed as a part of the court costs."[1] G.S. 6-21.1. Since an attorney's fee allowed in such actions is a part of the costs, Judge Whichard reasoned that a fee for an attorney's services rendered up to the time the Rule 68 offer is extended is a part of the "costs then accrued" within the meaning of the Rule. Defendant's tender of judgment excluding attorney's fees was thus considered to be fatally defective and ineffective to terminate plaintiff's entitlement to any attorney's fees which the court might allow. Because his offer was invalid, the Court of Appeals concluded defendant was not entitled to the protections provided by the Rule regarding assessment of costs even though the amount plaintiff recovered was in fact less than the offer.

In reaching this conclusion, the Court of Appeals relied upon *Scheriff v. Beck*, 452 F. Supp. 1254 (D. Colo. 1978). In *Scheriff* the United States District Court for the State of Colorado held that an offer of judgment excluding attorney's fees then accrued was fatally defective. The court stated: "Rule 68 does not permit an offeror to choose which accrued costs he is willing to pay." *Id.* at 1260.

We find the Court of Appeals' reliance on *Scheriff* misplaced and disagree with its conclusion that defendant's offer failed to comport with the requirements of Rule 68.

In *Scheriff*, the plaintiff brought a § 1983 civil rights action against the defendant. The defendant served on the plaintiff an offer of judgment "in the amount of $2,200 together with costs, not including attorney's fees, incurred to date." *Id.* at 1259. The plaintiff did not accept the offer and eventually recovered only $500.

1. The purpose of this statute is "to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim." *Hicks v. Albertson*, 284 N.C. 236, 239, 200 S.E. 2d 40, 42 (1973).

The Court of Appeals is correct in saying that the court in *Scheriff* held defendant's offer invalid because of the language attempting to exclude attorney's fees otherwise available in a civil rights action. The statute under which attorney's fees are awarded in a § 1983 action, however, is clearly distinguishable from G.S. 6-21.1. The 1976 amendment to 42 U.S.C. § 1988 (the Civil Rights Attorney's Fees Awards Act of 1976) provides in relevant part: "In any action or proceeding to enforce a provision of sections [42 U.S.C. §§ 1981-1983, 1985, 1986] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Thus, if the plaintiff had accepted the defendant's offer, clearly he would have been entitled to an award of attorney's fees, in the judge's discretion, had judgment been entered for the amount offered. There is *no* statutory dollar limitation as is incorporated in our statute. The attorney's fee in *Scheriff* was available under the *substantive law* involved, regardless of the amount ultimately obtained by the plaintiff. *See Coleman v. McLaren*, 92 F.R.D. 754, 757 (N.D. Ill. 1981) (distinguishes awards of attorney's fees in Title VII actions in this way). We agree with *Scheriff* to the extent that it holds attorney's fees under § 1988 are "costs then accrued" within the meaning of that phrase as it is used in Rule 68.

The cases we have found following the *Scheriff* rule also involve actions in which the trial judge had the statutory authority to award attorney's fees to the prevailing party regardless of the amount involved. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed. 2d 287 (1981) (Title VII action, statute entitles prevailing party, in court's discretion, to "a reasonable attorney's fee as part of the costs" 42 U.S.C. § 2000e-5(k); *Coop v. City of South Bend*, 635 F. 2d 652 (7th Cir. 1980) (award of attorney's fees under 42 U.S.C. § 1988); *Waters v. Heublein*, 485 F. Supp. 110 (N.D. Cal. 1979) (Title VII).

In this case, we reach the conclusion that attorney's fees were not part of the "costs then accrued" when defendant made his offer to plaintiff because attorney's fees could not properly have been taxed against defendant at that time.[2] In determining

2. We are aware of our decision in *Hicks v. Albertson*, 284 N.C. 236, 200 S.E. 2d 40 (1973). In that case, defendant made an offer "to allow judgment to be taken

the "costs then accrued," we must consider the relative positions of the parties as they existed at the time the offer was made.

In instant case, plaintiff sought to recover $300,000 for injuries sustained as a result of defendant's negligence. Defendant offered plaintiff $5,001, including costs accrued, with the exception of attorney's fees. At the time defendant tendered this offer to plaintiff, G.S. 6-21.1 was not applicable because the situation did not *then* involve a judgment for $5,000 or less. The mere fact that nearly two years later a judgment is obtained for less than $5,000 should have no bearing whatsoever on the costs accrued *at the time the offer was made.* Since defendant's offer exceeded $5,000, had judgment been entered in that amount pursuant to the offer, there would have been no discretion on the part of the trial judge to award an attorney's fee, *even if* defendant had not inserted this language excluding them. We have hereinabove held

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against him . . . for the sum of $150.00 plus the costs accrued to the date of this offer." Within the time allowed by Rule 68, plaintiff served a notice of acceptance of this offer but added language to the effect that the costs accrued to the date of the offer would include a reasonable attorney's fee pursuant to G.S. 6-21.1. The clerk entered judgment for the plaintiff for $150, including costs, and the trial judge awarded plaintiff $75 in attorney's fees. In this Court, the defendant argued that the alleged acceptance was in fact a counter-offer because of the additional language providing for an attorney's fee. We responded to defendant's argument in the following manner:

> The acceptance of this offer of judgment by the plaintiff proceeded from a reasonable interpretation by the plaintiff of the defendant's offer. If this was not the interpretation intended by the defendant, the misunderstanding is due to ambiguous language used by the defendant in making his offer and the defendant must bear any loss resulting therefrom. (Citations omitted.) . . .
>
> Rule 68(a) of the Rules of Civil Procedure provides for the making of an offer of judgment in a specified amount "with costs then accrued." Since the attorney's fee, when allowed, is "a part of the court costs" and the fee allowed was for services rendered prior to the date of the offer, we find nothing in Rule 68(a) which supports the position of the defendant.

Id. at 241, 200 S.E. 2d at 43.

We find *Hicks* distinguishable from instant case. In *Hicks*, defendant's offer was for $150, an amount within the statutory limitations of G.S. 6-21.1. Thus, when judgment was entered pursuant to the offer, attorney's fees were clearly available in the trial judge's discretion.

In instant case, defendant's offer was beyond the limitation of G.S. 6-21.1. Attorney's fees could not have been "costs accrued" at the time the offer was made because attorney's fees were not statutorily permissible at that time.

that G.S. 6-21.1 did not apply at the time the offer was made, and we find no other statute permitting the trial judge to award attorney's fees to the prevailing party in a personal injury action. We therefore do not agree with the Court of Appeals' reasoning that defendant's offer was invalid because it excluded attorney's fees.

We hold that defendant's offer of judgment complied with Rule 68 because attorney's fees were not part of the "costs *then* accrued."

Having determined that defendant's offer was effective, we conclude that defendant is entitled to the protections afforded him under Rule 68 when the plaintiff's recovery is not more favorable than the offer. Defendant's offer here was for $5,001, but plaintiff only received $3,500 from the jury. The Rule provides that in this situation, plaintiff must bear the costs incurred after the offer of judgment was made.

The trial judge, however, ordered defendant to pay $1,200 in attorney's fees and $325 in expert witness fees. An expert witness fee may not be awarded unless the witness is subpoenaed and testifies at trial. *Couch v. Couch*, 18 N.C. App. 108, 196 S.E. 2d 64 (1973); *State v. Johnson*, 282 N.C. 1, 191 S.E. 2d 641 (1972). The expert witness fees were incurred after the offer was made and therefore defendant was improperly ordered to pay them.

Similarly, any attorney's fees which were incurred after the offer of judgment was made must be borne by the plaintiff. The trial judge did not have the authority to award $1,200 in attorney's fees because that amount undoubtedly included fees incurred after the time of the offer.

We agree with plaintiff's argument that he is entitled to recover from defendant the attorney's fees which were incurred prior to the time the offer of judgment was made. The Rule 68 sanctions only provide protection against the costs incurred *after* the offer has been made. Since plaintiff's recovery was less than $5,000, the trial judge retained the authority under G.S. 6-21.1 to award an attorney's fee for that portion of time not excluded under Rule 68.

We therefore hold that it remained within the trial judge's discretion to order defendant to pay the attorney's fees incurred

by plaintiff prior to 29 August 1979, the date the offer was made. We further hold that any other costs incurred by plaintiff prior to the time the offer was made may be properly taxed to defendant.

This cause is remanded to the Court of Appeals with directions to remand to the Superior Court of Guilford County for proceedings consistent with this opinion.

Reversed and remanded.

WILLIAM T. MCLEAN, EMPLOYEE v. ROADWAY EXPRESS, INC., EMPLOYER, SELF-INSURER

No. 212PA82

(Filed 3 November 1982)

Master and Servant § 77.1— modification of workers' compensation award proper—change in condition

In a workers' compensation proceeding, the evidence in the record, including a doctor's determination that plaintiff's permanent partial disability had changed from 30% to 50% following a back operation, supported the Industrial Commission's findings of fact and its conclusion of law that plaintiff suffered a change in condition within the meaning of N.C.G.S. 97-47.

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

ON writ of certiorari to review the decision of the Court of Appeals, 56 N.C. App. 451, 289 S.E. 2d 58 (1982), reversing an award for the plaintiff filed 29 December 1980 by the North Carolina Industrial Commission.

Plaintiff, William T. McLean, seeks an increased award of workers' compensation benefits due to a change for the worse in his physical condition. A hearing commissioner from the Industrial Commission found as a matter of law that the plaintiff had suffered a change in condition and increased his award pursuant to N.C.G.S. 97-47. Defendant appealed to the full Industrial Commission, which affirmed the decision of its hearing commissioner. The defendant appealed to the Court of Appeals, which reversed, holding that there was no evidence to support the Commission's conclusion that Mr. McLean had suffered a change in

condition. For reasons stated below, we reverse the decision of the Court of Appeals.

Womble, Carlyle, Sandridge & Rice, by Keith W. Vaughan, for plaintiff appellant.

Blackwell, Blackwell, Canady & Eller, by Jack E. Thornton, Jr., for defendant appellee.

MARTIN, Justice.

Plaintiff was thirty-three years old when he suffered a back injury 11 December 1976 while employed by the defendant as a dock worker. Initially, he was treated for the injury by Dr. Stephen Homer. During surgery Dr. Homer performed a "Gill procedure," which consists of removing some of the bone in the back of the vertebral canal or posterior elements of the spine in order to relieve pressure on the nerve roots of the spinal canal. After this procedure plaintiff continued to experience pain and discomfort and could not work.

On 5 October 1977, plaintiff visited Dr. Frank Pollock to obtain an evaluation of the extent of his disability. At a hearing before the Industrial Commission, Dr. Pollock testified that at that time he felt the plaintiff had reached maximum improvement from the surgery performed by Dr. Homer, and he gave the plaintiff a 30 percent permanent partial disability rating. However, he advised Mr. McLean that if his pain did not improve, he would need to undergo a further surgical procedure known as a back fusion.

On the basis of the rating given to Mr. McLean by Dr. Pollock, plaintiff and defendant entered into a memorandum of agreement on 15 November 1977 which called for defendant to pay plaintiff for 30 percent permanent partial disability to the back. Upon his petition, plaintiff was paid his benefits in a lump sum on 13 February 1978.

Plaintiff was treated by Dr. Pollock for pain resulting from the back injury from October 1977 through March 1978. Dr. Pollock later testified that during that period the plaintiff's physical condition steadily worsened and that he advised the plaintiff that a back fusion might ameliorate it. More specifically, he told the plaintiff that any such surgery "had a greater than

50-50 chance to decrease his current disability. There was [also] a substantial possibility that he would be disabled further by it." Plaintiff decided to undergo the surgery, and Dr. Pollock performed it on 10 April 1978. This surgery consisted of a fusion of the spine from the third lumbar vertebra to the first sacral vertebra. As a result of the surgery, plaintiff suffered more rigidity of his back and ultimately worse pain than he had suffered before the surgery. After the surgery Dr. Pollock saw plaintiff in his office in May, June, August, October, and November 1978 and in January, February, March, August, September, and October 1979.

In January 1979, Dr. Pollock concluded that plaintiff had reached maximum improvement following the back fusion and changed his rating of plaintiff's permanent partial disability to 50 percent. At a hearing before the Industrial Commission on 29 April 1980, he testified that this remained his opinion of the extent of plaintiff's permanent partial disability. Dr. Pollock noted that in increasing his disability rating he had taken into account the fact that plaintiff "had had additional surgery." Both he and the plaintiff testified that between 5 October 1977 when plaintiff was first rated by Dr. Pollock and April 1978 when the back fusion was performed, the condition of plaintiff's back had changed for the worse. Following the second surgical procedure, his condition further worsened.

Upon this evidence, the Industrial Commission found facts as follows:

> 4. Following his initial surgery, the plaintiff was unable to perform his old job as it involved heavy lifting and he continued to experience pain in his back and some limitation of mobility. He discussed with both Dr. Homer and Dr. Pollock the possibility of a spinal fusion surgery as a potential method of reducing his disability. Dr. Homer advised him that the chances of spinal fusion surgery decreasing his disability were 50-50. Dr. Pollock also advised him that there was no guarantee that he could obtain relief by spinal fusion, and that there was a possibility that his back could be made worse by the operation. The plaintiff elected to have the surgery performed on April 10, 1978.

5. On January 30, 1979, some nine months following his second operation, the plaintiff was given a 50 percent permanent partial disability rating of his back by Dr. Pollock. As reasons for his rating Dr. Pollock identified the factors that the plaintiff had undergone a second operation and that he still suffered some discomfort and pain in his back. This rating followed a lengthy period during which the plaintiff received post-operative treatment from Dr. Pollock.

6. The reason Dr. Pollock changed his rating of permanent partial disability from 30 percent to 50 percent of the back was that the plaintiff had undergone a second operation on his back which involved a Gill type procedure lateral gutter type fusion, exploration of the nerve roots, and spinal cord, and that the plaintiff was still experiencing discomfort in the low back region.

The Commission concluded as a matter of law that the "[p]laintiff has had a change of condition since he was rated as having a 30 percent permanent partial disability of the back and now has a 50 percent permanent partial disability of the back."[1] It is this finding that the Court of Appeals declared erroneous.

Jurisdiction of appellate courts on appeal from an award of the Industrial Commission is limited to the questions (1) whether there was competent evidence before the Commission to support its findings and (2) whether such findings support its legal conclusions. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981); *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978). Except as to questions of jurisdiction, the rule is that the findings of fact made by the Commission are conclusive on appeal when supported by competent evidence. This is so even though there is evidence to support a contrary finding of fact. *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822, *rehearing allowed for limited unrelated purpose*, 305 N.C. 296, 285 S.E. 2d 822 (1982); *Hansel v. Sherman Textiles, supra; Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981); *Perry v. Furniture Co., supra; Inscoe v. Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977). Defendant here excepted only to finding of fact number 7,

1. This conclusion of law was also set out in the hearing commissioner's opinion and award as finding of fact number 7.

which is actually a conclusion of law. Therefore, it is presumed that all findings of fact are supported by competent evidence, and they are conclusive on appeal. *Brown v. Board of Education*, 269 N.C. 667, 153 S.E. 2d 335 (1962); *Durland v. Peters, Comr. of Motor Vehicles*, 42 N.C. App. 25, 255 S.E. 2d 650 (1979). We are thus limited to the question whether such findings support the Industrial Commission's conclusion of law that the plaintiff suffered a change in condition entitling him to an increase in benefits.

In relevant part, N.C.G.S. 97-47 provides:

> Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article, and shall immediately send to the parties a copy of the award.

In construing this statute, the Court of Appeals has noted that: "A change in the degree of permanent disability is a change in condition within the meaning of G.S. 97-47." *West v. Stevens Co.*, 12 N.C. App. 456, 461, 183 S.E. 2d 876, 879 (1971). *See also Knight v. Body Co.*, 214 N.C. 7, 197 S.E. 563 (1938).

At the hearing before the Industrial Commission on 29 April 1980, Dr. Pollock testified that plaintiff's degree of permanent partial disability had changed from 30 to 50 percent. A physician's change of opinion with respect to degree of permanent partial disability is not evidence of a change in condition within the meaning of N.C.G.S. 97-47 if it is based solely on his reconsidering the contents of the patient's medical record as of the date of his first opinion. *See Shuler v. Talon Div. of Textron*, 30 N.C. App. 570, 227 S.E. 2d 627 (1976). If, however, the physician examines his patient subsequent to the date of his first opinion and in the interim the patient's physical condition has deteriorated, then a change of opinion with respect to the degree of permanent partial disability is evidence of a change in condition for purposes of N.C.G.S. 97-47.

> Change of condition "refers to conditions different from those existent when the award was made; and a continued incapacity of the same kind and character and for the same injury is

> not a change of condition . . . the change must be actual, and not a mere change of opinion with respect to a pre-existing condition." 101 C.J.S., Workman's Compensation, sec. 854(c), pp. 211-2. . . . Change of condition is a substantial change, after a final award of compensation, of physical capacity to earn and, in some cases, of earnings.

Pratt v. Upholstery Co., 252 N.C. 716, 722, 115 S.E. 2d 27, 33-34 (1960). *See also Edwards v. Smith & Sons*, 49 N.C. App. 191, 270 S.E. 2d 569 (1980), *cert. denied*, 301 N.C. 720 (1981); *Shuler v. Talon Div. of Textron*, *supra*. In the present case, Dr. Pollock changed his rating of the degree of plaintiff's permanent partial disability from 30 percent to 50 percent because plaintiff's condition had demonstrably worsened between 5 October 1977 and 30 January 1979. We find that the evidence in the record, including Dr. Pollock's determination, supports the Industrial Commission's findings of fact and its conclusion of law that plaintiff suffered a change in condition within the meaning of N.C.G.S. 97-47. *See Knight v. Body Co.*, *supra*, 214 N.C. 7, 197 S.E. 563 (1938). Therefore, the Court of Appeals erred in holding that the Industrial Commission's conclusion of law as set forth above was erroneous. For this reason, the decision of the Court of Appeals is

Reversed.

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

STATE OF NORTH CAROLINA v. JOE LEE BARNES

No. 268A82

(Filed 3 November 1982)

Rape and Allied Offenses § 6— second degree rape—penetration with sex organ—erroneous failure to instruct

Where, in a prosecution for second degree rape, the evidence of penetration by a male sex organ was weak, there was a suggestion from the examining physician that penetration could have been by some other object, and a prior erroneous instruction on second degree sexual offense which equated sexual intercourse with penetration of an object might have misled the jury,

the trial court erred in failing to instruct the jury that in order to convict defendant of second degree rape, it must find beyond a reasonable doubt that defendant penetrated the sex organ of the prosecutrix with his sex organ.

DEFENDANT appeals pursuant to G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals affirming his conviction of second degree rape, judgment entered 20 May 1981 in Superior Court, DUPLIN County, by *Barefoot, J.*

Defendant was indicted on charges of second degree rape, common law robbery, and assault with a deadly weapon with intent to kill. He pled guilty to common law robbery. A jury found him not guilty on the assault charge and guilty of second degree rape. He was sentenced to not more than forty nor less than thirty years imprisonment.

Rufus L. Edmisten, Attorney General, by Wilson Hayman, Associate Attorney, and William F. Briley, Assistant Attorney General, for the State.

Malcolm R. Hunter, Jr., Assistant Appellate Defender, Adam Stein, Appellate Defender, Attorneys for Defendant-Appellant.

MEYER, Justice.

Defendant assigns as error the trial court's failure to properly instruct on an element of second degree rape, and its failure to submit the lesser included offense of simple assault. For error in the charge on an essential element of the crime of second degree rape defendant is entitled to a new trial.

The victim of the alleged rape was 89 year old Anna Newkirk. We glean from her testimony in the record that on 28 March 1981, the defendant entered Ms. Newkirk's home, pushed a pillow against her mouth, "ravished" her, and left with approximately $2,000 of her money. Her testimony included the following: "[H]e got my pillow, he took and smothered me and I was under-conscious. I didn't know nothing. I was near about gone." "I'm not over it yet. My mouth is out of shape." When questioned about the alleged rape, Ms. Newkirk testified that defendant "just done what he wanted and I was under conscious then," and when pressed further, she stated that defendant "ravished" her.

Following the incident, Ms. Newkirk was taken to a hospital where she was examined by a physician. The physical evidence of

rape was inconclusive. At trial, Dr. Corazon Ngo Simpson testified:

> I discovered a vaginal tear. There was no blood. If this was done on younger lady, it would have—I'm sure it would have blood in it. But being in a woman that age and being—the vagina being atrophic, there may be some atrophy in the blood vessels producing no blood after the tear. In other words, the being—the fact that there was no blood after it was torn could be due to her atrophic vagina—old age—vagina. There being no blood I can't say whether the tear was recent or not. I can't tell exactly the time. I can't be sure about that.
>
> It is my opinion that there had been some kind of penetration in the vagina. I don't know if the penetration was by a male organ or not. We took some specimen from the vagina and the specimen was turned over to the State and I don't have the result of it. I am not able to say what made the penetration. All I know is there was a tear in there. This penetration could have been made by some object or by a finger or hand or something like that.

The State did not introduce into evidence the results of specimens taken from the vagina or pubic hair combings.

The defendant testified on his own behalf. He admitted going to Ms. Newkirk's home on the afternoon of 28 March 1981, as he had done on prior occasions, to assist in lighting her heater or take care of small chores. On this afternoon he noticed a little black bag with two stacks of money in it. According to defendant, it "seem like it was just sitting there for me," and in response to this singularly unique opportunity, he "snatched the money and . . . cuffed it down." Ms. Newkirk objected and began "to holler." Defendant picked up a pillow with which to quiet the woman. However, he got nervous, threw it "down just like that right in her face and took off" as Ms. Newkirk called after him, "Bring me my money back you strumpet." Defendant denied having any kind of sexual relations with Anna Newkirk and stated that he "didn't even get that close to her to choke her."

Defendant was apprehended by law enforcement officers the next day and the money was recovered. After his arrest he made

a statement which included the following: "I saw the big money. I had part of it. I took a pillow and held it over her face until she passed out, then I took the money and Freddie Lee came in and he was having sex with her." When defendant was confronted with this statement at trial, he stated that he did not recall making the statement because he was drunk at the time it was made.

After summarizing the evidence presented at trial, Judge Barefoot erroneously instructed the jury on second degree sex offense, rather than on second degree rape, as follows:

> And I charge for you to find the defendant guilty of second degree sex offense, the State must prove three things to you beyond a reasonable doubt: First, that the defendant engaged in sexual act with Anna Newkirk. Sexual act means any penetration however slight by an object into the genital opening of the person's body; second, that the defendant used or threatened to use force sufficient to overcome any resistance Anna Newkirk might have or might make; third, that Anna Newkirk did not consent and it was against her will. So, I charge that if you find from the evidence beyond a reasonable doubt that on or about March 28, 1981, Joe Lee Barnes engaged in sexual intercourse with Anna Newkirk and he did so by placing a pillow over her face and choking her and that was sufficient to overcome any resistance which Anna Newkirk might make and Anna Newkirk did not consent and it was against her will, it would be your duty to return a verdict of second degree sexual offense. (Emphasis added.)

Thus, as evident from the underlined portions of the instruction, the trial court equated "sexual intercourse" with "penetration however slight by an object."

Following a discussion at the bench, the trial court then stated:

> Members of the jury, I am informed by the District Attorney that it should be second degree rape and I am going to charge you to that. Now, you will disregard what I have said to you with reference to second degree sexual offense. This is what you will be guided by:

[Defendant has been accused of second degree rape, which is forcible sexual intercourse with a woman against her will. Now, I charge that for you to find the defendant guilty of second degree rape, the State must prove three things to you beyond a reasonable doubt. First, that the defendant had sexual intercourse with Anna Newkirk. Second, that the defendant used or threatened to use force sufficient to overcome any resistance that she might make. Third, that Anna Newkirk did not consent and it was against her will. So I charge that if you find from the evidence beyond a reasonable doubt that on or about March 28, 1981, Joe Lee Barnes by the use of force—a pillow and choking had sexual intercourse with Anna Newkirk without her consent and against her will, it would be your duty to return a verdict of guilty of second degree rape.]

Defendant first assigns as error the trial court's failure to instruct the jury that in order to convict him of second degree rape, it must find beyond a reasonable doubt that the defendant penetrated Ms. Newkirk's sex organ with his sex organ. By failing to do so, argues defendant, the trial judge left open an inference in the minds of the jurors, who had earlier heard the instruction on second degree sex offense, that the "sexual intercourse" required under the second degree rape instruction could consist of "any penetration however slight by an object into the genital opening of the person's body." In light of the total absence of any direct testimony at trial that defendant did, in fact, penetrate Ms. Newkirk's sex organ with his sex organ, we agree that the failure of the trial judge to include the explicit language of this element of the offense was prejudicial error.

In order to satisfy the requirement of vaginal intercourse, as defined at the time of the alleged offense, G.S. § 14-27.3 (Cum. Supp. 1979), it was necessary to establish penetration by the male sex organ of the female sex organ. *State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27 (1973); *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968). However, as the State correctly points out in its brief, the failure of the trial court to define "sexual intercourse" in its instructions to the jury is not usually error. *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980); *State v. Hensley*, 294 N.C. 231, 240 S.E. 2d 332 (1978); *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), death sentence vacated, 428 U.S. 902 (1976).

Here the only evidence from which penetration could even be inferred was Ms. Newkirk's characterization of defendant's act, "he ravished me," and Dr. Simpson's testimony that upon physical examination of Ms. Newkirk, he found a vaginal tear resulting from some kind of penetration. Dr. Simpson testified that he couldn't say whether the tear was recent or not and that the "penetration could have been made by some object or by a finger or hand or something like that." This Court and the North Carolina Court of Appeals have refused to require special instructions beyond the phrase "sexual intercourse" as to this element of rape when there is *plenary evidence* before the jury that the female sex organ had been penetrated by the male sex organ. *State v. Ashford*, 301 N.C. 512, 272 S.E. 2d 126 (1980); *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252; *State v. Hensley*, 294 N.C. 231, 240 S.E. 2d 332; *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60; *State v. Banks*, 31 N.C. App. 667, 230 S.E. 2d 429 (1976).[1] But where, as in the case at bar, (1) the evidence of penetration by a male sex organ is weak, (2) there is a suggestion from the examining physician that penetration could have been by some *other* object, and (3) a prior erroneous instruction on second degree sex offense, equating sexual intercourse with penetration of an object might have misled the jury, the failure to instruct on the penetration element of the offense is prejudicial error. Under these circumstances it was necessary for the trial judge to have included, in his instruction on second degree rape, language sufficient to establish that penetration must be of the female sex organ by the male sex organ.

Defendant next contends that the trial court committed reversible error by failing to submit the lesser included offense of assault where the State's evidence was not positive as to every

1. The record on appeal in *Ashford* discloses that both his victims and the defendant testified that there had been "intercourse" and "sexual intercourse." In *Thacker*, medical tests established that the complaining witness had rope burns and had recently engaged in vaginal intercourse; in *Hensley*, medical tests revealed spermatozoa in the victim's vagina, a medical expert testified that the victim had been penetrated by a male sex organ, and both the victim and an eyewitness testified that the defendant's penis was in the victim's vagina; in *Vinson*, the complaining witness testified that the defendant "actually penetrated" her and raped her twice and medical tests revealed recent intercourse and active spermatozoa in her vagina; and in *Banks*, medical tests revealed a white secretion in the vagina, the complaining witness testified explicitly about the forced vaginal intercourse, and the defendant confessed to the offense.

element of second degree rape and where there was sufficient evidence of assault to support a conviction of that crime. Our decision to grant defendant a new trial on the first issue renders a resolution of this issue unnecessary as it is unlikely to recur at trial.

The decision of the Court of Appeals is reversed. For error in the court's instructions to the jury, defendant is entitled to a new trial.

Reversed.

STATE OF NORTH CAROLINA v. THOMAS GLENN BAILEY

No. 250PA82

(Filed 3 November 1982)

Constitutional Law § 32; Criminal Law § 101.4— right to impartial jury—contact with State's witness

The Court of Appeals erred in finding no error in the trial judge's denial of defendant's motion to set aside the verdict of manslaughter which was based upon alleged misconduct of a sheriff in driving three jurors to a restaurant for an evening meal during a break in the jury deliberations since (1) the sheriff testified as a witness for the State in its case-in-chief, (2) the trial judge had cautioned the jurors not to associate themselves with anyone involved in the case, (3) extraordinary precautions had been taken to prevent the sheriff from having any contact with the jury, and (4) since, by gratuitously transporting the three jurors to the restaurant, the sheriff granted them a special "favor."

ON petition for discretionary review of an unpublished opinion of the Court of Appeals, 56 N.C. App. 642, 291 S.E. 2d 371 (1982), finding no error in the trial before *Llewellyn, J.*, at the 23 March 1981 Session of the NASH Superior Court.

Defendant Thomas Glenn Bailey was tried for the first-degree murder of Eugene Perry. The State presented seventeen witnesses, including Sheriff Brown, whose testimony tended to show that on 22 August 1980 defendant shot and fatally wounded Eugene Perry at the B & F Grocery, a gameroom-pool hall.

Defendant presented evidence of his good character and evidence which tended to show that he acted in self-defense when

he shot Eugene Perry. Defendant and two witnesses testified that Eugene Perry was leaving the B & F Grocery when defendant arrived. They testified that Eugene Perry threatened defendant saying: "You can go in, you big m--- f---, but you better not come out. I done shot you one time, and I'll kill you the next time," and that Eugene Perry had a shiny object in his hand. Defendant testified that Eugene Perry returned to the B & F Grocery later that evening and threatened him several times. Upon the final threat, defendant shouted, "I can't stand it no more," and shot Eugene Perry. Defendant was ordered to leave the B & F Grocery by manager Michael Bissette. He then went to his parents' home where he lived. He was arrested later that night after Eugene Perry died from the gunshot wound.

Other pertinent facts are hereafter set out in the opinion.

The jury returned a verdict of guilty of manslaughter. Defendant moved for the court to set aside the verdict due to contact between the jurors and a State's witness. This motion was denied and judgment was entered sentencing defendant to a term of imprisonment of not less than fourteen nor more than sixteen years. The Court of Appeals affirmed and defendant sought discretionary review by this Court. We allowed the petition on 12 May 1982.

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

John E. Clark and Perry W. Martin for defendant-appellant.

BRANCH, Chief Justice.

The sole question presented by this appeal is whether the Court of Appeals erred in finding no error in the trial judge's denial of defendant's motion to set aside the verdict. This motion was based upon alleged misconduct of Sheriff Frank Brown in driving three jurors to a restaurant for an evening meal during a break in the jury deliberations.

A motion for a new trial based on misconduct affecting a jury's deliberation is addressed to the sound discretion of the trial judge, and unless his ruling is clearly erroneous or an abuse of discretion, it will not be disturbed. *State v. Johnson*, 295 N.C. 227, 244 S.E. 2d 391 (1978); *State v. Sneeden*, 274 N.C. 498, 164

S.E. 2d 190 (1968). "The circumstances must be such as not merely to put suspicion on the verdict, because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge." *Lewis v. Fountain*, 168 N.C. 277, 279, 84 S.E. 278, 279 (1915). Nevertheless, we recognized in *State v. Sneeden, supra*, that "[c]ontacts between court officers and jurors, except as authorized by the court in appropriate circumstances, are not to be countenanced since no justification should be given for arousing suspicions as to the sanctity of jury verdicts." 274 N.C. at 503, 164 S.E. 2d at 194 (quoting 89 C.J.S. *Trial*, § 457(f) (1955)).

This Court has unequivocally held that a State's witness is disqualified to act as custodian or officer in charge of the jury in a criminal case, and when this occurs, prejudice is conclusively presumed. *State v. Macon*, 276 N.C. 466, 173 S.E. 2d 286 (1970); *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed. 2d 424 (1965); *cf. State v. Taylor*, 226 N.C. 286, 37 S.E. 2d 901 (1946).

We are cognizant of the fact that the majority of our cases which have considered the question of misconduct between jurors and custodial officials involve communications. In these instances, the question of prejudice largely depended upon the nature of the communication. *State v. Sneeden, supra; State v. Johnson, supra; State v. Adkins*, 194 N.C. 749, 140 S.E. 806 (1927); *State v. Burton*, 172 N.C. 939, 90 S.E. 561 (1916); *Gaither v. Generator Co.*, 121 N.C. 384, 28 S.E. 546 (1897).

In *State v. Mettrick*, 305 N.C. 383, 289 S.E. 2d 354 (1982), prejudicial error was found where two of the State's principal witnesses, the sheriff and deputy sheriff, transported prospective jurors in buses from one county to another. Each officer was alone in the bus with the jurors for about three hours. There was no evidence of any conversations concerning the trial at any time during the transportation of the jury. Holding that the officers who drove the buses acted as custodians of the jury, a unanimous Court, speaking through Justice Mitchell, stated, in part:

> The integrity of our system of trial by jury is at stake. No matter how circumspect officers who are to be witnesses for the State may be when they act as custodians or officers in charge of the jury in a criminal case, cynical minds often will

leap to the conclusion that the jury has been prejudiced or tampered with in some way. If allowed to go unabated, such suspicion would seriously erode confidence in our jury system. . . .

* * * *

In determining whether the officers who testified for the State were "custodians" or "officers in charge" of the jury as we employ those terms here, we look to factual indicia of custody and control and not solely to the lawful authority to exercise such custody or control. . . .

In the present case, Sheriff Waddell was called to testify five times in the presence of the jury. He was alone with jurors in a bus for a total of at least three and one-half hours as he drove them at various times through the mountains. The same is true of Deputy Parsons who testified three times in the presence of the jury. The jurors, in fact, were in these law enforcement officers' custody and under their charge out of the presence of the court for protracted periods of time with no one else present. Without question, the jurors' safety and comfort were in the officers' hands during these periods of travel. We find that the sheriff and the deputy who were witnesses for the State also acted as custodians or officers in charge of the jury in the present case. Therefore, prejudice is conclusively presumed despite the fact that the evidence reveals no hint of malice or misconduct by the officers. The defendants are entitled to a new trial.

305 N.C. at 385, 386, 289 S.E. 2d at 356.

Although the instant case differs from *Mettrick* in that here the sheriff was in the presence of the jurors for a very short period of time, it is similar in that there was no evidence of prejudicial conversation in either case and that for the given period of time in each case the officers were performing an act of transporting the jurors for their comfort and accommodation. We do not conclude that *Mettrick* squarely controls the decision in this case or that Sheriff Brown actually acted as an officer in charge of the jury so as to permit a conclusive presumption of prejudice. We must therefore turn to the particular and peculiar facts of this case in order to determine whether defendant was denied a fair trial.

We summarize the pertinent facts. Sheriff Brown had testified as a witness for the State in its case-in-chief. Defendant relied solely upon self-defense and his own testimony was crucial. The sheriff testified to a custodial statement made by defendant, which if believed, would have completely destroyed defendant's testimony.

Immediately after the jury selection was completed, the trial judge cautioned the jurors as follows: "You are not to associate yourselves with anyone involved in this case, either as a party, as a lawyer, as a witness or as a judge." On at least nineteen other occasions, by similar language or by reference to prior instructions, the jurors were instructed in a similar manner. Finally, Sheriff Brown was in the courtroom during most of the course of this trial; and even had he not been, because of his long service as a police officer, he must have been familiar with the impropriety of a witness associating in any manner with a juror. For some reason, two superior court judges took extraordinary precautions to insure that the sheriff would have absolutely no contact with this jury. To that end, Judge Allsbrook, in denying a pretrial motion for change of venue, indicated that Sheriff Brown should not assume his usual duties of opening and closing court during the course of this trial and that he should not have any contact with the jurors who were to try this case. At trial Judge Llewellyn did permit the sheriff to sit with the district attorney during jury selection but, thereafter, required him to remove his chair to another part of the courtroom. He also made it very clear that the sheriff should not have *any* contact with the jury by not even allowing him to deliver a list of the jurors to the deputy who was the custodian of the jury.

We do not know whether it was the sheriff's personal popularity in Nash County, an inordinate desire to obtain a conviction or some other cause that prompted two superior court judges to take such extraordinary precautions to prevent Sheriff Brown from having any contact with the jury. We can only infer that whatever the reason, it was their purpose to guarantee that both defendant and the State receive a fair trial.

Upon this background, and while the jury was still deliberating upon their verdict, Sheriff Brown, in direct contravention of all of the court's precautions and cautionary instruc-

tions concerning contact with the jurors, initiated or permitted a situation which placed him in contact with three jurors. The jurors also acted in total disregard of the court's numerous instructions.

The probability of prejudice was more certain in this case than in *Mettrick*. In *Mettrick* the drivers were in effect chauffeurs who were carrying out their duties to transport jurors to and from the courthouse. Here Sheriff Brown, by gratuitously transporting the three jurors to the restaurant, granted them a special "favor." Certainly, this must have improved his image and strengthened his credibility in the eyes of the three jurors who were actually in the process of their deliberations. We further note that the jurors were not questioned as to whether their encounter with the Sheriff in any way affected their verdict. The action of Sheriff Brown and the jurors constituted misconduct which if "allowed to go unabated . . . would seriously erode confidence in our jury system." We therefore hold that such misconduct resulted in prejudicial error to defendant. This holding is limited to the particular and peculiar circumstances of this case and we wish to make it clear that we do not by this holding extend the rationale of our prior cases.

The decision of the Court of Appeals is reversed and for reasons stated there must be a new trial.

Reversed.

STATE OF NORTH CAROLINA v. STANLEY CURTIS WHITAKER

No. 105PA82

(Filed 3 November 1982)

Robbery § 5.4— common law robbery—failure to instruct on lesser offense of assault—no error

The trial court did not err in failing to submit assault as a lesser included offense of attempted common law robbery where the evidence tended to show that the victim's assailant grabbed her and said "[t]his is a stickup"; that she offered him her car keys, declaring they were all she had, and that defendant refused to take them. If this evidence is believed, the offense of attempted common law robbery was complete and the State's evidence that defendant in-

tended to rob the victim was overwhelming and unequivocable. Even if defendant's actions in trying to take the victim into the bushes, after the above exchange, gave rise to a reasonable inference that he intended to commit some sexual assault upon her, they did not constitute evidence requiring the submission of lesser included offense for two reasons: (1) If defendant did intend to commit a sexual assault when he first accosted her, he may have committed crimes different from but not lesser included offenses of attempted robbery. (2) If defendant did form an intent to sexually assault her, it arose only after his attempt to rob her was complete, and constituted an offense separate from the attempted robbery but not included in it.

BEFORE *Judge Samuel E. Britt* and a jury at the 2 March 1981 Session of WAKE Superior Court, defendant was convicted of attempted common law robbery. He was sentenced to a maximum term of three years' imprisonment as a committed youthful offender. The Court of Appeals ordered a new trial in an opinion written by *Judge Whichard* and joined by *Judges Clark* and *Becton.* 55 N.C. App. 666, 286 S.E. 2d 640 (1982). This Court granted the state's petition for discretionary review under G.S. 7A-31(a) on 4 May 1982.

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

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

EXUM, Justice.

The sole question in this appeal is whether the trial court erred in failing to submit to the jury the crime of assault as a lesser included offense of attempted common law robbery. The Court of Appeals believed it did and ordered a new trial. We conclude that even if an assault is a lesser included offense of attempted common law robbery, a point we do not decide, the evidence does not justify submission of it to the jury. We reverse.

Defendant was tried on two indictments. One charged him with kidnapping Jo Ellen Inman by removing her from one place to another for the purpose of facilitating the commission of the felony of armed robbery. The other charged him with attempted armed robbery of Ms. Inman.

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

The principal witness for the state was Jo Ellen Inman, the victim. She testified that on 20 September 1980 she went to a friend's apartment near North Carolina State University in Raleigh about midnight. She knocked on the apartment door but there was no answer. There was a light above the door and a street lamp to the side of the apartment. While she waited for her friend to answer, she saw a young black man walking along the sidewalk. She asked the man if he knew if anyone was at home; he responded, "Hunh?"

Suddenly the man jumped toward her, grabbed her around the waist, and shoved a "hard object" into her rib cage. He told her, "[T]his is a stick up," and not to say anything or fight. She held up her car keys and told him that was all she had. The man did not take the keys; instead, he told her they were going down to the bushes. He began pulling her down the steps but she held onto the rail and pushed against him. Before they got to the bushes she kicked him in the thigh, causing him to jump back and loosen his grip. She began screaming and he reacted by backing away. He then hit her in the face and "took off running."

Ms. Inman did not believe the object with which the man threatened her was a knife, although he told her it was. He pressed it against her so hard that she believed if it had actually been a knife it would have cut through her clothing into her body. Instead, it left a bruise about one-and-one-half inches long by one-half inch wide. She also suffered swelling of the forehead and a black eye from the blow to her head.

A neighbor who heard her screams came out to check on her. He did not see her attacker but called police officers and relayed a description of the attacker and Ms. Inman's statement that a man tried to rape her. She identified defendant as her attacker less than an hour later at a "show up" in a restaurant parking lot. She also made a voice identification at the police station a short time later.

Defendant testified in his defense, offering evidence of an alibi.

In the robbery case Judge Britt submitted to the jury only the offense of attempted common law robbery, instructing the jury that it could find defendant guilty of that offense or not

guilty. Judge Britt submitted the kidnapping case to the jury on the theory as charged that the removal of the victim was for the purpose "of facilitating his [defendant's] commission of common law robbery," instructing the jury that it could find defendant guilty of that offense or not guilty.

The jury returned verdicts of guilty of attempted common law robbery and not guilty of kidnapping.

Defendant contends, and the Court of Appeals agreed, that Judge Britt erred in the robbery case by not instructing the jury on the offense of assault. Defendant and the Court of Appeals reason as follows: Attempted common law robbery consists of (1) defendant's specific intent to commit the crime of common law robbery, and (2) a direct but ineffectual act by defendant leading toward the commission of this crime. *See State v. Bailey*, 4 N.C. App. 407, 167 S.E. 2d 24 (1969) (citing *State v. Surles*, 230 N.C. 272, 52 S.E. 2d 880 (1949) (defining elements of attempt), and *State v. Lunsford*, 229 N.C. 229, 49 S.E. 2d 410 (1948) (defining elements of common law robbery)). Assault is a lesser included offense of attempted robbery. *State v. Duncan*, 14 N.C. App. 113, 187 S.E. 2d 353 (1972). The trial judge must charge on a lesser included offense if: (1) the evidence is equivocal on an element of the greater offense so that the jury could reasonably find either the existence or the nonexistence of this element; and (2) absent this element only a conviction of the lesser included offense would be justified. *State v. Riera*, 276 N.C. 361, 368, 172 S.E. 2d 535, 540 (1970). Since defendant in the instant case refused to take the victim's car keys but, instead, told her they were going down into the bushes and attempted to pull her down the steps, he could have had the intent to commit a crime other than robbery, *e.g.*, kidnapping,[1] rape or some other kind of sexual assault. Thus, the state's evidence that defendant intended to commit common law robbery is at best equivocal so that the jury could reasonably find that defendant lacked this intent. Therefore assault should have been submitted to the jury as a lesser included offense of common law robbery.

Assuming, without deciding, that assault is a lesser included offense of attempted common law robbery, we nevertheless dis-

1. We reiterate that defendant was charged with kidnapping but was acquitted of that offense.

agree with the proposition that the state's evidence on defendant's intent to commit common law robbery is equivocal. Although it may never be possible to determine with absolute certainty someone's intent, a particular combination of speech and action may constitute such overwhelming evidence that the one who speaks and acts is motivated by a specific intent that no other conclusion is reasonable. Here the uncontradicted evidence is that Ms. Inman's assailant grabbed her and said, "[T]his is a stick up." She offered him her car keys, declaring they were all she had. Defendant refused to take them. At this point, if the state's evidence is believed, the offense of attempted common law robbery was complete and the state's evidence that defendant intended to rob Ms. Inman is overwhelming and unequivocal.

When Ms. Inman said, "[A]ll I have are my car keys," defendant began to pull her down the steps saying, "[W]e are going down to the bushes." We agree with the state that this conduct is perfectly consistent with Ms. Inman's assailant's intent to rob. It is reasonable to infer that, not wanting the car keys, he was attempting to get Ms. Inman in a more secluded spot to determine whether, indeed, she had other property susceptible to being taken. Even if, as defendant argues and the Court of Appeals concluded, defendant's actions in trying to take Ms. Inman into the bushes give rise to a reasonable inference that he intended to commit some sexual assault upon her, they do not constitute evidence requiring the submission of a lesser included offense for two reasons. First, if Ms. Inman's assailant did intend to commit a sexual assault when he first accosted her, he may have committed the crimes of attempted second degree rape or attempted second degree sexual offense, different but not lesser included offenses of attempted robbery. Second, the only reasonable inference to be drawn from the evidence is that if Ms. Inman's assailant did form an intent to sexually assault her, it arose only after his attempt to rob her was complete, and constituted an offense separate from the attempted robbery but not included in it.

It was not error, therefore, to fail to submit assault as a lesser included offense of attempted common law robbery. The judgment and verdict of the trial court are, therefore, reinstated and the decision of the Court of Appeals awarding a new trial is

Reversed.

STATE OF NORTH CAROLINA v. THOMAS LANEAU CLARK

No. 323A82

(Filed 3 November 1982)

Rape and Allied Offenses § 5— first degree sexual offense—insufficient evidence

The State's evidence was insufficient to be submitted to the jury on the issue of defendant's guilt under G.S. 14-27.4 of a first degree sexual offense with an eight-year-old boy.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Collier, J.*, at the 1 February 1982 Criminal Session of DAVIDSON County Superior Court.

Upon a plea of not guilty, defendant was tried on a bill of indictment charging that on or about April 1980, with force and arms, Thomas Laneau Clark did unlawfully and feloniously commit sodomy with one Jerry Dean Garris, Jr., an eight year old boy at the time of the alleged crime, who was more than four years younger than the defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Donald W. Grimes, for the State.

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

PER CURIAM.

After reviewing the transcript and record in this case we find that there was insufficient evidence to submit to the jury the issue of defendant's guilt under G.S. 14-27.4. For this reason the judgment of the Superior Court is reversed and the charge against defendant dismissed.

In addition to the record on appeal, defendant has filed a motion for appropriate relief pursuant to G.S. 15A-1415, G.S. 15A-1417 and G.S. 15A-1418. The heart of this motion is the defendant's contention that he was denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution.

In light of our decision in the defendant's previous assignment of error, we dismiss the defendant's motion for appropriate relief.

The decision of the Superior Court is reversed and the charge against the defendant dismissed. Defendant's motion for appropriate relief is dismissed.

Reversed.

ELLEN D. FELTON, EMPLOYEE, PLAINTIFF v. HOSPITAL GUILD OF THOMASVILLE, INC., EMPLOYER; PENNSYLVANIA NATIONAL MUTUAL INSURANCE CO., CARRIER, DEFENDANTS

No. 325A82

(Filed 3 November 1982)

Appeal and Error § 64— equally divided court—opinion of Court of Appeals affirmed—no precedent

Where one member of the Supreme Court did not participate in the consideration or decision of a case and the remaining six Justices are equally divided, the opinion of the Court of Appeals is affirmed without precedential value.

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

APPEAL as of right pursuant to G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 57 N.C. App. 33, 291 S.E. 2d 158 (1982), which reversed an Opinion and Award of the North Carolina Industrial Commission denying compensation to the claimant, Ellen D. Felton, and remanded the cause for entry of an appropriate award.

Henson and Henson, by Perry C. Henson and J. Victor Bowman, Attorneys for defendant-appellants.

Boyan and Nix, by Robert S. Boyan and Clarence C. Boyan, Attorneys for plaintiff-appellee.

PER CURIAM.

The facts are adequately stated in the opinion of the Court of Appeals. Judge (now Justice) Harry C. Martin having participated in the consideration and decision of this case while a member of the Court of Appeals and therefore not participating in this Court's consideration and decision of the appeal, and the members

of this Court being equally divided, with three members voting to affirm, and three members voting to reverse, the decision of the Court of Appeals is left undisturbed as the law of the case but stands without precedential value. *Greenhill v. Crabtree*, 301 N.C. 520, 271 S.E. 2d 908 (1980); *Wayfaring Home Inc. v. Ward*, 301 N.C. 518, 272 S.E. 2d 121 (1980); *Shields v. Bobby Murray Chevrolet, Inc.*, 300 N.C. 366, 266 S.E. 2d 658 (1980), *reh. den.* 301 N.C. 107; *Bank v. Morgan*, 299 N.C. 541, 263 S.E. 2d 576 (1980); *Starr v. Clapp*, 298 N.C. 275, 258 S.E. 2d 348 (1979); *Mortgage Co. v. Real Estate, Inc.*, 297 N.C. 696, 256 S.E. 2d 688 (1979); 1 N.C. Index 3d, Appeal and Error, § 64.

Affirmed.

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

LESSIE SIMMONS v. C. W. MYERS TRADING POST, INC.

No. 281PA82

(Filed 3 November 1982)

1. **Evidence § 45— plaintiff's opinion as to value of trailer**

In an action to recover damages for breach of an express warranty to repair plaintiff's house trailer, the trial court erred in excluding plaintiff's testimony on the value of her trailer without the promised repairs.

2. **Appeal and Error § 2; Consumer Credit § 1— treble damages upon retrial—improper determination on appeal**

The Court of Appeals should not have addressed the question whether upon a verdict in her favor at retrial plaintiff would be entitled, under G.S. 25A-44(4) and G.S. Ch. 75, to treble damages for a violation of G.S. 25A-20, a provision of the Retail Installment Sales Act, since the issue had not been decided by the trial court and was neither briefed nor argued by either party before the Court of Appeals, and the issue will arise, if at all, only if plaintiff receives a verdict in her favor upon retrial.

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

ON defendant's petition for writ of certiorari to review the decision of a divided panel of the Court of Appeals, which affirmed in part and reversed in part the entry of a directed ver-

dict for defendant at the close of plaintiff's evidence by *Judge Alexander* at the 2 February 1981 Session of FORSYTH District Court. The opinion of the Court of Appeals, reported at 56 N.C. App. 549, 290 S.E. 2d 710 (1982), is by *Judge Harry Martin* with *Chief Judge Morris* concurring. *Judge Vaughn* concurred in part and dissented in part.

Legal Aid Society of Northwest North Carolina, Inc., by Kate Mewhinney, for plaintiff appellee

Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown, by Richard G. Badgett and Herman L. Stephens, for defendant appellant.

PER CURIAM.

[1] The facts are fully and accurately set out in the Court of Appeals' opinion. Defendant contends that the Court of Appeals erred in holding that plaintiff had shown reversible error in the trial court's exclusion of testimony relating to damages she suffered from defendant's alleged breach of an express warranty to repair her house trailer, and that she would be entitled to treble damages in the event of a verdict in her favor upon retrial. We agree with all three judges of the Court of Appeals that it was error to exclude plaintiff's testimony on the value of her trailer without the promised repairs.

[2] The Court of Appeals majority, however, should not have addressed the question whether upon a verdict in her favor plaintiff would be entitled, under G.S. 25A-44(4) and Chapter 75 of the General Statutes, to treble damages for a violation of G.S. 25A-20. As both parties stress in their briefs before us, this issue was not properly before the Court of Appeals. It was not a question ripe for review because it will arise, if at all, only if plaintiff receives a verdict in her favor upon retrial. The issue had not been decided by the trial court and was neither briefed nor argued by either party before the Court of Appeals. We express no opinion on the question. That portion of the Court of Appeals' opinion dealing with this question is, for the reasons stated, vacated.

Except as herein modified, we adopt the decision of the Court of Appeals.

Modified and affirmed.

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

PROPST CONSTRUCTION CO. v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 291PA82

(Filed 3 November 1982)

Highways and Cartways § 9— action on completed highway construction contract —trial by judge without jury

The Court of Appeals erred in remanding for trial by jury a case concerning a completed contract for the construction of a state highway, since under G.S. 136-29(c) such an action is to be tried by a judge without a jury.

ON discretionary review of the decision of the Court of Appeals, 56 N.C. App. 759, 290 S.E. 2d 387 (1982), reversing summary judgment for defendant entered by *Wood, J.*, at the 21 April 1981 Session of Superior Court, MONTGOMERY County.

Kluttz, Hamlin, Reamer, Blankenship & Kluttz, by Clarence Kluttz and Malcolm B. Blankenship, Jr., for plaintiff appellee.

Rufus L. Edmisten, Attorney General, by Blackwell M. Brogden, Jr., Assistant Attorney General, for defendant appellant.

PER CURIAM.

The Court of Appeals erred in remanding this case for trial by jury. Under N.C.G.S. 136-29(c), any controversy concerning a completed contract for the construction of a state highway is to be tried by a judge without a jury. Therefore, the opinion of the Court of Appeals is modified to the extent that the controversy is remanded for trial by a judge sitting as the finder of fact. Except as modified herein, the opinion of the Court of Appeals is affirmed and adopted by this Court.

Modified and affirmed.

STATE OF NORTH CAROLINA v. JOSEPH EMANUEL THOMPSON

No. 329A82

(Filed 3 November 1982)

APPEAL of right pursuant to G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals, 57 N.C. App. 142, 291 S.E. 2d 266 (1982), awarding the defendant a new trial.

Rufus L. Edmisten, Attorney General, by William R. Shenton and Robert L. Hillman, Assistant Attorneys General, for the State.

Adam Stein, Appellate Defender, by Ann B. Petersen, Assistant Appellate Defender, for defendant-appellee.

PER CURIAM.

The majority of the panel of the Court of Appeals which decided this case correctly concluded that the trial court expressed an opinion on the evidence and thereby violated G.S. 15A-1232. Consequently, the majority opinion of the Court of Appeals awarding the defendant a new trial must be affirmed. It is unnecessary for this Court to consider the other matters discussed in the majority opinion in the Court of Appeals, as they are not likely to arise again during a retrial of this case.

Affirmed.

State v. Barrett

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
CHARLES PHILLIP BARRETT	)	

No. 525A82

(Filed 19 November 1982)

DEFENDANT has attempted to appeal to this Court from the denial of his motion for appropriate relief by the Court of Appeals, with *Becton, J.*, dissenting. This he cannot do. N.C. Gen. Stat. § 15A-1422(f) (Cum. Supp. 1981). Defendant's motion is based upon N.C.G.S. 15A-1415(b)(2) (Cum. Supp. 1981). Nevertheless, the record on appeal before us discloses that defendant was convicted of crime against nature, which is not a lesser included offense of a sexual offense in the first degree. N.C. Gen. Stat. § 14-27.4 (1981). Therefore, we arrest judgment. The appeal is dismissed and the case is remanded to the Court of Appeals with direction that it further remand the case to the Superior Court of FORSYTH County for the entry of this order arresting judgment.

BY ORDER OF THE COURT IN CONFERENCE, this 19th day of November, 1982.

MARTIN, J.
For the Court

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

CAMERON v. NEW HANOVER MEMORIAL HOSPITAL

No. 528P82.

Case below: 58 N.C. App. 414.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 3 November 1982. Motion of defendants to dismiss appeal for lack of substantial constitutional question allowed 3 November 1982.

CONNOLLY v. SHARPE

No. 512P82.

Case below: 58 N.C. App. 606.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1982. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 3 November 1982.

DAVIS v. DAVIS

No. 537P82.

Case below: 58 N.C. App. 25.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1982.

GIVENS v. TOWN OF NAGS HEAD

No. 558A82.

Case below: 58 N.C. App. 697.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 3 November 1982. Notice of appeal dismissed 3 November 1982.

ORANGE WATER & SEWER v. TOWN OF CARRBORO

No. 550P82.

Case below: 58 N.C. App. 676.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1982.

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

PERRY v. PERRY

No. 532P82.

Case below: 58 N.C. App. 606.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 3 November 1982.

STATE v. HILL

No. 612PA82.

Case below: 59 N.C. App. 216.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 5 November 1982.

STATE v. PAUL

No. 547P82.

Case below: 58 N.C. App. 723.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1982.

STATE v. STANLEY

No. 587P82.

Case below: 59 N.C. App. 238.

Petition by defendant for discretionary review under G.S. 7A-31 denied 26 October 1982.

STATE v. STRANGE

No. 557P82.

Case below: 56 N.C. App. 263.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1982. Appeal dismissed 3 November 1982.

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

STATE v. TILLMAN

No. 577P82.

Case below: 58 N.C. App. 821.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1982.

STATE v. WILHITE & RANKIN

No. 569A82.

Case below: 58 N.C. App. 654.

Petition by defendant Wilhite for writ of certiorari to North Carolina Court of Appeals denied 3 November 1982. Motion of Attorney General to dismiss appeal for lack of significant public interest allowed 3 November 1982.

STATE v. WILLOUGHBY

No. 578P82.

Case below: 58 N.C. App. 746.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1982.

STATE OF NORTH CAROLINA v. TIMOTHY ROGERS CHAMBERLAIN

No. 135A81

(Filed 7 December 1982)

1. **Criminal Law § 120.1— capital case—eligibility for parole or probability of execution—necessity for instruction—question not presented**

It was not necessary for the Supreme Court to decide whether, under the circumstances of this case, the trial court should have instructed the jury during the selection process that defendant's eligibility for parole if he were sentenced to life imprisonment and the probability that defendant would in fact be executed if he were sentenced to death were not proper matters for their consideration where the jury returned a verdict of guilty of second degree murder and thus did not have occasion to consider whether to recommend a sentence of death or life imprisonment.

2. **Criminal Law § 76.5— admissibility of confession—finding not required by evidence**

The trial court was not required to find that an officer told defendant that if he made a statement "it would be easier for everyone" because the officer stated on cross-examination, after repeated questioning on this point and after repeated assertions that he recalled making no such statement, that "[i]f he [defendant] said that I did make such a statement I don't know how I could deny it because I don't remember saying it," where the clear thrust of the officer's testimony was that he did not make such a statement to the defendant.

3. **Criminal Law § 75.3— confronting defendant with identification by victim—confession not involuntary**

An officer's statement to defendant that the deceased had identified defendant as the person who had hit him in the head with a brick did not render defendant's subsequent confession involuntary where the evidence showed that the statement was truthful in that deceased nodded his head affirmatively when asked by the officer if defendant was the person who had hit him and that deceased squeezed the officer's hand when asked to do so if defendant was the person who had hit him.

4. **Criminal Law § 75.2— officer's statement as to defendant's lack of intent to kill—confession not involuntary**

Even if an officer told defendant that he knew defendant killed the deceased but that defendant may not have intended to do so, the connection between the officer's statement and defendant's subsequent confession was so attenuated that the statement itself could not render the confession involuntary where it was unaccompanied by any express promise or suggestion of leniency, was made the day before defendant actually confessed, and was followed by defendant's twice asserting his rights to remain silent and to counsel.

5. **Criminal Law § 99.2— remark by trial judge—no prejudice to defendant**

Defendant was not prejudiced by the trial judge's remark during an officer's testimony at a voir dire hearing on the admissibility of defendant's confession that he was "not going to pay attention to anything he said," whether such remark referred to what the defendant might say or to what was said to defendant by the officer, where the record shows that it did not intimidate, stifle or constrain defendant in the introduction of his evidence either on voir dire or before the jury.

6. **Homicide § 26— instruction on felony murder in the second degree—error not prejudicial**

Although the trial court's instruction that the jury could find defendant guilty of second degree murder on a felony murder theory was erroneous since this jurisdiction recognizes no offense of felony murder in the second degree, such error was not prejudicial where the court also instructed the jury that it could find defendant guilty of second degree murder "on the basis of malice without premeditation and deliberation," the jury returned a verdict of guilty of second degree murder both "on the basis of malice without premeditation and deliberation" and "under the second degree felony rule," and the evidence at trial supported a second degree murder conviction on the theory of malice.

7. **Homicide § 24.1— intentional use of deadly weapon—instructions on presumption of malice and unlawfulness**

The trial court did not err in instructing the jury that if the State proved beyond a reasonable doubt that defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused his death, the law implies that the killing was unlawful and done with malice.

8. **Homicide § 30.2— failure to submit voluntary manslaughter as alternative verdict**

The trial court in a homicide prosecution did not err in refusing to submit voluntary manslaughter as an alternative verdict where the evidence tended to show that defendant intentionally killed the victim by striking him with a brick, a deadly weapon, and there was no evidence of any killing in the heat of passion or in self-defense.

Justices COPELAND and MARTIN did not participate in the consideration or decision of this case.

BEFORE *Judge Napoleon B. Barefoot*, presiding at the 20 July 1981 Criminal Session of LENOIR Superior Court, and a jury, defendant was found guilty of second degree murder. He was sentenced to life imprisonment and appeals of right pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Guy A. Hamlin, Assistant Attorney General, for the State.

William D. Spence for defendant appellant.

EXUM, Justice.

In this appeal defendant's assignments of error relate to the trial court's failure to grant his motion to suppress his pretrial confession, the denial of his motions to dismiss the charge, and the court's instructions to the jury. We find no reversible error in the trial; therefore, we affirm the judgment.

The state's evidence tends to show the following:

On 24 February 1981, the victim, Wilbert Grady, was eighty-three years old and lived in a house with his son, Isom Grady, near LaGrange, North Carolina. When Isom went to work around 7:30 that morning, he left his father sitting near a heater. When Isom returned from work around 4:45 p.m., he found his father sitting on the floor in the sitting room, leaning against a wall near the heater. Although the victim was alive when Isom found him, he was unable to speak; he had a gash about an inch long on his forehead and blood on his T-shirt. A fire brick, not there when he went to work, was lying near his father when Isom returned. Isom observed that the house had been ransacked and that a door leading to the outside was badly damaged. Isom testified that his father kept a considerable sum of money on his person and on the day in question had at least $1,200 or $1,500 in a billfold in his pocket.

Isom rushed to LaGrange and reported what he had found to police. An ambulance was dispatched to the Grady residence and his father was taken to the hospital in Kinston. X-rays disclosed a fractured skull and "intercranial bleeding," a wound which the emergency room physician recognized as being "almost always fatal." He was taken to Craven County Hospital in New Bern where he was treated for head and brain injuries; he died as a result of those injuries on 2 March 1981. The pathologist who performed an autopsy on the victim found that his brain was bruised and testified that the brain injury he observed was "consistent with having been produced" by a blow with a brick, and "that the most probable cause of . . . death was this traumatic injury . . . to his head."

Following the death of Wilbert Grady, a warrant was issued for defendant's arrest. On 9 March 1981 police officers went to a house near Freemont for the purpose of serving the warrant.

After being admitted to the house and finding defendant hiding in the corner of a clothes closet, they arrested him.

On 10 March 1981, while defendant was in custody, he signed a written statement relating to the charged offense. In the statement defendant admitted going to Wilbert Grady's house at 1:45 p.m. on 24 February 1981. After he knocked on the door and received no answer, he took a brick off a shelf on the porch and broke in the door. Wilbert Grady was sitting in a chair "just about to go to sleep." Defendant hit Grady in the head with the brick. He then "went through" everything in the front room, took a purse from Grady's front pants pocket and left. After leaving the house, he took approximately $1,000 contained in the purse and threw the purse into a field. Defendant went to a house in the area and got Robert Dawson to take him to LaGrange where he purchased about $150 worth of groceries and some marijuana. He gave most of the money away.

Defendant's only evidence was his own testimony, which is summarized as follows:

At the time of trial defendant was eighteen years of age and had completed the seventh grade. Wilbert Grady was his great-uncle. On 24 February 1981, defendant was not working and went to Grady's house to borrow money from him. As he was walking the two and one-half miles from LaGrange to Grady's house, he caught a ride with Andre Nevins. On arriving at the Grady house, defendant knocked on the door and Grady admitted defendant and Nevins. Defendant and Nevins entered and defendant told Grady what he wanted; Grady loaned defendant $30. Grady then asked defendant to hang a shotgun, which he had near him, in the front room. Defendant did so. When defendant returned to the room Grady was in, he observed Grady sitting in his chair with blood coming from his head. Nevins was holding Grady's purse and counting the money that was in it. Defendant "cussed" at Nevins, snatched the purse out of his hand, threw it on the floor and left the house running. Before leaving the house defendant criticized Nevins for taking the money and told him that he did not want "to have nothing to do with it." Defendant went to Pauline Morgan's house where he prevailed on Robert Dawson to take him to LaGrange. In LaGrange he went to a residence and purchased some marijuana. Thereafter, as he was walking to

another part of town, he saw Nevins in his car. He entered the Nevins car and remained there for about ten minutes. While in the car on that occasion, Nevins gave him $300. He then left Nevins and did not see him again. Defendant did not at any time strike Grady, rob him or harm him in any way.

Andre Nevins was not called as a witness by either the state or the defendant.

The court submitted to the jury alternative verdicts of: (1) first degree murder on alternative theories of premeditation and deliberation and the felony murder rule; (2) second degree murder on alternative theories of malice and what the trial court referred to as "a second degree felony rule"; and (3) not guilty. The jury found defendant guilty of second degree murder on the basis of malice and "under the second degree felony rule."

I.

[1] By his first assignment of error defendant contends the trial court erred in failing to instruct the jury during the jury selection process that defendant's eligibility for parole if he were sentenced to life imprisonment, and the probability that defendant would in fact be executed if he were sentenced to death, were not proper matters for their consideration.

Before trial defendant filed a written motion stating: The state would seek the death penalty in his case; potential jurors would be asked about their attitudes concerning capital punishment during the jury selection; and he anticipated some prospective jurors would express their belief that a death sentence would never be carried out, that a higher court would "set him free," or that if he received a life sentence, he would be released from prison on parole after only a few years. Defendant requested that if any prospective juror so responded, the court then instruct the juror not to speculate upon "these matters," that the jury is duty-bound to follow the law as given to them by the court, and that "death means death and life imprisonment means life imprisonment."

The record discloses that during jury selection, after the state had passed the jury, defendant's attorney questioned prospective jurors in the presence of all potential jurors on whether

they had read or heard anything that would cause them to believe that defendant would not actually be executed even if a death sentence were pronounced, or would not spend his life in prison if he were sentenced to life imprisonment. Five prospective jurors seated in the jury box stated that defendant "would probably be paroled or the case would be appealed or the death sentence would not actually take place."

The court denied defendant's request that these jurors be instructed as requested in defendant's pretrial motion. The record reveals that "[s]ix jurors who were in the jury box at the time of the simultaneous responses ultimately remained on the [jury] which convicted the Defendant."

Defendant relies on *State v. Conner*, 241 N.C. 468, 85 S.E. 2d 584 (1955), and *State v. Flippin*, 280 N.C. 682, 186 S.E. 2d 917 (1972). In *Conner* defendant was tried for first degree murder, and the state sought the death penalty. After the jurors had deliberated for some time, they returned to the courtroom. One juror wanted to know if defendant would be eligible for parole if he were given life imprisonment. The trial judge stated that he could not answer that question and the jury returned to their room. They returned a verdict of guilty without recommendation of life imprisonment. Defendant appealed from the judgment imposing a death sentence. In granting a new trial this Court held that "[w]hen the question of eligibility for parole arises spontaneously during the deliberations of the jury, and is brought to the attention of the court by independent inquiry of the jury and request for information," 241 N.C. at 471, 85 S.E. 2d at 587, the court should give the jurors

> a positive instruction to put the irrelevant question, and matters relating thereto, out of their minds; for example, by having the court reporter read to the jury the pertinent part of the original charge bearing on the question of the right of the jury to recommend life imprisonment under application of the 1949 statutory amendment, and by further instruction in substance as follows: that the question of eligibility for parole is not a proper matter for the jury to consider and that it should be eliminated entirely from their consideration and dismissed from their minds; that in considering whether they should recommend life imprisonment, it is their duty to

> determine the question as though life imprisonment means exactly what the statute says: 'imprisonment for life in the State's prison,' and that they should resolve the question of mitigation of punishment in the exercise of their unbridled discretion, wholly uninfluenced by considerations of what another arm of the government might do or might not do in the future by way of commutation, pardon, or parole.

241 N.C. at 471-72, 85 S.E. 2d at 587.

In *State v. Flippin, supra*, 280 N.C. 682, 186 S.E. 2d 917, the defendant was charged with rape, and the state was seeking the death penalty. After the jury began their deliberations, they returned to the courtroom in order to ask the court if defendant would be eligible for parole should they reach a verdict of guilty with a recommendation for life imprisonment. The trial judge responded that he could not enlighten the jury on that question, but further instructed them: "This is a matter that you should not be concerned with and are in law not concerned with. . . . [I]f you return a verdict of guilty with a recommendation of life imprisonment the punishment will be life imprisonment and that is as much as I can tell you." *Id.* at 688, 186 S.E. 2d at 921. The jury returned a guilty verdict and recommended life imprisonment. This Court held that the trial judge "properly declined to answer the foreman's question and adequately instructed the jury that the question of eligibility for parole was not a proper matter for their consideration." *Id.* at 689, 186 S.E. 2d at 922.

The instant case is not controlled by the decision in *Conner* and the legal principle restated in *Flippin.* In those cases the jury, after beginning its deliberation, spontaneously raised the questions and requested information. In the case at bar, defendant's counsel raised the questions before the jury was selected, and the record does not establish that the five prospective jurors who expressed concern sat on the jury ultimately selected.

In any event, we need not decide whether under these circumstances the trial court should have instructed in accordance with defendant's motion because the jury did not return a verdict of guilty of first degree murder and did not have occasion to consider whether to recommend a sentence of death or life imprisonment. On the contrary, they returned a verdict of guilty of second degree murder, the sentence for which was not determined by the

jury but by the trial judge in the exercise of his discretion within the range permitted by the then-existing statute.[1] This assignment is overruled.

II.

Defendant's assignments of error argued under Questions II through IX and XIV as presented in his brief all relate to the voir dire hearing on his motion to suppress his confession.

The principal witnesses at the hearing were Lieutenant Pearson of the Lenoir County Sheriff's Department, who was in charge of the investigation, and defendant himself. Pearson testified on direct examination that after he obtained the murder warrant for defendant's arrest he went with three other deputies, two of whom were from the Wayne County Sheriff's Department, to a house near Freemont. Defendant, found in a closet in the rear bedroom, was arrested. Pearson then rode in the car with defendant and the two other deputies from this house to Kinston. Pearson said that during this trip defendant was advised of his rights to remain silent and to a lawyer. Defendant said that he wanted a lawyer and did not want to make a statement. Defendant also refused to sign a form indicating that he had waived his rights. Pearson then testified as follows:

Q. What happened then?

A. At that point he stated if I was to bring it to him the next day he would sign it, the waiver and he would talk to me.

Q. And that he would what?

A. Talk to me.

Q. In order to get him to say that to you, did you suggest that very point to him?

A. No, sir.

Q. Did you say anything to him to get him to come to see you the next day and to sign the form and to talk to you?

1. The controlling statute was G.S. 14-17 (Cum. Supp. 1979) which then provided for a maximum term of life imprisonment and a minimum term of two years. Second degree murder is now punished as a Class C felony. G.S. 14-17 (1981).

A. No, sir. I did not ask him any questions whatsoever after he told me he didn't want to talk with me about the incident. I did not threaten him in any way to get him to execute the *Miranda* Form or to make any statement to me whatsoever at this time. I did not offer any promise or hope of reward or anything of that nature to get him to talk with me and execute the form at that time. I did not use any sort of inducement to get him to do anything on this occasion. I did not use any sort of coercion, duress, fraud, trickery or anything of that nature to get him to execute the form at that time or to say anything to me at all. He appeared to me to know where he was and what was going on around and about him.

Pearson then testified that at 12:05 p.m. the following day he went to the jail to see defendant. He again advised defendant of his rights to remain silent and to a lawyer; defendant, after indicating that he understood his rights, waived them in writing. Pearson testified that when defendant made his confession, "he appeared . . . to understand what I was saying to him and what was going on around and about him. He did not appear . . . to be under the influence of any narcotic drug or alcoholic beverage. . . . I did not threaten him . . . offer him any promise or hope of reward . . . use any sort of inducement . . . use any sort of fraud or trickery . . . [or] use any sort of force or coercion to get him to talk to me." Thereafter defendant confessed to having struck Grady in the head with a brick and to burglarizing Grady's home on the afternoon of 24 February 1981.

On cross-examination Pearson was asked repeatedly whether he made certain statements to the defendant to induce defendant to confess. Pearson testified as follows:

I don't remember any specific conversation that I had with Tim Chamberlain during the hour and a half from the time that we left the house until we got back to Kinston.

Q. Did you tell him if he would go ahead and make a statement it would help him in Court?

A. Not that I recall.

Q. Did anyone tell him that?

A. Not that I recall.

I didn't make any notes on the trip. I do not have anything to refresh my recollection on that point.

Q. At any point from the time you first arrested him in the house until the last time you spoke with him, did anyone tell him that if he made a statement it would help him in Court?

A. Not that I recall.

Q. Did you tell him or did you hear anyone tell him that if he would go ahead and make a statement that you could testify in Court that he had cooperated and it would help him?

A. Not that I recall.

Q. Did you say anything to him then?

A. Not that I recall.

If he said that I did make such a statement I don't know how I could deny it because I don't remember saying it.

I believe I did tell him that I knew that he had killed the old man, Mr. Grady at some point from the time when I first arrested him until the time that I interrogated him the last time. I told him I knew he had killed the old man. I said I don't know anything about an accident. I remember telling the Defendant that I knew he had killed the old man. I don't remember telling the Defendant that it could have been an accident but I could have possibly said that.

Q. I will ask you one more time, Mr. Pearson, for the record, did you at any point during your interrogation of the Defendant in the car tell him that you knew that he had killed Mr. Grady but that you didn't think he meant to do it?

A. I told Mr. Chamberlain I knew that he had killed Mr. Grady but I don't know anything about an accident. I said it was possible that he did it intentionally or nonintentionally when he broke into the residence by him going there to see the man and he picked up a, I said the statement is that he probably picked up a brick and struck Mr. Grady by the head and knocked him out so he wouldn't get hurt or something like that.

Q. Did you ever say to him words to the effect that you knew that he did not mean to do it?

A. Not that I recall.

COURT: Go ahead; the court is not going to pay attention to anything he said.

EXCEPTION NO. 3

Others who assisted Pearson in arresting defendant and transporting him to the sheriff's department were Deputies A. L. Phillips, William C. Goodman, Jr., and J. S. Flowers. Deputy Phillips testified on voir dire that none of the officers asked defendant whether he would waive his rights "if we come back tomorrow." Phillips said "the idea of coming back the next day was the Defendant's idea." Phillips testified further:

Q. Do you recall anyone telling him that if he would go ahead and make a statement, things would go easier for him?

A. No, sir, nobody made that statement.

Defendant testified that after his arrest and during the trip to Kinston:

The Detectives told me that it would be easier for everyone if I cooperated. The Detective told me that things would go lighter and easier for me if I made a statement. When we got to the Detectives' office, he said that it would be easier for everyone if I made a statement, a confession. I told him I didn't want to make a statement; that I wanted a lawyer. Detective Pearson told me that he had went to the hospital where Mr. Grady was and asked Mr. Grady did Tim Chamberlain assault him and he said Mr. Grady shook his head yes.

He said he again reiterated his desire for a lawyer and refused to make a statement after he got to the sheriff's department in Kinston. Defendant said, "I did not invite [Pearson] to come by the next day. I did not request that he come back the next day." Defendant said that the next day, at approximately noon, Detective Pearson and two other deputies took him to an interrogation room and

Pearson said that he had come back; that he was ready for me to make a statement. He did not tell me again that I had

the right to have a lawyer. After Detective Pearson made that statement I didn't say nothing. After he said that, he said it would be easier if I just cooperated and it would be easier for everyone. I was scared. I did make the statement that Detective Pearson referred to. It is not true. I don't know why I made it; maybe confusion and intimidation. I did sign papers for Detective Pearson. I signed these papers on the second day at about twelve o'clock in the conference room. I did not read them before I signed them. After Detective Honeycutt had finished writing the statement, he handed it to me and told me to sign it. After I signed the statement Detective Pearson gave me two more papers and told me to sign them also. Prior to the time I made the statement I had not signed anything. I did not tell Detective Pearson in his office on the night that I was arrested that I wanted him to come back the next day and I would make a statement.

Upon this evidence the court made the following pertinent findings of fact and conclusions of law:

4. That the indictment was issued on March 2, 1981; that the defendant was arrested on March 9, 1981; that he was apprehended in his home in a closet; that he was taken from there in a police car; that he was advised of his *Miranda* Rights in the police car at which time he requested to have an attorney, and advised the officers that he did not wish to talk.

5. That approximately thirty minutes after the advice of his *Miranda* Warning, the defendant was taken to the Lenoir County Sheriff's Department; that he was taken to an interrogation room where the officers told him that they wanted to fill out a written *Miranda* Form and that they got a written Waiver . . .; at that time he informed the officers that he still wanted a lawyer; that he did not wish to talk. Although he refused to sign the *Miranda* Warning at that time, [he] informed the officer that if he would come back the next day, that he would sign the *Miranda* Warning and make a statement.

6. Whereupon the following day the officer went to the Lenoir County Jail and confronted the defendant with three other officers at about twelve noon and [defendant] made a

statement freely, voluntarily and understanding and knowing what he was doing at that time; that he signed a Waiver of his rights which were read to him on that occasion.

7. After signing this Waiver of his rights, he made the statement or made a confession. Before the confession, he signed the first Waiver of his rights which were presented to him the night before.

8. That at the time of the warning given to the defendant on both occasions he stated to the police officers that he understood his rights.

9. That the defendant is 18 years of age; that he quit school in the 8th Grade; that the physical condition of the defendant is good; that his mental condition is good; that he is not confused; that he is coherent; that he understands what is going on.

10. That there were no promises or offers of reward or inducements by law enforcement officers for the defendant to make any statement; that there were no threats or suggested violence or show of violence by law enforcement officers to persuade or induce the defendant to make a statement.

11. That at the time of the second *Miranda* Warning and interrogation on March 10, 1981, the defendant said he did not want an attorney present; that the defendant signed two Waivers of his rights under the *Miranda* Provision; that these were marked as exhibits in this evidentiary hearing.

12. That on March 9, 1981, the defendant, while being interviewed by Detective Pearson in the Detective Office, told Detective Pearson that he, the defendant, wanted an attorney and did not want to make a statement.

That upon the foregoing Findings of Fact, the Court concludes as a matter of law that none of the defendant's constitutional rights, either Federal or the State, were violated by his arrest, detention, interrogation or confession. There were no promises, offers of reward or inducements to the defendant to make a statement; there were no threats or suggested violence or show of violence to persuade or induce the defendant to make a statement; that the statement made by

the defendant to Officer Pearson on March 10, 1981, was made freely, voluntarily and understandingly; that the defendant was in full understanding of his constitutional rights to remain silent, the right to counsel and all other rights and he freely, knowingly, intelligently and voluntarily waived each of those rights and thereupon made the statement to the officers above mentioned.

Defendant excepts to all these findings, but Nos. 4 and 12, on the ground that they are not supported by the evidence. He excepts to the court's failure to find certain facts requested by him on the ground that these are material facts supported by all the evidence adduced at the hearing. Defendant excepts to all conclusions of law on the ground that had the trial court found facts in accordance with all the material evidence at the suppression hearing, it would have been required to conclude that defendant's confession was involuntary.

Following a hearing on a motion to suppress, it is incumbent on the trial court to make findings of fact and conclusions of law. *State v. Jackson*, 292 N.C. 203, 232 S.E. 2d 407, *cert. denied*, 434 U.S. 850 (1977). The court's findings, if supported by competent evidence, are conclusive on appeal. *State v. Herndon*, 292 N.C. 424, 233 S.E. 2d 557 (1977). If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal. *Id.* If *all* the evidence tends to show that investigators made promises or threats to a suspect whose confession is the product of hope or fear generated by such promises or threats, the confession will be ruled involuntary as a matter of law. *State v. Pruitt*, 286 N.C. 442, 455-58, 212 S.E. 2d 92, 100-02 (1975), and cases there cited.

In the case before us there are material conflicts in the evidence adduced at the suppression hearing. Defendant testified that: (1) he did not tell the officers on the night of his arrest that he would waive his rights and make a statement if they would see him the next day; (2) the interrogating officers told him things would be easier on him if he made a statement; and (3) at the time he made his statement he was "scared," confused, and intimidated by the officers. The state's evidence contradicts defendant's on each of these propositions. This conflict in the evidence was for

the trial court to resolve after hearing the evidence and observing the demeanor of the witnesses. *State v. Fox*, 277 N.C. 1, 24, 175 S.E. 2d 561, 575 (1970). The trial court resolved the conflict in favor of the state; we are bound by that resolution. *State v. Herndon, supra*, 292 N.C. 424, 233 S.E. 2d 557; *State v. Fox, supra*. We conclude that all findings of the trial court are supported by competent evidence.

[2] Defendant argues the court should have found that Pearson told defendant that if he made a statement "it would be easier for everyone." Defendant so testified. Detective Pearson, however, testified consistently on cross-examination that he did not recall making such a statement. It is true that after repeated questioning on cross-examination on this point and repeated assertions that he recalled making no such statement, Pearson did say, "[i]f he [defendant] said that I did make such a statement I don't know how I could deny it because I don't remember saying it." We think, nevertheless, the clear thrust of Detective Pearson's testimony is that he did not make such a statement to the defendant. It would have been preferable for the trial court to have expressly resolved this factual controversy. We are satisfied, however, that the trial court did so by implication at least in its finding number ten "[t]hat there were no promises or offers of reward or inducements by law enforcement officers for the defendant to make any statement."

Defendant argues the trial court should have found that after defendant asserted his rights to counsel and to remain silent on 9 March, Pearson told defendant he would come back the next day to see if defendant had changed his mind. Defendant so testified. Pearson's testimony was to the contrary. Pearson testified that "[a]t that point he stated if I was to bring it [the written waiver of rights form] to him the next day he would sign it, the waiver and he would talk to me." Pearson expressly denied saying anything to defendant to persuade or induce defendant to volunteer to talk with him the following day. Deputy Phillips corroborated Pearson. The trial court, by its finding of fact number five, resolved this factual issue against defendant.

[3] Defendant argues the trial court should have found that Pearson told defendant that the deceased, Grady, had identified defendant as the person who had hit him in the head with a brick,

when in fact Grady had never identified defendant as his assailant. Defendant testified, "Detective Pearson told me that he had went to the hospital where Mr. Grady was and asked Mr. Grady did Tim Chamberlain assault him and he said Mr. Grady shook his head yes." Detective Pearson testified that it was "possible" that he had "told the Defendant that Mr. Grady had identified him as the person that hit him in the head with the brick." Pearson also testified that when he visited Grady in the hospital before his death Grady couldn't speak. Pearson said, "I asked Mr. Grady if Mr. Chamberlain was the person who had hit him. Mr. Grady nodded yes. I then advised Mr. Grady if Timothy Chamberlain had hit him to squeeze my right hand. He did this." We conclude, therefore, that all the evidence tends to show that if Pearson advised defendant that Grady had identified defendant as his assailant, he did so truthfully. Investigators may during interrogation truthfully inform a suspect of the evidence they have against him. Such information, standing alone, does not render a subsequent confession involuntary. *State v. Booker*, 306 N.C. 302, 309-10, 293 S.E. 2d 78, 82-83 (1982). Therefore, a finding by the trial court that Pearson made such a statement would not have necessitated a change in the court's legal conclusions on the motion to suppress.

[4] Defendant argues the trial court should have found that Pearson told defendant that he (Pearson) knew that defendant had killed Grady but that defendant "didn't mean to do it." Defendant so testified. Pearson's testimony is that he did not recall telling defendant the killing "could have been an accident but I could have possibly said that." Pearson said he told defendant that he could have intentionally struck Grady in the head with a brick, intending merely to knock him out, but not intending to kill him. Even if he told defendant the killing could have been accidental, he did not couch this statement in a promise of leniency. Pearson consistently denied telling defendant that a confession would yield him any leniency. Further, Pearson's statement that the killing might have been accidental, according to defendant's own testimony, was made on the evening of 9 March 1981 immediately after defendant was arrested and while he was being transported to the sheriff's department. Defendant then refused to make a statement and asserted his right to a lawyer while he

was in the car and again in the sheriff's office. Defendant did not make his written confession until the following day, around noon.

"A promise of leniency renders a confession involuntary only if the confession is so connected with the inducement as to be the consequence of it." *State v. Pressley*, 266 N.C. 663, 666-67, 147 S.E. 2d 33, 35 (1966) (citing 23 C.J.S., Criminal Law § 825 (1961); 20 Am. Jur., Evidence § 497 (1939)). But "if promises or threats have been used, it must be made to appear that their influence has been entirely done away with before subsequent confessions can be deemed voluntary, and therefore admissible." *State v. Drake*, 113 N.C. 625, 628, 18 S.E. 166, 167 (1893) (confession made within hours after arresting officer told defendant it might be easier for him if he made an honest confession; separate reason for excluding confession was intervening threat by committing magistrate). Since Pearson's statement about defendant's lack of intent to kill was unaccompanied by any express promise or suggestion of leniency, was made the day before defendant actually confessed, and was followed by defendant's twice asserting his rights to remain silent and to counsel, we conclude the connection between the statement and the confession was so attenuated that the statement itself could not render the confession involuntary. Therefore, even if the trial court had found Pearson's statement to have been made in accordance with what defendant's testimony tended to show, this finding would not have necessitated a change in the court's legal conclusions on the motion to suppress.

[5] Finally defendant contends the trial court erred in announcing during the voir dire that it was "not going to pay attention to anything he said." This remark was made during the cross-examination of Deputy Pearson after Pearson repeatedly stated that he could not recall making certain statements to defendant. Defendant argues that a judge commits error when he makes a remark concerning the credibility of a witness "in or out of the presence of the jury . . . 'which is calculated to deprive the litigants or their counsel of the right to a full and free submission of their evidence upon the true issues involved to the unrestricted and uninfluenced deliberation of a jury (or court in a proper case).' " *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E. 2d 631, 636 (1976) (quoting Annot., 127 A.L.R. 1385, 1387). Defendant argues that this remark either had reference "to anything the Defendant himself said or anything that was said to the Defend-

ant by Detective Pearson." In either case defendant says the remark "probably had the effect of stifling the free presentation of competent available testimony during the . . . voir dire and constituted reversible error." Defendant relies largely on *State v. Rhodes, supra.*

Rhodes was a prosecution for incest committed by defendant with his stepdaughter, aged twelve. Before trial the stepdaughter's version of several incidences of sexual intercourse with defendant in the presence of her mother were corroborated by an out-of-court written statement signed by the victim's mother, Mrs. Rhodes. At trial the state called Mrs. Rhodes as a hostile witness. At a voir dire hearing to determine her hostility, Mrs. Rhodes testified that she did not remember making or signing the statement, although she did acknowledge the signature on the statement to be hers. She further testified that "none of this is true." She explained that for the past several years she had been treated for mental illness which caused her to have temporary periods of amnesia. The trial court declared her to be a hostile witness and the state proceeded to examine her as such. Before the jury Mrs. Rhodes testified that she had no recollection of signing the statement but acknowledged her signature on the document. On cross-examination she told about her mental illness and again repeated her lack of recollection of making any pretrial statement. At that point the trial court excused the jury and admonished the witness in strong terms to tell the truth. The following colloquy occurred:

> A. [by Mrs. Rhodes] Yes, sir. I do remember about taking my medicine at about 1:00 o'clock in the morning.
>
> THE COURT: Yes ma'am, you do. In my estimation you remember the whole thing—whatever you did that day. I just want to let you know that you are treading on very dangerous ground here. And all I'm asking you to do is to tell the truth, Mrs. Rhodes, whatever the truth is.
>
> A. All right, I'll just tell the truth. My husband did not do any of it. He's not that type of man. As far as being a wonderful husband. He's a wonderful husband to me. And to my children he's been a wonderful father. And to that little girl down there (indicating), he's treated her as his. . . .
>
> . . . .

> THE COURT: All right. I'm going to allow the State to continue to cross-examine her. I think that the jury will determine what the truth is. I still want you to keep in mind that you are treading upon perjury in your testimony. All I want is the truth. What the Court seeks is the truth. I don't want this man convicted on false testimony. Nor do I want this tragedy to happen.

State v. Rhodes, 290 N.C. at 20-21, 224 S.E. 2d at 634. The jury then returned and defendant's counsel stated that he had no further questions for the witness. On appeal this Court awarded defendant a new trial on the ground that the trial court's remarks to Mrs. Rhodes on voir dire, characterized by this Court as "extensive, accusatory, and threatening," resulted in a "record [which] suggests a substantial likelihood that Mrs. Rhodes was not asked [before the jury] whether defendant committed the alleged acts because her attorney felt constrained by the judge's statements. This being true, we feel justice requires that defendant be given a new trial so that all relevant testimony may be adduced and subjected to searching cross-examination." *Id.* at 28, 30, 224 S.E. 2d at 640.

The instant case presents nothing like the situation to which the Court spoke in *Rhodes*. Defendant has failed to demonstrate that the principle relied on in *Rhodes* was violated here. Whether the trial court's remark that it was "not going to pay attention to anything he said" referred to what the defendant might say or what was said to defendant by Pearson, the record fails to suggest that it intimidated, stifled, or constrained defendant in the introduction of his evidence, either on voir dire or before the jury. Defendant testified fully and freely on voir dire regarding his version of the events leading to his confession. At trial he testified fully and freely regarding his version of the events surrounding the crime. Indeed, he makes no contention that the trial court's remarks had any effect on his testimony at trial.

Defendant argues that "the trial court should 'pay attention' to everything said *by* the Defendant and *to* the Defendant during a confession voir dire." We agree. The record, including the remark complained of, simply does not support the argument that the trial court failed to be attentive to all the testimony adduced

at the voir dire hearing, even though he ultimately rejected portions of it. The statement itself is inherently ambiguous; when read contextually it strongly suggests nothing more than the trial court's temporary exasperation with Pearson's inability to recall whether he made certain statements or the continued questioning in light of Pearson's inability to recall. But the court continued to hear testimony from Pearson and other witnesses, including defendant. The court then made reasonably adequate findings and conclusions, including the specific finding that "there were no promises or offers of reward or inducements by law enforcement officers for the defendant to make any statement."

With errors not of constitutional dimension, the burden is on appellant to demonstrate both the error and that the error is reversible, or prejudicial, *i.e.*, that "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) (1978). Although the trial court should not have made this kind of remark, we conclude, because of all the circumstances to which we have referred and the unresolvable ambiguity in the remark itself, defendant has not shown on this record that the remark is indicative of any impropriety on the part of the trial court which might have affected the result either of the voir dire hearing or the trial.

III.

[6] Defendant next assigns as error the trial court's instructions to the jury that he could be found guilty of second degree murder under a "second degree felony rule" if he killed the deceased while committing common law robbery of the deceased. We agree with defendant that this instruction was erroneous. After careful consideration of the question this Court in a thoroughly researched and documented opinion by Justice Mitchell concluded that "the law of this jurisdiction recognizes no offense of felony murder in the second degree." *State v. Davis*, 305 N.C. 400, 422, 290 S.E. 2d 574, 588 (1982).

Although the court erred in instructing the jury that it could find defendant guilty of second degree murder on a felony murder theory, the error is not reversible because the court also instructed the jury that it could find defendant guilty of second degree murder "on the basis of malice without premeditation and

deliberation" and the jury returned a verdict of guilty of second degree murder both "on the basis of malice without premeditation and deliberation" and "under the second degree felony rule." The evidence at trial supported a second degree murder conviction on the theory of malice and the trial court's instructions on this theory were correct. Since the jury found defendant guilty of second degree murder on this theory, which was properly submitted to it, the error in submitting second degree murder on an erroneous legal theory is not reversible. *See State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. denied*, 410 U.S. 958 (1973) (case of defendant White), 410 U.S. 987 (1973) (case of defendant Holloman); *State v. Smith*, 201 N.C. 494, 160 S.E. 577 (1931); *cf. State v. Silhan*, 302 N.C. 223, 261-63, 275 S.E. 2d 450, 477-78 (1981) (if two theories submitted in first degree murder case, verdict may be based on either or both); *State v. Goodman*, 298 N.C. 1, 20, 257 S.E. 2d 569, 582 (1979) (jury found defendant guilty of first degree murder using two separate theories; felony murder basis of homicide verdict could be ignored in imposing punishment).

IV.

[7] Defendant assigns as error the following portion of the trial court's instruction:

> If the State proves beyond a reasonable doubt that the defendant intentionally killed Wilbert Grady with a deadly weapon or intentionally inflicted a wound upon Wilbert Grady with a deadly weapon that proximately caused his death, the law implies first that the killing was unlawful; second, that it was done with malice. If the killing was unlawful and done with malice, the defendant would be guilty of second degree murder.

This assignment of error is overruled on the authority of *State v. Biggs*, 292 N.C. 328, 339-41, 233 S.E. 2d 512, 518-19 (1977), and *State v. Hankerson*, 288 N.C. 632, 649-50, 220 S.E. 2d 575, 588 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977). *See also State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982); *State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981).

V.

[8] We find no merit in defendant's assignment of error relating to the trial court's refusal to submit voluntary manslaughter as an alternative verdict.

This Court said in *State v. Hampton*, 294 N.C. 242, 250, 239 S.E. 2d 835, 841 (1978):

> Voluntary manslaughter (a lesser included offense of first degree murder) is the unlawful killing of a human being without malice, expressed or implied, and without premeditation or deliberation. *State v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135 (1971); *State v. Street*, 241 N.C. 689, 86 S.E. 2d 277 (1955). One who kills a human being while under the influence of passion or in the heat of blood produced by adequate provocation is guilty of manslaughter. *State v. Wynn, supra; State v. Cooper*, 273 N.C. 51, 159 S.E. 2d 305 (1968).

Furthermore,

> [w]here all the evidence tends to show a killing resulting from the intentional use of a deadly weapon, and there is no evidence which will support a finding that the killing was done in the heat of passion on sudden and sufficient provocation or that the defendant used excessive force while fighting in self defense, the law of this State requires the trial judge to instruct the jury that if they are satisfied beyond a reasonable doubt that defendant intentionally inflicted a wound upon the decedent with a deadly weapon which proximately caused his death it would be their duty to return a verdict of guilty of murder in the second degree. *State v. Hankerson*, 288 N.C. 632, 651, 220 S.E. 2d 575, 589 (1975).

State v. Jones, 291 N.C. 681, 686, 231 S.E. 2d 252, 255 (1977).

A brick used to strike a victim with such force that it fractures his skull and inflicts brain injury is a deadly weapon as a matter of law. *State v. Perry*, 226 N.C. 530, 39 S.E. 2d 460 (1946); *see also State v. Hobbs*, 216 N.C. 14, 3 S.E. 2d 431 (1939).

Thus all the evidence for the state tended to show that defendant intentionally killed the victim with a deadly weapon. There is no evidence of any killing in the heat of passion or in self-defense. There is no evidence, therefore, which would have supported the submission of voluntary manslaughter as an alternative verdict. *State v. Hampton, supra; State v. Jones, supra.* This assignment of error is overruled.

VI.

Defendant assigns as error the failure of the trial court to dismiss the cases against him at the close of all the evidence. In his brief defendant candidly concedes that he can find no "valid basis, factual or legal," to support this assignment, but he asks this Court to carefully review the evidence to determine if it is sufficient to support defendant's conviction.

It suffices to say that we have thoroughly reviewed the record and conclude that the evidence is more than sufficient to support the verdict. We deem any further recapitulation of the evidence unnecessary. The assignment of error is overruled.

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

No error.

Justices COPELAND and MARTIN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JAMES A. BUSH

No. 6PA82

(Filed 7 December 1982)

1. Homicide § 28— instruction of self-defense erroneous—harmless error

Where there was neither (1) evidence which would have supported a finding that defendant in fact formed a belief that it was necessary for him to kill the victim in order to protect himself from death or great bodily harm, nor (2) was there evidence which would have supported a finding that any such belief was reasonable, the trial court erred in giving the jury any instructions relative to self-defense. However, this error was favorable to the defendant and clearly harmless to him beyond a reasonable doubt, since it resulted in the jury giving consideration to acquittal upon a ground which the defendant was not entitled to have the jury consider.

2. Homicide § 25.2— error in instructions concerning absence of malice—cured by jury's verdict of murder in first degree

In a prosecution for murder in the first degree, any error in the jury instructions placing the burden of persuasion on the defendant to show absence of malice was cured by the jury's verdict of murder in the first degree. In find-

ing the defendant guilty beyond a reasonable doubt of the willful, deliberate and premeditated killing of the victim, the jury in the case necessarily rejected *beyond a reasonable doubt* the possibility that the defendant acted in the heat of passion.

3. Criminal Law § 181 — collateral attack upon criminal convictions — statutes controlling

The procedures and standards to be employed with regard to collateral attacks upon criminal convictions, such as defendant's Motion for Appropriate Relief, are no longer controlled by our former Post-Conviction Hearing Act, G.S. 15-217 through G.S. 15-222, but are now controlled by the statutes comprising Article 89 of G.S. Chapter 15A, G.S. 15A-1411 through G.S. 15A-1422.

4. Criminal Law § 181.1 — motion for appropriate relief — time for filing — grounds

Even though the defendant made his Motion for Appropriate Relief more than 10 days after the entry of judgment, the motion was not subject to summary denial on that basis since the defendant asserted that his conviction was obtained unconstitutionally which is one of the grounds for appropriate relief which may be asserted without limitation as to time. G.S. 15A-1414 and G.S. 15A-1415.

5. Criminal Law § 181.2 — post-conviction hearing — motion for appropriate relief — requirement of showing ground for relief and prejudice

Once defendant stated with specificity in his Motion for Appropriate Relief the manner in which he asserted that his conviction was obtained in violation of the Constitution of the United States, he was entitled to a hearing on questions of law or fact arising from the motion. G.S. 15A-1420(c)(1). Defendant then had the burden of showing the existence of the asserted ground for relief and also to show "prejudice." G.S. 15A-1420(c)(3) and (6). The superior court then must make findings of fact and conclusions of law in its order granting or denying relief; however, it was not necessary for the Court to remand the case for further findings of fact or conclusions of law where the superior court did not make extensive findings or conclusions in its order denying defendant's motion since the record revealed that the determinative facts were and are uncontested and that the errors complained of were harmless beyond a reasonable doubt as a matter of law.

ON certiorari to review the 21 April 1981 Order of *Judge Henry L. Stevens, III,* Superior Court, ONSLOW County, denying the defendant's Motion for Appropriate Relief. The Supreme Court allowed the defendant's petition for writ of certiorari on 12 January 1982.

Rufus L. Edmisten, Attorney General, by Lester V. Chalmers, Jr., Special Deputy Attorney General and Donald W. Stephens, Assistant Attorney General, for the State.

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MITCHELL, Justice.

The primary issue presented in this case is whether the trial court committed prejudicial and reversible error during the defendant's original trial for murder in the first degree by instructing the jury that the defendant had the burden of proving self-defense and absence of malice. For reasons set forth herein, we find no reversible error in this regard and affirm the 21 April 1981 Order of the Superior Court denying the defendant's Motion for Appropriate Relief.

The defendant was tried before Judge George M. Fountain and a jury and convicted during the 19 May 1975 Session of Superior Court, Onslow County, for the murder in the first degree of Kirby W. Marshburn.[1] He was sentenced to death and appealed. This Court found no error in the conviction or sentence, 289 N.C. 159, 221 S.E. 2d 333 (1976). The Supreme Court of the United States later vacated the sentence of death against the defendant, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 46 (1976). On remand a life sentence was imposed in Superior Court, Onslow County, on 30 November 1976.

On 14 April 1981, the defendant filed a Motion for Appropriate Relief pursuant to G.S. 15A-1411 *et seq.* alleging that the trial court improperly placed the burden upon him to prove self-defense and absence of malice and denied him due process of law in violation of the requirements of the Fifth and Fourteenth Amendments to the Constitution of the United States, Article I, Section 19 of the Constitution of North Carolina and the constitutional mandate of *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975). The defendant further alleged that the failure of his court appointed attorneys to raise the due process issues of *Mullaney* relative to the burden of proof on self-defense and absence of malice deprived him of his right to effective assistance of counsel, due process of law and equal protection of

1. The jury was instructed on both murder in the commission of a felony and murder with premeditation and deliberation. The jury returned a verdict finding the defendant guilty of "murder in the first degree" without specifying whether it had found him guilty on one theory or the other or on both theories. This being so, prejudicial error in the trial court's instructions relative to either theory will require a new trial. *Cf. Stromberg v. California*, 283 U.S. 359, 75 L.Ed. 1117, 51 S.Ct. 532 (1931) (conviction could have been based on any one clause in the statute, unconstitutionality of one of the three clauses in the statute required reversal).

the law guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 19 and 23 of the Constitution of North Carolina. By Order dated 21 April 1981, the Superior Court denied the defendant's Motion for Appropriate Relief. We allowed the defendant's petition for writ of certiorari to review that Order on 12 January 1982.

A complete recitation or review of the evidence offered during the original trial on behalf of the State and the defendant would serve no useful purpose. A more complete statement of facts in this regard is to be found in the opinion rendered by this Court upon the defendant's direct appeal of his trial and conviction, 289 N.C. 159, 221 S.E. 2d 333 (1976). Our review of the evidence for the State and the defendant and the instructions of the trial court during the original trial is limited to those matters pertinent to our consideration of the propriety of the 21 April 1981 Order of the Superior Court denying the defendant's Motion for Appropriate Relief.

Sometime during the early evening hours of 18 November 1974, the defendant took an automobile which was parked outside a bar near Camp Lejeune, a base operated by the United States Marine Corps near Jacksonville, North Carolina. The defendant, a 20 year old marine, had been drinking beer and lost control of the car and drove it into a ditch. He then walked to the trailer home of Kirby W. Marshburn, the deceased, and Mrs. Marshburn. There the defendant asked for and received permission to enter the Marshburn home to use the telephone. The defendant's testimony in his own behalf during his trial indicated in substance that the following events then occurred:

> After I was unable to reach the person I was calling, I had a conversation with the man in the house and as far as I knew there was nobody in the house except me and the man. We were standing in the kitchen having our conversation. Up until that time our relationship had been good and we had just been talking. There were no ill words between us at that time. I asked him for a drink of water and he gave me a glass full of water and we stood there and talked. I was standing inside the kitchen by the sink and the man was standing near me and the door was on the other side of him. The man was talking about some person down the road that owned a

wrecker and he said something about there being a "colored boy" down the road who owned a wrecker. Before he got all the words out I corrected him and I said "colored boy?" and I asked him what color the person was. The man did not make any immediate response, it was kind of a delayed response and he stopped for a second and then all of a sudden he started pushing me and telling me to get out. At that time I was standing in front of the sink and the sink was to my back. Mr. Marshburn was standing in front of me and the door that I entered was behind him. I must have been six or seven inches from the sink when he pushed me and I backed into the sink. He never struck me and he did not have a weapon in his hand.

I believe he repeated three or four times for me to get out of the trailer and all the time he was between me and the door. There were dishes around the kitchen but I do not recall if there was any food on the table. There was a counter top by the sink and I saw a knife laying there (State's Exhibit 4) and I picked it up. I picked up the knife because I was nervous and I thought I was protecting myself and I was afraid for my safety.

As far as I knew the only way out of the trailer was the door that I entered as I had never been there before and I did not know who was there when I went there. After picking up the knife, I stabbed the man to get him off of me and at that time I did not have any intention of stealing anything from him or from his house. When I went into the house earlier I did not have any intention of stealing anything.

. . . .

Earlier in my testimony I did say that I picked up a knife on the counter and I did pick it up intentionally. I stabbed Kirby Marshburn knowing what I was doing and I stabbed him to get him away from me. I had backed up as far as I could back up and the only way I knew out of the trailer was through the door that I entered. I was afraid for my safety at that time and I now realize that I probably used more force than was necessary. Prior to using the force that resulted in the man's death, I did not intend on doing anybody any harm or taking anything from the trailer.

. . . .

The thought of robbery never entered my mind when I went to the Marshburn house. Mr. Marshburn pushed me towards the sink and we were facing each other at that time. My body hit the sink and I looked back behind me and saw the knife. I was in another man's house and I knew that he wanted me to get out of his house. I do not know what kept me from walking past this 65 year old man and I guess I probably could have done that. At that time I thought I had a reason for picking up the knife as I was looking out for myself and my safety. I do not know what made me afraid of this 65 year old man. I realize he was much older than me and he did not have a weapon. He had not threatened to use a weapon on me and he allowed me to come into his house and use his phone and he had given me a drink of water. I did think it was necessary to pick up a knife and stab him at that time.

I do not remember where I stabbed him the first time and I do not remember how many times I stabbed him. Mr. Marshburn had nothing behind him and I had the sink behind me. There was nothing behind and I could have hit him in the face but I grabbed the knife and stabbed him instead. I don't know how many times I stabbed him before he fell but I did not stab him after he fell on the floor. If the man was stabbed six times with the knife then he was stabbed six times standing up. I cannot explain the abrasions about Mr. Marshburn's face because I did not hit him in the face. I did not stomp him with my boots after he was on the floor and I do not know how he got those abrasions on his face. I was no more than an arm's length away from him. He wasn't exactly struggling at that time and I don't remember exactly what he was doing. I did stab him six times before he fell.

The evidence additionally revealed that the deceased died of the knife wounds inflicted by the defendant. Mrs. Eva Marshburn returned to the home shortly after the events described by the defendant in his testimony and found it ransacked with her husband, Kirby W. Marshburn, lying on the floor in a pool of blood. One of the Marshburns' steak knives and Mr. Marshburn's billfold were on the floor near his body. When Mrs. Marshburn looked up

from her husband's body she saw the defendant standing near her. The defendant took three dollars from Mrs. Marshburn and told her that he was not going to harm her. The defendant then tied her up, took her car keys and a gun and left the home.

[1] On certiorari to this Court, the defendant assigns as error the denial of his Motion for Appropriate Relief and reasserts his contention that the instructions of the trial court during his original trial erroneously placed the burden upon him to prove self-defense and absence of malice to the satisfaction of the jury. We consider first the erroneous instructions[2] of the trial court on the issue of self-defense. We find that the evidence before the trial court did not justify any instruction on the law of self-defense and that any instruction on self-defense was error favorable to the defendant and harmless beyond a reasonable doubt.

Perfect self-defense excuses a killing altogether and is established when it is shown that, at the time of the killing:

> (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.

2. Although our analysis and decision in this case do not make it necessary for us to resolve the question, we assume *arguendo* throughout this opinion that the instructions of the trial court during the defendant's original trial violated the constitutional principles of *Mullaney* by placing on the defendant the burden of proving to the satisfaction of the jury self-defense and the burden of proving that he acted in the heat of passion on sudden provocation which would establish an absence of malice.

State v. Norris, 303 N.C. 526, 530, 279 S.E. 2d 570, 572-73 (1981). Imperfect self-defense arises when only elements (1) and (2) in the preceding quotation are shown. Therefore, if the defendant believed it was necessary to kill the deceased in order to save himself from death or great bodily harm, and the defendant's belief was reasonable because the circumstances at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but the defendant, although without murderous intent, was the aggressor or used excessive force, the defendant would have lost the benefit of perfect self-defense. In this situation he would have shown only that he exercised the imperfect right of self-defense and would remain guilty of at least voluntary manslaughter. *State v. Wilson*, 304 N.C. 689, 695, 285 S.E. 2d 804, 808 (1982). However, both elements (1) and (2) in the preceding quotation must be shown to exist before the defendant will be entitled to the benefit of either perfect or imperfect self-defense.

Applying the foregoing principles of law to the present case, we find that the evidence taken in the light most favorable to the defendant completely fails to show any circumstances existing at the time the defendant killed the deceased which would have justified an instruction on the law of either perfect or imperfect self-defense. The record before us is void of any evidence tending to show that the defendant in fact believed it necessary to kill the deceased in order to save himself from *death* or *great bodily harm*. The defendant's own testimony taken in the light most favorable to him indicates clearly that Marshburn, at worst, pushed the defendant and told him to get out of the Marshburn home. The defendant clearly testified that Marshburn "had not threatened to use a weapon" against the defendant and had not attempted even to strike the defendant other than by placing his hands upon him and pushing him. There is absolutely no evidence tending to indicate that Marshburn was so large or powerful as to cause the defendant to be unduly alarmed by such conduct. To the contrary, the evidence shows that Marshburn was a 65 year old man and the defendant was a 20 year old member of the United States Marine Corps. Nor are the defendant's self-serving statements that he was "nervous" and "afraid" and that he thought he was "protecting myself" an adequate basis for an instruction on self-defense. Even these self-serving statements do no more than indicate merely some vague and unspecified nervousness or fear; they do not amount to evidence that the defend-

ant had formed any subjective belief that it was necessary to kill the deceased in order to save himself from *death* or *great bodily harm.* Instead, all of the evidence tends to indicate that the defendant had not formed a belief that it was necessary to kill Kirby Marshburn in order to save himself from death or great bodily harm. It is even more apparent, if that is possible, that any fear by the defendant of death or great bodily harm was not reasonable. The circumstances as the defendant testified that they appeared to him at the time were totally insufficient to create any such belief in the mind of a person of ordinary firmness.

A defendant is entitled to an instruction on self-defense if there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for him to kill his adversary in order to protect himself from death or great bodily harm. *State v. Spaulding,* 298 N.C. 149, 156, 257 S.E. 2d 391, 395 (1979). If, however, there is no evidence from which the jury reasonably could find that the defendant in fact believed that it was necessary to kill his adversary to protect himself from death or great bodily harm, the defendant is not entitled to have the jury instructed on self-defense. *State v. Rawley,* 237 N.C. 233, 74 S.E. 2d 620 (1953). It is for the court to determine in the first instance as a matter of law whether there is any evidence that the defendant reasonably believed it to be necessary to kill his adversary in order to protect himself from death or great bodily harm. *See State v. Johnson,* 166 N.C. 392, 81 S.E. 941 (1914). If there is no evidence that the defendant in fact formed such a reasonable belief, then there is no evidence of self-defense and the issue should not be submitted to or considered by the jury. On the other hand, the defendant is entitled to an instruction on self-defense when there is any evidence in the record that it was necessary or reasonably appeared to be necessary to kill in order to protect himself from death or great bodily harm. *State v. Spaulding,* 298 N.C. 149, 257 S.E. 2d 391 (1979). In other words, before the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given. If, however, the

evidence requires a negative response to either question, a self-defense instruction should not be given.

In the present case, there was no evidence which would have supported a finding that the defendant in fact formed a belief that it was necessary for him to kill Marshburn in order to protect himself from death or great bodily harm. Nor was there evidence which would have supported a finding that any such belief was reasonable. Therefore, the trial court erred in giving the jury any instructions relative to self-defense. This error was favorable to the defendant and clearly harmless to him beyond a reasonable doubt, since it resulted in the jury giving consideration to acquittal upon a ground which the defendant was not entitled to have the jury consider. When a trial court undertakes to instruct the jury on self-defense in a case in which no instruction in this regard is required, the gratuitous instructions on self-defense are error favorable to the defendant even though they contain misstatements of law which would constitute reversible error in a case in which instructions on self-defense were required by the evidence. *See State v. Church*, 229 N.C. 718, 51 S.E. 2d 345 (1949). As the defendant in the present case was not entitled to any jury instructions on self-defense, any mistakes by the trial court in its instructions on self-defense were, at worst, harmless error not necessitating a new trial. *State v. Boone*, 299 N.C. 681, 263 S.E. 2d 758 (1980).

[2] We turn now to that portion of the defendant's argument in support of his Motion for Appropriate Relief in which he contends that the trial court committed reversible error during his original trial by instructing the jury in such manner as to place the burden on him to prove that the killing was in the heat of passion and therefore without malice. We find this assignment without merit.

In instructing the jury with regard to the element of malice, the trial court stated throughout the instructions that malice is implied in law from an intentional killing with a deadly weapon. The trial court also instructed the jury that should they find that the defendant intentionally inflicted the wounds which caused Marshburn's death, a presumption of unlawfulness and malice would arise and that an unlawful killing with malice is murder in the second degree. The trial court further instructed the jury,

that if they so found, the burden then would be upon the defendant to satisfy them of the absence of malice to reduce the homicide from murder in the second degree to manslaughter.

The defendant contends and we agree that there was some evidence justifying an instruction concerning heat of passion killing on sudden provocation and a resulting absence of malice. This being the case, any presumption of malice arising from a finding that the defendant intentionally inflicted the fatal wounds with a deadly weapon disappeared and the State was entitled to no presumption. *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *reversed on other grounds*, 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977). The defendant contends that the action of the trial court in placing the burden upon him to satisfy the jury that the killing was without malice tainted his conviction of murder in the first degree and required the Superior Court to grant his Motion for Appropriate Relief and award him a new trial. We do not agree.

Any error in the jury instructions placing the burden of persuasion on the defendant to show absence of malice was cured by the jury's verdict of murder in the first degree.[3] *State v. Fowler*, 285 N.C. 90, 203 S.E. 2d 803 (1974); *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969). The holding in *Mullaney* was intended to cure those situations in which a presumption of malice unfairly relieved the State of the burden of proving the malice which distinguishes murder in the second degree from manslaughter when there was some evidence tending to show a mitigating circumstance negating malice. We have held that when, as in the present case, there is some evidence of "heat of passion on sud-

3. Although the jury did not indicate the theory upon which they returned the verdict of guilty of murder in the first degree against the defendant, we assume for our purposes here that the verdict represented a finding of premeditated and deliberate murder in the first degree. This presumption is, of course, favorable to the defendant. To assume that the conviction of murder in the first degree was based upon the theory that the killing occurred during the perpetration or attempt to perpetrate a felony, would make the trial court's allocation of the burden of proof in regard to elements such as premeditation, deliberation and malice irrelevant and harmless, as none of these elements are elements of the crime of murder in the commission or attempted commission of a felony. *Smith v. State*, 244 Ga. 814, 262 S.E. 2d 116 (1979); *Street v. Warden*, 423 F. Supp. 611 (D. Md. 1976), *aff'd*, 549 F. 2d 799 (4th Cir. 1976) (unpublished opinion), *cert. denied*, 431 U.S. 906, 52 L.Ed. 2d 390, 97 S.Ct. 1700 (1977).

den provocation (which negates malice) then in order to prove the existence of malice the State must prove the absence of heat of passion beyond a reasonable doubt." *State v. Jones*, 299 N.C. 103, 109, 261 S.E. 2d 1, 6 (1980). The State met this requirement in the present case when it proved to the jury beyond a reasonable doubt that the defendant was guilty of murder in the first degree. Murder in the first degree is the unlawful killing of a human being with malice and *with premeditation and deliberation*, and the trial court so instructed the jury. The term "premeditation" means thought out beforehand for some length of time. A killing in the heat of passion is a killing *without premeditation. Id.; State v. Jennings*, 276 N.C. 157, 161, 171 S.E. 2d 447, 449-50 (1970). When the jury found beyond a reasonable doubt that the defendant killed his victim with premeditation, they also necessarily found beyond a reasonable doubt that the State had shown that the defendant did not act in the heat of passion. The trial court at all times correctly emphasized that the State must bear the burden of proving beyond a reasonable doubt premeditation on the part of the defendant, which would negate the possibility of his acting in the heat of passion. The trial court placed this burden upon the State without the benefit of any presumption in its favor.

Similarly, the term "deliberation" means "an intention to kill, executed by the defendant in *a cool state of the blood*, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and *not under the influence of a violent passion, suddenly aroused* by some lawful or just cause or legal provocation." *State v. Benson*, 183 N.C. 795, 798, 111 S.E. 869, 871 (1922) (emphasis added) (quoted with approval in *State v. Biggs*, 292 N.C. 328, 337, 233 S.E. 2d 512, 517 (1977)). The State did not enjoy the benefit of any presumption in carrying its burden of proving beyond a reasonable doubt the deliberation on the part of the defendant necessary to support a conviction for murder in the first degree. Quite the contrary, the trial court specifically instructed the jury on two occasions that, in order to find deliberation on the part of the defendant, they must be satisfied beyond a reasonable doubt that the killing was done "in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose and not under the influence of a violent passion suddenly aroused by

some lawful and just cause or legal provocation." Having twice instructed the jury in this manner, the trial court went on to instruct them that, if they found the killing was executed in the heat of passion, they must find it was not the result of deliberation by the defendant. The trial court in no way indicated to the jury that any presumption arising from the intentional infliction of fatal wounds with a deadly weapon could be considered in determining whether the defendant acted with deliberation. Instead, the trial court more than once specifically instructed the jury that the State must prove those things necessary to establish deliberation beyond a reasonable doubt and that the burden of proof remained with the State. The jury convicted the defendant of murder in the first degree and thereby found beyond a reasonable doubt that the defendant acted with deliberation and premeditation and not in the heat of passion.

When a jury reaches a verdict finding a defendant guilty of murder in the second degree, the presumption of malice arising from the intentional infliction of fatal injuries with a deadly weapon may be a decisive factor in the jury's verdict. In those cases, the principles of *Mullaney* apply, and it is reversible error to require the defendant to carry the burden of satisfying the jury that his acts were in the heat of passion suddenly aroused and without malice.

In cases in which the defendant is convicted of premeditated and deliberate murder in the first degree, however, the State has not relied upon a mere presumption of malice. In finding the defendant guilty beyond a reasonable doubt of the willful, deliberate and premeditated killing of the victim, the jury in the present case necessarily rejected *beyond a reasonable doubt* the possibility that the defendant acted in the heat of passion. *Dorsey v. Maryland*, 278 Md. 221, 362 A. 2d 642 (1976); *Evans v. Maryland*, 28 Md. App. 640, 349 A. 2d 300 (1975); *Street v. Warden*, 423 F. Supp. 611 (D. Md. 1976), *aff'd*, 549 F. 2d 799 (4th Cir. 1976) (unpublished opinion), *cert. denied*, 431 U.S. 906, 52 L.Ed. 2d 390, 97 S.Ct. 1700 (1977).

> Phrased otherwise, in proving the elements of first degree murder beyond any reasonable doubt in the jurors' minds, the state necessarily disproved manslaughter beyond a reasonable doubt. Accordingly, the gist of *Mullaney v.*

Wilbur, supra, that the state prove all elements of an offense beyond a reasonable doubt, is satisfied in fact. And, any arguable error in the jury instructions was harmless beyond a reasonable doubt.

Wilkins v. Maryland, 402 F. Supp. 76, 80 (D. Md. 1975) (citations omitted), *aff'd*, 538 F. 2d 327 (4th Cir. 1976), *cert. denied*, 429 U.S. 1044, 50 L.Ed. 2d 757, 97 S.Ct. 747 (1977). Therefore, we find that the instructions of the trial court with regard to the presumption of malice arising from the defendant's intentional infliction of fatal wounds with a deadly weapon constituted error which was harmless beyond a reasonable doubt.[4] For this reason, the defendant's Motion for Appropriate Relief was properly denied.

[3] Until recently the procedures and standards to be employed in reviewing a collateral attack upon a criminal conviction were prescribed in our former Post-Conviction Hearing Act, G.S. 15-217 through G.S. 15-222, and cases decided thereunder. E.g, *State v. White*, 274 N.C. 220, 162 S.E. 2d 473 (1968); *Branch v. State*, 269 N.C. 642, 153 S.E. 2d 343 (1967); *State v. Graves*, 251 N.C. 550, 112 S.E. 2d 85 (1960); *State v. Wheeler*, 249 N.C. 187, 105 S.E. 2d 615 (1958); *State v. Cruse*, 238 N.C. 53, 76 S.E. 2d 320 (1953); *Miller v. State*, 237 N.C. 29, 74 S.E. 2d 513 (1953). Since the statutes comprising our former Post-Conviction Hearing Act have now been repealed, neither those statutes nor cases decided thereunder are now authoritative with regard to the procedures and standards used in reviewing collateral attacks upon criminal convictions. 1977 N.C. Sess. Laws, ch. 711, §§ 33 and 39. The procedures and standards to be used in such collateral attacks are now set forth in Article 89 of Chapter 15A of the General Statutes of North Carolina, G.S. 15A-1411 through G.S. 15A-1422. The statutes comprising Article 89 took effect on 1 July 1978, but specifically were made fully retrospective without regard to when a defendant's guilt was established or when judgment was entered against him. 1977 N.C. Sess. Laws, ch. 711, § 39. Further, the motion for appropriate relief provided for by Article 89 was intended by the legislature to replace motions in arrest of judgment, motions to

4. As we have found any errors in the defendant's original trial to be harmless, we need not address his assignment and contentions relative to the failure of his counsel, during the direct appeal of his conviction, to raise such errors as grounds for a new trial.

set aside the verdict, motions for new trial, post-conviction proceedings, *coram nobis* and all other post-trial motions, but was not intended as a bar to relief by writ of habeas corpus. G.S. 15A-1411(c). Therefore, the procedures and standards to be employed with regard to collateral attacks upon criminal convictions, such as the defendant's Motion for Appropriate Relief in the present case, are controlled by the statutes comprising Article 89, G.S. 15A-1411 through G.S. 15A-1422.

[4] We turn now to those portions of Article 89, Chapter 15A which control our review of the Superior Court's Order denying the defendant's Motion for Appropriate Relief in the present case. Ordinarily, a motion for appropriate relief must be made after the verdict but not more than ten days after entry of judgment. G.S. 15A-1414. Certain grounds for appropriate relief set forth in G.S. 15A-1415 may, however, be asserted without limitation at any time after the verdict. The list of such grounds contained in G.S. 15A-1415 is exclusive and no other ground asserted by a defendant will support a motion for appropriate relief made more than ten days after the entry of judgment. G.S. 15A-1415(b). Included among the grounds which a defendant may assert by a motion for appropriate relief made more than ten days after judgment is the ground that the defendant's "conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina." G.S. 15A-1415(b)(3). In the present case, the defendant made his Motion for Appropriate Relief more than ten days after the entry of judgment. The motion was not subject to summary denial on this basis, however, as the defendant asserted that his conviction was obtained unconstitutionally which is one of the grounds for appropriate relief which may be asserted without limitation as to time. Thus, the Superior Court was required to consider the merits of his motion.

[5] The defendant having stated with specificity in his motion the manner in which he asserted that his conviction was obtained in violation of the Constitution of the United States, he was entitled to a hearing on questions of law or fact arising from the motion. G.S. 15A-1420(c)(1). At the hearing, the defendant had the initial burden of going forward and of showing the existence of the asserted ground for relief. As the defendant's petition presented only questions of law arising from the record of his original trial for the Superior Court's determination, the Superior

Court was required to determine the motion without an evidentiary hearing. G.S. 15A-1420(c)(3). Even after a showing by the defendant that the asserted ground for relief existed,[5] the Superior Court was still required pursuant to G.S. 15A-1420(c)(6) to deny him any relief "unless prejudice appears, *in accordance with G.S. 15A-1443*." G.S. 15A-1420(c)(6) (emphasis added). In other words, the defendant was required to show the existence of the error asserted as a ground for relief and also to show "prejudice."

The term "prejudice" now has two different meanings in cases in which post-conviction relief is sought by way of a motion for appropriate relief. The term "prejudice" is defined in G.S. 15A-1420(c)(6) by cross-reference to and incorporation of G.S. 15A-1443. If the error asserted in the motion for appropriate relief does not arise under the Constitution of the United States, then the definition of "prejudice" traditionally used in collateral attacks on convictions applies. In these cases the burden is upon the defendant to show a reasonable possibility that a different result would have been reached at his trial had the asserted error not been committed. G.S. 15A-1443(a). If, however, the error asserted in the motion for appropriate relief is shown by the defendant to exist and involves a violation of the defendant's rights under the Constitution of the United States, the State must bear the burden of demonstrating that the error was harmless beyond a reasonable doubt. G.S. 15A-1443(b). Such constitutional errors are deemed prejudicial unless they are found harmless beyond a reasonable doubt.[6] Id.

5. We have assumed *arguendo* throughout this opinion that the instructions of the trial court during the defendant's original trial placed an unconstitutional burden of proof upon the defendant with regard to self-defense and the absence of malice resulting from a killing in the heat of passion. *Infra* n. 2. Therefore, we also assume *arguendo* that the defendant showed the existence of the asserted ground for relief.

6. The use of this latter definition of "prejudice" in the context of a statute providing for collateral attacks upon criminal convictions is entirely new to the law of this jurisdiction and appears to provide relief to convicted criminal defendants in excess of that previously provided by this Court or the Supreme Court of the United States. In the recent case of *United States v. Frady*, 456 U.S. 152, 71 L.Ed. 2d 816, 102 S.Ct. 1584 (1982), the Supreme Court of the United States announced the standard it would apply under 28 U.S.C. § 2255 in reviewing collateral attacks upon criminal convictions. There, the Supreme Court of the United States held that a convicted defendant must show both cause excusing his failure to raise the asserted errors on direct appeal and "actual prejudice" resulting from the errors.

When post-conviction relief is sought by way of a motion for appropriate relief in the Superior Court, that court ordinarily must make findings of fact and conclusions of law in its order granting or denying relief. In those cases in which appellate review of rulings on such motions properly may be undertaken by this Court, we are bound by the findings of fact made by the Superior Court if they are supported by evidence in the record. *See Branch v. State*, 269 N.C. 642, 153 S.E. 2d 343 (1976) (applying our former Post-Conviction Hearing Act); *State v. Wheeler*, 249 N.C. 187, 105 S.E. 2d 615 (1958) (same). The Superior Court's conclusions of law based upon its findings of fact are subject to our review. *Id.* In the present case, the Superior Court did not make extensive findings or conclusions in its Order denying the defendant's Motion for Appropriate Relief and instead primarily relied upon its conclusion that the facts as stated by the defendant in his motion did not entitle him to any form of relief. Where as here the record reveals that the determinative facts were and are uncontested and that the errors complained of were harmless beyond a reasonable doubt as a matter of law, it is unnecessary for us to remand the case for further findings of fact or conclusions of law by the Superior Court. It is sufficient that we determine, as we have here, that the Order of the Superior Court denying the defendant's Motion for Appropriate Relief was required as a matter of law in light of the uncontested operative facts.

In the present case the defendant asserted errors involving a violation of his rights under the Constitution of the United States. Such errors must be deemed prejudicial unless they were harmless beyond a reasonable doubt. We have determined, for

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456 U.S. at 167, 71 L.Ed. 2d at 830, 102 S.Ct. at 1594. Under this standard, the defendant has "the burden of showing not merely that the errors at his trial created a possibility of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." 456 U.S. at 170, 71 L.Ed. 2d at 832, 102 S.Ct. at 1596.

The definitions of the term "prejudice" contained in G.S. 15A-1443 were originally intended to apply only to direct appeals of criminal convictions. By adopting and incorporating those definitions by reference as a part of G.S. 15A-1420(c)(6), and making them also apply to collateral attacks upon convictions, the General Assembly has provided benefits to convicted criminal defendants in excess of those already provided them by the Constitution of the United States and the Supreme Court of the United States. This the General Assembly in its wisdom is free to do.

reasons previously set forth, that any errors in the trial court's instructions during the defendant's original trial relative to self-defense were favorable to the defendant or, at worst, harmless beyond a reasonable doubt. We have also determined that any errors in the trial court's instructions with regard to the presence or absence of malice were rendered harmless beyond a reasonable doubt by the jury verdict of guilty of murder in the first degree. The defendant having received a fair trial free of prejudicial error, the Order of the Superior Court denying his Motion for Appropriate Relief must be and is

Affirmed.

STATE OF NORTH CAROLINA v. CARLTON FANANDZA CORBETT

STATE OF NORTH CAROLINA v. CARL LAWRENCE RHONE

No. 167A81

(Filed 7 December 1982)

1. **Rape and Allied Offenses § 3— indictment for first degree rape—failure to allege "with force and arms"**

An indictment for first degree rape was not fatally defective for failure to contain the averment "with force and arms," since G.S. 15-144.1(a) neither required such an averment nor expressed a legislative intent that the language in the statute should prevail over the express language in G.S. 15-155 stating that no judgment shall be stayed or reversed because of the omission of the words "with force and arms" from the indictment.

2. **Constitutional Law § 31— indigent defendant—denial of funds for fingerprint expert**

The trial court did not abuse its discretion in the denial of an indigent defendant's motion for funds with which to retain an expert in fingerprint analysis. G.S. 7A-454.

3. **Constitutional Law § 30; Bills of Discovery § 6— pretrial discovery—statements and names of witnesses**

Defendant was not entitled under G.S. 15A-904(a) to the pretrial discovery of (1) written statements of witnesses, (2) the names and addresses of all witnesses to be called by the State, and (3) copies of statements made to any law enforcement officer or staff connected with defendant's case.

4. Criminal Law § 15.1— denial of change of venue for publicity and local prejudice

In this prosecution for armed robbery, kidnapping and rape, evidence that four newspaper articles traced the investigation and reported on the apprehension of the defendants did not show "great prejudice" sufficient to preclude a "fair and impartial trial" in the county so as to require a change of venue pursuant to defendant's motion under G.S. 15A-957. Furthermore, testimony that the victim came from a large, respected family in the county and that people of the community were concerned and upset over the crimes did not show "local prejudice" sufficient to invoke the protection of G.S. 15A-957.

5. Criminal Law § 92.1— consolidation of charges against two defendants

Charges against two defendants for armed robbery, kidnapping and rape were properly consolidated for trial. G.S. 15A-926(b)(2).

6. Criminal Law § 99.9— examination of witnesses by court—no expression of opinion

The trial court's questions to witnesses were intended to clarify their testimony and did not constitute an expression of opinion in violation of G.S. 15A-1222.

7. Criminal Law § 66.12— in-court identification—independent origin from viewing at preliminary hearing

The evidence supported the trial court's determination that the victim's identification of defendants was of independent origin based upon her viewing of them at the time of the crimes and did not result from her viewing of them at the preliminary hearing.

8. Rape and Allied Offenses § 4— testimony using the word "rape"—waiver of objection

The benefit of defendant's objection to a question to a physician concerning his examination of "rape" victims was lost where the witness had earlier testified concerning "rape" cases without objection.

9. Rape and Allied Offenses § 4— testimony about "rape examination"

The trial court did not err in permitting a physician to testify that he had performed a "rape examination" on the prosecutrix since (1) defendant waived his objection to such testimony when he failed to object to other testimony by the witness that he was trained in "rape cases," that this was a "rape investigation," and that he used a "rape kit," and (2) the word "rape" merely described, as a shorthand statement of fact, the nature or purpose of the procedure and did not constitute an invasion of the province of the jury or an inflammatory conclusion.

10. Criminal Law § 89.5— corroborating testimony—slight variances

Slight variances between the in-court testimony of the prosecutrix and corroborating statements testified to by a detective did not render the corroborating statements inadmissible.

11. Criminal Law § 60.3— fingerprint testimony—implicit finding that witnesses were experts

By admitting fingerprint testimony by three officers, the trial court presumably found the officers to be expert witnesses where each officer was questioned concerning his background, training and experience before so testifying, and there was ample evidence in the record to support such a finding.

12. Criminal Law § 87.1— leading questions—no abuse of discretion

The trial court did not abuse its discretion in permitting the State to ask leading questions of a witness concerning the chain of custody of items from which latent fingerprints were lifted.

13. Criminal Law § 168.1— correction of error in instructions

Error in the trial court's summary of the evidence that defendant, rather than his codefendant, was in possession of the victim's watch when he was apprehended was cured by the court's subsequent correction thereof.

14. Kidnapping § 1.2; Rape and Allied Offenses § 5; Robbery § 4.3— kidnapping, first degree rape and armed robbery—sufficiency of evidence

The State's evidence was sufficient to support conviction of two defendants for the kidnapping, armed robbery and first degree rape of a victim whom defendants accosted in a grocery store parking lot. G.S. 15A-1227(a).

APPEAL by defendants from judgments of *Long, J.*, entered at the 23 July 1981 Criminal Session of Superior Court, BLADEN County. Defendants were indicted for armed robbery, kidnapping, and first degree rape. The cases were consolidated for trial and defendants were found guilty on all charges. Each defendant received two sentences of life imprisonment, to run consecutively, upon his convictions of kidnapping and rape, and a seven year sentence upon his conviction of armed robbery. We allowed defendants' motions to bypass the Court of Appeals on the armed robbery convictions.

The State's evidence tended to show that on 23 January 1981, at approximately 7:30 p.m., Donna Gooden Rice was accosted by two young black males as she attempted to get out of her car in the parking lot of Hill's grocery store in Elizabethtown. Ms. Rice testified that one of the men, whom she identified as defendant Rhone, ordered her at gunpoint to open the driver's door and move over to the passenger's side. A second man, identified as defendant Corbett, got into the back seat. Rhone drove the 1981 gray Mustang out of the parking lot "to a place called the Shaw Farm," where "he parked the car toward a hedgerow in a field." During the journey Ms. Rice had offered the two men all

the money that she had if they would let her go. She gave defendant Rhone $26.00.

Ms. Rice further testified that once Rhone had parked the car, he ordered her to remove her clothes and move to the back seat. Rhone followed her to the back while Corbett moved to the front seat. Rhone positioned himself on top of the victim and holding a gun to her side forced her to assist him achieve penetration. After three or four minutes, Corbett announced that another car was approaching. Rhone sat up and when the car was safely out of sight, he returned to the front seat and drove the car further into the woods. Corbett then had sexual intercourse with Ms. Rice, followed again by Rhone. Ms. Rice was told to dress and remain in the back seat. Rhone drove the car to the Scotchman store in Dublin where he planned to cash a $100.00 check written by Ms. Rice. Meanwhile, Corbett told Ms. Rice to remove all her jewelry. She surrendered a wedding band, a diamond ring, a high school class ring and a Timex watch. After arriving at the Scotchman, Rhone decided "it was too risky to go in." According to Ms. Rice, Rhone "wasn't very good at driving a straight-drive" car and as they left the Scotchman, her car stalled two or three times. This occurred at approximately 10:00 p.m.

Rhone drove back to Elizabethtown. Ms. Rice was informed that she "was lucky this time; that they were going to let [her] go." The defendants tried to wipe off the inside of the car with Ms. Rice's coat and then shut the car doors and ran. Ms. Rice drove immediately to her mother-in-law's, then to the sheriff's department, and then to the hospital. After undergoing a medical examination at the hospital, she returned to the sheriff's department where she gave a statement.

Other testimony tending to corroborate the victim's version of the events included the following:

Phillip Little, a detective with the Bladen County Sheriff's Department, testified concerning Ms. Rice's statement to him, which statement essentially paralleled her testimony at trial. He also testified that when Corbett was arrested on 2 February 1981, a Timex watch identified as that belonging to Ms. Rice was found in his pocket.

Joe Horace Nance testified that on 31 January 1981, defendant Corbett came into the Trade Center where Nance worked and

sold him a diamond ring and a wedding band. Corbett wrote Nance a receipt for $30.00 bearing the following: "Johnny Corbett, Route 3, Box 138, Elizabethtown, 862-4625." Nance handed the rings over to Detective Little and they were identified at trial as belonging to Ms. Rice.

Lisa Faye Kinlaw testified that on 23 January 1981 she was waiting in her car across the street from the Dublin Scotchman at approximately 10:00 p.m. She noticed a gray Mustang with two black males in it parked in front of the Scotchman. The men "made two attempts to try and get onto the highway . . . " but the "car jerked and cut off."

Dr. Don Creed testified that tests performed on Ms. Rice after the alleged rape were positive for the presence of seminal fluid. His examination revealed multiple small abrasions and lacerations and a small amount of hemorrhage in the vaginal area.

SBI Agent Stephen R. Jones testified that fingerprints found inside Ms. Rice's car, and on an envelope and Exxon gasoline receipts found in the car, corresponded to the fingerprints of both defendants.

Rufus L. Edmisten, Attorney General, by Thomas H. Davis, Jr., Assistant Attorney General and Charles M. Hensey, Assistant Attorney General, for the State.

James E. Hill, Jr., Attorney for appellant-defendant Rhone; David Garrett Wall, Attorney for defendant-appellant Corbett.

MEYER, Justice.

We will discuss each defendant's assignments of error separately.

Defendant Rhone

[1] This defendant first contends that the indictment charging him with first degree rape was fatally defective for failure to allege the averment "with force and arms" which, he maintains, is required under G.S. § 15-144.1 (Cum. Supp. 1981). He further contends that "since the indictment was fatally defective, the charge to the jury and the entry of verdicts and judgment against [him] which were based on the indictment are equally defective and must be reversed." We do not agree.

In support of his contention that the indictment charging him with first degree rape was fatally defective defendant relies on the following language which appears in G.S. § 15-144.1(a):

> (a) In indictments for rape it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, *and the averment 'with force and arms,' as is now usual,* it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will and concluding as is now required by law. Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape in the first degree, rape in the second degree, attempted rape or assault on a female.

(Emphasis added.)

By contrast, the bill of indictment charging defendant with first degree rape reads as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 23rd day of January, 1981, in Bladen County Carl Lawrence Rhone unlawfully and wilfully did feloniously ravish and carnally know Donna Gooden Rice, by force and against the victim's will, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Also of some significance to our decision on this issue is the following language appearing in G.S. § 15-155:

> No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for . . . omission of the words . . . 'with force and arms,' . . . .

Defendant was charged with first degree rape pursuant to G.S. § 14-27.2(a)(2)(a): "A person is guilty of rape in the first degree if the person engages in vaginal intercourse . . . [w]ith

another person by force and against the will of the other person, and [e]mploys or displays a dangerous or deadly weapon . . . . " Defendant does not attempt to argue, nor would we agree, that the averment "with force and arms" is necessary to establish the "dangerous or deadly weapon" element of the offense. We have previously held that in enacting G.S. § 15-144.1(a), the General Assembly has provided for a "shortened form" of the rape indictment which explicitly eliminates the requirement that the indictment contain allegations of every element of the offense. *State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979); *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978). Although proof of the "dangerous or deadly weapon" element of the offense was essential to a conviction of the defendant for first degree rape, G.S. § 15-144.1(a) "clearly authorizes an indictment for first-degree rape which omits averments (1) that the offense was perpetrated with a deadly weapon . . . . " *State v. Lowe*, 295 N.C. at 600, 247 S.E. 2d at 881. In *Lowe* this Court upheld the constitutionality of G.S. § 15-144.1.[1]

We therefore must determine whether the inclusion of the averment "with force and arms," though not necessary by virtue of G.S. § 15-155, is nevertheless mandated by G.S. § 15-144.1(a). We do not read this statute as either *requiring* the averment or as expressing a legislative intent that the language in G.S. § 15-144.1(a) prevail over the express language in G.S. § 15-155 which states in effect that no judgment shall be stayed or reversed because of the omission of the words "with force and arms" from the indictment. As the bill of indictment upon which defendant was charged comports with the requirements of G.S. § 15-144.1(a), this assignment of error is overruled.

[2] As his second assignment of error, defendant Rhone contends that the court erred by denying his motion for funds with which to retain an expert in fingerprint analysis "in view of the heavy reliance which the State placed on the testimony of Phillip

1. As we stated in *Lowe*, "[a]n indictment is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him for subsequent prosecution for the same offense." In the present case, each defendant, in a pretrial motion, stated specifically that he had been indicted for first degree rape, which charge potentially carried a sentence of life imprisonment. While not dispositive of the issue, defendant's acknowledgment of his awareness of the charges against him does little to bolster his position.

Little as an expert in fingerprint analysis." Defendant concedes that the decision to approve fees for the appointment of an expert under G.S. § 7A-454 rests within the sound discretion of the trial judge and will not be disturbed on appeal absent abuse of discretion. *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981); *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976).

As we stated in *State v. Gray*, 292 N.C. 270, 277, 233 S.E. 2d 905, 911 (1977), "the assistance of an expert or private investigator or both would be, generally, welcomed by all defendants and their counsel as an added convenience to the preparation of a defense . . . . We, must, however, also recognize that it is practically and financially impossible for the state to give indigents charged with crime every jot of advantage enjoyed by the more financially privileged." The Court further stated that the assistance contemplated by G.S. § 7A-454 will be provided "only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial." *Id.* at 278, 233 S.E. 2d at 911. The record before us discloses that defendant's counsel conducted an intelligent and thorough cross-examination of Detective Little. Defendant makes no convincing argument that the retention of an expert would have materially assisted him in his preparation for trial. This assignment of error is overruled.

[3] Defendant's third assignment of error concerns the denial of portions of his motion for information necessary to receive a fair trial. Defendant concedes that the three paragraphs in question "would appear to seek information prohibited by G.S. 15A-904(a)." Inasmuch as defendant requested (1) written statements of witnesses, (2) the names and addresses of all witnesses to be called by the State, and (3) copies of statements made to any law enforcement officer or staff connected with defendant's case, we agree that the information sought was not subject to discovery, pursuant to G.S. § 15A-904(a). *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978); *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977). The trial court did not err in denying defendant's motion with respect to these requests.

[4] Defendant next contends that the trial court erred in denying his motion for a change of venue. In support of his position,

defendant includes in the record on appeal copies of four newspaper articles concerning the crimes with which he was charged. The articles, captioned as follows: "Search Underway for Two Rapists," "No Arrests Yet in Friday Rape Case," "Rape Suspect Charged," and "Second Rape Suspect Arrested," give a factual, straightforward account of the investigation. We do not view these articles as evidence of "considerable publicity and reaction to the crimes" as defendant asserts. Also included in the record is testimony that Ms. Rice came from a large, respected Bladen County family and that at the time of the crime, the people of the community, especially friends and neighbors, were concerned and upset over the event.

This Court has held that a motion for change of venue on the grounds of local prejudice or unfavorable publicity against the defendant is addressed to the sound discretion of the trial judge. The trial court's ruling will not be disturbed absent an abuse of discretion. *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410; *State v. See*, 301 N.C. 388, 271 S.E. 2d 282 (1980); *State v. Faircloth*, 297 N.C. 100, 253 S.E. 2d 890, *cert. denied*, 444 U.S. 874 (1979); *State v. Matthews*, 295 N.C. 265, 245 S.E. 2d 727 (1978), *cert. denied*, 439 U.S. 1128 (1979). The burden is on the defendant to show that "there exists in the county in which the prosecution is pending so great a prejudice . . . that he cannot obtain a fair and impartial trial." G.S. § 15A-957. *State v. See*, 301 N.C. 388, 271 S.E. 2d 282. From the information supplied to us in the record, we conclude that defendant has not met this burden. The mere fact that four newspaper articles traced the investigation and reported on the apprehension of the defendants is not tantamount to a showing of "great prejudice" sufficient to preclude "a fair and impartial trial." Nor does the fact that the prosecuting witness and her family enjoyed the respect of a community which was quite naturally concerned for Ms. Rice's well-being suggest "local prejudice" sufficient to invoke the protection of G.S. § 15A-957. The assignment of error is overruled.

[5] By his fifth assignment of error, defendant contends that the trial court erred in allowing the State's motion to consolidate for trial his cases with those of his co-defendant Corbett. Defendant properly points out that the joinder of offenses and defendants is governed by G.S. § 15A-926, and that G.S. § 15A-926(b)(2) permits joinder of defendants who may have acted as part of a common

scheme or plan or are accused of offenses "[s]o closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others." Absent a showing of abuse of discretion, the trial judge's ruling on joinder will not be disturbed on appeal. *State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981); *State v. Rinck*, 303 N.C. 551, 280 S.E. 2d 912 (1981). We hold that under the facts of this case, the trial judge properly consolidated the cases. *See State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978). Defendant concedes, and we agree, that the record does not disclose sufficient evidence to demonstrate either an abuse of discretion or deprivation of a fair trial upon joinder of the cases against these two defendants. The assignment of error is overruled.

[6] Defendant's sixth assignment of error includes numerous exceptions to what he styles as "serious and extensive intrusions" into the trial proceedings by the trial judge by way of questions to witnesses in violation of G.S. § 15A-1222. Our review of the pertinent portions of the record discloses that the trial judge's questions to the witnesses were intended to clarify the testimony and did not convey the court's opinion as to the credibility of the witnesses or defendant's guilt. Defendant has failed to show that any of the excepted to remarks were prejudicial. *State v. Rinck*, 303 N.C. 551, 280 S.E. 2d 912; *State v. Norwood*, 303 N.C. 473, 279 S.E. 2d 550 (1981).

[7] Ms. Rice's in-court identification of the defendant is the source of defendant's seventh assignment of error. He contends that because Ms. Rice saw him at a preliminary hearing, "there was substantial likelihood of irrevocable misidentification." This contention is totally without merit. The trial court conducted a voir dire hearing during which Ms. Rice testified that she had ample time and opportunity to view her assailants at the time of the kidnapping, rape and robbery; that although the defendants were present at the preliminary hearing, they were in the company of five or six other prisoners and were not singled out as being her assailants; and that her identification of the defendant was not based on what she saw at the preliminary hearing. The court concluded that Ms. Rice's identification of the defendant was based on her observation of him during the evening of 23 January 1981. On the authority of *State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981) and *State v. Tann*, 302 N.C. 89, 273 S.E. 2d 720 (1981),

we hold that Ms. Rice's in-court identification of the defendant was of independent origin and was properly admissible at trial.

[8] Defendant assigns as error the admission of certain testimony which he argues was irrelevant, immaterial and incompetent. Specifically he objects to the use of the word "rape" during direct examination of Dr. Creed. Dr. Creed had previously testified, without objection, that he had undergone training in "rape cases." When evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost. 1 Brandis on North Carolina Evidence § 30 (1982); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981); *State v. Searles*, 304 N.C. 149, 282 S.E. 2d 430 (1981); *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). Thus the benefit of an objection to the subsequent question to Dr. Creed concerning his examination of "rape victims" was lost as a result of his earlier testimony concerning "rape cases" to which no objection was made. Nor do we find error in the admission of testimony, elicited on re-direct examination of Officer Jones, concerning the possibility of duplicate fingerprints. Defendant had raised this issue during cross-examination of the witness. Evidence explanatory of testimony brought out on cross-examination is admissible on re-direct. 1 Brandis § 36; *State v. McKeithan*, 293 N.C. 722, 239 S.E. 2d 254 (1977).

Defendant also includes under this assignment of error the admission of the following testimony, properly objected to as nonresponsive to the questions propounded. The first resulted from a question to Ms. Rice on direct examination:

> Q. All right. Now, before you got on the Peanut Plant Road, did either Mr. Rhone or Mr. Corbett say anything to you?
>
> A. I asked—started to ask—told them they could have all the money I had left and just to let me go; that I hadn't done anything to them.

The second incident occurred during the defendant's cross-examination of Detective Little concerning Ms. Rice's description of defendant Corbett:

> Q. Mr. Little, you never found these items of clothing, did you?
>
> A. No sir.

Q. The fact is, they are a very common and an ordinary type of clothing, aren't they?

A. Well, I guess you would say they were common and ordinary; but I have seen the defendant Corbett wearing—

Q. Well, I didn't ask you that, Mr. Little. I just asked you if they were a common and ordinary type of clothing.

At this point, the court permitted the witness to explain his answer:

A. I don't know how common that type of clothing would be; but I have seen the defendant Corbett wearing a tan colored or a light brown colored cap that fits that description.

Assuming arguendo that the admission of this testimony constituted error, defendant has made neither argument nor showing of actual prejudice, *i.e.*, that "had the error in question not been committed, a different result would have been reached at the trial . . . . " G.S. § 15A-1443(a). We find no error.

[9] By a separate assignment of error, defendant further contends that because the term "rape" is a legal rather than a medical term, the trial court erred when it permitted Dr. Creed to testify that he had performed a "rape examination" on Ms. Rice. Defendant's argument is two-fold: that the use of the term "rape" constituted an invasion of the province of the jury and that it constituted "an unwarranted and inflammatory conclusion." We reject defendant's arguments upon two separate grounds. First, as noted above, Dr. Creed had previously testified, without objection, that he was trained in "rape cases." After he testified that he conducted a "rape examination" on Ms. Rice, he then testified, again without objection, that "this was a rape investigation" and later he used the term "rape kit." Thus, defendant waived the benefit of the objection. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629. Moreover, nowhere in this testimony is there the suggestion that the defendant raped Ms. Rice. *State v. Galloway*, 304 N.C. 485, 284 S.E. 2d 509 (1981). The word "rape" is used as an adjective in each instance, merely *describing*, as a shorthand statement of fact, the nature or purpose of the procedure. *Id.* We find no error here.

Defendant objects to the introduction, as substantive evidence, of certain exhibits without proper foundation—specifically an automatic pistol taken from defendant and various sets of fingerprints. He is unable to point to any precise lapse in the chain of custody, nor has he argued that the evidence was immaterial or irrelevant. The assignment of error is without merit.

[10] Defendant next contends that the trial court erred in allowing Detective Little to testify concerning statements made to him by Ms. Rice, arguing that they were not corroborative of her earlier testimony. We find, upon examination of the record, that although there were slight variances between Ms. Rice's in-court testimony and the statements testified to by Detective Little, such variance does not render the statements inadmissible. *See State v. Mayhand*, 298 N.C. 418, 259 S.E. 2d 231 (1979).

By his twelfth assignment of error defendant argues that the expert opinion testimony given by Dr. Creed, Officer Bunn, Detective Little, and Special Agent Jones was offered without proper foundation. There is no basis whatsoever for the objections taken to Dr. Creed's "expert opinion" testimony. The witness was questioned extensively concerning his background and qualifications. He was tendered as an expert and found by the court to be a "Medical expert." Moreover, defendant's exceptions to Dr. Creed's testimony include only the following:

> Q. And completed medical school at the University of South Carolina?
>
> A. The Medical University, in Charleston.

And later, in response to a question concerning the results of an oxidation test to determine the presence of seminal fluid, Dr. Creed was permitted to answer, over objection, as follows:

> A. There was a change in color from white to greenish-blue.

[11] Officer Bunn, Detective Little and Special Agent Jones testified that latent prints were lifted from Ms. Rice's vehicle and from items found in the car; that fingerprint impressions were taken from both defendant Rhone and defendant Corbett; and that the defendants' fingerprints matched those taken from the crime scene. In each case, the witness was questioned concerning

his background, training and experience before so testifying. By admitting the testimony of these witnesses, the court presumably found them to be experts. There is ample evidence in the record to support such a finding. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied* 448 U.S. 907, *reh. denied* 448 U.S. 918 (1980); *State v. Cates*, 293 N.C. 462, 238 S.E. 2d 465 (1977); *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972). We find no error.

[12] We find no merit in defendant's next contention that the court erred in allowing the State to ask leading questions of witness Steve Bunn concerning the chain of custody of items from which latent fingerprints were lifted. It is established law in this State that the decision to permit counsel to ask leading questions is within the sound discretion of the trial judge and absent abuse of such discretion, the decision will not be disturbed on appeal. *State v. Rankin*, 304 N.C. 577, 284 S.E. 2d 319 (1981). Much of the information contained in the questions was repetitive of earlier testimony and introductory in nature. *See State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981), *cert. denied* --- U.S. --- (1982). The assignment of error is overruled.

[13] In summarizing the evidence for the jury, the trial judge erroneously stated that the defendant Rhone, rather than defendant Corbett, was in possession of Ms. Rice's watch when he was apprehended. The error was brought to the attention of the court and corrected. Defendant concedes that the subsequent correction "likely" cured the error. We agree. *State v. Orr*, 260 N.C. 177, 132 S.E. 2d 334 (1963).

[14] Finally, defendant contends that the trial court erred in denying his motions to dismiss pursuant to G.S. § 15A-1227(a).

> In ruling upon defendants' motion to dismiss on the grounds of insufficient evidence, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor. *State v. Fletcher*, 301 N.C. 709, 272 S.E. 2d 859 (1981); *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980); *State v. Bowman*, 232 N.C. 374, 61 S.E. 2d 107 (1950). The trial court must determine as a question of law whether the State has offered substantial evidence of defendant's guilt on every essential element of the crime charged. 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might ac-

cept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

State v. Cox, 303 N.C. 75, 87, 277 S.E. 2d 376, 384 (1981). Upon a complete review of the evidence in the record before us, we find that the State offered substantial evidence on each and every element of the offenses with which defendant was charged.

Defendant Corbett

Defendant Corbett assigns the following errors as the basis for his appeal:

1. Insufficiency of the indictment charging him with rape in failing to include the averment "with force and arms."

2. Denial of his motion for funds to employ an expert in fingerprint analysis.

3. Denial of his motion for a change in venue.

4. Granting of the State's motion for consolidation of the cases against both defendants.

5. The trial court's questioning of witnesses in violation of G.S. § 15A-1232.

6. The in-court identification made of defendant Corbett by the prosecuting witness.

7. The admission into evidence of certain exhibits including an automatic pistol, sets of fingerprints, and a gold wedding band.

8. Denial of his motions to dismiss.

As this defendant's eight assignments of error duplicate in all material respects those brought forward by defendant Rhone, and as we have fully discussed each of these alleged errors with respect to defendant Rhone's appeal, we therefore deem it unnecessary to repeat the portions of our opinion applicable to these issues.

For the reasons set forth in this opinion, we hold that defendants Rhone and Corbett received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. STEVEN DOUGLAS REYNOLDS

No. 75A81

(Filed 7 December 1982)

1. **Homicide § 24.1— instructions concerning implied malice from intentional use of deadly weapon**

Where the State offered evidence sufficient to permit a jury to find beyond a reasonable doubt that defendant intentionally used a deadly weapon, a pistol, to cause the death of the deceased, and there was no evidence in mitigation, the State proved murder in the second degree because malice and unlawfulness are implied in law. Therefore, an instruction to the jury that the law implies malice and unlawfulness from the intentional use of a deadly weapon proximately resulting in death was not a conclusive, irrebuttable presumption. Rather, the presumption was mandatory in that defendant, to avoid its effect, had the burden of producing some evidence raising an issue on the existence of malice and unlawfulness.

2. **Homicide § 15— admissibility of evidence of another crime to prove identity**

In a prosecution for second degree murder, the trial court did not err in allowing evidence tending to show that defendant shot another person where the evidence tended to identify defendant as the perpetrator of the crime charged.

3. **Homicide § 15— evidence of arrest for "unrelated crime"—no objection by defendant—no error**

Where in a prosecution for second degree murder, defendant made no objection to two references to defendant's arrest for a supposedly separate crime, his objection to the third reference came too late and was unaccompanied by a motion to strike. Further, it was clear the references had no effect on the outcome of the trial.

4. **Criminal Law § 96— erroneously admitted testimony cured by instruction**

The trial court cured testimony which was erroneously admitted when it sustained defendant's objection and motion to strike and it instructed the jury to disregard the witness's statement.

5. **Criminal Law § 57— ballistics expert—testimony concerning similarities between bullets—admissible**

In a homicide case in which an expert testified concerning similar rifling characteristics on bullets fired by defendant's gun and bullets taken from the deceased and another man, it was not error to permit the expert to state that he found nothing in his examinations to be inconsistent with the bullets taken from deceased and the other man having been fired from defendant's gun.

BEFORE *Rousseau, J.*, at the 26 January 1981 Criminal Session of GUILFORD Superior Court and a jury, defendant was tried and convicted of second degree murder. A sentence of life impris-

onment was imposed and defendant appealed as of right pursuant to G.S. 7A-27(a).

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

Adam Stein, Appellate Defender, by Ann B. Petersen, pro hac vice, for defendant appellant.

EXUM, Justice.

The questions raised by this appeal are whether the trial court erred by: (1) instructing the jury on the implication of malice and unlawfulness from the use of a deadly weapon; (2) admitting evidence that defendant committed crimes other than the one for which he was tried; (3) admitting evidence of a prosecution witness's "feelings" about defendant; and (4) admitting ballistics evidence. We conclude no error warranting a new trial was committed.

Evidence presented by the state tended to show the following:

On 25 July 1980 at approximately 6 p.m., defendant arrived at Uncle Duke's Bar in Greensboro and began playing pool with the bartender, David Kirkman. Defendant told Kirkman that he had some marijuana hidden in the woods behind a trailer park on Interstate 85 and Holden Road and asked him if he knew anyone who would want to buy some of the drug at a cheap price. Kirkman indicated that he did not but would check.

A few minutes later, Daniel Morgan (the victim) and Lorraine Baysdon entered the bar accompanied by two others. Baysdon, who knew Kirkman, asked Kirkman if he knew where they could get some marijuana. Kirkman then spoke with defendant and defendant agreed to sell one-half pound of marijuana for $180. Defendant stipulated, however, that only one of the group could go with him and that person would have to drive. Morgan agreed to drive and left the bar to get his car. He returned to Uncle Duke's around 6:50 p.m. Morgan and defendant left the bar together around 7:10 p.m. Neither of them returned to Uncle Duke's that evening. One of Morgan's friends, Norbert Tarabec, however, saw and spoke with Morgan later that night. At the

time, Morgan was driving a 1966 turquoise Mustang. Tarabec testified that Morgan told him that he was going to buy some "herb," and that there was another person in the car with Morgan. Thereafter Morgan was never again seen alive. His body was found on 11 August 1980 in a wooded area near Interstate 85 and Holden Road. A forensic pathologist testified that the degree of decomposition of the body indicated that Morgan had been dead between ten days and six weeks. Witnesses observed defendant alone driving the 1966 turquoise Mustang on several occasions after he and Morgan left Uncle Duke's Bar. The first of these observations was in the late evening of 25 July and the last was on 30 July. On 31 July the car was seen by a state's witness at the bottom of a ravine near Wiley Davis Road, and was impounded by police on 2 August.

As further evidence connecting defendant with the murder of Morgan, the state offered testimony of Robert Stone and Barbara Stone about an assault on Mr. Stone by defendant. On 29 July 1980 around 8 p.m., defendant arrived at the Stones' home and was invited in. Robert Stone had met defendant on two or three previous occasions and knew him by the name of Steve Hayes. When he entered the Stones' house, defendant was wearing only a pair of jeans and had a blood-soaked bandage wrapped around his left hand. Defendant told Stone that he had been injured at work and needed a ride to his home in Level Cross. Stone gave defendant a shirt and agreed to drive him home. On the way Stone asked defendant if he had any marijuana; defendant said he did not but suggested Stone might get some from a person living with defendant.

When they reached Level Cross, Stone parked the car beside the road. He and defendant then proceeded to walk across a wooded area to where defendant said his trailer was located. Approximately fifteen feet into the field, defendant pulled a gun from his pocket and shot Stone in the mouth. When he shot Stone, defendant said he was going to take his money and kill him. Stone threw his money, $1,410 he had for a deposit on a house, at defendant, then ran to a nearby house where an ambulance was called. In the ambulance, Stone spit out the bullet which was later analyzed and compared with the bullet taken from Morgan's head.

At the time of his arrest, defendant was in possession of a .25 caliber pistol and .25 caliber ammunition. This pistol and the ammunition, the bullets extracted respectively from Morgan's body and Stone's mouth, were submitted to the FBI for analysis. Microscopic comparisons revealed that the "rifling characteristics," *i.e.*, lands and grooves, on the test bullets fired from the .25 caliber pistol were the same as those on the bullets taken out of both Morgan and Stone. The ballistics expert was unable to state that the bullets taken from Morgan and Stone were definitely fired from the gun taken from defendant but, in his opinion, they could have been because there was nothing in their rifling characteristics inconsistent with their having been fired from that gun. Further, neutron activation analysis revealed that the bullets taken from Morgan and Stone and the ammunition found with defendant were of the same chemical composition, consistent with their having come from the same box of ammunition.

Defendant offered no evidence.

The trial judge instructed the jury, in part, as follows:

> Now, as I have said, the defendant has been accused of second degree murder. Second degree murder is the unlawful killing of a human being with malice.
>
> Now, I charge that for you to find the defendant guilty of second degree murder, the State of North Carolina must prove two things beyond a reasonable doubt:
>
> First, that the defendant intentionally and with malice shot Daniel Bradley Morgan with a deadly weapon. Intent is the exercise of intelligent will. Intent is the condition or emotion of the mind which is seldom, if ever, capable of direct proof, but the intent of the person is usually deduced from the acts, declarations, and circumstances known to the person charged with having that intent. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom. Now, malice means not only hatred, ill will, or spite, as it is ordinarily understood to be, and to be sure that is malice, but it also means that condition of the mind which prompts a person to take the life of another in-

tentionally or to intentionally inflict a wound with a deadly weapon upon another which proximately results in his death without just cause, excuse, or justification. Now, a .25 caliber pistol is a deadly weapon.

Second, the State of North Carolina must prove and prove beyond a reasonable doubt that the shooting was the proximate cause of Daniel Bradley Morgan's death. A proximate cause is a real cause, a cause without which Morgan's death would not have occurred.

Now, members of the jury, if the State of North Carolina proved beyond a reasonable doubt that the defendant intentionally killed Daniel Bradley Morgan with a deadly weapon or intentionally inflicted a wound upon Daniel Bradley Morgan with a deadly weapon that proximately caused his death, the law implies, first, that the killing was unlawful; and, second, that it was done with malice. If the killing was unlawful and was done with malice, the defendant would be guilty of second degree murder. [Emphasis added.]

I.

[1] Defendant's first assignment of error is to the italicized portion of the trial judge's instructions set out above. Defendant argues that this instruction gives the state the benefit of a conclusive presumption of malice and unlawfulness upon proof by the state of the intentional infliction of a wound with a deadly weapon that proximately caused death. Defendant relies on *Sandstrom v. Montana*, 442 U.S. 510 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); and *Morissette v. United States*, 342 U.S. 246 (1952), for the proposition that conclusive presumptions violate the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

Defendant fails to appreciate the difference between an unconstitutional conclusive presumption and a constitutionally permissible mandatory presumption. The difference between conclusive and mandatory presumptions has been stated as follows:

A presumption, or deductive device, is a legal mechanism that allows or requires the factfinder to assume the existence of a fact when proof of other facts is shown. The fact that

> must be proved is called the basic fact; the fact that may or must be assumed upon proof of the basic fact is the presumed fact. A conclusive presumption provides that upon proof of the basic fact, the presumed fact must be found and cannot be overcome by rebutting evidence. If the deductive device provides that upon proof of the basic fact the presumed fact must be found but is subject to rebuttal, the device is commonly known as a mandatory presumption.

Schmolesky, *County Court of Ulster County v. Allen and Sandstrom v. Montana: The Supreme Court Lends an Ear but Turns Its Face*, 33 Rutgers L. Rev. 261, 265 (1981) (footnotes omitted). This Court noted the difference in *State v. White*, 300 N.C. 494, 507, 268 S.E. 2d 481, 489 (1980):

> If the words of instruction describe an inference which must be drawn upon the proof of basic facts, then the presumption is *mandatory* in nature. Mandatory presumptions which conclusively prejudge the existence of an elemental issue or actually shift to defendant the burden to disprove the existence of an elemental fact violate the Due Process Clause. Mandatory presumptions which merely require defendant to come forward with *some evidence* (or take advantage of evidence already offered by the prosecution) to rebut the connection between the basic and elemental facts do not violate the Due Process Clause so long as in the presence of rebutting evidence (1) the mandatory presumption disappears, leaving only a mere permissive inference, and (2) the other requirements for permissive inferences described above are then met. Mandatory presumptions which require defendant to come forward with a quantum of evidence significantly greater than 'some evidence' may run afoul of due process by shifting the burden of persuasion to defendant. In the absence of *any* rebutting evidence, however, no issue is raised as to the nonexistence of the elemental facts and the jury may be directed to find the elemental facts if it finds the basic facts to exist beyond a reasonable doubt. [Emphasis original.]

The presumptions condemned in *Morissette* and *United States Gypsum Company* were conclusive, *i.e.*, irrebuttable. The Court in *Morissette* referred to a conclusive presumption as one

"which testimony could not overthrow." 342 U.S. at 275. In *United States Gypsum Company* the Court construed the presumption also as being irrebuttable. 438 U.S. at 446.

This Court in *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977), and subsequent cases, has consistently recognized that an instruction to the jury that the law implies malice and unlawfulness from the intentional use of a deadly weapon proximately resulting in death is not a conclusive, irrebuttable presumption. *See, e.g., State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982); *State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981); *State v. Biggs*, 292 N.C. 328, 233 S.E. 2d 512 (1977). The presumption is mandatory in that defendant, to avoid its effect, must produce some evidence raising an issue on the existence of malice and unlawfulness or rely on such evidence as the state may have adduced. In the presence of evidence raising such issues, the presumption disappears altogether, leaving only a permissible inference which the jury may accept or reject. *State v. Hankerson, supra.*

> The effect of the presumption is to impose upon the defendant the burden of going forward with or producing some evidence of a lawful reason for the killing or an absence of malice; *i.e.*, that the killing was done in self-defense or in the heat of passion upon sudden provocation. The state is not required to prove malice and unlawfulness unless there is some evidence of their nonexistence, but once such evidence is presented, the state must prove these elements beyond a reasonable doubt.

State v. Simpson, supra, 303 N.C. at 451, 279 S.E. 2d at 550. And:

> If, after the mandatory presumptions are raised, there is no evidence of a heat of passion killing on sudden provocation and no evidence that the killing was in self-defense, *Mullaney* [*v. Wilbur*, 421 U.S. 684 (1975)] permits and our law requires the jury to be instructed that defendant must be convicted of murder in the second degree. If, on the other hand, there is evidence in the case of all the elements of heat of passion on sudden provocation the mandatory presumption of malice disappears but the logical inferences from the facts proved remain in the case to be weighed against this evidence.

State v. Hankerson, supra, 288 N.C. at 651, 220 S.E. 2d at 589. The mandatory presumption "is simply a way of stating our legal rule that in the absence of evidence of mitigating or justifying factors all killings accomplished through the intentional use of a deadly weapon are deemed to be malicious and unlawful." *State v. Hankerson, supra*, 288 N.C. at 650, 220 S.E. 2d at 588.

The reason is that in our law of homicide there are at least three kinds of malice. One connotes a positive concept of express hatred, ill-will or spite, sometimes called actual, express, or particular malice. *State v. Benson*, 183 N.C. 795, 111 S.E. 869 (1922), *overruled on other grounds in State v. Phillips*, 264 N.C. 508, 516, 142 S.E. 2d 337, 342 (1965). Another kind of malice arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). Both these kinds of malice would support a conviction of murder in the second degree. There is, however, a third kind of malice which is defined as nothing more than "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Foust*, 258 N.C. 453, 458, 128 S.E. 2d 889, 893 (1962) (quoting *State v. Benson, supra*, 183 N.C. 795, 111 S.E. 869). It is this third kind of malice which is proved as a matter of law when the state proves the intentional infliction of a wound with a deadly weapon which results in death and there is no evidence of mitigation, justification or excuse.

> The critical step in the conceptual evolution of malice is MacKally's Case [9 Co. Rep. 65b, 77 Eng. Rep. 828 (1611)]. That early 17th century decision, as reported and interpreted by Coke, stands for the principle that the prosecution need not prove the element of malice to convict of murder. The judges realized that malice does not lend itself to affirmative proof; by and large, the malicious killing is defined by reference to what it is not, not by what it is. As agreed by all, one type that was not malicious was a killing provoked by a sudden quarrel. Thus, to have a triable issue of malice, one had to have a triable claim that the defendant killed in the course of a sudden quarrel.

Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880, 905 (1968). Similarly, all intentional killings are deemed, in law, to be unlawful in the absence of some evidence showing that the killing was excused or justified. *State v. Hankerson, supra.*

In the instant case the state offered evidence sufficient to permit a jury to find beyond a reasonable doubt that defendant intentionally used a deadly weapon, a pistol, to cause the death of the deceased. There is no evidence of mitigation which might reduce the crime to manslaughter nor is there any evidence which would justify or excuse the killing. Under these circumstances the state has proved murder in the second degree because malice and unlawfulness are implied in law. The trial judge properly instructed the jury accordingly. This assignment of error is overruled.

II.

Next defendant urges that the trial court erred in admitting evidence of other crimes committed by defendant.

[2] He first challenges the evidence of his assault against Robert Stone. Defendant contends this evidence was inadmissible under the general rule "that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." *State v. McClain*, 240 N.C. 171, 173, 81 S.E. 2d 364, 365 (1954). The rule, however, is subject to a number of exceptions which are set out with clarity and fully supported by applicable authorities in *McClain*, the leading case on this evidentiary point. One of these exceptions is: "Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged." *State v. McClain, supra*, at 175, 81 S.E. 2d at 367.

Under this exception evidence of the Stone assault was properly admitted against defendant. The state's principal burden was to satisfy the jury beyond a reasonable doubt that defendant was in fact Morgan's murderer. The state offered evidence of a num-

ber of circumstances tending to identify, but not definitely, defendant as Morgan's murderer. There was evidence tending to show that both Morgan and Stone were shot by the same person. Thus it was permissible for the state to show defendant shot Stone, notwithstanding this evidence tended to prove defendant guilty of a crime other than the one for which he was being tried.

III.

[3] Defendant next contends that certain references in the testimony to defendant's "arrest" for an "unrelated crime" were erroneously admitted. Deputy G. R. Brady of the Guilford County Sheriff's Department testified *without objection* that on 26 July 1980 he "arrested" defendant in the parking lot of the Americana Motor Lodge on I-85 near Greensboro. Defendant successfully objected to testimony the state sought to offer regarding a conversation between Deputy Brady and defendant. Jasper Gibson then testified for the state that he was a maintenance man at the Americana Motor Lodge on 26 July when defendant approached him to ask if he had a shovel. Gibson testified, *without objection*:

> I said yes I have several of them. I said what do you want with a shovel. He said that he wanted to go down the road and dig up some pot. He asked me to go with him. I said no but I would loan him a shovel. I would have loaned him the shovel but at that point the officer drove up and apprehended him. I'm not sure how much later it was but about an hour and a half or two hours later Mr. Reynolds came back. I asked him if he was in trouble. He said he got questioned about some sort of murder.

Thereafter Gibson testified that he had seen the gun the state contended was the murder weapon:

> I am not certain of the day or date that I saw him with it, but it was one or two weeks before he was arrested by the sheriff.
>
> MR. RAY: Objection.
>
> COURT: Overruled.
>
> EXCEPTION NO. 8
>
> I had the gun in my hand. Mr. Reynolds showed it to me. State's Exhibit is the same gun I saw with Mr. Reynolds.

That same day I also saw him with some money. I was off duty sitting in a lounge chair and Mr. Reynolds jumped in the pool. He jumped in the pool with his money. He took the money and asked me to hold it for him. I started laying it out in the sun to dry but I didn't count it. I don't know how much was there.

Defendant made no objection to the first two references to defendant's arrest. His objection to the third reference came too late and was unaccompanied by a motion to strike. Defendant, therefore, cannot complain about the introduction of this evidence on appeal. *State v. Foddrell*, 291 N.C. 546, 231 S.E. 2d 618 (1977); *State v. Hankerson, supra*, 288 N.C. 632, 220 S.E. 2d 575; *State v. Battle*, 267 N.C. 513, 520, 148 S.E. 2d 599, 604 (1966).

Furthermore, we are satisfied these passing references to defendant's arrest, presumably for the purpose of questioning him about Morgan's murder, had no effect on the outcome of the trial. The jury was never clearly apprised of the purpose of the arrest. The only reference to the reason for the arrest was the witness Gibson's statement that after defendant returned from being apprehended, "[h]e said he got questioned about some sort of murder." This undoubtedly led the jury to believe the purpose of the arrest was for questioning defendant about the very murder for which he was being tried. It is clear that at trial defendant was concerned not about the fact of this arrest but about what conversation might have taken place between the arresting officer and defendant. The damaging aspects of Gibson's testimony had nothing to do with his references to defendant's arrest. The damaging aspects were the testimony as to defendant's desire for a shovel and defendant's possession of what the state contended was the murder weapon.

Finally in this same vein defendant contends it was error for one of the state's witnesses to testify that she had seen a photograph of defendant. When asked to describe the picture she had seen she said, "I guess it was a wanted picture, a wanted poster." Defendant immediately objected; the trial court sustained the objection and instructed the jury to "disregard what she guessed it was." We conclude the court's prompt sustaining of defendant's objection and instructing the jury to disregard the evidence adequately cured any error that might have occurred. *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970).

IV.

[4] Defendant next argues the testimony of one of the state's witnesses who observed defendant several days after Morgan's murder was erroneously admitted. The witness, Louise Stafford, a desk clerk at Howard Johnson's Motel, testified that she observed defendant driving the turquoise 1966 Mustang when he checked into the motel on 28 July 1980. The following colloquy occurred:

Q. Did you pay particular attention to him?

A. Yes.

MR. RAY: Objection.

COURT: Overruled.

Q. Why did you pay particular attention to him?

EXCEPTION NO. 9

MR. RAY: Object.

COURT: Overruled.

EXCEPTION NO. 10

A. I don't know. I was just nervous. I had a funny feeling when he came in.

EXCEPTION NO. 11

MR. RAY: Object and move to strike.

COURT: Sustained. Members of the jury, disregard her funny feeling.

Again, the court's ruling on defendant's motion to strike and its instruction to the jury cured any error that might have occurred. *State v. Perry, supra*, 276 N.C. 339, 172 S.E. 2d 541.

V.

[5] Neither was there error in the admission of the testimony of one of the firearms experts. After testifying at length that various similarities existed between bullets fired from the gun taken from defendant and bullets taken from Stone and Morgan, firearms identification specialist William Albrecht of the FBI was permitted to testify as follows:

Q. And notwithstanding that you were not able to because of the condition of the gun make an absolute final conclusion that these bullets were fired by these guns, state whether or not you formed an opinion satisfactory to yourself as to whether there was anything in your analysis that would be inconsistent with these two bullets, State's Exhibit 11 and State's Exhibit No. 15, having both been fired by State's Exhibit No. 2, the gun?

MR. RAY: Object.

COURT: Overruled.

EXCEPTION NO. 23

A. No, there is nothing inconsistent that I found.

Defendant argues this testimony is so speculative and so lacking in probative value as to be inadmissible. A similar argument was made and rejected with regard to similar testimony in *State v. Ward*, 300 N.C. 150, 266 S.E. 2d 581 (1980). In *Ward* we held that it was not error for a firearms expert to testify that the fatal bullet "could have been fired" from defendant's gun, notwithstanding the expert's concession that the bullet was too deformed to make a conclusive comparison. The expert testified: "This type of bullet can be discharged from this type of firearm due to the family that it is. In other words, it is a .22 caliber bullet. And in [defendant's pistol] the bullet can be chambered or discharged with a .22 caliber cartridge which holds a .22 caliber bullet." *Id.* at 153, 266 S.E. 2d at 583. This Court said, *id.* at 153-54, 266 S.E. 2d at 583-84:

> Defendant contends that the expert's answer that the fatal bullet 'could have' been fired from defendant's gun amounted to no more than mere speculation and therefore was inadmissible under the rule in *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E. 2d 541 (1964). *Lockwood*, however, requires only that an expert's opinion that a particular cause 'might' or 'could' have produced a particular result be based upon a reasonable probability 'that the result is *capable* of proceeding from the particular cause as a scientific fact . . . .' 262 N.C. at 669, 138 S.E. 2d at 545. (Emphasis supplied.) Considered contextually, witness Cerwin's testi-

> mony was to the effect that the fatal bullet, a .22 caliber slug, was *capable* of being discharged from defendant's .22 caliber pistol *or from any other .22 caliber weapon.* Although the witness could have been allowed to express a more positive opinion, if he had had one, as to the causal relationship between defendant's gun and the bullet removed from the deceased's body, *see State v. Sparks,* 285 N.C. 631, 207 S.E. 2d 712 (1974), *death sentence vacated,* 428 U.S. 905 (1976), there was no error in the admission of his testimony that the bullet 'could have' been fired from defendant's pistol. *State v. Tilley,* 292 N.C. 132, 232 S.E. 2d 433 (1977). That the testimony might have had little probative value goes to the question of its weight and sufficiency, not its admissibility. *See generally* 1 Stansbury's North Carolina Evidence § 137 n. 97 (Brandis rev. 1973 and 1979 Supplement).

If anything, the testimony in *Ward* was less probative than the testimony offered by the firearms expert in the instant case. Here, the expert testified to similar rifling characteristics on bullets fired by defendant's gun and bullets taken from the deceased and Stone. His testimony that he found nothing in his examinations to be inconsistent with the Stone and Morgan bullets having been fired from defendant's gun in our opinion has some, if limited, probative value. This is true because the expert also testified that: "We have had some cases out of the thousands of cases I have worked on where there would be an inconsistency. We have had some cases where we could say that the bullet was definitely not fired from the gun." The evidence was thus admissible. Its weight was for the jury.

For the reasons stated we conclude that defendant has had a fair trial free from reversible error.

No error.

Justices MITCHELL and MARTIN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. DANIEL BOONE

No. 382A82

(Filed 7 December 1982)

1. **Rape and Allied Offenses § 5— first degree rape—first degree sexual offense—mental injury as serious personal injury**

Proof of the element of infliction of "serious personal injury" required for a conviction of first degree rape under G.S. 14-27.2(a)(2)b. or first degree sexual offense under G.S. 14-27.4(a)(2)b. may be met by the showing of mental injury as well as bodily injury.

2. **Rape and Allied Offenses § 5— requisites of serious personal injury**

In order to support a finding of serious personal injury because of injury to the mind or nervous system in a prosecution for first degree rape or first degree sexual offense, the State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself.

3. **Rape and Allied Offenses § 5— first degree rape—first degree sexual offense—mental injury—insufficient showing of serious personal injury**

The State's evidence was insufficient to support a jury finding that the victim of an attempted rape and a sexual offense suffered such mental or emotional injuries as a result of defendant's acts which would constitute "serious personal injury" so as to raise the degree of the crimes from second degree to first degree where there was evidence that the victim was shaking, crying and hysterical immediately after the crimes were committed and after the officers arrived on the morning of the crimes, but there was no evidence of any residual injury to the mind or nervous system of the victim after the morning of the crimes.

4. **Bills of Discovery § 6; Constitutional Law § 30— statements by witnesses—effect of discovery statute**

G.S. 15A-904(a) only restricts pretrial discovery of witnesses' statements and does not bar the discovery of a prosecuting witness's statement at trial.

5. **Bills of Discovery § 6; Constitutional Law § 30— written statement by prosecutrix—denial of motion at trial for discovery**

The trial court did not err in the denial of defendant's motion at trial that the State be required to produce a written statement taken from the prosecutrix by the sheriff for use by defense counsel in impeaching the prosecutrix where the trial court examined the statement *in camera* and ordered that the statement be placed in a sealed envelope to be available for appellate review, and an examination of the statement by the appellate court revealed that there was nothing in the statement which tended to exculpate the defendant and there was no substantial inconsistency between the statement and the testimony of the prosecutrix.

6. **Criminal Law § 5.2— voluntary use of drugs—defense of unconsciousness—instruction not required**

The trial court in a prosecution for attempted first degree rape and first degree sexual offense correctly refused to instruct the jury on the defense of unconsciousness or automatism where all the evidence tended to show that defendant's mental state was caused by his voluntary smoking of the drug characterized as "angel dust."

7. **Criminal Law § 6; Rape and Allied Offenses § 6— first degree sexual offense—attempted rape—intoxication as defense**

Since the intent to commit the crime of sexual offense is inferred from the commission of the act, intent is not an essential element of the crime of first degree sexual offense, and intoxication is thus not a defense to that crime. However, intent is an essential element of attempted rape and intoxication may be a valid defense to that crime. Therefore, the trial judge properly submitted the defense of intoxication on the charge of attempted rape and properly declined to submit that defense on the charge of first degree sexual offense.

8. **Criminal Law § 113.1— jury instructions—no undue emphasis on State's evidence**

The trial judge did not place undue emphasis upon the State's evidence but fairly summarized the evidence by the State and defendant in a case in which the State produced more witnesses than defendant. Furthermore, had there been error in the summation of the evidence, it was waived when defendant failed to call the alleged error to the court's attention before the jury retired for its deliberations. G.S. 15A-1232.

9. **Criminal Law § 102.8— failure to testify—exclusion of explanation**

The trial court properly refused to permit defense counsel to explain to the jury the reason defendant did not testify. G.S. 8-54.

10. **Criminal Law § 114.2— recapitulation of evidence—no expression of opinion**

The trial court did not express an opinion in stating in his recapitulation of the evidence that defendant had said to the prosecutrix that he intended to have sexual intercourse with her where the evidence showed that defendant had used a vulgar word which conveyed the same meaning as "sexual intercourse."

APPEAL by defendant from *Tillery, Judge*, at the 21 January 1981 Criminal Session, HALIFAX Superior Court.

Defendant was charged in separate indictments with attempted first-degree rape and first-degree sexual act. The charges were consolidated for trial.

The State offered evidence tending to show that at about 6:00 a.m. on 18 September 1981, Winona Lynch Boone was at her home in rural Halifax County with her infant child and a young

niece. Her husband had already departed for work. Defendant, her husband's uncle, came to the door and asked to use the phone. She agreed and defendant made a call and then joined Mrs. Boone in watching television. Defendant rolled a substance which Mrs. Boone recognized as "angel dust" into a cigarette paper and smoked it. Shortly thereafter he began to act in such an irrational manner that it frightened Mrs. Boone and she ran into the bathroom. However, before she could secure the door he put his arm around her neck and threw her against a washing machine. He then pulled the victim into the bedroom, threw her on the floor, twisted her breasts, struck her on the side of her head and attempted to put his hand into her vagina. He pulled aside her underclothes and inserted his tongue into her vagina. He then told Mrs. Boone that she was going to suck him and pushed her head into his crotch. He did not unzip his pants or expose himself. He continued to talk and act in a very strange manner, and after the assault, he carried Mrs. Boone into the living room and made her sit in his lap while he stroked her hair. He thereafter forced her to go to a window, broke out the window with his fist and pushed her head through the opening while exclaiming, "Help me, Jesus, help me." He then jumped through the window and left the premises. Mrs. Boone called for help and later notified police officers of these events. Defendant was later seen standing naked in a nearby yard and was apprehended by the officers in a house which was located a short distance from the Boone residence.

The State also offered testimony tending to show that at the time of the assault and in the morning hours following the incident, Winona Lynch Boone was hysterical and crying. She had bruises and swelling about her forehead. Sheriff Ward, one of the witnesses who testified as to her condition, stated that he asked Mrs. Boone if she wanted to go to a doctor and she declined. He also testified that if she had been seriously injured, he would have insisted that she go to a doctor.

Defendant did not testify but offered Sheriff Ward as a witness and attempted through him to place into evidence a written statement that he had taken from Winona Lynch Boone. The trial judge did not allow this testimony to be placed into evidence. Sheriff Ward was also examined as to other matters contained in his previous testimony.

Defendant also offered Katie L. Boone as a witness. She testified that defendant came to her home in the early morning hours of 18 September 1981. At that time he appeared to be normal, and after she had prepared a bed for him, defendant retired. She did not see him when he left her home, but he telephoned at about 6:00 a.m. and requested that she ask her husband to come and get him when he awakened. He said that he was at the home occupied by Winona Lynch Boone and her husband.

The jury returned a verdict of guilty of first-degree sexual offense and guilty of attempted first-degree rape. Defendant appealed, and on 20 June 1982, we allowed defendant's motion to bypass the Court of Appeals on the charge of attempted first-degree rape.

Rufus L. Edmisten, Attorney General, by James Peeler Smith, Assistant Attorney General, for the State.

Perry W. Martin and Donnie R. Taylor, for defendant appellant.

BRANCH, Chief Justice.

Defendant assigns as error the trial court's denial of his motion to dismiss the charges of attempted first-degree rape and first-degree sexual offense.

G.S. 14-27.2 provides in part:

> (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:
>
> * * * *
>
> b. Inflicts serious personal injury upon the victim or another person; or . . . .

G.S. 14-27.4, in pertinent part, reads as follows:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

* * * *

(2) With another person by force and against the will of the other person, and:

* * * *

b. Inflicts serious personal injury upon the victim or another person; or . . . .

It is defendant's position that the State has failed to prove beyond a reasonable doubt that defendant inflicted "serious personal injury" on the victim and therefore defendant, at most, could be convicted of attempted second-degree rape and second-degree sexual offense.

The General Assembly of 1979 redefined first-degree rape and, *inter alia*, included the language "serious personal injury" in lieu of the former language "serious bodily injury." At the same time the legislature created the crimes of first-degree and second-degree sexual offenses. One of the elements of the crime of first-degree sexual offense is the infliction of "serious personal injury" upon the victim. 1979 N.C. Sess. Laws, ch. 682.

In instant case the trial judge, in his mandate on the charge of first-degree sexual offense, instructed the jury:

> So I charge you that if you find from the evidence and beyond a reasonable doubt that on this eighteenth day of September, 1981, Daniel Boone engaged in the act of cunnilingus, as I have defined that for you, with Winona Boone; and that he did so by threatening to beat her to death if she resisted; and that this was sufficient to overcome any resistance which Winona Boone might make; and that Winona Boone did not consent; and that it was against her will; and that Daniel Boone inflicted extreme terror, fear, agitation and produced a state of hysteria to the extent that this was a serious personal injury, then this would constitute the offense and it would be your duty to return a verdict of guilty of a first degree sexual offense.

In his charge on attempted first-degree rape the trial judge did not again attempt to define "personal injury" but instead instructed as follows:

> Third, you must find beyond a reasonable doubt that he inflicted serious personal injury upon Winona Boone. I've already defined serious personal injury for you with respect to the other alleged offense, and I will not undertake to do it again simply to say to you that the same rule would apply as to what would be necessary to constitute serious personal injury.

Our examination of the entire charge leads us to conclude that the trial judge chose not to submit the case to the jury on the theory of actual "serious bodily injury" but rather limited the jury's consideration of the element of "serious personal injury" to mental or emotional injury.

This Court has not considered the meaning of the phrase "serious personal injury," and we find little guidance as to mental injury in our Court's treatment of the former language in the relevant statutes of the phrase "serious bodily injury."

The leading case defining "serious bodily injury" is in *State v. Jones*, 258 N.C. 89, 128 S.E. 2d 1 (1962), where it is stated:

> The term 'inflicts serious injury' means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. The injury must be serious but it must fall short of causing death. Further definition seems neither wise nor desirable. Whether such serious injury has been inflicted must be determined according to the particular facts of each case.

Id. at 91, 128 S.E. 2d at 3.

In *Jones* the victim was shot in the back with a shotgun resulting in hospitalization for the removal of 17 birdshot pellets. There the Court held that the evidence was sufficient to carry the case to the jury on the question of "serious bodily injury."

Other cases holding that there was sufficient evidence to go to the jury on the question of "serious bodily injury" are *State v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626 (1964) [defendant while driving his pickup truck intentionally rammed into the back of the victim's automobile causing a "whiplash" injury which required two visits to the doctor. The victim testified that he continued to have cramps and pain in his legs]; *State v. White*, 270 N.C. 78, 153

S.E. 2d 774 (1967) [knife wounds requiring 64 stitches to close the wounds]; *State v. Roberts*, 293 N.C. 1, 235 S.E. 2d 203 (1977) [female victim suffered blows from defendant which knocked five teeth out of alignment, breaking the root of one tooth. The victim was required to use a metal brace in her mouth for six weeks and a medical expert testified the teeth would in all probability have to be extracted despite his treatment]. *See also, State v. Hefner*, 199 N.C. 778, 155 S.E. 879 (1930); *State v. Roseman*, 108 N.C. 765, 12 S.E. 1039 (1891); *State v. Shelly*, 98 N.C. 673, 4 S.E. 530 (1887). All of the cases above referred to involved tangible bodily injury and continuing suffering and pain. In its consideration of these cases, our Court has declined to attempt to define the substance of the phrase "serious bodily injury" and has adopted the rule clearly enunciated in *State v. Jones, supra*, and quoted with approval in the recent case of *State v. Roberts, supra*, that, "[w]hether such serious injury has been inflicted must be determined according to the particular facts of each case."

Because of the paucity of precedent in this or other jurisdictions concerning the question presented by this assignment of error, we turn for guidance to our civil cases involving damages for mental anguish in negligence cases. In those cases, it appears to be well settled in North Carolina that recovery in civil cases may be had where coincident in time and place with the act producing the mental stress, some actual physical impact or genuine physical injury also results from the defendant's wrongful acts. *King v. Higgins*, 272 N.C. 267, 158 S.E. 2d 67 (1967); *Williamson v. Bennett*, 251 N.C. 498, 112 S.E. 2d 48 (1960). *See also, Ford v. Blythe Bros. Co.*, 242 N.C. 347, 87 S.E. 2d 879 (1955); *Kistler v. R.R.*, 171 N.C. 577, 88 S.E. 864 (1916). This Court has also recognized that there may be recovery when the physical injury "consists of a wrecked nervous system instead of wounded or lacerated limbs, as those of the former class are frequently much more painful and enduring than those of the latter." *May v. Telegraph Co.*, 157 N.C. 416, 422, 72 S.E. 1059, 1061 (1911).

[1] Our consideration of the above principles of law convinces us, and we so hold, that proof of the element of infliction of "serious personal injury" as required by G.S. 14-27.2(2)b. and G.S. 14-27.4(2)b. may be met by the showing of mental injury as well as bodily injury.

[2] It is impossible to enunciate a "bright line" rule as to when the acts of an accused cause mental upset which could support a finding of "serious personal injury." It would defy reason and common sense to say that there could be a forcible rape or forcible sexual offense which did not humiliate, terrorize and inflict some degree of mental injury upon the victim. Yet, the legislature has seen fit to create two degrees of rape and provide that one of the elements which may raise the degree of the crime from second degree to first-degree rape is the infliction of "serious personal injury." Likewise, the legislature has created two degrees of sexual offense by providing that one of the elements which may raise the degree of the crime from second-degree sexual offense to first-degree sexual offense is the infliction of "serious personal injury." We therefore believe that the legislature intended that ordinarily the mental injury inflicted must be more than the *res gestae* results present in every forcible rape and sexual offense. In order to support a jury finding of serious personal injury because of injury to the mind or nervous system, the State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself. Obviously, the question of whether there was such mental injury as to result in "serious personal injury" must be decided upon the facts of each case.

[3] In instant case there was evidence that the victim was shaking, crying and "hysterical" immediately after the crime was committed and after the officers arrived on the morning of the crime. It must be borne in mind that all of this testimony related to the morning hours of the day that the crime was committed. This record does not disclose that there was any residual injury to the mind or nervous system of the victim after the morning of the crime. The hysteria and crying described by the witnesses occurred nearly coincident with the crime and were results that one could reasonably expect to be present during and immediately after any forcible rape or sexual offense has been committed upon the female's person.

Upon the facts of this particular case, we hold that there was not sufficient evidence to support a jury finding that the victim suffered such mental or emotional injuries as a result of defendant's acts which would constitute "serious personal injury."

By his assignment of error No. 5, defendant contends that the trial judge erred by denying his motion to inspect a written statement taken from the prosecuting witness by Sheriff Ward and by not permitting defense counsel to use the statement for the purpose of impeaching the prosecuting witness.

At trial, defense counsel twice moved that the State be required to produce any written statement made by the prosecuting witness, Winona Lynch Boone, to any law enforcement officer. The court denied the motions. After defendant had completed the presentation of his evidence, the court made this statement:

> I intend to seal that statement. I want the record to reflect that I have examined it *in camera* and, in the event of any appeal of this case for any purpose, I would want the Court of Appeals to have the opportunity to view it and assess whether or not I was right or wrong in it in holding it out. I would also want the record to reflect so that the Court of Appeals would have the opportunity to rule squarely on the point that the reason I kept it out was because I felt that the statutory definition of documents did not cover a statement made by a State's witness which was made in answer to questions asked her by the investigating detective and was written in his hand and unsigned.
>
> The Court reasons that if the General Assembly had intended statements of prosecuting witnesses would be subject to discovery, it would have said so in plainer terms.

In *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977), we established rules which are pertinent to the decision of this assignment of error. There Judge Copeland, speaking for the Court, stated:

> [W]e believe 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.
>
> We do not hold as the United States Supreme Court has held, as a matter of federal criminal procedure, that a defendant is automatically entitled to such statements at trial.

Jencks v. United States, 353 U.S. 657, 1 L.Ed. 2d 1103, 77 S.Ct. 1007 (1957), a holding that Congress subsequently approved and codified in the Jencks Act, 18 U.S.C. § 3500. [Citations omitted.]

Instead, we hold that 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 127-28, 235 S.E. 2d at 842.

[4] We first note that the trial judge's reliance upon the provisions of G.S. 15A-904(a) was misplaced. That section of the General Statutes only restricts *pretrial* discovery of witnesses' statements and does not bar the discovery of a prosecuting witness's statement at trial. *State v. Hardy, supra; State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979).

The trial judge followed the dictates of the *Hardy* rule except that he failed to make appropriate findings of fact. This he should have done, but we do not find this to be a fatal omission. Obviously, the requirement that facts be found is for the benefit of the appellate courts, and although the judge's failure to find facts placed an additional burden on this Court, such failure did not adversely affect defendant.

[5] In the case before us, the witness Carolyn H. Lynch testified that she heard the prosecuting witness tell Sheriff Ward "exactly what happened." The testimony of Sheriff Ward as to what the witness told him was consistent with the prosecuting witness's testimony at trial. The testimony of Carolyn H. Lynch as to what defendant told her was consistent with the testimony of Sheriff Ward and the prosecuting witness. We have read the statement placed in the sealed envelope according to the *Hardy* requirements and find no substantial inconsistency in that statement and the witness's testimony at trial. Neither do we find any evidence which is exculpatory to defendant. It logically follows

that the trial judge must have likewise based his ruling upon the facts that the prosecuting witness's statement to Sheriff Ward was consistent with her testimony at trial and that there was nothing in the sealed statement which tended to exculpate defendant.

This assignment of error is overruled.

[6] Defendant next assigns as error the failure of the trial judge to charge on the affirmative defense of unconsciousness or automatism.

The defense of unconsciousness or automatism was first addressed by this Court in *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969). We find there a quotation from *People v. Wilson*, 66 Cal. 2d 749, 756-57, 427 P. 2d 820, 825 (1967), approving the following jury instructions:

> Where a person commits an act without being conscious thereof, such act is not criminal even though, if committed by a person who was conscious, it would be a crime.
>
> This rule of Law does not apply to a case in which the mental state of the person in question is due to insanity, mental defect or voluntary intoxication resulting from the use of drugs or intoxicating liquor, but applies only to cases of the unconsciousness of persons of sound mind as, for example, somnambulists or persons suffering from the delirium of fever, epilepsy, a blow on the head or the involuntary taking of drugs or intoxicating liquor, and other cases in which there is no functioning of the conscious mind and the person's acts are controlled solely by the subconscious mind.
>
> When the evidence shows that a person acted as if he was conscious, the law presumes that he then was conscious. The presumption, however, is disputable and may be overcome or questioned by evidence to the contrary.

Id. at 118, 165 S.E. 2d at 335-36. In *Mercer*, the Court granted a new trial because of the trial judge's failure to charge on the defense of unconsciousness and for other errors. We here note that there was no evidence that the defendant Mercer was under the influence of intoxicating beverages or narcotics at the time of the alleged offenses. However, in *State v. Williams*, 296 N.C. 693,

252 S.E. 2d 739 (1979), the defendant was charged, *inter alia*, with murder. One of his defenses was the defense of unconsciousness. The evidence disclosed that the defendant had consumed large amounts of intoxicating beverages on the night preceding the murder and on the day the crime was committed. He testified that just before the crime was committed his mind "went blank." Justice Britt, writing for the Court, quoted the above stated language from *Mercer* and concluded,

> "In view of the overwhelming evidence that defendant's mental state at the time of the commission of the offenses in question was brought about by his excessive consumption of intoxicants, we hold that the trial court did not err in refusing to instruct the jury on the defense of unconsciousness."

Id. at 701, 252 S.E. 2d at 744.

Here, all the evidence tends to show that defendant's mental state was caused by the voluntary smoking of the drug characterized as "angel dust."

We therefore hold that the trial judge correctly refused to instruct on the defense of unconsciousness.

[7] The defendant further contends that the jury was confused because the trial judge instructed on intoxication as a defense to the charge of attempt to commit rape and refused to give a like instruction on the charge of first-degree sexual offense.

Intoxication is not a defense to the crime of rape. The intent to commit the crime of rape is inferred from the commission of the act. *State v. Hairston*, 222 N.C. 455, 23 S.E. 2d 885 (1943). This Court has not decided whether intent is an essential element of the crime of sexual offense. Examination of the provisions of G.S. 14-27.2 (rape) and the provisions of G.S. 14-27.4 (sexual offense) discloses that the only difference in the language setting forth the respective crimes is the description of the prohibited sexual conduct. We therefore conclude that since the elements of the crime of rape and the crime of sexual offense are so nearly identical in statutory language and in the nature of the crimes, that the intent to commit the crime of sexual offense is inferred from the commission of the act. Since intent is not an essential element of the crime of first-degree sexual offense, intoxication is not a defense of that crime. Therefore the trial judge properly declined

to charge on intoxication in his instruction on first-degree sexual offense.

We turn to the question of whether the trial judge was correct in charging on intoxication when he instructed on the crime of attempted rape.

G.S. 14-27.6 was enacted to replace the former crime of assault with intent to commit rape. In order to prove the offense set forth in G.S. 14-27.6, the State must prove that an accused had the intent to commit the crime and committed an act that goes beyond mere preparation, but falls short of actual commission of the offense. *State v. Surles*, 230 N.C. 272, 52 S.E. 2d 880 (1949); *State v. Hoover*, 14 N.C. App. 154, 187 S.E. 2d 453, *cert. denied*, 281 N.C. 316, 188 S.E. 2d 899 (1972). *See also, Survey of Developments in North Carolina Law*, 1979, 58 N.C. L. Rev. 1181, 1394-1402 (1980). Intent is an essential element of attempted rape and intoxication may be a valid defense to that crime. In summary, we hold that the trial judge properly submitted the defense of intoxication on the charge of attempted rape and properly declined to submit that defense as to the charge of first-degree sexual offense.

[8] By assignment of error No. 3, defendant contends that the trial judge expressed an opinion prejudicial to defendant in violation of G.S. 15A-1232.

G.S. 15A-1232 provides:

> *Jury instructions; explanation of law; opinion prohibited.* —In instructing the jury, the judge must declare and explain the law arising on the evidence. He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence. He must not express an opinion whether a fact has been proved.

It is well settled in this jurisdiction that a person charged with a crime is entitled to a trial by an impartial judge, and any expression or intimation of an opinion by the judge during the course of the trial which prejudices the jury against a defendant warrants a new trial. *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Carter*, 268 N.C. 648, 151 S.E. 2d 602 (1966). Defendant argues that the trial judge placed undue emphasis upon

the State's evidence by going into more detail in summarizing the State's evidence than when he summarized defendant's evidence. We note that the State produced more witnesses than defendant, and in our opinion the trial judge fairly summarized the evidence by the State and defendant. Further, had there been error in the summation of the evidence, it was waived when defendant failed to call the alleged error to the court's attention before the jury retired for its deliberations. *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978).

[9] Defendant argues that the trial judge erred by sustaining the district attorney's objection to defense counsel's attempt to explain to the jury the reason defendant did not testify. We find no merit in this argument.

G.S. 8-54, in part, provides:

> In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him.

In *State v. Bovender*, 233 N.C. 683, 65 S.E. 2d 323 (1951), this Court, in interpreting G.S. 8-54, stated:

> The decisions of this Court referring to this statute seem to have interpreted its meaning as denying the right of counsel to comment on the failure of a defendant to testify. The reason for the rule is that extended comment from the court or from counsel for the state or defendant would tend to nullify the declared policy of the law that the failure of one charged with crime to testify in his own behalf should not create a presumption against him or be regarded as a circumstance indicative of guilt or unduly accentuate the significance of his silence. *To permit counsel for a defendant to comment upon or offer explanation of the defendant's failure to testify would open the door for the prosecution and create a situation the statute was intended to prevent.* (Emphasis added.)

Id. at 689-90, 65 S.E. 2d at 329.

[10] Defendant further contends that the trial judge in his summation intimated that an element of the crime had been proven when he stated in his recapitulation of the evidence that defendant had said to the prosecuting witness that he intended to have sexual intercourse with her. Defendant avers that there was no evidence at trial that he made such statement. The record shows that defendant, in effect, said just that. The trial judge merely used the term "sexual intercourse" instead of a vulgar, four-letter word used by defendant which conveys the same meaning. This assignment of error is overruled.

Finally, defendant assigns as error the denial of his motions for appropriate relief. These motions appear to be merely formal and relate to matters heretofore discussed and decided. Further discussion is not merited.

In Case No. 81CRS11684, attempt to commit first-degree rape, the jury found that defendant (1) attempted to engage in vaginal intercourse with Winona Lynch Boone, (2) by force and against her will, and (3) that defendant inflicted serious personal injuries upon Winona Lynch Boone. Such findings, if supported by the evidence, would support a verdict of attempted first-degree rape. There was sufficient evidence to support jury findings as to the elements (1) and (2), but there was not sufficient evidence to support a jury finding of element (3). Thus, the evidence supports and the jury, in effect, found defendant to be guilty of the lesser-included offense of attempt to commit second-degree rape, a Class F felony.

In Case No. 81CRS11686, defendant was charged with a first-degree sexual offense and the jury found that defendant (1) engaged in a sexual act with Winona Lynch Boone, (2) by force and against her will, and (3) inflicted serious personal injury upon Winona Lynch Boone. Such findings, if supported by the evidence, would support a verdict of first-degree sexual offense. There was sufficient evidence to support jury findings of the elements (1) and (2), but there was not sufficient evidence to support a jury finding of element (3). Thus, the evidence supports and the jury, in effect, found defendant to be guilty of second-degree sexual offense, a Class D felony.

The judgments in Cases Nos. 81CRS11684 and 81CRS11686 entered in the Superior Court of Halifax County are vacated, and

this cause is remanded to that court where with defendant and his counsel present, defendant will be sentenced in accordance with this opinion.

Judgments vacated and cases remanded for resentencing.

STATE OF NORTH CAROLINA v. CLEASTER WOODS

No. 229A82

(Filed 7 December 1982)

1. **Criminal Law § 10.2— accessory before the fact of murder—sufficiency of evidence**

There was substantial evidence of each of the three elements of accessory before the fact of murder where (1) there was testimony that defendant agreed to pay the principal $30,000.00 out of the insurance proceeds on her husband's life if the principal would kill defendant's husband, (2) the jury could reasonably infer that defendant was not present when the principal shot her husband, and (3) the principal admitted that he was the one who shot defendant's husband after lying in wait for him. Defendant's life sentence was proper in that the Legislature abolished the difference in guilt and sentencing treatment between the principal to the felony and an accessory by repealing G.S. 14-5, G.S. 14-5.1 and G.S. 14-6 and replacing them with G.S. 14-5.2.

2. **Conspiracy § 6— conspiring to commit murder—sufficiency of the evidence**

The evidence was sufficient to convict defendant of conspiring to commit murder where the State's witness testified to the effect that he agreed with defendant that for $10,000.00 in insurance proceeds he would find a "hit man" to kill defendant's husband.

3. **Criminal Law § 163— failure to object to jury charge—waiver of objection**

Under Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure, defendant may not assign the trial court's failure to instruct the jury on the defense of abandonment of the criminal enterprise as error where defendant failed to object thereto before the jury retired.

4. **Criminal Law § 146.4— failure to raise constitutional question at trial level—inability to raise question on appeal**

Because defendant failed to ask the trial court to pass upon the constitutionality of G.S. 15A-626, the Supreme Court declined to review the constitutionality of the statute on appeal.

5. **Homicide § 12— no constitutional right to indictment stating aggravating circumstances**

The United States Constitution does not require that a first-degree murder indictment give allegations of aggravating circumstances to fulfill constitutional demands of pretrial notice.

6. **Criminal Law § 98.2— denial of motion to sequester witnesses—no abuse of discretion**

Defendant made no showing that the trial court abused its discretion in denying her motion to sequester the witnesses, and the Court perceived none.

7. **Criminal Law § 88— cross-examination limited—no abuse of discretion**

Defendant failed to show that the verdict was improperly influenced by the trial court's limiting of defendant's cross-examination of the State's chief witness.

8. **Criminal Law § 102.3— closing argument by State—objection to, and cure of, impropriety**

Where defense counsel objected to each of two improper arguments to the jury, and in both instances, the trial court sustained defense counsel's objections and immediately instructed the jury to disregard the improper portion of the State's closing argument, the improprieties were cured and possible prejudice to the defendant was avoided.

9. **Constitutional Law § 28— claim that witness recanted testimony unfounded**

There was no merit to defendant's claim that her murder conviction was obtained in violation of her rights under the Fourteenth Amendment to the United States Constitution because the State's principal witness recanted his testimony which helped convict defendant since the affidavit submitted to support the claim showed that the witness was not recanting his testimony at all.

10. **Constitutional Law § 30— informing defendant of charge reduction arrangements made with State's witness**

The record did not support defendant's claim that her lawyer was not provided with information about various concessions the prosecutor made to the State's chief witness in exchange for his testimony. Even if defendant did not receive the information in written form within a reasonable time before trial, her only remedy under G.S. 15A-1054(c) was to move for a recess, not suppression of the testimony.

11. **Criminal Law § 138— conspiracy to commit murder—sentence imposed exceeding maximum**

Under G.S. 14-1.1(b) the trial court erred in giving defendant a 10-year prison sentence for conspiracy to commit murder since the maximum sentence which can be imposed is 3 years imprisonment.

DEFENDANT Cleaster Woods appeals directly to this Court as a matter of right under G.S. 7A-27(a) (1981) from the judgment of *Brown, Judge,* entered 2 December 1981, which imposed a life sentence. Defendant was tried during the 21 November 1981 Session of Superior Court, CRAVEN County. The life sentence was imposed after a jury found defendant guilty of first-degree murder. Defendant was also convicted of conspiring to commit murder, a felony, and given a ten-year prison term on that conviction. On 24

May 1982 we allowed defendant's motion under G.S. 7A-31(b) (1981) to bypass the Court of Appeals on the conspiracy to commit murder conviction.

Defendant raises a potpourri of contentions in this appeal. Some of the issues we address below are: (1) the sufficiency of the evidence supporting defendant's convictions; (2) the trial court's omission of a jury instruction on the defense of abandonment; (3) the constitutionality of G.S. 15A-626 (1978); (4) the sufficiency of the indictments; (5) the trial court's denial of a motion to sequester the witnesses; and (6) the trial court's limiting of cross-examination of the State's principal witness.

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

Reginald L. Frazier and Bowen C. Tatum, Jr., for defendant.

CARLTON, Justice.

I.

Defendant, Cleaster Woods, was indicted for the murder of her husband, Leinster Woods, and for conspiring with Danny Lee Nichols to kill Leinster Woods. At the guilt-innocence phase of the trial Nichols, the State's chief witness, testified as follows under a plea arrangement:

Nichols and defendant were lovers. About two weeks before defendant's husband was killed, defendant talked to Nichols about a life insurance policy which would pay $104,000 upon her husband's death. Nichols stated that defendant offered him a portion of the insurance proceeds—$10,000—to find someone who would "rig up" her husband's car so that he would be blown up. When Nichols was unable to find anyone to "rig up" the car, defendant suggested Nichols find a "hit man" who would shoot her husband while he was driving. Again, she offered Nichols $10,000 in life insurance proceeds for his help. When Nichols was unable to find a "hit man," defendant proposed a third plan. She asked Nichols to do the shooting himself. Her scheme, according to Nichols, was as follows:

After Leinster Woods had fastened all the locks on the door and gone to bed, defendant would unlock all the locks on the door

except one so that it would be easier for Nichols to enter the house and kill defendant's husband. Nichols stated defendant then would "grab her kid and wait five or ten minutes after we get out of sight and then holler 'help, someone killed my husband.'"

In proposing this plan, defendant offered Nichols $30,000 in insurance proceeds and told Nichols' friend, Craig Davis, she would give him $5,000 if he would accompany Nichols when he carried out the plan.

Nichols and Davis went to defendant's home on Tuesday night, 25 August 1981. Nichols stated that while trying to find something with which to cut a screen, "the door slammed and the car took off." Nichols, not knowing who drove off in Leinster Woods' car, left the scene with Davis. Nichols returned to defendant's house early the next morning with Davis, waited beside the house, and shot defendant's husband when he walked out the front door to go to work. The State and defendant stipulated that Leinster Woods died on 26 August 1981 as a result of a gunshot wound through the head.

One witness testified that defendant had said that "sometimes that man [Leinster Woods] makes me so mad I could kill him." Another witness testified that on the day before Leinster Woods was shot defendant spoke about having had a fight with her husband and that Leinster Woods "was good as dead." She had remarked to one other witness that she would share the proceeds from a large insurance policy with him if he would kill her husband.

Defendant did not offer any evidence.

The jury found defendant guilty of both charges. A sentencing hearing was held and the jury found that the aggravating circumstance—that the murder was committed for monetary gain—outweighed the mitigating circumstances. However, it also found that the aggravating factor was not sufficiently substantial to call for imposition of the death penalty and recommended a sentence of life imprisonment. Defendant was sentenced as noted above.

II.

Defendant presents several issues in this appeal. We will discuss each briefly in turn.

A.

[1] We address first defendant's contention that the evidence was not sufficient to support convictions of first-degree murder and conspiracy to commit murder, and, therefore, that the trial judge erred in submitting the case to the jury.

In determining whether the evidence is sufficient to go to the jury, the trial court is to ascertain whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the evidence is sufficient, as a matter of law, to go to the jury. *State v. Earnhardt*, 307 N.C. 62, 63, --- S.E. 2d ---, --- (1982); *State v. Powell*, 299 N.C. 95, 98, 261 S.E. 2d 114, 117 (1980); *State v. Roseman*, 279 N.C. 573, 580, 184 S.E. 2d 289, 294 (1971). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E. 2d 164, 169 (1980). The trial court is to determine whether the evidence allows a "reasonable inference" to be drawn as to the defendant's guilt. *State v. Thomas*, 296 N.C. 236, 244-45, 250 S.E. 2d 204, 208-09 (1978).

In the case at bar, defendant was tried for first-degree murder. Although Nichols' testimony, as outlined above, indicates defendant solicited Nichols' assistance in carrying out the killing, defendant was not present when her husband was shot. Under these circumstances, a defendant is considered an accessory before the fact of murder, not a principal in the crime. The guilt and sentencing distinctions formerly made between an accessory before the fact and a principal in the felony have been abolished, however. G.S. 14-5.2 (1981). In responding to this Court's holding in *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980), which had recognized those distinctions, the General Assembly enacted G.S. 14-5.2 (1981). That statute provides: "Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony." After enacting the new statute, the legislature repealed G.S. 14-5, G.S. 14-5.1 and G.S. 14-6, the statutes which previously had applied to those charged as accessories before the fact of

felony.[1] The language of G.S. 14-5.2 indicates that the essential elements of the offense have not changed. The legislature merely abolished the difference in guilt and sentencing treatment between the principal to the felony and an accessory in repealing G.S. 14-5, G.S. 14-5.1 and G.S. 14-6 and replacing them with G.S. 14-5.2. Therefore, cases decided under the repealed statutes delineating the essential elements of accessory before the fact of felony are applicable to cases brought under the new statute. The elements of accessory before the fact of felony are: (1) that defendant counseled, procured or commanded the principal to commit the offense; (2) that defendant was not present when the principal committed the offense; and (3) that the principal committed the offense. *State v. Sauls*, 291 N.C. 253, 256-57, 230 S.E. 2d 390, 392 (1976), *cert. denied*, 431 U.S. 916, 97 S.Ct. 2178, 53 L.Ed. 2d 226 (1977).

In this case, there was substantial evidence of each of the three elements. The State's chief witness, Danny Nichols, testified to the first element: Cleaster Woods, defendant, agreed to pay Nichols, the principal, $30,000 out of the insurance proceeds if Nichols would kill defendant's husband. The jury could reasonably infer the second element: defendant was not present when Nichols shot her husband because Nichols did not mention she was there. Finally, Nichols testified to the third element: he admitted he was the principal in this first-degree murder—the one who shot the victim after lying in wait for him. Therefore, defendant was not a principal. The State's evidence, thus, presents substantial evidence of each of the essential elements of accessory before the fact of murder. The trial court also is to determine whether there was substantial evidence of defendant's being the perpetrator of the offense. Nichols testified that he and defendant were lovers, and that she was the person who offered him a portion of the proceeds from the insurance policy if he killed her husband. In so doing Nichols presented sufficient evidence of defendant's identity as the perpetrator of the offense.

1. The General Assembly repealed G.S. 14-5, G.S. 14-5.1 and G.S. 14-6 by Act of 25 June 1981, ch. 686, § 2, 1981 N.C. Sess. Laws 984. The legislature enacted G.S. 14-5.2 by Act of 25 June 1981, ch. 686, § 1, 1981 N.C. Sess. Laws 984.

B.

[2] We also find that the evidence of conspiracy to commit murder was sufficient to go to the jury. The essential elements of that crime are: (1) an agreement between two or more people; (2) to do an unlawful act, specifically, to murder another. See *State v. Abernathy*, 295 N.C. 147, 164, 244 S.E. 2d 373, 384 (1978).

Abundant evidence of both elements of conspiracy to commit murder are found throughout the record. One example will suffice. On direct examination Nichols testified to the effect that he agreed with defendant that for $10,000 in insurance proceeds he would find a "hit man" to kill defendant's husband.

The trial court properly allowed the jury to consider defendant's guilt of both crimes.

C.

[3] Defendant also contends that the trial court erred in failing to instruct the jury on the defense of abandonment of the criminal enterprise. Under Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure, 303 N.C. 713, 716-17 (1981) (amending 287 N.C. 669, 699 (1975)), defendant may not assign this omission as error. The rule states that "[n]o party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection . . . ." The rule is applicable to all cases tried on or after 1 October 1981. Defendant's trial began on 30 November 1981. She is barred, therefore, from claiming this omission as error. Even if we were to assume that Rule 10(b)(2) did not apply, a close examination of the record does not disclose any evidence that defendant abandoned the enterprise.

D.

[4] Defendant claims that her convictions are based on invalid indictments because G.S. 15A-626 (1978), the statute "placing restrictions on any independent powers the grand jury may possess," Official Commentary to G.S. 15A-626 (1978), is unconstitutional. In *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547 (1980), this Court reiterated the well-established rule in this jurisdiction that "the

constitutionality of a statute will not be reviewed in the appellate court unless it was raised and passed upon in the proceedings below . . . ." *Id.* at 428, 269 S.E. 2d at 577; *City of Durham v. Manson*, 285 N.C. 741, 743, 208 S.E. 2d 662, 664 (1974). This is in accord with decisions of the United States Supreme Court. *Irvine v. California*, 347 U.S. 128, 129-30, 74 S.Ct. 381, 98 L.Ed. 561, 567 (1954); *Edelman v. California*, 344 U.S. 357, 358-59, 73 S.Ct. 293, 294-95, 97 L.Ed. 387, 390-91 (1953). Defendant raises this issue for the first time on appeal. Because she failed to ask the trial court to pass upon this question, we must decline to do so now.

E.

[5] Defendant also claims that the murder indictment was insufficient in a constitutional sense because it failed to give notice that the first-degree murder charge carried with it the possibility that she might receive the death penalty upon conviction. Defendant claims a "constitutionally adequate indictment requires allegations of aggravating circumstances to fulfill constitutional demands of pretrial notice . . . ." In *State v. Taylor*, 304 N.C. 249, 256-58, 283 S.E. 2d 761, 767-68 (1981), we held that the United States Constitution does not require such notice be given. These assignments of error are overruled.

F.

[6] Defendant contends the trial court's denial of her motion to sequester the witnesses was reversible error. We disagree. The rule in this State is that a motion to sequester witnesses is addressed to the discretion of the trial court, and the court's denial of the motion will not be disturbed in the absence of a showing of abuse. *E.g., State v. Tatum*, 291 N.C. 73, 85, 229 S.E. 2d 562, 569 (1976); *State v. Davis*, 290 N.C. 511, 534, 227 S.E. 2d 97, 111 (1976). Defendant's sole reason for the request was "because of the seriousness and gravity of the case." Defendant made absolutely no showing that the trial court abused its discretion and we perceive none. The trial court's ruling on the motion is without error.

G.

[7] Defendant contends that the trial court's limiting of defendant's cross-examination of the State's chief witness, Danny Nichols, was reversible error. The long-standing rule in this

jurisdiction is that the scope of cross-examination is largely within the discretion of the trial judge, and his rulings thereon will not be held in error in the absence of a showing that the verdict was improperly influenced by the limited scope of the cross-examination. *E.g., State v. McPherson*, 276 N.C. 482, 487, 172 S.E. 2d 50, 54 (1970); *State v. Edwards*, 228 N.C. 153, 154, 44 S.E. 2d 725, 726 (1947). Defendant makes absolutely no showing that the verdict was improperly influenced by any of the trial court's curtailments of her cross-examination of Nichols. Indeed, the record indicates that such a showing would have been impossible. For example, defendant claims she was prejudiced when not allowed to continue a line of questioning in which defense counsel asked Nichols if he had seen or talked with any member of defendant's family since his own arrest. Nichols stated that he had seen defendant's son once. The exchange between Nichols and defense counsel went as follows:

Q: And did you speak with him [defendant's son]?

A: I spoke with him.

Q: And what did you say, if anything?

A: I just told him everything would be all right.

Q: Did you say "Hello, how are you?"

[State]: Well, objection.

THE COURT: Sustained.

Q: What did you say?

THE COURT: Sustained.

A: I said everything is going to be all right.

THE COURT: I sustained the objection.

DEFENDANT'S EXCEPTION NUMBER 9.

As shown, the line of questioning itself was irrelevant, and the question to which the State objected was irrelevant to the line of questioning. Indeed, Nichols answered the question anyway. We fail to see how defendant was harmed. Suffice it to say that the other exceptions made on this ground are as meritless. We find no error here.

H.

[8] Defendant contends that the prosecutor's statements made in his closing argument during the guilt phase of the trial constituted prejudicial error. Where, immediately upon a defendant's objection to an improper remark made by the prosecutor in his closing argument, the trial court instructs the jury to disregard the offending statement, the impropriety is cured. *E.g., State v. Sanders*, 303 N.C. 608, 617-18, 281 S.E. 2d 7, 12-13, *cert. denied*, --- U.S. ---, 102 S.Ct. 523, 70 L.Ed. 2d 392 (1981); *State v. Martin*, 294 N.C. 253, 260, 240 S.E. 2d 415, 420-21 (1978).

In this case the State made the following improper arguments to the jury: ". . . I think you should also know that you should convict that woman of first degree murder and conspiracy and should she be sentenced to a sentence of life imprisonment, she won't spend the rest of her life in a _____." The prosecutor also stated: "You know, when is the last time anybody went to the gas chamber in this state? Twenty years. People in this state don't believe you go to the gas chamber on murder and maybe you don't." Defense counsel objected to each argument. In both instances the trial court sustained defense counsel's objections and immediately instructed the jury to disregard the improper portion of the State's closing argument. Thus, the improprieties were cured and possible prejudice to defendant was avoided with each instruction to disregard the improper statement.

III.

This Court docketed defendant's appeal on 27 April 1982. Since that time, defendant has filed in this Court three motions for appropriate relief. We dispose of them here. G.S. 15A-1418 (1978). Since the motions were made more than ten days after entry of judgment, grounds for relief are limited to those listed in G.S. 15A-1415 (Cum. Supp. 1981).

A.

[9] In her first motion for appropriate relief, filed 21 May 1982, defendant claims that her murder conviction was obtained in violation of her rights under the fourteenth amendment to the United States Constitution because the State's principal witness,

Danny Nichols, has recanted the testimony which helped convict defendant. This claim is unfounded. The affidavit submitted to support this claim, a copy of Nichols' petition for relief, shows that Nichols was not recanting his testimony; he was merely claiming (1) that his guilty plea was coerced because he was confronted with the possibility that he might be tried for first-degree murder and perhaps sentenced to death upon conviction; and (2) that he was denied effective assistance of counsel because his lawyer did not get him a better sentence. Nichols' claims do not amount to a recantation of his testimony at trial. Defendant's claim is, therefore, without merit.

B.

[10] Defendant's second motion, filed 25 June 1982, attacks the validity of her murder conviction, claiming that her lawyer was not provided with information about various concessions the prosecutor made to Danny Nichols in exchange for his testimony. G.S. 15A-1054 (1978). The record does not support this claim. The trial transcript shows defense counsel was informed at some time before trial of the charge reduction arrangements made with Nichols. Indeed, defense counsel stated before trial he knew of Nichols' plea of guilty to second-degree murder. If defendant did not receive the information in written form within a reasonable time before trial, her only remedy under G.S. 15A-1054(c) was to move for a recess, not suppression of the testimony. *State v. Lester*, 294 N.C. 220, 228-29, 240 S.E. 2d 391, 398-99 (1978).

Defendant also submits with this second motion several letters Nichols wrote to defendant which we find not relevant to the case at all.

C.

Defendant's last motion, filed 19 October 1982, repeats the claims made in the first two motions and adds the contention that based on our decision in *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980), she cannot be convicted of first-degree murder under G.S. 14-5.1 because she was only an accessory before the fact. This contention is meritless because defendant was tried after the effective date of G.S. 14-5.2, the statute which replaced G.S. 14-5, G.S. 14-5.1 and G.S. 14-6, and abolished the guilt and punishment distinction, recognized in *Small*, between an accessory before the

fact to a felony and the principal in a felony. G.S. 14-5.2 is applicable to all offenses committed on or after 1 July 1981. Defendant's husband was murdered 26 August 1981.

IV.

[11] In reviewing the record, we note that defendant received a ten-year prison sentence for conspiracy to commit murder. Although conspiracy to commit a felony is itself a felony, *State v. Abernethy*, 220 N.C. 226, 231-32, 17 S.E. 2d 25, 28 (1941), it is not assigned by statute to any particular felony class. Therefore, under G.S. 14-1.1(b) (1981), it is a Class J felony. As such, the maximum sentence which can be imposed is three years' imprisonment, not ten. Therefore, we remand the conspiracy conviction to the superior court for resentencing.

The order committing defendant to ten years in prison for conspiracy to commit murder is

Vacated.

The case is

Remanded for resentencing on conspiracy charge.

In the trial of this defendant on both charges we find

No error.

STATE OF NORTH CAROLINA v. ALFRED BURNS

No. 226A82

(Filed 7 December 1982)

1. Criminal Law § 80.3— prior statement by victim—use of different words—admissibility for corroboration

In a prosecution of defendant upon two counts of first degree sexual offense with his stepchildren, a doctor's testimony relating one child's description to her of the emission from defendant during ejaculation was admissible to corroborate the child's testimony at trial although the words used by the child in his description to the doctor were not identical to the words he used during his testimony at trial.

2. **Criminal Law § 89.3— prior statement by victim—admissibility for corroboration**

Testimony by a social worker that a child had said that defendant "had not wanted [him] to tell anybody" was admissible to corroborate the child's testimony that defendant "told us not to [talk to anyone] because they would put him in jail."

3. **Criminal Law § 89.2— corroborative testimony**

It is not necessary in every case that evidence tend to prove the precise facts brought out in a witness's testimony before that evidence may be deemed corroborative of such testimony and properly admissible.

4. **Criminal Law § 89.2— prior statements by victims—admissibility for corroboration**

In a prosecution of defendant upon two counts of first degree sexual offense with his two stepchildren, testimony by a doctor, a teacher and a social worker concerning prior statements made to them by the children was admissible to corroborate testimony of the children indicating a continuing course of sexual abuse of both of them by defendant, although the prior statements did not tend to prove the precise narrow facts brought out in the children's testimony during the trial.

5. **Rape and Allied Offenses § 4.3— sexual offense—untruthfulness of child victim on prior occasion—no probative value—exclusion as harmless error**

In a prosecution of defendant for first degree sexual offense with his two stepchildren, even if testimony concerning the female victim's conduct with another child some four or five years prior to defendant's acts when the victim was only four or five years old tended to show untruthfulness on her part and was not inadmissible under the rape victim shield statute, G.S. 8-56, such testimony would have minimal probative value on the question of her truthfulness at defendant's trial. Assuming arguendo that such testimony had sufficient probative value to be competent, its exclusion was harmless beyond a reasonable doubt in light of the strong eyewitness testimony of the children and the corroborating medical evidence.

APPEAL by the defendant from Judgment of *Albright, Judge*, entered at the 14 December 1981 Criminal Session of Superior Court, ROCKINGHAM County.

The defendant was tried upon two indictments, proper in form, charging him with separate counts of first degree sexual offense. The defendant having pled not guilty, the jury found him guilty of both offenses. From the trial court's judgments sentencing him to life imprisonment in each case, the defendant appealed to the Supreme Court as a matter of right pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Nonnie F. Midgette, Assistant Attorney General for the State.

Douglas R. Hux, Attorney for defendant-appellant.

MITCHELL, Justice.

At trial the State called various witnesses whose testimony tended to show *inter alia* the following:

Malinda Lea Hardison lived with her mother, her brother Allen and the defendant, her stepfather Alfred Burns, during the summer of 1981. At that time she was nine years old. She testified that during that summer the defendant Alfred Burns required her at various times to commit fellatio and masturbation upon him and that he committed acts of cunnilingus, sexual intercourse and sodomy upon her. These acts took place primarily in a hay barn behind their house in Rockingham County. Some of the acts took place in the house, but Malinda could not recall in which rooms of the house they took place. Malinda also testified that she had seen the defendant make her younger brother Allen perform masturbation upon him. She further testified that sometimes her brother Allen was present when the defendant performed the various sexual acts with or upon her and sometimes she was alone with the defendant on these occasions.

Allen Hardison testified that he was six years old. During the summer of 1981 he had lived with his sister Malinda, his mother and the defendant Alfred Burns. Allen testified that, on more than one occasion during that summer, the defendant Alfred Burns made Allen perform fellatio upon him. Allen also testified that he had seen the defendant perform cunnilingus, sexual intercourse and sodomy upon his sister Malinda during that period of time as well as make her perform fellatio.

Mary Burns testified that she was the mother of Malinda and Allen Hardison and the wife of the defendant Alfred Burns. During the summer of 1981 she was employed outside the home during the evenings and usually returned home at approximately 7:15 a.m. She would then clean the house and go to bed around 11:00 a.m. The defendant usually kept the children while she was sleeping or at work. On the day the defendant was arrested for the crimes charged in the present case, Mary Burns asked the chil-

dren if Alfred had ever performed any sexual act with them or made them perform such acts upon him. Each child at first denied that such acts had occurred but later stated that they had and described the acts in detail.

Sue Aldridge testified that she was a second and third grade combination teacher in the Rockingham County Schools. Malinda was assigned to her third grade class. Malinda seemed very nervous and at first Aldridge attributed this to her being a new student. The nervousness continued, however, and Malinda began to complain that she was sick. Aldridge would take Malinda to the bathroom, where Malinda would sit on the floor with her head over the commode and say that she was sick. This continued for several days with the child continuing to exhibit nervousness. Malinda came to Aldridge on 21 September 1981 and stated that she had to talk to her. Malinda then told Aldridge that "her stepfather was trying to get her to play with him and she didn't want to." After further conversation with Malinda, Aldridge informed the principal who called the Rockingham Department of Social Services. Amy Tuttle and Wanda Dickerson from the Department of Social Services came to the school that day. Aldridge told them about the situation and introduced Malinda to them and left her with them. She waited for Malinda and later returned with her to the classroom. As the days went on after 21 September 1981, Malinda was much calmer, worked harder and seemed much happier.

Amy Tuttle testified that she worked in protective service for children at the Rockingham Department of Social Services. In that capacity she investigated child abuse and rape cases and negligence and abuse cases against adults. She had been so employed for six years. She talked with Malinda in private for about an hour on 21 September 1981. Malinda described to Tuttle various sexual acts which she said the defendant had performed with and upon her and her brother Allen and sexual acts the defendant had made the children perform upon him in the barn behind their house.

Tuttle further testified that on 28 September 1981 Mary Burns came into Tuttle's office with six-year old Allen. During Tuttle's interview with him, Allen described various sexual acts the defendant had required Allen and Malinda to perform upon

him and sexual acts the defendant had performed with and upon Malinda in Allen's presence.

Brenda Maddox testified that she was a marriage and family therapist in Reidsville. She had seen Malinda six times for counseling sessions of about forty-five minutes each. She had also seen Allen on two occasions. Each child described to Maddox certain of the sexual acts in question.

Dr. J.A.N. German, a pediatrician, was stipulated to be a medical expert. She testified that she had examined Malinda Hardison on 21 September 1981. She said that on that date Malinda told her that on occasion the defendant would take Malinda from her bed to his bed and "fondle her and press with his penis in the vaginal area." Malinda complained to Dr. German of pain during urination and rectal pain of approximately one week's duration. Malinda was hesitant about discussing what had happened.

Dr. German testified that her physical examination of Malinda revealed bruises on Malinda's vagina and that the vaginal opening was larger than would be expected in a child of her age. Dr. German testified that she determined this by inspection with a speculum-tracheoscope about five centimeters round. She testified that such examinations were usually done under anesthesia, but that the instrument went into the child's vaginal opening without any problem which was not normal for a child of Malinda's age. Her vaginal examination of Malinda revealed no hymen. She testified that when the hymen is gone in children of Malinda's age tears or tags are usually seen on either side of the vagina. These tags disappear as the person grows older. There were none in Malinda. Dr. German's examination also revealed bruising of tissue and marked tenderness to pressure in Malinda's rectal area. When Dr. German examined Malinda again on 6 October 1981 none of these findings were present except the larger than usual vaginal opening. Dr. German formed the opinion that Malinda's vagina had been penetrated by a foreign object. She recommended counseling for both Malinda and Allen.

The defendant offered evidence through various witnesses tending to show the following:

Patricia Easter testified that she was the defendant's sister and lived in Beaufort, North Carolina. She had seen the defendant with the children frequently before they moved to Rockingham

County. Easter testified that the defendant never physically abused or beat the children and sent them to Sunday School. Easter also testified that her husband Frank had been charged with the crime of taking indecent liberties with a nine-year old girl on 14 April 1981 in Beaufort. The defendant attempted to introduce additional testimony by Easter which was excluded. The excluded testimony will be discussed later in this opinion.

The defendant's father, brother and others testified on the defendant's behalf. Their testimony tended to show the defendant's good character and reputation and that he had regularly cared for the children and provided for their needs.

The defendant took the stand and testified in his own behalf. He testified that to his knowledge none of the things the children had testified to had actually occurred.

Other testimony offered on behalf of the State and the defendant will be reviewed hereinafter as the need arises.

The defendant assigns as error the admission into evidence of testimony of various of the State's witnesses with regard to statements made to them by the children Malinda and Allen which related to sexual acts by the defendant with the children. The defendant contends that this testimony was not admissible as it did not tend to corroborate the earlier testimony of the children. This assignment of error is without merit.

[1] Evidence which is inadmissible for substantive or illustrative purposes may nevertheless be admitted as corroborative evidence in appropriate cases when it tends to enhance the credibility of a witness. *See Brandis on North Carolina Evidence*, §§ 49 & 52 (2nd rev. ed. 1982). In the present case, however, the defendant contends that certain testimony of witnesses concerning statements made to them by the children contradicted the children's testimony and was not corroborative. We do not find this to be the case. The defendant bases this assignment of error upon his exceptions numbered one through six. Exception Number Two related to testimony by Dr. German in which she recounted Allen's description to her of the emission from the defendant during ejaculation. It is unnecessary for us to set forth this testimony in graphic detail in order to state that it was substantially similar to testimony elicited during the direct examination

of the child. It is true that the words used by Allen in describing the emission to Dr. German were not identical to the words he used during his testimony at trial. Slight variances or inconsistencies in and between the corroborative testimony and that sought to be corroborated, however, do not render the corroborative testimony inadmissible. *State v. Bryant* (White and Holloman), 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. denied sub nom. White v. North Carolina*, 410 U.S. 958, 35 L.Ed. 2d 691, 93 S.Ct. 1432, *Holloman v. North Carolina*, 410 U.S. 987, 36 L.Ed. 2d 184, 93 S.Ct. 1516 (1973). In the ordinary course of things, an individual will not describe the same event in precisely the same way on any two occasions. Nor is it necessary that a person do so in order that his prior consistent statements be admissible to corroborate his testimony at trial. Indeed, if a person recounted the same event in precisely the same words on several occasions without some minor variations, it might reasonably be suspected that he had contrived and memorized his account. The very minor variances or inconsistencies between Allen's testimony and his prior statement to Dr. German did not make her testimony about this prior statement any less corroborative and it was properly admitted.

[2] The defendant's Exception Number Six is directed to testimony by Amy Tuttle of the Rockingham Department of Social Services that Allen said that the defendant "had not wanted Allen to tell anybody." This statement to Tuttle directly corroborated Allen's statement during his testimony at trial that the defendant "told us not to [talk to anyone] because they would put him in jail." Any minor variance or inconsistency between these two statements was clearly not sufficient to render the statement made by Allen to Tuttle inadmissible as corroborative of Allen's testimony at trial.

The remaining exceptions in support of this assignment relate to other statements of witnesses concerning prior statements of the children. Exception Number One was to Dr. German's testimony that Malinda told her that "on occasion her stepfather would take her from her bed to his bed and fondle her and press with his penis in the vaginal area." Exception Number Three was to testimony by Sue Aldridge, Malinda's teacher, that Malinda told her "that her stepfather was trying to get her to play with him and she didn't want to. She said he wanted her to touch that

thing at night at home while her mother was at work." Exception Number Four was to testimony by Tuttle that Malinda had told her that her "stepfather tries to get in bed with me—I don't want him in bed with me . . . I felt him pushing up against my back." Exception Number Five was to Tuttle's testimony that Allen had told her "that on another occasion they did 'more nasty stuff,' that Mr. Burns had played with Allen's hinney and stuck his finger in Malinda's hinney." The defendant contends that this testimony by the witnesses concerning prior statements made to them by the children did not repeat testimony given by the children and did not corroborate the children's testimony.

[3, 4] It is not necessary in every case that evidence tend to prove the precise facts brought out in a witness's testimony before that evidence may be deemed corroborative of such testimony and properly admissible. The term "corroborate" means "[t]o strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence." *State v. Case*, 253 N.C. 130, 135, 116 S.E. 2d 429, 433 (1960), *cert. denied*, 365 U.S. 830, 5 L.Ed. 2d 707, 81 S.Ct. 717 (1961), quoting BLACK'S LAW DICTIONARY 444 (3d ed.). "Corroborating evidence is supplementary to that already given and tending to strengthen or confirm it." *State v. Lassiter*, 191 N.C. 210, 212-13, 131 S.E. 577, 579 (1926). In the present case, the corroborative testimony which is the subject of the defendant's exceptions apparently does not restate specific facts testified to by the child witnesses. The children's testimony at trial, however, indicated quite clearly a continuing course of sexual abuse by the defendant of both of them involving sexual intercourse, fellatio, cunnilingus, sodomy, masturbation and other abuse. The prior statements of the children did not inject evidence of acts or crimes of the defendant having no direct bearing upon the crimes charged against him. The children's prior statements to the doctor, a teacher and a social worker, although perhaps not tending to prove the precise narrow facts brought out in the children's testimony during the trial, certainly constituted corroborating evidence supplementary to their testimony and tending to strengthen or confirm their testimony. Therefore, the testimony of the witnesses concerning the prior statements of the children to them was admissible as tending to corroborate the testimony of the children. Whether it in fact corroborated the children's testimony was, of course, a question for the jury after

proper instructions from the trial court. *Brandis on North Carolina Evidence*, § 52 (2nd rev. ed. 1982); *see State v. Tolley*, 290 N.C. 349, 226 S.E. 2d 353 (1976).

We further find that, even had the evidence complained of under this assignment been incompetent, its admission into evidence was not reversible error. The defendant at no time objected to any of the testimony which forms the basis for his exceptions under this assignment of error. Nor did he move to strike the testimony or seek to have its admission into evidence restricted to corroborative purposes. Thus, any basis for the defendant's first six exceptions and first assignment of error was lost. *See generally 12 Strong's N.C. Index 3d, Trial* §§ 15, 15.3 and 15.4.

[5] The defendant also assigns as error the trial court's exclusion of certain evidence he sought to introduce through the testimony of his sister Patricia Easter. The trial court conducted an *in camera* hearing during which Easter testified that sometime during 1976 or 1977 she caught Malinda and her son Ronald who was Malinda's age "looking at each other." Her son Ronald had his trousers down at the time. Easter stated that her son Ronald "admitted he'd been doing something, but Malinda denied doing anything." Easter testified that Malinda "finally broke down and admitted kissing Ronnie. This was 30 or 40 minutes after I caught them." The trial court excluded this testimony as being inadmissible under G.S. 8-58.6, commonly referred to as the rape victim shield statute.

The defendant contends that the trial court erred in excluding this testimony by Easter as it was offered to show the untruthfulness of the child victim and not her past sexual behavior. We have recently held that G.S. 8-58.6 does not prevent introduction of evidence by a defendant which tends to show untruthfulness on the part of the victim merely because such evidence also tends to reveal past sexual behavior of the victim. *State v. Younger*, 306 N.C. 692, 295 S.E. 2d 453 (1982). It is unnecessary for us to determine whether the testimony of Easter during the *in camera* hearing rose to the level of testimony revealing past sexual behavior of the victim within the meaning of G.S. 8-58.6. The conduct described by Easter occurred between the children at least four years prior to the criminal acts charged against the defendant. At that time Malinda and Ronald were

each either four or five years old. The conduct involved that sort of "looking at each other" common among children of that age. Whether Malinda immediately told the truth about that incident at that time would, at most, have minimal probative value on the question of her truthfulness at the defendant's trial. Assuming *arguendo* that such testimony had sufficient probative value to be competent, its exclusion was harmless beyond a reasonable doubt in light of the strong eyewitness testimony of the children and the corroborating medical evidence.

The defendant additionally contends under this assignment of error that the trial court erred in excluding certain other testimony which he sought to elicit from the witness Easter. If allowed to, Easter would have testified that:

> I was present when Malinda told Alfred that she had been having sexual dreams. Mary left the house because she was too mad at Malinda because of the incident I testified about in chambers previously. Mary was throwing a fit about it. I told her what Malinda said and I think Alfred did, too.

The defendant contends that this evidence was admissible to rebut testimony by Malinda that she had not told her mother that she had dreamed of any of the sexual events that she had described the defendant as having committed and to rebut the testimony of her mother to the same effect. Easter's excluded testimony did not tend to rebut any such statements by Malinda as it in no way indicated that Malinda in fact ever told her mother that she had had such dreams. At most Easter's testimony tends to indicate that Malinda told the defendant she had had such dreams and that Easter and the defendant told this to Malinda's mother Mary. Even if it is assumed that this excluded testimony of the defendant's sister was admissible, we conclude its exclusion was harmless beyond a reasonable doubt in light of the strong evidence of the two victims and the corroborating medical evidence and other evidence offered by the State. This assignment of error is without merit.

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

No error.

MARY R. (MATTHEWS) HOLT, EDGECOMBE BANKING AND TRUST COMPANY, CO-EXECUTORS OF THE ESTATE OF D. G. MATTHEWS, JR. v. MARK G. LYNCH, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 411A82

(Filed 7 December 1982)

1. **Taxation § 27— interest on funds borrowed to satisfy estate and inheritance tax liabilities—deductible as cost of administration**

Plaintiffs' decision to borrow funds with which to pay federal estate and state inheritance taxes due on the decedent's estate was authorized under G.S. §§ 28A-13-2 & -3, and interest expenses incurred as the result of borrowing funds may be properly deductible as a cost of administration pursuant to G.S. § 105-9(8).

2. **Taxation § 27— interest on estate and inheritance taxes—deductible as cost of administration**

The interest paid on the actual tax liabilities for federal estate and state inheritance taxes is properly deductible as a cost of administration since G.S. § 105-241.1(i1) must necessarily extend to the laws of inheritance tax, and interest paid or accrued does not become part of the tax assessed and is an allowable deduction.

PLAINTIFFS appeal from a decision of the Court of Appeals, one judge dissenting in part, which affirmed the granting of summary judgment in favor of the defendant, entered 26 June 1981 in Superior Court, MARTIN County, by *Reid, J.*

The sole question presented for our review is whether interest paid with respect to federal estate tax deficiencies and deferred installment of federal estate tax, state inheritance tax deficiencies, and moneys borrowed to pay estate and inheritance tax deficiencies is deductible as costs of administration under G.S. § 105-9(8). We answer in the affirmative.

The facts are not in dispute: On 6 August 1980 plaintiffs instituted a civil action against the defendant seeking to recover a refund of inheritance tax previously paid in the amount of $6,710.94, computed by deducting from the decedent's gross estate, as a cost of administration, the amount of $94,879.65 paid as interest. The defendant answered, denying that the taxpayer was entitled to the refund; denying that the $94,879.65 paid as interest in 1979 constituted an expense of administration of the estate; and denying that the same should be allowed as a deduc-

tion from the gross estate under G.S. § 105-9(8). Both parties moved for summary judgment. At a hearing on the motions, the following were stipulated as facts:

1. Plaintiffs are the duly qualified Co-executors of the Estate of D. G. Matthews, Jr., who died testate on March 26, 1976, the will of D. G. Matthews, Jr. having been admitted to probate before the Clerk of Superior Court, Martin County, North Carolina.

2. The taxpayer is the Estate of D. G. Matthews, Jr., having its residence in Martin County, North Carolina.

3. The Defendant is an adult citizen and resident of Wake County, North Carolina, is duly appointed and is acting as Secretary of Revenue of the State of North Carolina.

. . . .

16. For purposes of accepting the annual and final accounts of the Estate of D. G. Matthews, Jr., pursuant to N.C.G.S. §§ 28A-21-1 and 28A-21-2, the Clerk of Superior Court of Martin County, acting in her capacity as Judge of the Probate Court, has audited and approved the distribution and expenditure of the taxpayer's (estate's) assets, including the interest expense incurred by the taxpayer in deferring payment of estate and inheritance taxes as stated herein and in borrowing funds from D. G. Matthews & Son, Inc. during 1979. By such audit and approval, the Clerk has accepted such expenses as being reasonably necessary for the benefit of the estate.

17. Since the promulgation of Section 6166 of the Internal Revenue Code, it has become a customary practice of executors of estates in North Carolina, acting in their fiduciary capacities, to obtain deferrals for payment of federal estate taxes under Section 6166 when it is in the best interest of the estate and its beneficiaries to do so.

. . . .

21. The Plaintiffs were empowered by the will of D. G. Matthews, Jr. to borrow money on behalf of the estate according to the provisions of G.S. § 32-27(12), which provisions were incorporated by reference in said will.

. . . .

23. The taxpayer paid $94,879.65 in fiscal year 1979 as interest comprised as follows: $40, 515.86 as interest in the Federal Estate Tax deficiency; $16,726.20 as interest on the amended North Carolina Inheritance Tax Return; $23,757.09 as [interest on] Section 6166 installment; and $13,728.04 as interest on the amounts borrowed from D. G. Matthews & Son, Inc.

24. On or about March 22, 1980, Plaintiffs, within three (3) years of the due date of the return (April 26, 1977), applied to the Defendant for the refund of inheritance tax overpaid by the taxpayer in the amount of $6,710.94, with all interest due thereon. Such application and claim was timely filed.

25. On or about May 12, 1980, the Defendant notified the Plaintiffs, through their attorney, of his decision denying Plaintiffs' application for refund.

Rufus L. Edmisten, Attorney General, by George W. Boylan, Assistant Attorney General, for defendant-appellee.

Burney, Burney, Barefoot & Bain, by Auley M. Crouch III, and Jeff D. Batts, for plaintiff-appellants.

MEYER, Justice.

The trial court, in denying plaintiffs' motion for summary judgment, essentially concluded as a matter of law that interest expenses incurred by the taxpayer on federal estate tax and state inheritance tax liabilities or on funds borrowed to pay these taxes were not deductible from the gross estate as a cost of administration. The Court of Appeals, in construing G.S. § 105-9, agreed that plaintiffs were not permitted to deduct the interest on federal estate and North Carolina inheritance tax liabilities. The opinion further stated that

> [t]his bar on deductibility based on statutory construction, however, is not applicable to interest which accrued on something other than estate and inheritance tax liability, to wit, on funds borrowed to pay such taxes. Plaintiffs could argue that such interest, which also was incurred as 'being reasonably necessary for the benefit of the estate,' could

> hardly fail to be characterized, given ordinary understandings of the language, as a 'cost of administration.' *The parties, however, have agreed that each kind of interest payment at issue should receive identical treatment in terms of their [sic] deductibility, and, hence, the interest on borrowed funds is also not deductible as a cost of administration.*

Holt v. Lynch, 57 N.C. App. 532, 536, 291 S.E. 2d 920, 923 (1982) (emphasis added).

Judge Becton concurred in the majority's analysis relating to the interest paid on the federal estate tax and state inheritance tax liability. He dissented to that portion of the opinion denying the deduction of interest on borrowed money, believing that the parties' reliance on an "all or nothing" theory was not controlling.

[1] We first address the question of interest on funds borrowed to satisfy federal estate and state inheritance tax liabilities. We disagree with the decision of the Court of Appeals and hold that interest expenses incurred as a result of borrowing funds to satisfy federal estate and state inheritance tax liabilities may be deducted from a decedent's gross estate as a cost of administration pursuant to G.S. § 105-9(8). We find no statute which would prohibit such a deduction. Indeed, a reading of G.S. §§ 28A-13-2 and -3 appears to authorize a fiduciary to incur such costs when necessary for the proper administration and preservation of the estate.

G.S. § 28A-13-2 provides that:

> A personal representative is a fiduciary who, in addition to the specific duties stated in this Chapter, is under a general duty to settle the estate of his decedent as expeditiously and with as little sacrifice of value as is reasonable under all of the circumstances. He shall use the authority and powers conferred upon him by this Chapter, by the terms of the will under which he is acting, by any order of court in proceedings to which he is party, and by the rules generally applicable to fiduciaries, for the best interests of all persons interested in the estate, and with due regard for their respective rights.

Under G.S. § 28A-13-3 a personal representative has the power

(12) To borrow money for such periods of time and upon such terms and conditions . . . as the personal representative shall deem advisable . . . for the purpose of paying debts, taxes, and other claims against the estate . . . .

. . . .

(16) To pay taxes, assessments, his own compensation, and other expenses incident to the collection, care, administration and protection of the assets of the estate in his possession, custody or control.

From these provisions we conclude that plaintiffs' decision to borrow funds with which to pay federal estate and state inheritance taxes due on the decedent's estate was authorized under G.S. §§ 28A-13-2 and -3, and hold that interest expenses incurred as a result of borrowing funds may be properly deductible as a cost of administration pursuant to G.S. § 105-9(8). *See Estate of Jane deP. Webster*, 65 T.C. 968 (1976); *Estate of James S. Todd, Jr.*, 57 T.C. 288 (1971). As the Clerk of Superior Court of Martin County, acting in her capacity as Judge of the Probate Court, approved the expenses as being reasonably necessary for the benefit of the estate, the amount so designated is properly deductible.

[2] We turn next to plaintiffs' contention that the interest paid on the actual tax liabilities for federal estate and state inheritance taxes is properly deductible as a cost of administration. Defendant Revenue Commissioner's position, adopted by the Court of Appeals, is as follows:

1. Interest on a tax is a tax pursuant to G.S. § 105-241.1(i1):

"Tax" and "additional tax," for the purposes of this Subchapter and for the purposes of Subchapters V and VIII of this Chapter, include penalties and interest, as well as the principal amount of such tax or additional tax.

2. G.S. § 105-9 allows no deduction of estate and inheritance taxes from the gross estate of a decedent other than "*taxes* paid to other states, and death duties paid to foreign countries." G.S. § 105-9(5) (emphasis added).

3. Thus the interest on estate and inheritance taxes are not properly deductible under G.S. § 105-9(8) as costs of administra-

tion, because to allow them would erode the clear intent of G.S. § 105-9(5).

To adopt the Commissioner's reasoning, we must accept his underlying assumption that interest on a tax is a tax for purposes of determining its non-deductibility under G.S. § 105-9. It is this underlying assumption that we now reject. In so doing, we look to our own tax statutes as well as to federal tax statutes and case law.

Both our inheritance tax statutes and our individual income tax statutes fall within Subchapter I of G.S. Ch. 105. Thus, the definition of "tax" found in § 105-241.1(i1) applies to both taxing schemes. G.S. § 105-147(5) allows as a deduction in computing net income "[a]ll *interest* paid during the income year on the indebtedness of the taxpayer except interest paid or accrued in connection with the ownership of property, the income from which is not taxable under this Division." (Emphasis added.) At least for individual income tax purposes, it seems clear that interest is not viewed as a tax, but something other than a tax. In order to adopt defendant's definition of "tax" to include interest for purposes of the inheritance tax statutes, it would be necessary to bifurcate the definition of "tax" in G.S. § 105-241.1(i1), applying one definition for income tax and another for inheritance tax. We do not deem such bifurcation necessary or advisable.

G.S. § 105-241.1(i1) falls under Subchapter I, Article 9, Schedule J, which is entitled "General Administration; Penalties and Remedies," suggesting that this statutory definition of tax which includes interest is for administrative purposes only, and that interest itself is substantively something different and apart from the tax. Moreover, a close reading of G.S. § 105-241.1(i1), in the context of our overall tax scheme, including the provisions of Subchapters V and VIII yields the inevitable conclusion that it is only for purposes of assessment, collection and payment that interest should be treated in the same manner as taxes. Thus, although collected as part of the tax, interest paid on an estate or inheritance tax deficiency is not part of the tax, but something in addition to the tax. *See Penrose v. United States,* 18 F. Supp. 413 (E.D. Penn. 1937); *Estate of Bahr v. Commissioner,* 68 T.C. 74 (1977).

On this issue we find the reasoning in *Bahr*, if not controlling, particularly persuasive. As does the defendant in the case *sub judice*, the Commissioner in *Bahr* argued that the deduction of interest should be disallowed and reasoned as follows:

1. To be deductible for estate tax purposes, the deduction for interest must be claimed under the general provisions allowing administration expenses.

2. Similar to the limitation in G.S. § 105-9(5), the federal law disallowed the deductibility of taxes as a cost of administration.

3. "[I]nterest on tax is procedurally assessed, collected, and paid in the same manner as tax pursuant to section 6601(e)(1)." *Id.* at 78.

4. The Commissioner attempted to distinguish deductibility for income tax purposes "because section 163 is specific and is not burdened with any prohibition against deducting taxes." *Id.*

Under federal tax law, interest on the deficiency of federal income taxes is an allowable deduction under section 163 of the Internal Revenue Code which, like G.S. § 105-147(5), allows as a deduction all interest paid or accrued within the taxable year on indebtedness. *See* Rev. Rul. 70-560, 1970-2 C.B. 37. Likewise, interest on the deficiency in State income tax is an allowable deduction under G.S. § 105-147(5) for purposes of a state income tax return. Inasmuch as the definition of "tax" in G.S. § 105-241.1(i1), and therefore the construction we have placed upon it, specifically applies to the subchapter dealing with our state inheritance taxes, we hold, as did the tax court in *Bahr*, that "interest on tax, although administratively treated as tax for assessment, collection and payment purposes, remains substantively interest paid for the use of money and is deductible." *Id.* at 83.

In so holding that interest on a tax is not a tax, but something in addition to the tax, we are no longer bound by the limitations imposed by G.S. § 105-9(5) which permits as a deduction from a decedent's gross estate only inheritance and estate *taxes* paid to other states. We must nevertheless determine whether such interest resulting from estate and inheritance tax liability is properly includable as a cost of administration.

Again we turn for guidance to the well-reasoned opinion in *Bahr*. We have today held, as the tax court in *Bahr* was bound to

do under prior federal tax law, that interest incurred upon money borrowed to pay federal estate and state inheritance taxes is allowable as an administration expense. The tax court rejected, as we now do, the Commissioner's argument that there was a distinction between interest paid on a debt created to pay the taxes and interest paid on the tax itself. To deny a deduction merely because the government is the lending party "has the practical effect of treating such interest in the same manner as a penalty if the estate does not have sufficient taxable income to benefit from deducting the interest paid on its income tax returns. It has been repeatedly held that interest in the tax law, as elsewhere, is merely the cost of the use of money and is not a penalty." *Id.* at 82.

In answer to the Commissioner's final argument that Congress did not intend that the general provision relating to administration expenses should be a vehicle to reduce taxes through the deductibility of interest, the tax court in *Bahr* stated:

> We fail to see the significance of the fact that the interest, if deductible, would reduce the taxable estate and thus the ultimate amount of estate tax paid. The result is the same when interest is paid to a private lender . . . A deductible administration expense, by definition, reduces the taxable estate. To deny an administration expense deduction upon the mere basis that it would otherwise reduce the amount of estate taxes paid would result in the disallowance of all administration expenses.

Id. at 82.

Our holding today reflects what we consider to be the more reasoned approach to two potential inconsistencies raised by the defendant. First, our construction of G.S. § 105-241.1(i1), if it is to be in conformity with the accepted definition of interest in the area of income taxes, must necessarily extend to the law of inheritance tax; that is, interest paid or accrued does not become part of the tax assessed and is an allowable deduction. Secondly, we fail to perceive any justification for finding a distinction in the treatment of interest paid on money borrowed to satisfy a tax debt, and interest paid on the debt itself.

The Court of Appeals erred in affirming summary judgment for the defendant. The plaintiffs' motion for summary judgment

should be allowed. The decision of the Court of Appeals is reversed and the cause is remanded to that court for further remand to the Superior Court, Martin County, for entry of summary judgment for the plaintiffs.

Reversed and remanded.

STATE OF NORTH CAROLINA v. BEVERLY ELAINE TATE

No. 350A82

(Filed 7 December 1982)

1. **Criminal Law § 73.2— statements by another—admissibility to show reason for defendant's actions**

In a prosecution for various offenses which arose from defendant's alleged delivery of methaqualone at a garage and body shop, testimony by defendant as to what the garage owner said to her should have been admitted by the trial court to show why defendant left the garage so quickly, since the statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statements are made. However, the exclusion of such testimony was harmless error because defendant was allowed to explain her hasty departure by other testimony before the jury, and because the fact that she left the garage so quickly bore little or no weight as to whether defendant had delivered drugs to the garage owner.

2. **Criminal Law § 90.2; Witnesses § 4— necessity for voir dire to determine whether witness was hostile witness**

It was prejudicial error for the trial court to deny defendant's motions for a voir dire to determine whether a defense witness, to the surprise of defense counsel, was unwilling to answer certain questions before the jury which were relevant to the defense and was thus a hostile witness whom defense counsel could ask leading questions.

APPEAL by the State of North Carolina pursuant to N.C.G.S. 7A-30(2) from the decision of the Court of Appeals (*Judges Robert Martin* and *Arnold* concurring, *Judge Vaughn* dissenting), reported in 57 N.C. App. 350, 291 S.E. 2d 326 (1982), which overruled the judgment entered by *Walker, Judge*, at the 3 August 1981 Criminal Session of FORSYTH Superior Court and granted a new trial to defendant.

Defendant was charged in separate indictments, proper in form, with conspiracy to trafficking in methaqualone, trafficking

by delivery of methaqualone, trafficking by possession of methaqualone, and trafficking by transportation of methaqualone. Upon verdicts of guilty, the charges were consolidated for judgment, and the defendant was sentenced to imprisonment for not less than five nor more than ten years and to pay a fine of $25,000.

Evidence presented by the state tended to show that undercover agent M. D. Robertson had arranged to purchase 1,200 tablets of methaqualone from Donald Watson at his garage and body shop on 23 January 1981. Watson told Robertson that the woman who supplied him with drugs for resale would make a delivery about noon that day. Robertson and another agent began surveillance of the garage at noon. The defendant arrived at 12:20 p.m., entered the garage, and then came out within a minute. The undercover agents noticed that when she entered the garage, the defendant's hand was in her coat as though she were carrying something. There was a bulge in her coat about the size of a rolled up newspaper or a book. When the defendant came out of the garage, her hands were outside the coat and the bulge was gone. After defendant left, Watson motioned Robertson inside, where Robertson purchased the 1,200 tablets of methaqualone.

The defendant's evidence tended to show that she went to Watson's garage on 23 January 1981 to make her monthly payment for car repairs and to discuss some problems with Donald Watson concerning the repairs. The defendant denied delivering any controlled substances to Watson.

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General, and John F. Maddrey, Associate Attorney, for the State appellant.

Morrow and Reavis, by John F. Morrow, for defendant appellee.

MARTIN, Justice.

[1] The trial judge would not permit the defendant to testify concerning a conversation she had with Donald Watson upon entering the garage. Upon voir dire the defendant stated that had she been allowed to do so, she would have testified:

> When I entered Mr. Watson's office and I pushed the bag across and sat down on the corner of his desk and I

started to talk to him about when he could possibly repaint the roof of my car, and Don told me, he said, "I have some urgent business to take care of." He said, "If you're going up to the barbecue stand with my brother to eat lunch, as soon as I get finished with it, I'll be right, come up there with you and I'll be glad to come up with a date we can repaint your car." So he rushed me, he literally rushed me out of the office, and he said there was a guy waiting outside and he had something to take care of.

The Court of Appeals held that the trial judge's exclusion of this testimony was error and that it prejudiced the defendant because it was the only evidence tending to show why the defendant left the garage so quickly. We find this holding erroneous because, although the trial judge did err in excluding the testimony, there is no reasonable possibility that had the testimony been allowed into evidence a different result would have been reached at trial. N.C. Gen. Stat. § 15A-1443(a) (1978).

The Court of Appeals correctly held that the defendant's excluded testimony as to what Donald Watson said to her would have been admissible to show why defendant left the building so quickly. The statements of one person to another are admissible to explain the subsequent conduct of the person to whom the statements were made. *State v. White*, 298 N.C. 430, 259 S.E. 2d 281 (1979); *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978); *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). However, the exclusion of this testimony was harmless error because Tate was allowed to explain her hasty departure by other testimony that was before the jury: Immediately before going into the garage, Tate saw Frank Watson standing in front of a truck in the parking lot of the garage. She noticed that he "was in very bad shape," and told him that "[she] was going to run in the office and give Don $200.00 and . . . would be right back out and help him walk up to the barbecue stand . . . ." She further testified that when she went into the garage:

I sat down on the desk and I happened to push and put my hands on a bag that was sitting there and push something and immediately was told something. I said, "Listen, I'll come back and give you the $200.00 after you got finished taking care of what you got to take care of. I'm going up to the

> barbecue stand with your brother and when you have finished doing what you got to do, come up and get me and then I'll finish talking to you about my vehicle." At the point, I not only went to talk to Don about giving him the $200.00 for my car, but when he originally decided to paint my car, he and I made an agreement if there was anything not satisfactory to me that he would repaint it.

This testimony offers an explanation similar to that of the excluded testimony as to why she stayed such a short time in the garage. It also tends to show that the "bag" was already on Watson's desk when she entered the garage. Her excluded testimony is susceptible of the interpretation by the jury that she brought the bag into the garage: "When I entered Mr. Watson's office and *I pushed the bag across . . .*." (Emphasis ours.) The exclusion of the tendered testimony was not prejudicial to her defense. Defendant has failed to show that there is a reasonable possibility that had the error not been committed a different result would have been reached at the trial. N.C. Gen. Stat. § 15A-1443(a) (1978); *State v. Culpepper*, 302 N.C. 179, 273 S.E. 2d 686 (1981). We note that the fact that she left the garage quickly—for whatever reason—bore little or no weight as to whether the defendant had delivered the drugs to Donald Watson. The opinion of the Court of Appeals is modified to the extent that it conflicts with this holding.

[2] We agree, however, that a new trial is required. Defendant called Charles Ronnie Watson (no relation to Donald or Frank Watson) to the stand and hoped to elicit from him testimony to the effect that he was fairly sure that the person who had brought the drugs to Donald Watson was not Beverly Tate. Before trial Charles Ronnie Watson told defense counsel in the presence of others that he would so testify, but when questioned before the jury and to counsel's surprise, he was unwilling to do so. When defense counsel attempted to ask Watson leading questions, the trial judge sustained the state's objection each time. Defense counsel then moved several times for a voir dire hearing to establish that Charles Ronnie Watson was a hostile witness. The trial judge denied each of these motions. We hold that the trial judge's denial of these motions was prejudicial error, and for this reason the defendant is entitled to a new trial.

It remains the general rule in this jurisdiction that counsel may not ask his own witness leading questions on direct examination. *E.g., State v. Royal*, 300 N.C. 515, 268 S.E. 2d 517 (1980); *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). The purpose of this rule is to prevent counsel from putting a desired answer into the mouth of a witness he has called to testify. *State v. Greene, supra*; 1 Brandis on North Carolina Evidence § 31 (1982). However, it is also well established in this state that in his discretion the trial judge may allow counsel to ask leading questions of his own witness and, in the absence of abuse, the exercise of such discretion will not be disturbed on appeal. *E.g., State v. Batts*, 303 N.C. 155, 277 S.E. 2d 385 (1981); *State v. Royal, supra; State v. Greene, supra; State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972). As Justice Branch (now Chief Justice) stated in *Greene*:

> The trial judge in ruling on leading questions is aided by certain guidelines which have evolved over the years to the effect that counsel should be allowed to lead his witness on direct examination when the witness is: (1) hostile or unwilling to testify, (2) has difficulty in understanding the question because of immaturity, age, infirmity or ignorance or where (3) the inquiry is into a subject of delicate nature such as sexual matters, (4) the witness is called to contradict the testimony of prior witnesses, (5) the examiner seeks to aid the witness' recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required, (6) the questions are asked for securing preliminary or introductory testimony, (7) the examiner directs attention to the subject matter at hand without suggesting answers and (8) the mode of questioning is best calculated to elicit the truth.

285 N.C. at 492-93, 206 S.E. 2d at 236. *See also, e.g., State v. Royal, supra.*

In the present case, had the trial judge allowed a voir dire examination of Charles Ronnie Watson, defense counsel might have been able to demonstrate that to his surprise the witness was unwilling to answer certain questions before the jury which were very relevant to Tate's defense. Ralph E. Tate testified in the absence of the jury:

> Mr. Ronnie Watson told Mr. Morrow that he was pretty sure he knew who brought the stuff out there to Don Watson's, and he was afraid to tell, that he would get shot. And he knew it was not Beverly. I do remember that you specifically asked him if he would testify to that. I thought he said he was going to, but he wouldn't when he got up here. You told him he did not have to name a name. He said he'd do it, but he wouldn't name the name.

If he had been able to establish this, defense counsel should have been permitted to ask leading questions of Watson during direct examination. *State v. Greene, supra.* These questions would have enabled defense counsel to bolster Tate's defense that she was not the person who delivered the drugs to Donald Watson on the day in question. Although defendant's argument is not based upon constitutional premises, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302, 35 L.Ed. 2d 297, 312 (1973). *Cf.* 1 Brandis, *supra*, § 40. We find that it was prejudicial error for the trial judge to deny defendant's motions for a voir dire to determine whether Watson was a hostile witness.

The opinion of the Court of Appeals is

Modified and affirmed.

STATE OF NORTH CAROLINA v. TOMMY LEE NEELEY

No. 259PA82

(Filed 7 December 1982)

1. **Constitutional Law § 40— procedure for raising rights to counsel claim when receive suspended sentence**

When a court activates a suspended prison sentence, defendant may, upon appeal of such activation, raise the claim that he was unconstitutionally denied counsel at his original trial.

2. **Constitutional Law § 40— right to counsel—record silent as to whether defendant indigent—active prison sentence improper**

Where the record is completely silent as to whether the defendant was indigent, whether he knew he had a right to counsel or whether he made a knowing waiver of his right to counsel, the trial judge should not have imposed an active prison sentence upon the defendant.

ON defendant's petition for discretionary review of the decision of the Court of Appeals, 57 N.C. App. 211, 290 S.E. 2d 727 (1982) (opinion by *Robert Martin, J.*, with *Vaughn, J.* and *Arnold, J.*, concurring), affirming the order of *Long, J.*, entered 10 April 1981 which revoked the suspension of defendant's six months prison sentence.

Defendant seeks to vacate the judgment entered 10 April 1981 by Judge Long which activated a six months prison sentence. Defendant contends the Superior Court could not impose an active sentence on him since the conviction on which the sentence is based is constitutionally invalid. This contention is based on an indigent defendant's constitutional right to appointed counsel which defendant claims he was denied.

On 7 September 1979 defendant pleaded guilty to unlawfully and willfully neglecting and refusing to provide adequate support for his child, Patricia Faye Hamilton, in violation of G.S. § 14-322. The arrest warrant alleges neither that defendant is the child's father nor that he is the husband of the child's mother. There is no indication in the record of this guilty plea whether defendant was represented by counsel, whether defendant was indigent or whether defendant made a knowing and intelligent waiver of counsel. Pursuant to his guilty plea defendant was sentenced to six months in prison. However, the sentence was suspended for five years upon the fulfillment of several conditions, one of which was the payment of twenty-five dollars a week for the support of Patricia Faye Hamilton.

On 23 January 1981 defendant's probation officer issued a violation report charging defendant with violating the terms of his probation by failing to make payments aggregating $685.00. On 11 February 1981, in the District Court of Wilkes County, Osborne, D.J., ordered that defendant's probation be revoked and that defendant begin serving an active six months prison term. Defendant appealed to Superior Court of Wilkes County for a hearing *de novo* which was held 10 April 1981. Long, J., found defendant in violation of the conditions of his probation, revoked the suspension of defendant's sentence and ordered defendant to begin serving his six months prison sentence.

From the order of Judge Long defendant appealed to the Court of Appeals. Defendant argued that the Superior Court

erred in revoking the suspension of his sentence for nonsupport because there was nothing in the record of his guilty plea to show whether the defendant was indigent, whether he was represented by counsel, or whether he made a knowing and intelligent waiver of counsel. In upholding the active prison sentence given defendant, the Court of Appeals felt that the defendant was improperly attempting to collaterally attack the underlying judgment of 7 September 1979. The Court of Appeals directed defendant to file a motion for appropriate relief pursuant to G.S. § 15A-1411 *et seq.* On 17 May 1982 defendant filed in this Court both a motion for appropriate relief and a petition for discretionary review. We granted defendant's petition for discretionary review 2 June 1982.

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

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for defendant-appellant.

COPELAND, Justice.

Defendant's petition for discretionary review presents two questions for review by this Court. The first question to be considered concerns the resolution of a conflict between the Court of Appeals' opinion in this case and its opinion in *State v. Black*, 51 N.C. App. 687, 277 S.E. 2d 584 (1981), *cert. denied*, 303 N.C. 546 (1981). That conflict concerns a determination of the proper procedure for raising a constitutional claim of right to counsel at a trial where the defendant received a suspended prison sentence in a case where the defendant does not challenge the sentence until the suspension is revoked and an active sentence imposed. We believe the sounder position is to follow the *Black* decision which allows the defendant to raise his right to counsel claim after the prison sentence has become active. The second question to be considered is whether the defendant is entitled to appointed counsel in a case where he receives a prison sentence which is suspended and later becomes active. In such a circumstance we feel an indigent defendant must have been afforded appointed counsel to represent him during the original trial.

[1] In *State v. Black*, 51 N.C. App. 687, 277 S.E. 2d 584 (1981), *cert. denied*, 303 N.C. 546 (1981), the Court of Appeals correctly

determined that the defendant properly appealed from the activation of his prison term and the denial of his Sixth Amendment right to counsel during his original trial.

In that case, as in the one *sub judice*, the defendant's suspended prison sentence was ordered activated. We therefore emphasize that this opinion only addresses those circumstances in which a defendant seeks to challenge the validity of an original uncounseled prison sentence at a later time when the prison sentence is activated. Thus, when a court activates a suspended prison sentence, defendant may, upon appeal of such activation, raise the claim that he was unconstitutionally denied counsel at his original trial. As a result, the appeal in this case was properly before the Court of Appeals on the issue of the right to appointed counsel under the Sixth and Fourteenth Amendments of the Constitution of the United States.

The Supreme Court of the United States has held that it is unconstitutional to impose an active prison sentence on an indigent defendant who has not been afforded appointed counsel. "[N]o person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S.Ct. 2006, 2012, 32 L.Ed. 2d 530, 538 (1972). Seven years later in *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed. 2d 383 (1979), the Supreme Court reiterated its position in *Argersinger* by stating that the central premise of *Argersinger* was, "that *actual imprisonment* is a penalty different in kind from fines or the mere threat of imprisonment . . ." *Scott v. Illinois*, 440 U.S. at 373, 99 S.Ct. at 1162, 59 L.Ed. 2d at 389. (Emphasis added.) In *Scott* the Court expressly rejected the contention that a state must provide counsel whenever imprisonment is an authorized penalty and stated that the central premise of *Argersinger*, "is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott, supra*, 440 at 373, 99 S.Ct. at 1162, 59 L.Ed. 2d at 389.

In a recent decision, we pointed out, "[T]hat due process *presumptively* requires the appointment of legal counsel to represent an indigent defendant *if* his *actual* imprisonment, or comparable confinement, is a likely result in the *present* proceeding

concerned." *Carrington v. Townes*, 306 N.C. 333, 335, 293 S.E. 2d 95, 97 (1982). (Original emphasis.) It is clear from our decision in *Carrington v. Townes* and the decisions of the United States Supreme Court in *Argersinger* and *Scott v. Illinois*, that the evil which must be avoided is the imprisonment of an indigent defendant who has not been afforded appointed counsel.

[2] We now address the second issue raised by this appellant as to whether he was entitled to court appointed counsel at the time he pled guilty to failure to support his minor child. There is no doubt that whenever a party receives an active prison sentence, no matter how short, he must be afforded the opportunity to have counsel represent him. "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for *any* offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Argersinger v. Hamlin*, 407 U.S. 25, 37, 92 S.Ct. 2006, 2012, 32 L.Ed. 2d 530, 538 (1972). (Emphasis added.)

In a 1979 decision, previously cited, the United States Supreme Court applied the *Argersinger* rule to indigent defendants and stated, "[T]he Sixth and Fourteenth Amendments to the United States Constitution require only that no *indigent criminal defendant* be sentenced to a term of imprisonment unless the State has *afforded* him the right to assistance of appointed counsel in his defense." *Scott v. Illinois*, 440 U.S. 367, 373, 99 S.Ct. 1158, 1162, 59 L.Ed. 2d 383, 389 (1979). (Emphasis added.) In recognition of the United States Supreme Court's decisions in *Argersinger and Scott*, this Court held in a recent decision, "[T]hat due process *presumptively* requires the appointment of legal counsel to represent an indigent defendant *if* his *actual* imprisonment, or comparable confinement, is a likely result in the *present* proceeding concerned." *Carrington v. Townes*, 306 N.C. 333, 335, 293 S.E. 2d 95, 97 (1982). (Original emphasis.)

The mandate of this Court and the United States Supreme Court in *Argersinger* could not be clearer. In *Argersinger* the United States Supreme Court, with *no* dissenting opinion, said, "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel." *Argersinger v. Hamlin*, 407 U.S. at 40,

92 S.Ct. at 2014, 32 L.Ed. 2d at 540.[1] Therefore, if the crime for which the defendant is charged carries a possible prison sentence of any length, the judge may not impose an active prison sentence on the defendant unless defendant has been afforded the opportunity to have counsel represent him.

In the case *sub judice* the record is completely silent as to whether the defendant was indigent, whether he knew he had a right to counsel or whether he made a knowing waiver of his right to counsel. In fact the record does not even indicate whether defendant was asked any questions whatsoever. As a result we cannot determine that defendant waived his right to counsel at the time he pled guilty to failure to support his minor child. "Waiver of counsel may not be presumed from a silent record." *State v. Morris*, 275 N.C. 50, 59, 165 S.E. 2d 245, 251 (1969); See also, *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed. 2d 70 (1962).

The defendant, if he is to be imprisoned, is entitled to counsel even though he pleads guilty regardless of the fact that he was not convicted after a full trial. We find guidance for this very proposition in *Argersinger*, where the Court stated:

> Beyond the problem of trials and appeals is that of the *guilty plea*, a problem which looms large in misdemeanor as well as felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.

Argersinger v. Hamlin, 407 U.S. at 34, 92 S.Ct. at 2011, 32 L.Ed. 2d at 536. (Emphasis added.) In this case had defendant been afforded legal counsel he may very well have decided not to plead guilty.

Whether assistance of counsel would have made a difference is speculative and non-determinative on the issue of defendant's constitutional right to assistance of counsel. The rule of law on this issue has been expressly addressed by the United States

1. The rule of *Argersinger* has been codified by our legislature in G.S. 7A-451 (a)(1) which provides: An indigent person is entitled to services of counsel in . . . any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged.

Supreme Court, by this Court, and by our legislature through G.S. 7A-451(a)(1). If a trial judge is prepared to impose an active prison sentence on an indigent defendant he must be sure that defendant is afforded appointed counsel. If an indigent defendant is not afforded appointed counsel he may not be given an active prison sentence. In this case where the record is silent on whether defendant was afforded counsel, the trial judge should not have imposed an active prison sentence upon the defendant.

We therefore vacate defendant's guilty plea and six months prison sentence. We also deny defendant's motion for appropriate relief because it is moot. 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, Wilkes County, for a new trial.

Reversed and remanded.

STATE OF NORTH CAROLINA v. KENNETH EARL GOOCH

No. 484PA82

(Filed 7 December 1982)

Narcotics §§ 4.6, 5— conviction of possession of more than one ounce of marijuana—necessity for instruction on amount possessed—verdict treated as guilty of simple possession

Defendant could not properly be convicted of possession of more than one ounce of marijuana in violation of G.S. 90-95(d)(4) when the trial court failed to submit to the jury the essential element of the amount of marijuana possessed, notwithstanding the evidence tended to show that if defendant possessed any marijuana, he possessed 59.9 grams, which is more than one ounce. However, in finding defendant guilty of possession of more than one ounce of marijuana, the jury necessarily found facts establishing the offense of simple possession of marijuana in violation of G.S. 90-95(a)(3), and the case will be remanded for resentencing as upon a verdict of guilty of simple possession of marijuana.

WE allowed defendant's petition for discretionary review of the decision of the Court of Appeals, 58 N.C. App. 582, 294 S.E. 2d 13 (1982), on 25 August 1982. A jury convicted Kenneth Earl Gooch, defendant, of possession of more than one ounce of marijuana and *Bailey, Judge*, gave defendant his sentence during the

27 April 1981 Session of Superior Court, DURHAM County. The Court of Appeals affirmed defendant's conviction.

In this appeal we are to decide whether defendant can be convicted of possession of more than one ounce of marijuana when the trial court fails to submit to the jury an essential element of the offense, the amount of contraband possessed.

Rufus L. Edmisten, Attorney General, by Blackwell M. Brogden, Jr., Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Marc D. Towler, Assistant Appellate Defender, for defendant.

CARLTON, Justice.

I.

The facts are adequately stated in the Court of Appeals' opinion. 58 N.C. App. 582, 294 S.E. 2d 13 (1982). It is unnecessary to repeat them here.

Kenneth Earl Gooch, defendant, was tried upon an indictment which read as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 30 day of August, 1980, in Durham County Kenneth Earl Gooch unlawfully and wilfully did feloniously possess with intent to sell and deliver a controlled substance 59.9 grams of marijuana which is included in Schedule VI of the North Carolina Controlled Substances Act.

The trial court submitted three possible verdicts to the jury: (1) guilty of possession of marijuana with intent to sell and deliver, (2) guilty of possession of more than one ounce of marijuana, (3) not guilty. The jury convicted defendant of possession of more than one ounce of marijuana. He was sentenced to spend a minimum of six months and a maximum of twenty-four months in the Durham County jail. Defendant appealed to the Court of Appeals. That court affirmed his conviction.

II.

Defendant's primary contentions before the Court of Appeals were (1) that he was improperly convicted of the offense of possession of more than one ounce of marijuana because he was

not charged with that offense and because that offense is not a lesser included offense of possession with intent to sell or deliver, and (2) the trial court erred in failing to instruct the jury on an essential element of the offense of which he was convicted—that the amount of marijuana possessed be more than one ounce.

With respect to defendant's first contention, the Court of Appeals, relying on *State v. McGill*, 296 N.C. 564, 251 S.E. 2d 616 (1979), agreed that possession of more than one ounce of marijuana is not a lesser included offense of possession of marijuana with intent to sell or deliver. However, the Court of Appeals held that the trial court did not err in submitting the alternative verdicts because defendant was properly charged with the offense for which he was convicted. It reasoned that defendant was properly charged with both offenses because "the elements of both forms of felony possession are set forth in the same count of the one indictment." *State v. Gooch*, 58 N.C. App. at 585-86, 294 S.E. 2d at 15. In other words, the court found that while the defendant in *McGill* was properly charged with *both* possession of marijuana with intent to sell or deliver and possession of more than one ounce of marijuana because the charges were contained in separate indictments, the defendant here was also properly charged with both offenses because "the two elements of possession of more than one ounce of marijuana are both set forth in the indictment." 58 N.C. App. at 585, 294 S.E. 2d at 15.

In light of what we believe to be the proper disposition of this case, as discussed below, it was unnecessary for the Court of Appeals to reach this issue. We therefore vacate this portion of the Court of Appeals' decision without deciding this issue presented by defendant.

III.

In the second portion of its decision, the Court of Appeals rejected defendant's contention that the trial court erred in failing to properly instruct the jury on the elements of possession of more than one ounce of marijuana, the offense of which defendant was ultimately convicted. Defendant contended before that court and contends here that the instructions failed to make clear that the amount of marijuana possessed by defendant had to be more than one ounce in order to convict defendant of this offense. We

agree with defendant and reverse this portion of the Court of Appeals' decision.

G.S. 15A-1232 (1978) requires the trial court to "declare and explain the law arising on the evidence." The provisions of the statute are mandatory and a failure to comply is prejudicial error. *State v. Lee*, 277 N.C. 205, 214, 176 S.E. 2d 765, 770 (1970) (decided under former G.S. 1-180, the statute G.S. 15A-1232 replaced). The trial court must charge the essential elements of the offense. *State v. Earnhardt*, 307 N.C. 62, --- S.E. 2d --- (1982); *State v. Hairr*, 244 N.C. 506, 509, 94 S.E. 2d 472, 474 (1956); *State v. Gilbert*, 230 N.C. 64, 51 S.E. 2d 887 (1949).

To prove the offense of possession of over one ounce of marijuana under G.S. 90-95(d)(4) (1981), the State must prove two elements: (1) possession by defendant, and (2) that the amount possessed was greater than one ounce. *State v. McGill*, 296 N.C. at 568, 251 S.E. 2d 616, 619 (1979). The trial court must give proper instructions with respect to each of these elements.

Here the trial court failed to instruct the jury that it had to find that the amount possessed was more than one ounce. The trial judge properly referred to the offense as "possessing a quantity of marijuana more than one ounce"; however, the court told the jury in the final mandate that it needed to find only that defendant possessed marijuana to find him guilty of the stated offense. Possession of *more than one ounce* is an essential element of the offense and the trial judge's failure to so charge was error.[1] *Accord State v. Reese*, 33 N.C. App. 89, 90, 234 S.E. 2d 41, 42 (1977).

We cannot agree with the Court of Appeals' reasoning that it was proper for the trial court to remove the amount element from the jury's consideration because the evidence tended to show that if defendant possessed any marijuana, he possessed 59.9 grams of marijuana, which is more than one ounce. Again, the amount possessed is an essential element for jury determination. Defend-

1. We note that this element is indeed an important one. Whether the amount of marijuana, a Schedule VI substance under G.S. 90-94 (Supp. 1981), is more or less than one ounce determines whether possession is a felony punishable by up to five years' imprisonment and/or a fine or merely a misdemeanor punishable by a fine of not more than one hundred dollars ($100). G.S. 90-95(d)(4) (1981).

ant pled not guilty to the offense charged and thus did not admit to possession of any amount of marijuana. The jury, therefore, must decide the quantity possessed.

Hence, defendant's conviction and sentence for possession of more than one ounce of marijuana must be vacated.

IV.

Defendant is not, however, entitled to a new trial. In failing to submit the amount requirement, as discussed above, the trial court essentially submitted to the jury the offense of simple possession of marijuana, G.S. 90-95(a)(3) (1981), and the jury convicted defendant of that offense. Simple possession of marijuana under G.S. 90-95(a)(3) (1981)—unlike possession of more than one ounce of marijuana under G.S. 90-95(d)(4) (1981)—*is* a lesser included offense of possession of marijuana with intent to manufacture, sell or deliver, G.S. 90-95(a)(1) (1981). *State v. McGill*, 296 N.C. 564, 251 S.E. 2d 616 (1979); *State v. Aiken*, 286 N.C. 202, 209 S.E. 2d 763 (1974). *See State v. Weaver*, 305 N.C. 629, 295 S.E. 2d 375, 378-79 (1982).

As Justice Lake stated in *Aiken*:

> [O]ne may not possess a substance with intent to deliver it . . . without having possession thereof. Thus, possession is an element of possession with intent to deliver and the unauthorized possession is, of necessity, an offense included within the charge that the defendant did unlawfully possess with intent to deliver.

286 N.C. at 206, 209 S.E. 2d at 766.

The sole distinction between the offenses of possession of more than one ounce of marijuana, G.S. 90-95(d)(4) (1981), and simple possession of marijuana, G.S. 90-95(a)(3) (1981), is the element of amount. In the former, the jury must find that defendant possessed more than one ounce; in the latter, possession of any amount is sufficient for conviction. Otherwise, the elements of the two offenses are the same. Therefore, in finding defendant guilty of possession of more than one ounce of marijuana, the jury necessarily had to find facts establishing the offense of simple possession of marijuana. Because the trial court failed to give proper instructions to the jury on the amount of contraband pos-

sessed, an element essential to sustain the conviction of possession of more than one ounce of marijuana, it follows that the verdict the jury returned must be considered a verdict of guilty of simple possession of marijuana, G.S. 90-95(a)(3) (1981). We, therefore, leave the verdict undisturbed but recognize it as a verdict of guilty of the lesser included offense of simple possession, vacate the judgment imposed upon the verdict of guilty of possession of more than one ounce of marijuana and remand the cause to the Court of Appeals for remand to the Superior Court, Durham County, for resentencing as upon a verdict of guilty of simple possession of marijuana, G.S. 90-95(a)(3) (1981). *See State v. Barnette*, 304 N.C. 447, 468-70, 284 S.E. 2d 298, 311 (1981); *State v. Jolly*, 297 N.C. 121, 130, 254 S.E. 2d 1, 7 (1979).

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

Vacated in part, reversed in part, and the case remanded.

STATE OF NORTH CAROLINA v. HARLEY LEWIS FENNELL

No. 384A82

(Filed 7 December 1982)

Criminal Law § 163— failure of defendant to request recorded conference concerning instructions—failure to object to instructions as given—no review of matters not properly before Court

Where defendant did not object to the instructions as given in his trial for a first degree sexual offense, and where defendant did not request a recorded conference pursuant to G.S. 15A-1231, in the absence of error so fundamental that the Court would invoke Rule 2 power to suspend the rules and consider defendant's assignments of error, the Court is bound by the rules of Appellate Procedure, and will not review matters not properly before it.

APPEAL by defendant from a judgment entered 24 February 1982, Criminal Session of Superior Court, DAVIDSON County, by *Collier, J.*

Defendant was charged with and found guilty of first degree sexual offense based upon the following indictment:

> That Harley Fennell late of the County of Davidson on the 30th day of August 1980 with force and arms, at and in the County aforesaid, unlawfully, wilfully and feloniously did commit a sexual offense, to wit: fellatio, with James Edward Grooms, a child of the age of 12 years or less, to wit: 7 years of age, he, the defendant, being of the age of 12 years or more and four or more years older than the victim, to wit: 32 years of age, against the form of the statute in such case made and provided and against the peace and dignity of the State.

The sole question presented for our review, as articulated by the defendant, is whether

> [t]he defendant is entitled to a new trial because of the trial court's failure in his instructions to the jury to specify which of several acts of fellatio presented by the evidence as occurring on different days the jury had to find beyond a reasonable doubt that the defendant committed in order to find him guilty.

For defendant's failure to comply with Rule 10(b)(2) of the Rules of Appellate Procedure (effective 1 October 1981), and because a careful review of the record discloses no question of sufficient import to invoke our Rule 2 power to suspend the rules, we decline to grant the defendant a new trial.

Facts pertinent to our decision are as follows:

Testimony at trial indicated that in addition to the act of fellatio which constituted the crime with which defendant was charged, and of which he was convicted, defendant performed at other times at least two additional acts of fellatio and one act of sodomy with the prosecuting witness, Jimmy Grooms, all of which also occurred in late August of 1980. The act of fellatio for which defendant was indicted, tried and convicted took place in a cornfield where the defendant had taken Jimmy to dig for worms after asking the boy to go fishing with him.

At the conclusion of the evidence, the trial court summarized the evidence as follows:

> Evidence has been received tending to show that at some occasion subsequent to the events alleged in this par-

ticular indictment that the defendant engaged in anal intercourse with the prosecuting witness James Edward Grooms on several occasions and that he attempted to have the prosecuting witness James Edward Grooms perform fellatio on him and burned him when he refused to do so. This evidence was received solely for the purpose of showing that there existed in the mind of the defendant a plan, scheme, system, or design involving the crime charged in this case, that is—the intent on his behalf to engage in various sexual conduct with the prosecuting witness. If you believe this evidence you may consider it but only for the limited purpose for which it was received.

. . . .

. . . [T]he State offered evidence which it contends tends to show that sometime in the late August of 1980 James Edward Grooms, the prosecuting witness accompanied Harley Fennell into a corn-field in order to dig for some worms for fishing purposes; that while in the corn-field Harley Fennell opened his pants by unzipping his pants and placed his mouth on the penis of James Edward Grooms; that on some subsequent occasion he engaged in anal intercourse with him at a service station in the bathroom and two occasions at the mobile home where he resided and another occasion he asked James Edward Grooms to engage in fellatio with him, and when James Edward Grooms refused, he burned him with a cigarette. That is what some of the evidence for the State tends to show; what it does show, if anything, is for you to say and determine.

Following his summary of the evidence, the trial judge instructed the jury on the elements of first degree sexual offense. He then charged:

I charge that if you find from the evidence and beyond a reasonable doubt that on or about sometime late in August, 1980 Harley Fennell engaged in fellatio with James Edward Grooms, and that at that time James Edward Grooms was a child of the age of twelve years or less; that Harley Fennell was four or more years older than James Edward Grooms, it would be your duty to return a verdict of guilty of first degree sexual offense; however, if you do not so find or have

a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

Rufus L. Edmisten, Attorney General, by Thomas H. Davis, Jr., Assistant Attorney General, for the State.

James H. Gold, Assistant Appellate Defender, Office of the Appellate Defender, for defendant-appellant.

MEYER, Justice.

It is defendant's contention that he is entitled to a new trial for the trial judge's failure to specify in his charge to the jury which of the several acts of fellatio the jury was to consider in determining his guilt. Defendant did not object to the instructions as given. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure, in effect at the time of defendant's trial, provides:

> *Jury Instructions; Findings and Conclusions of Judge.* No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. In the record on appeal an exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference. An exception to the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its substance immediately following the instructions given, or findings or conclusions made. A separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error.

Defendant would first have us overlook his failure to comply with this rule because, he contends, the record does not disclose that the trial court complied with Rule 21 of the General Rules of Practice for the superior and district courts in that the instruction conference was not recorded. Rule 21 requires a jury instruc-

tion conference for all trials occurring after 15 September 1981, and provides that

> [a]t the close of the evidence (or at such earlier time as the judge may reasonably direct) in every jury trial, civil and criminal, in the superior and district courts, the trial judge shall conduct a conference on instructions with the attorneys of record (or party, if not represented by counsel). Such conference shall be out of the presence of the jury, and *shall be held for the purpose of discussing the proposed instructions to be given to the jury.* An opportunity must be given to the attorneys (or party if not represented by counsel) to request any additional instructions or to object to any of those instructions proposed by the judge.

(Emphasis added.)

Defendant did not request a recorded conference pursuant to G.S. § 15A-1231. Defendant concedes, and the record confirms, that an instruction conference was held at the close of all the evidence. The conference was held in chambers and because it was not recorded defendant argues that there is no way to determine whether the trial judge tendered his proposed charge so that counsel could *read* it over and determine if he had any objections. We find the argument unpersuasive. Rule 21 of our General Rules of Practice does not require that the instruction conference be recorded or that the judge's proposed charge be reduced to writing and submitted to counsel. By the very wording of the rule itself, it is clear that the instruction conference contemplated by Rule 21 shall be held "for the purpose of *discussing* the proposed instructions" and providing an opportunity for counsel to object to any of the instructions proposed by the judge or to request additional instructions.

Where the record is silent upon a particular point, it will be presumed that the trial court acted correctly in performing his judicial acts and duties. *See State v. Sanders*, 280 N.C. 67, 185 S.E. 2d 137 (1971); *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970). We therefore conclude, in the absence of any evidence whatsoever to the contrary, that the trial judge fully complied with Rule 21 in conducting the instruction conference.

Rule 10(b)(2) of our Rules of Appellate Procedure requiring objection to the charge before the jury retires is mandatory and not merely directory. The reason for the rules was succinctly stated by Justice Stacy in *Pruitt v. Wood*, 199 N.C. 788, 789-90, 156 S.E. 126, 127 (1930):

> [T]he rules of this Court, governing appeals, are mandatory and not directory. They may not be disregarded or set at naught (1) by act of the Legislature, (2) by order of the judge of the Superior Court, (3) by consent of litigants or counsel. The Court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly.
>
> . . . The work of the Court is constantly increasing, and, if it is to keep up with its docket, which it is earnestly striving to do, an orderly procedure, marked by a due observance of the rules, must be maintained. When litigants resort to the judiciary for the settlement of their disputes, they are invoking a public agency, and they should not forget that rules of procedure are necessary, and must be observed, in order to enable the courts properly to discharge their duties.

(Citations omitted.)

In the absence of error so fundamental that we would invoke our Rule 2 power to suspend the rules and consider defendant's assignment of error, we, too, are bound by the Rules of Appellate Procedure, and will not review matters not properly before us.

Defendant, however, contends that the error alleged is so "fundamental" that a new trial is required despite defense counsel's failure to lodge a contemporaneous objection. We disagree. In view of defendant's life sentence, we have carefully reviewed the judge's charge and find no error so "plain" or "fundamental" as to require a new trial. In the context of the instructions given, including the summary of the evidence and the statement of applicable law, we find that the judge's charge sufficiently apprised the jury of which act of fellatio they were to consider in determining defendant's guilt.

Defendant brings forth no other assignment of error; nevertheless, we have carefully reviewed the record on appeal and conclude that defendant received a fair trial free of prejudicial error.

There is substantial evidence of each essential element of the offense charged and of defendant's being the perpetrator of the offense. Thus, the evidence was sufficient, as a matter of law, to go to the jury. *State v. Woods*, 307 N.C. 213, --- S.E. 2d --- (1982); *State v. Earnhardt*, 307 N.C. 62, --- S.E. 2d --- (1982); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

No error.

STATE OF NORTH CAROLINA v. PAUL WOODRUFF, JR.

No. 67A82

(Filed 7 December 1982)

Criminal Law § 177— equally divided court—opinion of Court of Appeals affirmed—no precedent

In a prosecution for two counts of first degree rape, two counts of robbery with a dangerous weapon, two counts of kidnapping, and first degree burglary, where one member of the Supreme Court did not participate in the consideration or decision of a case and the remaining six Justices were equally divided, the opinion of the Court of Appeals was affirmed without precedential value.

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

APPEAL by defendant pursuant to G.S. 7A-27(a) from a decision of *Mills, J.*, entered 19 October 1981, Special Session of Superior Court, DAVIDSON County, wherein the defendant received a number of consecutive sentences as follows: (1) life imprisonment upon conviction of first degree burglary; (2) life imprisonment upon conviction of two counts of kidnapping to begin at the expiration of the sentence imposed in the first degree burglary count; (3) life imprisonment upon conviction of two counts of robbery with a dangerous weapon, with sentence to commence at the expiration of the sentence imposed in the two kidnapping counts; (4) life imprisonment upon conviction of two counts of first degree rape, with sentence to commence at the expiration of the robbery with a dangerous weapon count.

Rufus L. Edmisten, Attorney General, by Frank P. Graham, Assistant Attorney General, for the State.

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

PER CURIAM.

On 3 December 1980, a masked man, later identified as the defendant, entered the residence of Ernestine Mobley in Thomasville, North Carolina. In the house at the time of entry were Mrs. Mobley, an invalid in her eighties, and Mrs. Aiken. Mrs. Aiken and Mrs. Winslow, who arrived shortly thereafter, were nurses employed to care for Mrs. Mobley.

Defendant, a young white man, wearing a face mask, threatened Mrs. Aiken and Mrs. Mobley with a gun. He advised Mrs. Aiken that he was an ex-convict, needed money to get out of town, and would kill her if necessary. The invalid, Mrs. Mobley, was only semi-conscious and did not know what was going on. Subsequently he took money from Mrs. Aiken and Mrs. Winslow. Mrs. Winslow arrived after the defendant had entered the house. She came for the purpose of relieving Mrs. Aiken.

Defendant led both Mrs. Aiken and Mrs. Winslow to the living room at gunpoint. He made inquiries about a safe. Each of the victims advised him that they knew nothing about a safe. Soon thereafter the defendant took both Mrs. Aiken and Mrs. Winslow to an upstairs bedroom and forced each to undress and lie on a bed. He placed a pillow over the head of each victim. The defendant then had vaginal intercourse with both of them. After the sexual acts were completed, he tied them up and left the room, after advising them to stay where they were. The women did not move for fifteen or twenty minutes, until they heard an automobile horn sound, coming from a vehicle operated by the son of Mrs. Aiken who had arrived to pick her up. The women got up, partially dressed, and reported what had occurred to the police.

Identification was eventually made of clothing worn by the defendant by each victim and Mrs. Winslow identified him by voice identification. Defendant's chief assignment of error concerns whether he was properly advised of his right to counsel at the voice identification. The evidence tends to show that the SBI

Agent conducting the voice identification advised defendant that although he had a right to counsel, the voice identification would be conducted regardless of the presence of defendant's attorney.

In addition to the voice identification, there was medical testimony from the physician who examined the victims shortly after the incident which was consistent with the State's claim that each victim had been raped. There was testimony from a forensic serologist that blood and saliva samples taken from defendant indicate that he could have been the perpetrator of the alleged rape. A forensic chemist also testified that a blonde hair taken from one of the victims was microscopically consistent with a sample of defendant's pubic hair. Furthermore, two items of evidence, a pistol and a watch, which were seized from defendant's trailer, were identified as belonging to one of the victims and had been taken during the robbery. The victims also identified a jacket and a pair of shoes found in defendant's trailer as the jacket and shoes worn by the person who robbed and raped them.

The defendant offered no evidence and the jury found the defendant guilty on each of the counts, as charged.

Chief Justice Branch took no part in the consideration or decision in this case. The remaining members of this Court were equally divided, with three members voting to affirm the Davidson County Superior Court, and three members voting for a new trial. The decision of the Davidson County Superior Court is left undisturbed and stands without precedential value. *State v. Johnson*, 286 N.C. 331, 210 S.E. 2d 260 (1974); *State v. Smith*, 243 N.C. 172, 90 S.E. 2d 328 (1955); *State v. Brown*, 242 N.C. 602, 89 S.E. 2d 157 (1955).

Affirmed.

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

SHEILA LOCKLEAR BECK, ADMINISTRATRIX OF THE ESTATE OF DARYL IVAN BECK, DECEASED v. CAROLINA POWER & LIGHT COMPANY

No. 398A82

(Filed 7 December 1982)

Appeal and Error § 64— evenly divided court—decision affirmed—no precedent

Where one member of the Supreme Court did not participate in the consideration or decision of a case and the remaining six Justices are equally divided, the decision of the Court of Appeals is affirmed without becoming a precedent.

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

APPEAL by defendant pursuant to G.S. 7A-30(2) and Rule 14 of the Rules of Appellate Procedure from a decision of a divided panel of the Court of Appeals, 57 N.C. App. 373, 291 S.E. 2d 897 (1982), which found no error in trial before *Godwin, Judge*, at the 17 February 1981 Session of WAKE Superior Court.

Thorp, Anderson, Slifkin, Roten & Clayton, P.A., by Anne R. Slifkin and William L. Thorp; Locklear, Brooks & Jacobs by Dexter Brooks, Attorneys for plaintiff appellee.

Fred D. Poisson; Manning, Fulton & Skinner by Howard E. Manning and Michael T. Medford, Attorneys for defendant appellant.

Harris, Bumgardner and Carpenter by Seth H. Langson, Attorneys for North Carolina Academy of Trial Lawyers, amicus curiae.

Golding, Crews, Meekins, Gordon & Gray, by John G. Golding; Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Irvin W. Hankins, III, Attorneys for North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

The facts in this case are fully stated in the decision of the Court of Appeals. Judge (now Justice) Harry C. Martin participated in the decision of this case as a member of the Court of Appeals and therefore took no part in the consideration or deci-

sion of the appeal before this Court. The remaining members of this Court were equally divided, three members voting to affirm the decision of the Court of Appeals and three members voting to reverse. Therefore the decision of the Court of Appeals is left undisturbed as the law of the case but stands without precedential value.

Affirmed.

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

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ODELL R. HILL	)	

No. 612P82

(Filed 7 December 1982)

THE defendant-petitioner, Odell R. Hill, by his Motion for Appropriate Relief, petitions this Court for an order arresting judgment entered upon his conviction of crime against nature. The record before us discloses that the defendant was indicted for first degree sexual offense (G.S. 14-27.4). The defendant-petitioner was convicted of crime against nature, which is not a lesser included offense of the crime of first degree sexual offense. Therefore, we arrest judgment. The Order of this Court of 5 November 1982 allowing the defendant-petitioner's Petition for Discretionary Review is vacated and the case is remanded to the Court of Appeals with direction that it further remand the case to the Superior Court, Cumberland County for the entry of this Order arresting judgment.

BY ORDER OF THE COURT IN CONFERENCE, this 7th day of December, 1982.

MARTIN, J.
For the Court

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

BARRETT, ROBERT & WOODS v. ARMI

No. 603P82.

Case below: 59 N.C. App. 134.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 December 1982.

BROUGHTON v. BROUGHTON

No. 590P82.

Case below: 58 N.C. App. 778.

Petitions by defendant and plaintiff for discretionary review under G.S. 7A-31 denied 7 December 1982.

CASSIDY v. CHEEK

No. 576PA82.

Case below: 58 N.C. App. 742.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 7 December 1982.

CITY OF WINSTON-SALEM v. DAVIS

No. 613P82.

Case below: 59 N.C. App. 172.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 December 1982.

HALLAN v. HALLAN

No. 574P82.

Case below: 58 N.C. App. 820.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 December 1982.

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

HOWELL v. BUTLER

No. 618P82.

Case below: 59 N.C. App. 72.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 December 1982.

McCAULEY v. AUSTIN

No. 562P82.

Case below: 58 N.C. App. 821.

Petition by defendants Thomas for discretionary review under G.S. 7A-31 denied 7 December 1982.

MERRITT v. CP&L

No. 593P82.

Case below: 58 N.C. App. 820.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 7 December 1982.

SOUTHERN RAILWAY CO. v. ADM MILLING CO.

No. 571P82.

Case below: 58 N.C. App. 667.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 December 1982.

STATE v. BIVINS

No. 609P82.

Case below: 58 N.C. App. 822.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 7 December 1982.

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

STATE v. BROWN

No. 527PA82.

Case below: 58 N.C. App. 606.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 7 December 1982.

STATE v. CAMP

No. 624P82.

Case below: 59 N.C. App. 38.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 December 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 December 1982.

STATE v. CHRISTOPHER

No. 595PA82.

Case below: 58 N.C. App. 788.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 7 December 1982.

STATE v. GINN

No. 663P82.

Case below: 59 N.C. App. 363.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 December 1982. Notice of Appeal dismissed 7 December 1982.

STATE v. HOWELL

No. 634P82.

Case below: 59 N.C. App. 184.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 December 1982.

STATE v. LEEPER

No. 631P82.

Case below: 59 N.C. App. 199.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 December 1982.

STATE v. LINGERFELT

No. 482P82.

Case below: 58 N.C. App. 606.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 December 1982.

STATE v. NICKERSON

No. 615PA82.

Case below: 59 N.C. App. 236.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 7 December 1982. Motion of Attorney General to dismiss appeal for lack of significant public interest denied 7 December 1982.

SUNBOW INDUSTRIES, INC. v. LONDON

No. 572P82.

Case below: 58 N.C. App. 751.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 December 1982.

TURNER v. BROOKS

No. 591P82.

Case below: 58 N.C. App. 821.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 7 December 1982.

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

PETITION TO REHEAR

WEEKS v. HOLSCLAW

No. 58PA82.

Case below: 306 N.C. 655.

Petition by defendant to rehear denied 7 December 1982.

STATE OF NORTH CAROLINA v. ANDREW D. STRICKLAND

No. 32PA82

(Filed 11 January 1983)

1. **Homicide § 25— first degree murder—four classes**

G.S. § 14-17 separates first degree murder into four distinct classes as determined by proof. They are: (1) murder perpetrated by means of poison, lying in wait, imprisonment, starving or torture, (2) murder perpetrated by any other kind of willful, deliberate and premeditated killing, (3) murder committed in the perpetration or attempted perpetration of certain enumerated felonies, (4) murder committed in the perpetration or attempted perpetration of any other felony committed or attempted with the use of a deadly weapon.

2. **Homicide §§ 25.2, 30— murder perpetrated by poison, lying in wait, imprisonment, starving or torture—presumption of premeditation and deliberation—no instructions on lower grades of murder**

When a murder is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the law conclusively presumes that the murder was committed with premeditation and deliberation, and if the evidence produced at trial supports a finding that the murder was so perpetrated, a defendant can properly be convicted of first degree murder, and there is no justification for submitting to the jury a charge of one of the lower grades of murder.

3. **Homicide §§ 25.2, 30— homicide perpetrated by any other kind of willful, deliberate and premeditated killing—instruction on second degree murder only if evidence tends to show lack of premeditation and deliberation**

Where a homicide is perpetrated by means of any other kind of willful, deliberate and premeditated killing, the second class of first degree murder, upon proof of any of the requisite elements, a defendant can be properly convicted of murder in the first degree. Prior to *State v. Harris*, 290 N.C. 718 (1976), the trial judge was required to give an instruction on second degree murder only if the evidence, reasonably construed, tended to show lack of premeditation and deliberation or would permit a jury to rationally find defendant guilty of the lesser offense and acquit him of the greater. *Harris* mandates a second degree murder instruction in *every case* in which the State relies on premeditation and deliberation to support a conviction of first degree murder. Because the *Harris* rule is not required or supported by precedent; does not manifestly improve the administration or quality of justice; has been emasculated by recent Supreme Court decisions; and is suspect of being constitutionally impermissible, the Court was compelled to overrule *Harris*, and its progeny in favor of the evidentiary approach consistent with the general rule that "the trial court is not required to charge the jury upon the question of defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees."

4. Homicide §§ 25.1, 30— felony murder—proof of premeditation and deliberation not required

Where a murder is committed in the perpetration or attempted perpetration of certain enumerated felonies or the murder is committed in the perpetration or attempted perpetration of any other felony committed or attempted with the use of a deadly weapon, the third and fourth classes of first degree murder, then the State is not required to prove premeditation and deliberation and neither is the court required to submit to the jury second degree murder or manslaughter unless there is evidence to support it.

5. Homicide § 30— first degree murder prosecution—second murder properly excluded from jury consideration

Where the evidence in a prosecution for first degree murder tended to disclose a brutal and senseless murder committed without justification or excuse, where there was evidence of preparation in that the victim was bound to facilitate his death, and where to suggest that the murderer did not act with premeditation and deliberation on the evidence as presented was to invite total disregard of the facts, the trial judge properly excluded from jury consideration the possibility of a conviction of second degree murder.

6. Homicide § 24.2— first degree murder—presumption of malice

The trial court did not err in failing to require the jury to find malice, an essential element in murder in the first degree, since malice exists as a matter of law whenever there has been an unlawful and intentional homicide without justification or excuse and defendant raised no legal justification or excuse at trial.

7. Homicide § 24.2— first degree murder—defense of duress—no evidence of lack of malice

The defense of duress is not available to a defendant charged with first degree murder and therefore is not evidence of lack of malice.

8. Criminal Law § 7.5— duress—jury instruction—erroneous—favorable to defendant

The trial judge did not impose a stricter standard on defendant by requiring the jury to find that defendant "was placed in such fear as would deprive him of the ability to act" in order to acquit him on the defense of duress. Although erroneous, the instruction was favorable to defendant in that it did not require the jury to find (1) that the defendant's fear be reasonable or (2) that the defendant was in imminent fear of death or serious bodily harm.

9. Criminal Law § 7.5— defense of duress—burden of proof

The burden of proving the affirmative defense of duress to the satisfaction of the jury is upon the defendant; however, the State is required to prove beyond a reasonable doubt all the elements of the offense in the face of any defenses raised and proved to the satisfaction of the jury.

10. Criminal Law § 7.5— jury instruction on duress—omission of words "because of fear for his own life"—no prejudicial error

The judge's omission of the words "because of fear for his own life" from his instructions on the defense of duress was not prejudicial error in light of

his summary of the evidence which adequately discussed defendant's alleged fear and in light of the evidence at trial which tended to negate defendant's evidence.

11. Kidnapping § 1.3— jury instructions—defense of duress to kidnapping charge—prejudicial error

Where the trial court's instruction to the jury on the defense of duress was such that the Court was unable to determine with certainty whether the jury's rejection of defendant's defense of duress was based upon a disbelief of his evidence or its failure to understand that duress was a complete defense to the kidnapping charge, defendant met his burden of showing that there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial."

12. Kidnapping § 1.3— element of unlawfulness adequately submitted to the jury

Where the trial judge used the words "forcibly abducted" in his charge concerning the offense of kidnapping, the element of unlawfulness was adequately submitted to the jury.

13. Criminal Law § 76.3— admission of defendant's statement for impeachment purposes—no voir dire required

The trial court did not err in failing to hold a voir dire hearing prior to admitting defendant's statement for impeachment purposes where defendant did not challenge its admissibility, prior to introduction, on the ground that it was coerced.

Justice MARTIN concurring.

Justice MITCHELL joins in this concurring opinion.

Justice MITCHELL concurring.

Justice CARLTON dissenting.

Chief Justice BRANCH joins in this dissenting opinion.

Justice EXUM dissenting.

APPEAL by defendant from *Bailey, J.* Judgments entered 14 May 1971, Criminal Session of Superior Court, CUMBERLAND County. Upon defendant's failure to perfect his appeal, the appeal was dismissed on motion of the State, 13 December 1971. Defendant's subsequent Motion for Appropriate Relief was allowed 1 October 1981, whereby his appeal was reinstated.

Defendant was indicted for first degree murder of James Earl Buckner, first degree rape of Gwen Davis, and kidnapping of Mr. Buckner and Miss Davis. He was found guilty of first degree murder and of two counts of kidnapping. Defendant was sentenced to serve a prison term of ninety-nine years on each of the

kidnapping convictions, to run consecutively and to be followed by imprisonment for the term of his natural life to begin at the expiration of the kidnapping sentences.

As a basis for his appeal, defendant assigns as error the trial court's failure to submit to the jury the issue of defendant's guilt of second degree murder; its failure to require the jury to find that defendant acted with malice in order to convict him of first degree murder; error in the court's instruction on duress as a defense to the kidnapping charges; failure to require the jury to find that defendant acted unlawfully in order to convict him of kidnapping; and the court's denial of defendant's request for a voir dire prior to the admission of an inculpatory statement. For the reasons set out in our opinion, we find no error in defendant's trial sufficient to warrant the granting of a new trial on his conviction of first degree murder. For error in the jury instructions on defendant's defense of duress, defendant is entitled to a new trial on his convictions of kidnapping.

Facts pertinent to our decision in this case are as follows:

David Sisneros testified as a witness for the State that on 28 June 1970, he, in the company of the defendant, Danny Chance, and Charles Wilcosky, decided "to have some fun" after happening upon a black Pontiac automobile occupied by James Earl Buckner and fourteen year-old Gwen Davis. Sisneros and the defendant were soldiers stationed at Fort Bragg. The four men had met together earlier at the Drop Zone Club in Fayetteville, and after drinking for some time, they left in a white station wagon belonging to Chance's wife. They chased some girls in another car "like cat and mouse" in the area of Yadkin Road. Later they were approached by two prostitutes. Sisneros told the defendant to leave the two prostitutes alone, and defendant replied that "they were going to get some tonight and to stay out of his way." The prostitutes left. The men finally targeted the black Pontiac and its occupants.

The defendant, using a gun he had earlier taken from Chance, ordered the two young people to join him and the others in Chance's car. They drove to a secluded area, stopped the car, and defendant instructed Sisneros to remove Buckner and tie him to a tree with a rope provided by Chance. After defendant had intercourse with Miss Davis, he found Buckner tied to a tree and

re-tied him, putting the rope around the young man's neck. Buckner began choking and gagging. In response to Sisneros's warning that defendant might kill Buckner, defendant replied that "it didn't bother him to kill anybody," "that his unit got wiped out in South Viet Nam and that he had killed twenty-three people in Viet Nam." Defendant then proceeded to tie Buckner against the tree "Viet Nam style;" that is "[w]ith his face to the tree, his arms wrapped around the tree . . . and his wrists tied around in that fashion, his legs crossed behind him and the rope wound around his neck and head about three times." He then "took off his shirt and wrapped it around Buckner's neck and started to pull on it, and just more or less hanging on to it, to choke him." At Sisneros's insistence, defendant stopped. Chance was having intercourse with Miss Davis at this time. He was followed by Sisneros, who, upon completing the act, saw Chance and the defendant walking up towards the road from the woods. Wilcosky was now with Miss Davis. Either the defendant or Chance told Sisneros that they had killed Buckner and put him in the bushes. With Wilcosky still in the back seat with Miss Davis, the others got into the front seat and drove the car to a nearby tobacco field. Defendant again had sexual intercourse with Miss Davis. Defendant and Chance "started talking about going two at a time with her;" "they tried, but it didn't work out too well." Miss Davis then got dressed. Defendant stated that they had already killed Buckner. "Now who is going to kill her?" defendant asked, looking at Sisneros. Sisneros "started to grab Miss Davis by the throat," pushed her back and let her go, stating that he couldn't do it. Then the defendant "reached back and hit her in the neck with his finger tips, and she, she coughed, and then he grabbed her by her throat until she passed out." Miss Davis regained consciousness as defendant, accompanied by Sisneros, carried her to a creek where "he was going to dump her in." Defendant dropped her on her head, stating that "he thought her neck was broken." Miss Davis again regained consciousness and defendant attempted to smother her with his hand over her mouth and nose. She stopped moving and defendant "stood up and started to kick her about the head and shoulders." Meanwhile Chance and Wilcosky arrived and asked if Miss Davis was dead yet. Defendant answered in the negative—"[b]ut she won't live very long." Chance then "stomped her neck with his heel, with the heel of his shoes, and while he was going [sic] this, Andrew

Strickland jumped on his back to make more weight . . . ." Miss Davis was then thrown on some boards. She survived.

The four men returned to defendant's home where they stayed for approximately six hours, at which time Chance drove them to Fort Bragg.

Defendant testified on his own behalf. He testified that after meeting with Chance, Wilcosky and Sisneros at the Drop Zone, he left with these men in Chance's car. Chance chased a red Chevrolet with four girls in it. Defendant asked to be taken home. He did not jump out of the car because he feared for his life. Both Chance and Sisneros threatened him with pistols. He took Chance's gun and used it against Buckner and Miss Davis because Sisneros was there behind him with another gun. He tried to help Buckner, and in fact cut him down from the tree. Chance was the last man with Buckner and Buckner was alive the last time the defendant saw him. He tried to help Miss Davis by telling her to run. The others beat the girl while he asked them to stop. Once they had returned to defendant's home, he didn't say anything to his wife because Sisneros still had a gun on him and he was afraid for his wife and family. Defendant's wife testified that at that time she saw Sisneros standing close to the defendant with a gun pointed at him.

On rebuttal, Sisneros denied ever using a gun. He stated that defendant did not attempt to help Mr. Buckner and that defendant was the leader of the operation.

Mr. C. L. Neal, Sheriff of Harnett County, testified that on 30 June 1970, he took a statement from the defendant in the presence of Mr. Gregory. In his statement, the defendant made no mention of being forced at gunpoint to participate in the crimes or of trying to help Mr. Buckner or Miss Davis.

Miss Davis testified that she never saw any pistol in Sisneros's hands; that the defendant never said anything to her about escaping. She further testified that while talking to Mr. Buckner, they were approached by the defendant and three other men; that the defendant pointed a pistol at Buckner and ordered them both to get into a white station wagon; that during the drive, the defendant sexually assaulted her, against her will. Buckner was removed from the car when they arrived at a place

with two small ponds. The men had sexual intercourse with her. She was too afraid to resist. She remembered little about the beating she received except for a hand around her throat. She awoke lying on some white boards in a small ditch. She walked to a farmhouse and was eventually returned home. She was able to lead the sheriff to the area where Mr. Buckner was last seen and Buckner was found dead.

From a description of the white station wagon given to them by Miss Davis, the sheriff's department was able to trace the vehicle to Danny Chance.

Dr. William D. McLester testified concerning the cause of James Earl Buckner's death as follows:

> [T]he body was that of a white male, that appeared to be about the age of, that was given me of twenty-three year. Examination of the exterior of his body revealed a ligature mark, or a mark made by some sort of rope or band, around the neck, over the larynx, in that area, and this mark extended over to the right side of the neck, and there was marks depressed about half an inch. Similar mark on the wrist with multiple lacerations or superficial cuts and bruises about the face. There were multiple scratches and bruises of the back, with leaves imbeded in these. Examination of the head showed that the head was blue. There were hemorrhages in his eyes. And there was a bruise of, a large bruise over the, I think it was the right leg.

Internal examination of the deceased revealed that:

> On examination of the deeper structure of the neck, there were fresh hemorrhage in the closures, especially of the left side. His lungs were very heavy, about three times normal weight. They were filled with fluid, and on examination there was blood in the lungs. There was blood in the heart and the larger vessels, filled with fluid.

It was Dr. McLester's opinion that James Earl Buckner "died of strangulation or asphyxiation due to a ligature, the mark which [he had] described around the neck."

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

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

MEYER, Justice.

[1] Defendant first assigns as error the trial court's failure to instruct the jury on a charge of second degree murder. He quotes the following language appearing in our opinion of *State v. Harris*, 290 N.C. 718, 730, 228 S.E. 2d 424, 432 (1976):

> [I]n all cases in which the State relies upon premeditation and deliberation to support a conviction of murder in the first degree, the trial court must submit to the jury an issue of murder in the second degree.

It is defendant's contention that the rule enunciated in *Harris* merely reaffirmed our prior ruling in *State v. Perry*, 209 N.C. 604, 184 S.E. 545 (1936), and that the rule has since been reaffirmed in *State v. Keller*, 297 N.C. 674, 256 S.E. 2d 710 (1979), and *State v. Poole*, 298 N.C. 254, 258 S.E. 2d 339 (1979). We disagree with the defendant that *Perry*, like *Harris*, mandates a second degree murder instruction in *every case* in which the State relies on premeditation and deliberation to support a conviction of first degree murder. We are further compelled to re-evaluate our decision in *Harris* in light of the recent Supreme Court decision in *Hopper v. Evans*, --- U.S. ---, 72 L.Ed. 2d 367 (1982).

We note initially that defendant was tried and convicted in December 1971, prior to our 1976 decision in *Harris*. Thus our first inquiry is directed toward an interpretation of the law in the pre-*Harris* cases, applicable to defendant on the date of his trial. As defendant further invokes the benefit of our subsequent interpretation and refinement of the law of these cases as set out in *Harris*, our inquiry must necessarily turn to a discussion of the "*Harris* rule" as affected by the interpretation we now place on those cases purportedly giving rise to the rule. *See State v. Perry*, 209 N.C. 604, 184 S.E. 545; *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928); *State v. Spivey*, 151 N.C. 676, 65 S.E. 995 (1909).

[1] Important to this interpretation is the language found in G.S. § 14-17, which defines murder in the first degree. While kidnapping was not a specified felony under the statute as it appeared in 1971, the present version of the statute is substantially the same and provides in pertinent part:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, ...

We read G.S. § 14-17 as separating first degree murder into four distinct classes as determined by the proof. The four classes are as follows:

I Murder perpetrated by means of poison, lying in wait, imprisonment, starving or torture;

II Murder perpetrated by any other kind of willful, deliberate and premeditated killing;

III Murder committed in the perpetration or attempted perpetration of certain enumerated felonies;

IV Murder committed in the perpetration or attempted perpetration of any other felony committed or attempted with the use of a deadly weapon.

See State v. Davis, 305 N.C. 400, 290 S.E. 2d 574 (1982), for a history of the Statute.

I

[2] Where the homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, all of which require planning or purpose, the law conclusively presumes that the murder was committed with premeditation and deliberation, and where the evidence produced at trial supports a finding that the murder was so perpetrated, a defendant can properly be convicted of first degree murder. *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Hendrick*, 232 N.C. 447, 61 S.E. 2d 349

(1950); *State v. Dunheen*, 224 N.C. 738, 32 S.E. 2d 322 (1944). *See Barfield v. Harris*, 540 F. Supp. 451, 468 (E.D.N.C. 1982). This Court has consistently held that under these circumstances the trial court is not required to instruct the jury on second degree murder. *State v. Perry*, 209 N.C. 604, 184 S.E. 545; *State v. Newsome*, 195 N.C. 552, 143 S.E. 187; *State v. Spivey*, 151 N.C. 676, 65 S.E. 995. We regard this particular aspect of the statute and cases construing it as significant to our determination of the issue before us, for it serves to place the issue of the trial judge's duty to instruct on a lesser offense within the context of an evidentiary determination rather than requiring such an instruction as a matter of law in every case. When the evidence presumptively supports a finding of premeditation and deliberation as in the case of murder by poison, lying in wait, imprisonment, starving or torture, there is no justification for submitting to the jury a charge on one of the lower grades of murder. As we stated in *Spivey*, "[i]t becomes the duty of the trial judge to determine, in the first instance, if there is any evidence or if any inference can be fairly deduced therefrom, tending to prove one of the lower grades of murder." 151 N.C. at 686, 65 S.E. at 999. The test, therefore, in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime,[1] but whether 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 crime charged. *See* 4 N.C. Index 3d, Criminal Law, § 115.

1. Murder in the first degree is sometimes defined briefly as murder in the second degree plus premeditation. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). If a person is guilty of murder in the first degree, *a fortiori*, his guilt encompasses murder in the second degree. Manslaughter is a lesser included offense of murder in the second degree. *State v. Holcomb*, 295 N.C. 608, 247 S.E. 2d 888 (1978). However, the mere fact that the evidence might support a verdict on the lesser crimes does not dictate that the trial judge instruct on the lesser grades. His decision rests on whether the evidence is sufficient to support the charge; that is, whether, in a murder case, the evidence raises a question with respect to premeditation and deliberation or malice, either under the facts or as raised by defendant's defenses. *See State v. Brown*, 300 N.C. 731, 268 S.E. 2d 201 (1980); *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978); *State v. Jones*, 291 N.C. 681, 231 S.E. 2d 252 (1977); *State v. Stewart*, 292 N.C. 219, 232 S.E. 2d 443 (1977); *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976).

It is an elementary rule of law that a trial judge is required to declare and explain the law arising on the evidence and to instruct according to the evidence. *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393. " 'The trial court is not required to charge the jury upon the question of the defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees' . . . ." *State v. Shaw*, 305 N.C. 327, 342, 289 S.E. 2d 325, 333 (1982).

Hence, by recognizing the important connection between what the evidence must show in determining what instructions must be given, the omission of an instruction on second degree murder in cases involving poison, lying in wait, etc., is entirely proper and consistent with our many decisions regarding the trial judge's duty to limit his instructions in accordance with the evidence presented.

II

[3] Where a homicide is perpetrated by means of any other kind of willful, deliberate and premeditated killing, upon proof of the requisite elements, a defendant can be properly convicted of murder in the first degree. We find the following to be an accurate statement of the law respecting the State's burden of proof on the elements of premeditation and deliberation and the trial court's duty to submit the question to the jury:

> Deliberation and premeditation, if relied upon by the State, as constituting the homicide murder in the first degree, under the statute, must always be proved by the evidence, beyond a reasonable doubt. In such case, under the statute as construed by this Court, it is for the jury and not the judge to find the fact of deliberation and premeditation, from the evidence, and beyond a reasonable doubt. Premeditation and deliberation are always matters of fact to be determined by the jury, and not matters of law to be determined by the judge.

State v. Newsome, 195 N.C. at 564, 143 S.E. at 193.

We do not, however, read this language as requiring, as a matter of law, that an instruction on second degree murder is mandated in every case merely because the jury must determine

the existence of premeditation and deliberation in order to convict defendant of first degree murder. Neither *Spivey, Newsome,* nor *Perry* so holds. The test in *Spivey* is whether there is evidence which would support a verdict of murder in the second degree.

> If, however, there is any evidence or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial judge, under appropriate instructions, to submit that view to the jury.

State v. Spivey, 151 N.C. at 686, 65 S.E. at 999.

Likewise, in *Newsome* the following language indicates that the decision to instruct on the lesser grade of murder is an evidentiary one:

> When on the trial of a criminal prosecution it is permissible under the bill, as here, to convict the defendant of 'a less degree of the same crime' (C.S., 4640), and *there is evidence tending to support a milder verdict,* the case presents a situation where the defendant is entitled to have the different views presented to the jury, under a proper charge, ...

State v. Newsome, 195 N.C. at 566, 143 S.E. at 194 (emphasis added). (Stacy, C.J., concurring in result.)

And in *Perry* we again find that although the jury must ultimately determine the existence of every element of first degree murder, it is the trial judge, upon his consideration of the evidence, who must determine whether to submit an instruction on a lesser grade of murder.

> Whenever there is any evidence or when any inference can be fairly deduced therefrom tending to show a lower grade of murder, it is the duty of the trial judge, under appropriate instructions, to submit that view to the jury.

State v. Perry, 209 N.C. at 606, 184 S.E. at 546.

Should the trial judge find, for example, that defendant's own evidence affirmatively negates the possibility that he did not intend to kill the victim, an instruction on the offense of an unintentional killing is not warranted. *See Hopper v. Evans*, --- U.S. ---,

72 L.Ed. 2d 367. To require an instruction on the lesser grade of murder under these circumstances, or where there is not "a scintilla of evidence to support the lesser verdicts" would invite jurors "to disregard their oaths and convict a defendant of a lesser offense when the evidence warranted a conviction of first degree murder, inevitably leading to arbitrary results." *Roberts v. Louisiana*, 428 U.S. 325, 334-35, 49 L.Ed. 2d 974, 982 (1976).

As our own Court stated in *State v. Lampkins*, 286 N.C. 497, 504, 212 S.E. 2d 106, 110 (1975), *cert. denied* 428 U.S. 909 (1976):

> **[5]** 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.

We further note that the language of the United States Supreme Court in *Beck v. Alabama*, 447 U.S. 625, 634, 65 L.Ed. 2d 392, 401 (1980), supports our position that lesser offense instructions should not be given indiscriminately or automatically, but only when warranted by the evidence: "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve doubts in favor of conviction." The availability of a third option, that of finding the defendant guilty of a lesser offense, thus reduces the risk of an unwarranted conviction. However, due process requires only that a lesser offense instruction be given "if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Id.* at 635, 65 L.Ed. 2d at 401.

We therefore hold that prior to our decision in *Harris*, the trial judge was required to give an instruction on second degree murder only if the evidence, reasonably construed, tended to show lack of premeditation and deliberation or would permit a jury to rationally find defendant guilty of the lesser offense and acquit him of the greater. Due process requires no more. Our pre-*Harris* case law supports such a holding, as does the law of other jurisdictions.[2]

Even so, this Court in *State v. Harris*, 290 N.C. 718, 228 S.E. 2d 424, appeared to convert a rule requiring the presence of evidence into a more inflexible rule *requiring* as a matter of law a second degree murder instruction *in every case* in which the State relied on premeditation and deliberation. It did so by omitting from consideration the following underlined evidentiary language appearing in *Perry*:

> In those cases where the evidence establishes that the killing was with a deadly weapon the presumption goes no further than that the homicide was murder in the second degree, and if the State seeks a conviction of murder in the first degree it has the burden of proving beyond a reasonable doubt that the homicide was committed with deliberation and premeditation. Under such circumstances it is error for the trial judge to fail to submit to the jury the theory of murder in the second degree, since it is the province of the jury to determine if the homicide be murder in the first or in the second degree, that is, whether they, the jury, are satisfied beyond a reasonable doubt, from the evidence, that the homicide was committed with deliberation and premeditation. *Whenever there is any evidence or when any inference can be fairly deduced therefrom tending to show a lower grade of murder,*

2. In *State v. Vickers*, 129 Ariz. 506, 633 P. 2d 315 (1981), the court rejected defendant's contention that he was entitled to an instruction on second degree murder, finding that the evidence supported only a premeditated and deliberate killing because defendant had to have "reflected" while tearing bedsheets to form a garrote with which to strangle the victim. In *Justus v. Commonwealth*, 222 Va. 677, 283 S.E. 2d 905 (1981), *cert. denied* 71 L.Ed. 2d 693 (1982), it was held that the only real issue before the jury was whether defendant was guilty of capital murder or of first degree murder and that because there was insufficient evidence to support a second degree murder instruction (the evidence must amount to more than a scintilla) the omission was not error.

> *it is the duty of the trial judge, under appropriate instructions, to submit that view to the jury.*

209 N.C. at 606, 184 S.E. at 546. (Emphasis added.)

The import of the *Harris* decision was to require a trial judge to instruct on the lesser offense *without regard to what the evidence supported.* As Justice Huskins admonished in his dissent in *State v. Poole*, 298 N.C. at 259-60, 258 S.E. 2d at 343, the *Harris* rule and its subsequent affirmation in *State v. Keller*, 297 N.C. 674, 256 S.E. 2d 710,

> perpetuate[d] an unnecessary refinement in the law.
>
> Submission of a lesser included offense when there is no evidence to support the milder verdict is not required when the indictment charges felony murder, arson, burglary, robbery, rape, larceny, felonious assault, or any other felony whatsoever. In all such cases if the evidence tends to show that the crime charged in the indictment was committed and there is no evidence tending to show commission of a crime of lesser degree, the court correctly refuses to charge on unsupported lesser degrees. The *presence* of evidence tending to show commission of a crime of lesser degree is the determinative factor.

(Citations omitted.)

As if to address this perception, the Supreme Court of the United States, in *Hopper v. Evans*, --- U.S. ---, 72 L.Ed. 2d 367, illustrated the vulnerability of an inflexible *Harris*-type rule and raised serious doubts as to whether the rule is constitutionally permissible. In *Hopper*, the defendant had signed a detailed written confession admitting that he had shot the victim in the back during the course of a robbery. He again confessed in detail before a grand jury to the effect that the victim was not the only person he had ever killed, "that he felt no remorse because of that murder, that he would kill again in similar circumstances, and that he intended to return to a life of crime if he was ever freed." *Id.* at 370. At his trial, the defendant testified on his own behalf, admitting his intent to commit the murder and once again stating that he would return to a life of crime if acquitted.

Hopper was tried prior to the Supreme Court's decision in *Beck v. Alabama*, 447 U.S. 625, 65 L.Ed. 2d 392, under an

Alabama law which precluded a jury hearing a capital case from considering lesser included offenses and which was invalidated in *Beck*. The Supreme Court held that the defendant was not prejudiced by the Alabama preclusion law because his own evidence negated the possibility that a lesser included offense instruction on a non-capital unintentional killing might have been warranted. Stating that the Court of Appeals for the Fifth Circuit had "misread" *Beck* in awarding defendant a new trial, the Supreme Court explained that:

> [O]ur holding [in *Beck*] was that the jury must be permitted to consider a verdict of guilt of a non-capital offense "in every case" in which "the evidence would have supported such a verdict."

Id. at ---, 72 L.Ed. 2d at 372-73.

The Court, in *Hopper*, further stated that "an instruction on a lesser offense in this case would have been impermissible absent evidence supporting a conviction of a lesser offense," relying on its analysis in *Roberts v. Louisiana*, 428 U.S. 325, 49 L.Ed. 2d 974. A plurality opinion in *Roberts* had held that to allow every jury in a capital murder case to return a verdict of guilty of the non-capital crimes of second degree murder and manslaughter was "impermissible" when the evidence warranted only a conviction of first degree murder.

Because the *Harris* rule is not required or supported by precedent;[3] does not manifestly improve the administration or

3. We take note of the conclusion of the dissenting opinion that "the doctrine of *stare decisis* must be dead in this jurisdiction," because this majority opinion "refuses to acknowledge the clear holdings of pre-*Harris* decisions of this Court." On the contrary it is the dissent which misinterprets the pre-*Harris* decisions of this Court. Ironically, on this issue it appears that history is repeating itself. In *State v. Gadberry*, 117 N.C. 811, 23 S.E. 477 (1895), a majority of the Court with Avery, J., concurring and Clark, J., and Montgomery, J., dissenting, adopted the position and reasoning as expressed in *Harris* and its progeny and now argued for so vehemently by the dissent in the case *sub judice*. *Gadberry* was decided shortly after the act of 1893 had divided murder into first and second degrees. In that case, the facts tended to show that the deceased was defendant's sister-in-law and was a girl of twelve or fourteen years. She had been living with the defendant and his wife in Virginia and had come home to visit her parents for Christmas. Armed with a razor, a knife, and a pistol, the defendant had earlier threatened to kill the girl if she refused to return to Virginia with him. In the presence of the girl's parents, the defendant, on the day of the shooting, accosted the girl and forced her to accom-

quality of justice; has been emasculated by *Hopper*; and is suspect of being constitutionally impermissible, we are compelled to over-

pany him, pushing her forward as he walked behind her with the gun at her back. The mother screamed for help "and the prisoner thereupon put the pistol to the child's back, fired, and ran off into the woods." The trial judge instructed the jury that if they believed the evidence to be true beyond a reasonable doubt, defendant was guilty of murder in the first degree.

In language more appropriate for quoting by the dissent in the case *sub judice*, the Court in *Gadberry* wrote:

> It is in vain to argue that the Judge was more competent to fix the degree than the jury, or that the circumstances proved the crime to be murder in the first degree, if murder at all; for the statute is imperative that commits the degree to the jury.

Id. at 816, 23 S.E. at 478.

The Court found error in the trial court's failure to instruct on second degree murder.

In his dissenting opinion, Justice Clark argued strenuously for the position that this Court adopts today, stating, "[i]n this state of facts there is no element of murder in the second degree or of manslaughter which the Judge could have submitted to the jury. The sole question was whether the facts were true or not." *Id.* at 825, 23 S.E. at 481-82. "If these facts constitute murder in the first degree, his Honor committed no error in telling the jury so." *Id.* at 824, 23 S.E. at 481.

Justice Montgomery, analogizing to first degree burglary cases, added that a jury cannot be permitted to reach a verdict independent of all evidence, and that " '[t]he power to commute punishment does not reside with the jury.' " *Id.* at 832, 23 S.E. at 484.

It is interesting to note that Justice Avery, who concurred in *Gadberry*, wrote the majority opinion in *State v. Covington*, 117 N.C. 834, 23 S.E. 337 (1895), the case immediately following *Gadberry* in the North Carolina Reports. In *Covington*, the Court found no error in the trial court's first degree murder charge to the jury, stating that "[t]he charge is correct if there is no evidence of murder in the second degree or of manslaughter." *Id.* at 860, 23 S.E. at 351. The State had presented a witness who testified that the defendant had confessed to him. The defendant's own words, as spoken to the witness, "signif(ied) a purpose deliberately and premeditately formed in the mind, immediately followed by an act to execute it,— the purpose to shoot the deceased, and the aiming and shooting to carry out the purpose." *Id.* at 861, 23 S.E. at 352. The Court commented further that

> [t]he confession in this case is not simply an admission of the homicide; for the prisoner not only admits the act of killing with a deadly weapon, but gives a full and detailed account of the manner and the purpose with which it was done. Accepting the account as true, it is impossible to perceive any theory upon which the question of murder in the second degree could have been submitted to the jury . . . . Where the testimony upon which he relies to establish a homicide with a deadly weapon, in order to raise a presumption of murder in the second degree, not only proves such homicide but has the

rule *Harris*, and its progeny in favor of the evidentiary approach consistent with our general rule that "the trial court is not required to charge the jury upon the question of defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees." Strong's North Carolina Index, Criminal Law § 115 (3d ed.) and cases cited thereunder.

Admittedly, a charge of first degree murder carries with it the possibility of a sentence of death and must therefore be, and is, subject to additional safeguards. *See e.g.*, G.S. § 15A-2000 (Cum. Supp. 1981). We do not, however, consider the seriousness of the potential sentence as sufficient justification for requiring a judge to instruct on a lesser offense of second degree murder, or for permitting a jury to disregard the evidence and arbitrarily find a defendant guilty of a lesser offense, when there is no evidence to support such an instruction by the court or finding by the jury.

III and IV

[4] A murder committed in the perpetration or attempted perpetration of a felony, as enumerated under the statute, shall be deemed murder in the first degree. This Court has held that "[u]nder G.S. 14-17 premeditation and deliberation are not elements of the crime of felony murder." *State v. Wall*, 304 N.C.

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tendency to prove murder in the first degree, and under no inference fairly deducible therefrom is the prisoner guilty of murder in the second degree or manslaughter, the court should instruct the jury that it is their duty to render a verdict of guilty or not guilty . . . . (The statute) does not give jurrors (sic) a discretion, when rendering their verdict, to determine of what degree of murder a prisoner is guilty. They must render a verdict according to the evidence, and believing a prisoner guilty beyond a reasonable doubt of murder in the first degree, it is their duty so to find . . . .

Id. at 863-64, 23 S.E. at 352.

The language and the holding in *Covington* appear to be in direct conflict with the Court's earlier decision in *Gadberry*. In fact, in *State v. Spivey*, 151 N.C. 676, 65 S.E. 995 (1909), which the dissent maintains supports its position, the Court cited *Covington* with approval. Concerning *Gadberry*, the Court wrote, "[w]e do not think that case, upon the evidence, well decided. There was no evidence upon which the judge below could have predicated a charge of murder in the second degree or manslaughter, nor was there any evidence from which the jury could have fairly deduced the crime of murder in the second degree or manslaughter." *Id.* at 685, 65 S.E. at 999. Thus, *Gadberry* was overruled.

609, 613, 286 S.E. 2d 68, 71 (1982). Moreover, "when the law and evidence justify the use of the felony-murder rule, then the State is not required to prove premeditation and deliberation, and neither is the Court required to submit to the jury second degree murder or manslaughter unless there is evidence to support it." *Id.* It has been further held that the State is not required, prior to trial, to declare whether it will prosecute a first degree murder indictment under a theory of premeditation and deliberation or felony murder. Thus a "murder indictment and a separate indictment charging the accompanying felony, joined for trial, set out sufficient factual information to enable defendant to understand the basis of the state's cases against him." *State v. Silhan*, 302 N.C. 223, 235, 275 S.E. 2d 450, 462 (1981). Nor is it necessary for the State to elect at the close of the evidence which theory of first degree murder to submit to the jury when the evidence is sufficient to establish a prima facie case as to both theories. *Id.* And, in *State v. Norwood*, 303 N.C. 473, 279 S.E. 2d 550 (1981), we rejected the argument that the theories of premeditation and deliberation and felony murder were inconsistent. "A murder may be committed after premeditation and deliberation *and* during the perpetration or attempt to perpetrate a felony. The theories involve different elements, but in no way are they inconsistent." *Id.* at 480, 279 S.E. 2d at 554. An interrelationship between the felony and the homicide is a prerequisite to the application of the felony murder doctrine. *State v. Bush*, 289 N.C. 159, 221 S.E. 2d 333, *death sentence vacated* 429 U.S. 809 (1976).

[5] Turning now to the facts of the present case, we must determine whether the evidence, as considered by the trial judge at the time of the trial, justified his decision to omit an instruction on second degree murder. Of some significance to our determination is the fact that this defendant was indicted for first degree murder as well as rape and kidnapping, two underlying felonies which could have supported a theory of felony murder. In fact, the circumstances surrounding the murder suggest the conclusion that the murder was committed in the perpetration of a felony as well as with premeditation and deliberation. A jury could surmise that the decision to render the murder victim helpless was to facilitate the sexual assaults on Miss Davis. The evidence was sufficient to establish a prima facie case as to first degree murder on the theory of premeditation and deliberation or felony murder,

and the State would have been fully justified in submitting either or both theories to the jury. Had the State relied on the felony-murder theory as well as on a theory of premeditation and deliberation, an instruction on second degree murder would not have been required. *See State v. Wall*, 304 N.C. 609, 286 S.E. 2d 68. In *Wall* the defendant was found guilty of murder in the first degree on the theory of felony murder, but was found not guilty of first degree murder on the theory of premeditation and deliberation. This Court held that the defendant was not prejudiced by the court's failure to charge on involuntary manslaughter.

We emphasize again that although it is for the jury to determine, from the evidence, whether a killing was done with premeditation and deliberation, the mere possibility of a negative finding does not, in every case, assume that defendant could be guilty of a lesser offense. Where the evidence belies anything other than a premeditated and deliberate killing, a jury's failure to find all the elements to support a verdict of guilty of first degree murder must inevitably lead to the conclusion that the jury disbelieved the State's evidence and that defendant is not guilty. The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

The record before us discloses a brutal and senseless murder committed without justification or excuse. There was evidence of preparation—the victim was bound to facilitate his death. As with any victim of strangulation, death came slowly. To suggest that the murderer did not act with premeditation and deliberation, on the evidence as presented, if believed, is to invite total disregard of the facts.

Defendant's own position on this issue further illustrates the need for a reevaluation of the *Harris* rule by placing the issue within the context of a rule of evidence, rather than a rule of law. Arguing in his brief that under the *Harris* rule, he was entitled to

an instruction on second degree murder as a matter of law, defendant states that the court's failure to so instruct resulted in prejudice *per se*. He does not argue, nor even suggest, in his brief, that he was *in fact* prejudiced by the absence of a second degree murder instruction. He offers no argument that had the alleged error not been committed, a different result would have been reached at his trial; that is, that the jury would have acquitted him of first degree murder and found him guilty of second degree murder. *See* G.S. § 15A-1443(a).

[6] Defendant assigns as error the trial court's failure to require the jury to find malice, an essential element of murder in the first degree. The trial judge instructed as follows:

> First degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation.
>
> For you to find the defendant guilty of murder in the first degree, there are five things that the State must prove: First that the defendant, Andrew Strickland, intentionally, with a rope, strangled James Earl Buckner, that the rope used in this manner was a deadly weapon, and you will consider the manner in which it was used, the nature of the rope and the size and strength of the Defendant Andrew Strickland to that of the victim, Mr. Buckner.
>
> Second, that the death of James Earl Buckner was a natural and probable result of defendant's act.
>
> The act need not have been the only cause nor the last or the nearest cause; it is sufficient if it concurred with some other cause, acting at the same time, which in combination with it, caused the death of James Earl Buckner. Third, you must find that the defendant Strickland intended to kill James Earl Buckner. Fourth, you must find that the defendant acted with premeditation—that is, that he had formed the intent to kill James Earl Buckner over some period of time, however short this period of time may have been, before he put the rope around his neck and tightened it and strangled him. And finally, you must find that the defendant acted with deliberation, which means that the intent to kill was formed while he was in a cool state of mind and not while under the influence of a suddenly aroused or violent passion.

Malice exists as a matter of law whenever there has been an unlawful and intentional homicide without justification or excuse. *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969). The elements of malice and unlawfulness are implied in an intentional killing with a deadly weapon. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied* (82-5353) (1982); *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574. This Court has held that the State is not required to prove malice and unlawfulness unless there is some evidence of their nonexistence. *Id.* As noted above, the trial judge instructed the jury that in order to find the defendant guilty of murder in the first degree, they had to find that the killing was committed by the intentional use of a deadly weapon. The rope burns around the victim's neck, coupled with the fact that there were hemorrhages in his eyes and his lungs were filled with fluid, indicated that Mr. Buckner died of strangulation. The rope used to strangle the victim may be considered as a deadly weapon. "A deadly weapon is not one which must kill but one which under the circumstances of its use is likely to cause death or great bodily harm." *State v. Strickland*, 290 N.C. 169, 178, 225 S.E. 2d 531, 538 (1976). Except for his plea of duress, which is not a defense to murder, defendant raised no legal justification or excuse at trial. Thus, the presumption of malice arose.

[7] Defendant further contends, however, that his defense of duress, although not a defense to first degree murder, nevertheless raises evidence of lack of malice. In *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982), this Court rejected a similar argument, holding that the defense of duress was not available to a defendant charged with first degree murder and he was therefore not denied his constitutional right to trial by jury upon failure of the trial court to instruct that the presumptions of malice and unlawfulness could be rebutted. Defendant's evidence that another committed all the acts in perpetration of the murder or that defendant participated under duress "did not raise any issues of self-defense or heat of passion upon sudden provocation." *Id.* at 543, 290 S.E. 2d at 574. We further note that the trial judge instructed generally on the defense of duress as negating the element of intent. He did not limit this instruction to the kidnapping or rape charges. Thus, the defendant received the benefit of a duress defense to the murder charge, although erroneously, and was, in fact, provided with the very instruction he now argues he was entitled to.

Defendant next assigns as error the trial judge's instructions to the jury on his defense of duress. He argues that the instruction did not direct the jury to consider coercion on the kidnapping charges; that it erroneously required the jury to find that he be "placed in such fear as would deprive him of the ability to do a willful act;" that it improperly placed the burden of persuasion on the defendant; and that it limited the defense to a fear for his family's safety.

The trial judge first summarized the evidence, including a full statement of defendant's evidence concerning his defense of duress, in part as follows:

> That Chance chased a red Chevrolet with four girls in it and followed them for sometime; then they started back and that he, Strickland, asked them to take him home, that he didn't want to have anything to do with it. That he did not jump out because he feared for his life. That they came on towards Fayetteville and that Chance stopped him from jumping out by putting a pistol on him. That Sisneros also put a pistol on him, which was a twenty-five automatic pistol. That he told them to leave the prostitutes alone, but Chance refused and said they were going to get some tonight and to stay out of his way.
>
> That they went on then to where Buckner and the Davis girl were. That Strickland took Chance's twenty-two and and (sic) put the gun on them, but that he did so because Sisneros was right behind him pointing a twenty-two or a twenty-five automatic at his back.
>
> Then all went back to the car and they went to Mr. Strickland's home, arriving there about five or five-thirty; that it was not quite daylight. That Strickland's wife opened the door and Sisneros and Wilcosky went in and Danny Chance told them to watch Strickland. That he didn't say anything to his wife about this because Sisneros had a gun on him. That he feared for his wife and that they had made threats about his wife and family.

Following his summary of the evidence, the judge then instructed on the law of kidnapping, first degree murder and first degree rape. He then instructed as follows:

> Ladies and Gentlemen, the defendant in this case contends and says that he acted out of fear for the safety of his wife and family. If you find from the evidence, to your satisfaction, that he was placed in such fear as would deprive him of the ability to do a wilful act, that he acted fully under compulsion and fear; then you would not find the element of intent to exist.

As noted earlier, by so concluding his instructions with this statement on the law of duress, the trial judge allowed the jury to consider the duress defense not only as to the kidnapping and rape charges, but also (and erroneously) as a defense to the first degree murder charge. Therefore, the fact that the instruction appeared at the conclusion of the judge's statements of the law, rather than following the charge as to the law of kidnapping was in this respect favorable to the defendant.

[8] We disagree with the defendant that the trial court imposed upon him a stricter standard in requiring the jury to find "that he was placed in such fear as would deprive him of the ability to do a wilful act" in order to acquit him on the defense of duress. No act done "fully under the compulsion of fear" could be a willful act under this instruction. The jury was required to find that the defendant did not act voluntarily (willfully), but rather in response to coercion based on fear. The instruction, though erroneous, was favorable to the defendant inasmuch as the instruction did not require the jury to find (1) that the defendant's fear be reasonable or (2) that the defendant was in imminent fear of death or serious bodily harm. *See State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976).

[9] We find no merit to defendant's contention that the instruction on duress improperly placed the burden of persuasion on the defendant. Like the defense of insanity, duress is an affirmative defense "with the laboring oar cast upon the defendant." *State v. Golden*, 203 N.C. 440, 441, 166 S.E. 311, 312 (1932). The burden of proving an affirmative defense to the satisfaction of the jury is upon the defendant in a criminal trial. We have so held in numerous cases in which the defendant has raised the defense of insanity and so hold now where the defense raised is that of duress. *See State v. Ward*, 301 N.C. 469, 272 S.E. 2d 84 (1980); *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980); *State v.*

Franks, 300 N.C. 1, 265 S.E. 2d 177 (1980); *State v. Leonard*, 296 N.C. 58, 248 S.E. 2d 853 (1978); *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976). Nor does placing the burden on a defendant under these circumstances relieve the State of its burden to prove beyond a reasonable doubt each and every element of the crime charged. *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595. We do not agree with defendant's interpretation of the following language in *State v. Sherian*, 234 N.C. 30, 34, 65 S.E. 2d 331, 333 (1951), which he argues requires the State to rebut coercion beyond a reasonable doubt:

> The defendants were entitled to have the court instruct the jury to the effect that if, upon a consideration of all the evidence, it failed to find beyond a reasonable doubt, that the assistance rendered to James Diggs, after he committed the felonious assault upon officer Howell, was rendered with the willful and felonious intent to aid Diggs to escape arrest and punishment, and not under compulsion or through fear of death or great bodily harm, it should return a verdict of not guilty.

We read this language only to require that the State prove beyond a reasonable doubt all the elements of the offense in the face of any defenses raised and proved to the satisfaction of the jury. Our decision on this issue is supported by the language in *Patterson v. New York*, 432 U.S. 197, 210, 53 L.Ed. 2d 281, 292 (1977):

> **[6]** We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion

such a rule in this case and apply it to the statutory defense at issue here.

[10] Finally under this assignment of error the defendant contends that he did not receive the full benefit of an instruction on his defense of duress due to the omission of the words "because of fear for his own life." In his summary of the evidence, the trial judge had fully and adequately discussed the defendant's alleged fear for his own life. Evidence at trial tended to negate this aspect of the defendant's evidence: he did not raise the question of his fear in a statement given to the sheriff's department; Miss Davis testified that the defendant never attempted to help her and that she never saw a gun in Sisneros's hand; Sisneros testified that the defendant was the only one with a gun. In light of the evidence before the jury and the generally favorable nature of the duress instruction, in addition to the trial judge's summary of defendant's evidence, the omission of the words "because of fear for his own life" cannot be viewed of such significance so as to warrant the granting of a new trial to this defendant, if we assume that the jury simply disbelieved defendant's version of the events that transpired.

[11] The instruction on duress, as given, is not one to which we give our approval. Although defendant's arguments are fragmentary, we are unable to satisfy ourselves that the jury was sufficiently apprised of the legal implications attaching to the defense. The trial judge, in this regard, merely stated that upon believing defendant's evidence on duress, the jury "would not find the element of intent to exist." Defendant sets forth the following suggested instruction, which we agree would have been more appropriate:

> There is evidence in this case tending to show that the defendant took part in the kidnapping only because he was threatened with death. The defendant would not be guilty of kidnapping if his actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not so act. His assertion that he acted only because of threats of death is in denial that he committed any crime.

We cannot, with certainty, determine whether the jury's rejection of defendant's defense of duress was based upon a disbelief of his evidence or its failure to understand that duress was a complete

defense to the kidnapping charge. Had the jury understood that duress, if proven, would be a complete defense to the kidnapping charges, the result might reasonably have been different. Thus, we conclude, defendant has met his burden of showing that 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). Defendant is therefore entitled to a new trial on the kidnapping charges.

[12] Because it may recur upon retrial of the kidnapping charges, we address defendant's contention that the trial court erred in failing to require the jury to find that he acted "unlawfully" in order to convict him of kidnapping. The trial judge instructed that:

> Kidnaping by definition means the *unlawful taking* and carrying away of a person by force and against his or her will, or the unlawful seizure and detention of a person by force and against her will. That is not to say that the person must be grabbed and physically pulled. It is sufficient force if the force used is enough to put a person in fear of his life or bodily harm unless he complies with the demands of this would-be kidnaper.
>
> Therefore, as to the bill of indictment charging the defendant with the crime of kidnaping James Earl Buckner, I charge you that if you find from the evidence and beyond a reasonable doubt, the burden being upon the State of North Carolina to so convince you, that on the 28th or early morning of the 29th of June, 1970, the defendant Andrew Strickland, by the use of a gun, forcibly *abducted* James Earl Buckner and removed him from the place where he was to some other place, forcibly and against his will, I say if you find those things from the evidence beyond a reasonable doubt, it will be your duty to find the Defendant Strickland guilty of kidnaping James Earl Buckner, as charged in the bill of indictment.

(Emphasis added.)

As noted by the defendant, the word "unlawful" does not appear in the second portion of the instruction. The trial court did,

however, require that the jury find that Mr. Buckner was "forcibly abducted." "Abduct" is defined by Webster's New World Dictionary, 2d ed. 2 as "1. to take (a person) away unlawfully and by force as fraud; kidnap." The word abduct includes the element of unlawfulness required to be found by the jury. Absent a request for special instructions, it was unnecessary for the trial judge to explain or define a word of common usage such as "abduct." *State v. Jones*, 300 N.C. 363, 266 S.E. 2d 586 (1980). The judge instructed similarly on the kidnapping charge respecting Miss Davis. We therefore hold that under both instructions, the element of unlawfulness was adequately submitted to the jury.

[13] As his final argument, the defendant contends that the trial court erred in failing to hold a voir dire hearing prior to admitting his statement into evidence for impeachment purposes. Defendant had taken the stand and testified on his own behalf. His testimony was inconsistent in several respects with the statement he made to Sheriff Neal. The statement was read into evidence for impeachment purposes. The defendant made a general objection, requested a voir dire, but did not at any time during trial allege that the statement was the result of coercion or was otherwise involuntary. Judge Bailey relied on *Harris v. New York*, 401 U.S. 222, 28 L.Ed. 2d 1 (1971), in denying defendant's request. This Court, in interpreting *Harris* on an issue substantially similar to the one here raised, stated in *State v. Richardson*, 295 N.C. 309, 326-27, 245 S.E. 2d 754, 765 (1978):

> When a confession is used on rebuttal for impeachment purposes and a defendant *specifically challenges the admissibility of the confession on the ground that it was coerced or 'induced by improper means,'* a voir dire hearing must be held for the purpose of determining whether the trustworthiness of the confession satisfies this State's legal standards. If not satisfied that the confession was made under circumstances rendering it trustworthy, *i.e.*, not produced by coercion or induced by other improper means, the trial court should bar use of the confession for any purpose.
>
> In the present case the record does not indicate that defendant objected to the impeaching use of his statements and drawings on the ground they were coerced or otherwise induced by improper means. Defendant did not request a voir

dire hearing to determine whether the statements and drawings were coerced. Neither defendant's testimony nor any other evidence suggests that the statements and drawings were coerced or induced by force, threat, fear or promise of reward. *Cf. State v. Byrd*, 35 N.C. App. 42, 240 S.E. 2d 494 (1978); *State v. Langley*, 25 N.C. App. 298, 212 S.E. 2d 687 (1975). Under such circumstances it was altogether proper for the trial court to overrule defendant's general objection to the use of the challenged evidence for impeachment purposes without conducting further voir dire hearings.

We hold, as did this Court in *Richardson*, that the trial court was not required to hold a voir dire hearing prior to the introduction of defendant's statement in rebuttal upon failure of the defendant to challenge its admissibility on the ground that it was coerced.

For error in the charge on the kidnapping convictions, defendant is entitled to a new trial.

We find no prejudicial error in defendant's conviction of murder in the first degree. Because defendant's life sentence on the murder conviction was to begin at the expiration of the kidnapping sentences, the judgment on the murder conviction must be set aside and the cause remanded for formal entry of a new judgment by a judge of Superior Court, Cumberland County, without the necessity of a hearing or the presence of the defendant. *State v. Whaley*, 262 N.C. 536, 138 S.E. 2d 138 (1964); *State v. Sutton*, 244 N.C. 679, 94 S.E. 2d 797 (1956).

Nos. 70CRS19799 and 70CRS19800 (kidnapping)—New trial.

No. 70CRS19801 (murder)—Remanded for entry of judgment.

Justice MARTIN concurring.

I concur and join in the well-reasoned, deliberative opinion of the majority. This concurring opinion is filed to emphasize some of the issues discussed.

First. The decisions relied upon by this Court in *Harris* do not support the proposition that as a matter of law murder in the second degree must be submitted to the jury in all murder cases in which premeditation and deliberation are elements of the

capital charge. Each of the cases, *Spivey*, *Newsome*, and *Perry*, were decided on whether there was evidence to support a verdict of murder in the second degree. None establishes a rule of law that requires the lesser charge to be submitted in all cases regardless of the evidence. Thus, *Harris* is not supported by precedent.

Second. Our decision today requires murder cases to be treated as all other criminal cases in determining whether a lesser included offense should be submitted to the jury. Proof of premeditation and deliberation does not require any special, mystical procedure. It can be proved as any other condition or state of the mind; it may be shown by such just and reasonable deductions from the acts and facts proven as the guarded judgment of a reasonably cautious and prudent person would ordinarily draw therefrom. It may be proved by the facts and circumstances known to the party charged and may be evidenced by the acts and declarations of the party and all other relevant circumstances. *State v. Love*, 296 N.C. 194, 250 S.E. 2d 220 (1978); *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970); *State v. Walters*, 275 N.C. 615, 170 S.E. 2d 484 (1969); *State v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626 (1964). There is nothing about murder cases involving premeditation and deliberation that justifies a special rule of law governing the submission of lesser included offenses.

Third. Today's decision does not abandon the trial judges of the state upon an uncharted sea. Trial judges will return to the evidentiary test they applied before *Harris* in determining whether to submit murder in the second degree and other lesser offenses. Under the *Harris* rule trial judges had to apply two standards with respect to lesser included offenses—the mandatory rule of law with respect to murder in the second degree and the evidentiary rule with respect to manslaughter and involuntary manslaughter. Now the evidentiary test will govern the submission of all lesser included offenses. Trial judges are skilled in making this determination; it is their daily diet.

Fourth. Certainly the application of the law to the facts in this case in determining whether to submit murder in the second degree is not a holding that every strangulation killing is murder in the first degree. Each case must be analyzed on its facts to

determine whether murder in the second degree should be submitted. I cannot add to the careful analysis of the majority opinion in determining whether there was evidence to support a verdict of murder in the second degree.

Fifth. The *Harris* rule is constitutionally suspect. Under it, a jury may return a verdict of guilty of murder in the second degree, even though all the evidence shows premeditation and deliberation. The jury is thereby given discretion to return such a verdict, which may be arbitrarily exercised regardless of the evidence. Such a rule is unconstitutional under the eighth and fourteenth amendments to the United States Constitution.

In *Hopper v. Evans*, --- U.S. ---, ---, 72 L.Ed. 2d 367, 373 (1982), we find:

> Our holding in *Beck* [*v. Alabama*, 447 U.S. 625, 65 L.Ed. 2d 392 (1980)], like our other Eighth Amendment decisions in the past decade, was concerned with insuring that sentencing discretion in capital cases is channelled so that arbitrary and capricious results are avoided. See, e.g., *Roberts v. Louisiana*, 428 U.S. 325, 334, 49 L.Ed. 2d 974, 96 S.Ct. 3001 (1976) . . . .
>
> In *Roberts v. Louisiana*, supra, the Court considered a Louisiana statute which was the obverse of the Alabama preclusion clause. In Louisiana, prior to *Roberts*, every jury in a capital murder case was permitted to return a verdict of guilty of the non-capital crimes of second-degree murder and manslaughter, "even if there [was] not a scintilla of evidence to support the lesser verdicts." Id., at 334, 49 L.Ed. 2d 974, 96 S.Ct. 3001 (plurality opinion). Such a practice was impermissible, a plurality of the Court concluded, because it invited the jurors to disregard their oaths and convict a defendant of a lesser offense when the evidence warranted a conviction of first-degree murder, inevitably leading to arbitrary results. Id., at 335, 49 L.Ed. 2d 974, 96 S.Ct. 3001 (plurality opinion). The analysis in *Roberts* thus suggests that an instruction on a lesser offense in this case would have been impermissible absent evidence supporting a conviction of a lesser offense.
>
> *Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants

such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence.

It is difficult to distinguish the rule in *Harris* from the statute in *Roberts v. Louisiana.*

In conclusion, I agree with the statement of Justice Huskins in *State v. Poole*, 298 N.C. 254, 258 S.E. 2d 339 (1979):

> On further reflection, however, I am convinced that *Harris* and *Keller* perpetuate an unnecessary refinement in the law.
>
> Submission of a lesser included offense when there is no evidence to support the milder verdict is not required when the indictment charges felony murder, arson, burglary, robbery, rape, larceny, felonious assault, or any other felony whatsoever. In all such cases if the evidence tends to show that the crime charged in the indictment was committed and there is no evidence tending to show commission of a crime of lesser degree, the court correctly refuses to charge on unsupported lesser degrees. The *presence* of evidence tending to show commission of a crime of lesser degree is the determinative factor. . . .
>
> For the reasons stated I no longer support the majority view which requires the court to submit second degree murder as a permissible verdict in a prosecution for premeditated first degree murder when there is no evidence to support the lesser degree.

Id. at 259-60, 258 S.E. 2d at 343 (citations omitted).

Although *Harris* is of recent vintage, the law is never settled until it is settled correctly.

Justice MITCHELL joins in this concurring opinion.

Justice MITCHELL concurring.

I concur in the holding of the majority and in the reasoning employed by the majority to reach that holding. I find myself unable, however, to agree with one statement of law made by the

majority, which I feel is incorrect and not necessary to the result reached.

The majority states that:

> Where the homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, all of which require planning or purpose, the law conclusively presumes that the murder was committed with premeditation and deliberation, and where the evidence produced at trial supports a finding that the murder was so perpetrated, a defendant can properly be convicted of first degree murder. *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Hedrick*, 232 N.C. 447, 61 S.E. 2d 349 (1950); *State v. Dunheen*, 224 N.C. 738, 32 S.E. 2d 322 (1944). *See Barfield v. Harris*, 540 F. Supp. 451, 468 (E.D.N.C. 1982).

Although the authorities cited by the majority support the quoted proposition, I believe that they were erroneous when decided or that the principle so stated was unnecessary to the decision of those cases and constitutes mere *obiter dicta* and not binding authority. When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the law does not presume, conclusively or otherwise, that the murder was committed with premeditation and deliberation. Instead, the presence or absence of premeditation and deliberation is irrelevant. As the majority correctly points out, a defendant may be guilty of *both* murder in the first degree by one of the aforementioned methods *and* guilty of murder in the first degree by reason of premeditation and deliberation on the same set of facts. Premeditation and deliberation are not, however, elements of murder in the first degree perpetrated by means of poison, lying in wait, imprisonment, starving or torture. A conviction of murder in the first degree is appropriate in these cases if it is shown that the defendant intentionally killed the victim by such means, and nothing else need be shown.

Prior to 1893 any intentional and unlawful killing of a human being with malice aforethought constituted murder punishable by death. Since 1893, G.S. 14-17 and its predecessors have not changed the definition of murder. The statute merely divides murders into two categories for purposes of imposing punishment. Those classified as murders in the first degree remain, as at com-

mon law, punishable by death. Included among this classification are murders perpetrated by means of poison, lying in wait, imprisonment, starving or torture, and the statute does not require that these crimes be premeditated or deliberate in order to be murder in the first degree and punishable by death as at common law. See *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982), for a more complete history of the evolution of the statute and its effect on the common law.

For the foregoing reasons, I am unable to agree with or concur in the quoted statement from the majority opinion. I entirely agree with the majority, however, that the trial judge's duty to instruct on the lesser offense of murder in the second degree must be placed within the context of an evidentiary determination and that such an instruction is not required in every case in which the defendant is tried for murder in the first degree by premeditation and deliberation. With this single exception, I completely concur in Justice Meyer's correct, scholarly and well documented opinion on behalf of the majority.

Justice CARLTON dissenting.

I dissent to that portion of the majority decision which overrules *State v. Harris*, 290 N.C. 718, 228 S.E. 2d 424 (1976).

In *Harris*, this Court held that in all cases in which the State relies upon premeditation and deliberation to support a conviction of murder in the first degree, the trial court must submit to the jury an issue of murder in the second degree. *Id.* at 730, 228 S.E. 2d at 432. Writing for a unanimous Court, Justice Moore noted that this has been the rule in North Carolina since 1928 when he cited *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928). *State v. Harris*, 290 N.C. at 729-30, 228 S.E. 2d at 431-32. Indeed, the *Harris* opinion presents a careful analysis of the rule's origins. *Id.* at 727-30, 228 S.E. 2d at 430-32. In *State v. Keller*, 297 N.C. 674, 256 S.E. 2d 710 (1979), and *State v. Poole*, 298 N.C. 254, 258 S.E. 2d 339 (1979), this Court recently affirmed the rule. Despite all of this precedent and the sound reasoning articulated for the rule, a new majority of this Court has, on the most specious reasoning, abruptly elected to overrule *Harris*. I cannot join in this injudicious disregard for this Court's unanimous recent precedents (except for *Poole* in which Justice Huskins dissented) recognizing this sound rule of law.

In *Harris*, this Court reaffirmed the rule, articulated many years earlier, that a second-degree murder charge also must be submitted to the jury whenever the State relies on premeditation and deliberation to support a first-degree murder conviction. We stated:

> We hold, therefore, that in all cases in which the State relies upon premeditation and deliberation to support a conviction of murder in the first degree, the trial court must submit to the jury an issue of murder in the second degree. Again, we reaffirm the rule originally stated in *State v. Spivey* [151 N.C. 676, 65 S.E. 995 (1909)], that in those cases in which the State proves a murder committed by one of the means stated in G.S. 14-17, or in the perpetration or attempted perpetration of a felony, an instruction to the jury to return a verdict of murder in the first degree or not guilty is proper; provided, that there is no evidence, or an inference deducible therefrom, tending to show a lesser offense. *See State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Hill*, 276 N.C. 1, 170 S.E. 2d 885 (1969).

Id. at 730, 228 S.E. 2d at 432.

When this Court reaffirmed the rule again three years later in *State v. Keller*, 297 N.C. 674, 256 S.E. 2d 710 (1979), we explained the reason for the rule: the *jury* must be allowed to decide whether to infer that the defendant did premeditate and deliberate the killing. This Court stated:

> Ordinarily premeditation and deliberation, being operations of the mind, must always be proved, if at all, by circumstantial evidence. . . . These mental operations of defendant must be inferred, if at all, from the circumstances of the case. Perhaps the only reasonable inference which could be made here is that defendant did indeed premeditate and deliberate the killing. Nevertheless *in first degree murder cases* the jury must be left free to draw or not to draw this inference; and if the jury chooses not to draw it, it should be given the alternative of finding defendant guilty of second degree murder.

Id. at 677-78, 256 S.E. 2d at 713 (original emphasis).

The majority has much to say about the general rule in this jurisdiction that a lesser included offense is not required to be submitted unless there is some positive evidence to sustain it. Indeed, in *Keller* the State had specifically requested that we abandon the *Harris* rule in view of the general rule. We specifically responded to this argument: "[t]his Court has not applied this rationale in cases involving crimes other than first degree murder which have as an essential element a specific criminal intent on the part of the defendant." *State v. Keller*, 297 N.C. at 678, 256 S.E. 2d at 713 (citing *State v. Allen*, 297 N.C. 429, 255 S.E. 2d 362 (1979)—in burglary prosecution, no error in refusing to submit nonfelonious breaking and entering where State's evidence tends to establish that defendant intended to rape occupant, defendant's defense is alibi and mistaken identity, and there is no evidence of nonfelonious breaking and entering—and *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971)—in assault with intent to commit rape prosecution, no error in refusing to submit assault on a female where there was no evidence tending to show that victim was assaulted for any purpose other than rape or for no purpose at all).

In *Keller* we added: *"The first degree murder rule is, however, firmly rooted in our cases. More importantly it was carefully reconsidered, reaffirmed and applied in Harris. In keeping with that reasonable predictability rightly expected of appellate courts, it should be applied here."* 297 N.C. at 678, 256 S.E. 2d at 713 (emphasis added).

In stressing the general rule concerning submission of lesser included offenses and the necessity for what it calls an "evidentiary approach," the majority completely misses the point: The *Harris* rule, which I suggest has only been *slightly modified* by the United States Supreme Court's decision in *Hopper v. Evans*, --- U.S. ---, 102 S.Ct. 2049, 72 L.Ed. 2d 367 (1982), is, as modified, nothing more than a specific application of the very principle urged by the majority—that whenever the evidence supports a conviction of a lesser included offense, the lesser included offense must be submitted to the jury with the greater offense. The *Harris* principle requires that a second-degree murder charge be submitted in first-degree murder cases relying on the elements of premeditation and deliberation because these elements connote a state of mind described with great particularity in our homicide

law and must be proved (with one exception discussed below), if at all, by inferences arising from circumstantial evidence. This pervasive use of circumstantial evidence (and the inferences to be drawn from it) and the particular nature of the state of mind required compels the conclusion that whether the defendant premeditated and deliberated the killing is *inherently* a jury question.

Because the elements of premeditation and deliberation are essentially "operations of the mind," the only "witness" to this amorphous process—the only person with firsthand knowledge of what went on in the defendant's mind at the time of the offense—is the defendant himself. If the defendant never testifies to what his state of mind was at the time of the killing the jury faces only one question: whether to infer from the circumstantial evidence that the defendant premeditated and deliberated the killing. If it decides to infer the defendant premeditated and deliberated the killing it will find the defendant guilty of first-degree murder. If it decides not to infer the existence of premeditation and deliberation but finds that the other elements of first-degree murder were proved beyond a reasonable doubt the jury will find the defendant guilty of second-degree murder. To allow the jury to decide whether to infer the existence of premeditation and deliberation, it must have for its consideration both a first-degree and a second-degree murder charge. This is the case because a decision whether to convict of first-degree murder or second-degree murder hinges on the jury's resolution of the premeditation and deliberation elements. The determination of whether premeditation and deliberation were proved beyond a reasonable doubt is a decision which only the jury should be allowed to make because that decision rests on an inference.

The above instance—where the defendant chooses not to testify about his state of mind—must be distinguished from the situation where the defendant's own evidence affirmatively demonstrates the existence of premeditation and deliberation. In so doing, I acknowledge that the recent United States Supreme Court decision in *Hopper v. Evans*, --- U.S. ---, 102 S.Ct. 2049, 72 L.Ed. 2d 367 (1982), tempers the rule in *Harris*. The Supreme Court held in *Hopper* that no jury instructions on lesser included offenses were required in a capital case in which the defendant's

own evidence affirmatively negated the possibility that such an instruction might have been warranted. *Id.* In *Harris* we held, "that in *all* cases in which the State relies upon premeditation and deliberation to support a conviction of murder in the first degree, the trial court must submit to the jury an issue of murder in the second degree." 290 N.C. at 730, 228 S.E. 2d at 432 (1976) (emphasis added).

I agree, therefore, in accordance with *Hopper*, that the rule in *Harris* has been modified by the United States Supreme Court to this extent: In cases in which *the defendant's own evidence affirmatively demonstrates* the defendant had the required mental state for first-degree murder—premeditation and deliberation—then an instruction on second-degree murder is improper in capital cases. In short, the Supreme Court carved out only a very narrow exception to the *Harris* rule.

In *Hopper* the United States Supreme Court was concerned that in a capital case, in which the defendant's own evidence affirmatively proved the requisite mental state, the inclusion of instructions to the jury on lesser included offenses "invited the jurors to disregard their oaths and convict a defendant of a lesser offense when the evidence warranted a conviction of first-degree murder, inevitably leading to arbitrary results." --- at ---, 102 S.Ct. at 2053, 72 L.Ed. 2d at 373 (citing *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed. 2d 974 (1976)). On the other hand, the Supreme Court in *Hopper* also noted its decision in *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed. 2d 392 (1980). In *Beck* the Court held, "if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the state] is constitutionally prohibited from withdrawing that option from the jury in a capital case." *Id.* at 638, 100 S.Ct. at 2390, 65 L.Ed. 2d at 403.

In defining the two poles between which due process must operate with respect to the inclusion of instructions on lesser included offenses, the Supreme Court wrote:

> *Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus

channelled so that it may convict a defendant of any crime fairly supported by the evidence.

Hopper v. Evans, --- at ---, 102 S.Ct. at 2053, 72 L.Ed. 2d at 373 (original emphasis). In sum, to fail to give an instruction on a lesser included offense when the evidence or lack of evidence on a particular essential element warrants it is a violation of due process. Conversely, to give an instruction on a lesser included offense when the evidence supports *only* the greater offense also violates due process.

In *Hopper* the defendant's own testimony, his confession regarding his state of mind, constituted direct evidence of the essential mental element and at the same time affirmatively negated any claim or inference that he did not intend to kill the victim. In the case at bar, however, defendant Strickland denied he had committed the murder and did not present any evidence as to the requisite mental elements of premeditation and deliberation. The jury's duty was to determine first whether defendant had committed the killing. If it found that he had it was then to decide whether to infer that defendant had premeditated and deliberated the killing. Defendant here did not confess; he did not provide evidence to support the charge that he had premeditated and deliberated the killing nor did his evidence affirmatively demonstrate that he had the requisite state of mind. There was no evidence to preclude the jury from reasonably declining to infer that defendant had the requisite state of mind for first-degree murder. In other words, the jury reasonably could have decided that defendant strangled the victim but that he did not do so with premeditation and deliberation. Without the instruction on second-degree murder the jury was prevented from making such a determination.

The only uncontroverted evidence bearing on the requisite mental state of the person who committed the murder in the case at bar is the fact that the victim was tied to a tree and strangled. To hold, as the majority apparently does, that the mere use of such means to kill another is sufficient, *as a matter of law*, to support *only* the inference that the murderer premeditated and deliberated the killing is to judicially amend G.S. 14-17 (1981) by adding "death by strangulation" to the list of methods of murder, proof of which are alternatives to proof of premeditation and

deliberation for first-degree murder. We, of course, should not attempt to do so.

The rule in *Hopper* is only a very narrow exception to the rule in *Harris*. This conclusion that the *Harris* rule is only slightly modified is based on the language found in *Hopper* itself. First, the issue in *Hopper* was framed very narrowly, as narrowly as I believe *Harris* is now modified. In his opinion for the majority, Chief Justice Burger stated the issue as follows: "[W]hether . . . a new trial is required in a capital case in which the *defendant's own evidence negates the possibility* that such an instruction [on lesser included offenses] might have been warranted." *Hopper v. Evans*, --- at ---, 102 S.Ct. at 2050, 72 L.Ed. 2d at 369-70 (emphasis added).

In addition, the Chief Justice repeatedly emphasized the significance of the particular facts in *Hopper*, specifically, the defendant's own statements which "made it crystal clear that he had killed the victim, that he intended to kill him, and that he would do the same thing again in similar circumstances." The Court wrote:

> The uniqueness of respondent's claims has been outlined in the statement of facts, but those facts merit emphasis for they bear on the key issue of whether there was any evidentiary basis to support a conviction of a lesser included offense. From the outset, beginning with his appearance before the grand jury, respondent made it crystal clear that he had killed the victim, that he intended to kill him, and that he would do the same thing again in similar circumstances. At trial, he testified that he always tried to choose places to rob so that he could avoid killing people. However, he also testified that, if necessary, he was always prepared to kill.

Id. at ---, 102 S.Ct. at 2053, 72 L.Ed. 2d at 373-74.

The Court concluded:

> It would be an extraordinary perversion of the law to say that intent to kill is not established when a felon, engaged in an armed robbery, admits to shooting his victim in the back in the circumstances shown here. The evidence not only supported the claim that respondent intended to kill the victim, but *affirmatively negated* any claim that he did not

> intend to kill the victim. An instruction on the offense of unintentional killing during this robbery was *therefore* not warranted.

Id. at ---, 102 S.Ct. at 2054, 72 L.Ed. 2d at 374 (emphasis added).

In the instant case, the State relied solely on the theory of premeditation and deliberation to support its first-degree murder charge. The trial court submitted only the issue of first-degree murder to the jury. Hence, under the long-standing rule in this jurisdiction that a second-degree murder charge also must be submitted to the jury whenever the defendant relies on premeditation and deliberation to support a first-degree murder conviction, I believe defendant is entitled to a new trial on the murder charge.

Finally, I think it particularly interesting to analyze the reasons the majority advances for overruling *Harris*. The majority states that it is "compelled" to overrule *Harris* because: (1) the *Harris* rule is not required or supported by precedent, (2) it does not manifestly improve the administration or quality of justice, (3) it has been "emasculated" by *Hopper*, and (4) it is "suspect of being constitutionally impermissible."

With respect to the first reason, if the *Harris* rule is not required or supported by precedent, then I submit the doctrine of *stare decisis* must be dead in this jurisdiction because the new Court majority simply refuses to acknowledge the clear holdings of pre-*Harris* decisions of this Court. For example, the majority conveniently quoted only the following language from a *concurring* opinion in *State v. Newsome*, 195 N.C. 552, 143 S.E. 187 (1928), to support its position:

> When on the trial of a criminal prosecution it is permissible under the bill, as here, to convict the defendant of 'a less degree of the same crime' (C.S., 4640), and *there is evidence tending to support a milder verdict*, the case presents a situation where the defendant is entitled to have the different views presented to the jury, under a proper charge, ...

The *entire* paragraph, which reads as follows, does not support its position, however:

> When on the trial of a criminal prosecution it is permissible under the bill, as here, to convict the defendant of "a less degree of the same crime" (C.S., 4640), and there is evidence tending to support a milder verdict, the case presents a situation where the defendant is entitled to have the different views presented to the jury, under a proper charge, *and an error in this respect is not cured by a verdict convicting the defendant of the highest offense charged in the bill of indictment, for in such event it cannot be known whether the jury would have convicted of a less degree of the same crime if the different views, arising on the evidence, had been correctly presented to them by the trial court. S. v. Holt*, 192 N.C., 490, 135 S.E., 324; *S. v. Kline*, 190 N.C., 177, 129 S.E., 417; *S. v. Lutterloh*, 188 N.C., 412, 124 S.E., 752; *S. v. Allen*, 186 N.C., 302, 119 S.E., 504; *S. v. Williams*, 185 N.C., 685, 116 S.E., 736; *S. v. Merrick*, 171 N.C., 788, 88 S.E., 501; *S. v. Kennedy*, 169 N.C., 288, 84 S.E., 515; *S. v. Kendall*, 143 N.C., 659, 57 S.E., 340; *S. v. White*, 138 N.C., 704, 51 S.E., 44; *S. v. Foster*, 130 N.C., 666, 41 S.E., 284; *S. v. Jones*, 79 N.C., 630.

State v. Newsome, 195 N.C. at 566-67, 143 S.E. at 194-95 (Stacy, C. J., concurring in result)(emphasis added).

The majority appears to believe the phrase "there is evidence tending to support a milder verdict" supportive of its position. This is not the case, however. The import of the *Newsome* decision is that in a first-degree murder case relying on premeditation and deliberation to support the charge there is *always* evidence tending to support a milder verdict, that is, a second-degree murder verdict. I will quote the facts, the trial court's charge to the jury and the holding in *Newsome* to demonstrate the precedential value of *Newsome* and the extent to which it supports the *Harris* rule.

The pertinent facts in *Newsome* are as follows:

> There was evidence tending to show that defendant was at his home, when deceased and Cora Reid passed the same, going to the home of the latter, walking together along the path, and that defendant saw them as they passed. He knew that deceased would later return to her father's home, by this path, alone. There was evidence tending to show further that defendant waylaid the deceased as she was returning

from the home of Cora Reid to the home of her father, about 6:30 o'clock, and that he killed her by cutting her throat with a knife.

There was also evidence tending to show that defendant met the deceased, as she was returning from the home of Cora Reid to her father's home, near defendant's home, and that he then and there assaulted her, with intent to commit rape upon her. This assault, made about 125 to 140 yards from the place at which the body of the deceased was found, was not successful. The deceased broke away from defendant and ran toward her father's home. There was evidence tending to show that defendant pursued her with intent to commit rape upon her, and that he overtook her; that defendant killed her by cutting her throat with a knife, while attempting to perpetrate upon her the crime of rape.

There was evidence tending to show further that when defendant failed in his attempt to commit rape upon the deceased, at the time of his first assault upon her, because of her successful resistance, he abandoned his purpose to rape her, and that deceased escaped and ran from him; that as she was running toward the home of her father, she called to defendant, saying that she would tell her father of defendant's assault upon her, as soon as she arrived at his home; that defendant then pursued her a distance of 125 to 140 yards from the place where he first assaulted her, overtook her and again assaulted her with a knife with no intent to rape her, but with intent to prevent her from telling her father of the previous assault with intent to commit rape; that while making this latter assault upon deceased, defendant cut her throat with a knife, thus causing her death.

Id. at 554, 143 S.E. at 188.

The trial court's charge to the jury was as follows:

"I charge you that if you are satisfied from this evidence, and find beyond a reasonable doubt, that is, to a moral certainty, that the defendant killed Beulah Tedder, while lying in wait, or that he killed her while attempting to commit rape upon her person, or if not in either of these instances, that he killed her after premeditation and delibera-

tion, as I have defined those terms to you, it would be your duty to return a verdict of guilty of murder in the first degree; but if you are not so satisfied, it would be your duty to return a verdict of not guilty."

"In this case I do not see and cannot arrive at any conclusion that would lead me to leave with you the question of his guilt upon charge of second degree murder or manslaughter; I therefore charge you that you can return but one of two verdicts in this case—either murder in the first degree, or not guilty."

Id. at 560-61, 143 S.E. 191-92.

The holding in *Newsome* was as follows:

When, however, the state relies upon evidence tending to show, not only that the murder was perpetrated by one of the means specified in the statute, or that it was committed in the perpetration of or attempt to perpetrate a felony as defined in the statute, but also upon evidence tending to show deliberation and premeditation, the jury should be instructed that, if they fail to find from the evidence, beyond a reasonable doubt, that the murder was perpetrated by one of the means specified in the statute, or that it was committed in the perpetration of, or attempt to perpetrate, a felony, and further fail to find from the evidence, beyond a reasonable doubt, that it was committed after deliberation and premeditation, they should return a verdict of guilty of murder in the second degree, provided, of course, they shall find from the evidence, beyond a reasonable doubt, that the defendant committed the murder. Deliberation and premeditation, if relied upon by the state, as constituting the homicide murder in the first degree, under the statute, must always be proved by the evidence, beyond a reasonable doubt. In such case, under the statute as construed by this court, it is for the jury and not the judge to find the fact of deliberation and premeditation from the evidence, and beyond a reasonable doubt. Premeditation and deliberation are always matters of fact to be determined by the jury, and not matters of law to be determined by the judge.

. . . .

> It cannot be held as a matter of law that all the evidence in this case, and every inference fairly and reasonably to be drawn therefrom, required the jury to return a verdict of "Guilty of murder in the first degree," or of "Not guilty." A verdict of "Guilty of murder in the second degree" could have been returned by the jury under the law and the evidence in this case.

Id. at 564, 143 S.E. 193.

Similarly, the majority finds this language in *State v. Perry*, 209 N.C. 604, 184 S.E. 545 (1936), particularly persuasive: "Whenever there is any evidence or when any inference can be fairly deduced therefrom tending to show a lower grade of murder, it is the duty of the trial judge, under appropriate instructions, to submit that view to the jury." *Id.* at 606, 184 S.E. at 546. The majority uses this language to reach its conclusion that *Harris* "appeared to convert a rule requiring the presence of evidence into a more inflexible rule *requiring* as a matter of law a second degree murder instruction *in every case* in which the State relied on premeditation and deliberation." In so doing, the majority fails to read the language of the *Perry* opinion in context, that is, in light of the facts and holding in the case. The language in *Perry* the majority quotes, language similar to that which it lifts from the concurring opinion in *Newsome*, stands for the proposition that there is *always* evidence of a lower grade of murder in first-degree murder cases relying on premeditation and deliberation to support a murder conviction. The Court in *Perry* wrote:

> The State offered evidence to the effect that the defendant made a confession in which he stated that he was with Joseph Terry late at night, and that Joseph Terry went into his house, out of sight of the defendant, and fired the fatal shot that killed the deceased. The State also offered in evidence the testimony of Joseph Terry to the effect that he and the defendant were out together at night and that the defendant told him (witness) that he (defendant) had shot and killed the deceased during an interval when they were separated. No eye-witness to the homicide was introduced. The evidence as to how the actual killing was accomplished is entirely circumstantial. While there was evidence of threats

and of motive and of other facts and circumstances amply sufficient to take the case to the jury upon the issue of murder in the first degree, there was no evidence that the crime was committed by any of the means specifically mentioned in the statute defining the two degrees of murder or in the perpetration or attempt to perpetrate a felony, as delineated in C. S., 4200.

The defendant offered no evidence.

The court charge [sic] the jury to return a verdict of guilty of murder in the first degree or not guilty.

It is only in cases where all the evidence tends to show that the homicide was committed by means of poison, lying in wait, imprisonment, starving, torture, or in the perpetration or attempt to perpetrate a felony, that the trial judge can instruct the jury that they must return a verdict of murder in the first degree or not guilty. In those cases where the evidence establishes that the killing was with a deadly weapon the presumption goes no further than that the homicide was murder in the second degree, and if the State seeks a conviction of murder in the first degree it has the burden of proving beyond a reasonable doubt that the homicide was committed with deliberation and premeditation. Under such circumstances it is error for the trial judge to fail to submit to the jury the theory of murder in the second degree, since it is the province of the jury to determine if the homicide be murder in the first or in the second degree, that is, whether they, the jury, are satisfied beyond a reasonable doubt, from the evidence, that the homicide was committed with deliberation and premeditation. Whenever there is any evidence or when any inference can be fairly deduced therefrom tending to show a lower grade of murder, it is the duty of the trial judge, under appropriate instructions, to submit that view to the jury. The defendant is entitled to have the jury instructed to the effect that if they should find beyond a reasonable doubt that he committed the murder, and should fail to find beyond a reasonable doubt that such murder was committed with deliberation and premeditation, they should return a verdict of guilty of murder in the second degree. *S. v. Spivey*, 151 N.C., 676; *S. v. Newsome*, 195 N.C., 552.

> Under the authorities cited, we hold that the failure to submit to the jury the theory of murder in the second degree entitles the defendant to a new trial, and it is so ordered.

State v. Perry, 209 N.C. at 605-06, 184 S.E. at 546.

The majority relies heavily on its interpretation of various bits of language in our pre-*Harris* decisions. It simply fails to acknowledge that *Newsome* and *Perry*, on their facts, are clear *holdings* supporting the *Harris* rule.

The majority does not explain its second reason—that the *Harris* rule does not manifestly improve the administration or quality of justice—and I can think of no reason to support such a statement. Indeed, the majority's opinion in this case serves only to confuse what was once a settled area of the law. Under this Court's decision today, the trial judges of this State no longer have any guidance whatsoever in determining when a second-degree murder charge is to be submitted to the jury. If the majority believes that its decision in this case will help get heinous murderers off the streets and into prison, then I fear it will be terribly disappointed. The majority's decision may require that a jury permit a killer to go free because it was unwilling to find that he premeditated and deliberated the killing although it would have found him guilty of second-degree murder had it been given the opportunity to do so. The majority's statement that the decision in *Hopper* "emasculated" the *Harris* rule is simply a gross exaggeration. If *Hopper* really did "emasculate" the *Harris* rule, rather than merely create a narrow exception to it, then the majority should simply announce that the United States Supreme Court had overruled *Harris;* it would have been unnecessary for the majority to then present page after page of strained reasoning to justify its holding. Finally, if the majority believes that *Harris* is "constitutionally impermissible" it ought to so hold.

The decision which the majority reaches today is, in my opinion, an extremely unfortunate one. I vote to give defendant a new trial on the murder charge for failure of the trial court to submit to the jury the alternative verdict of guilty of second-degree murder.

Chief Justice BRANCH joins in this dissenting opinion.

Justice EXUM dissenting.

I agree thoroughly with the position taken by Justice Carlton and join in his dissent. I write separately simply to say that this Court, having so recently decided *Harris* and even more recently reaffirmed *Harris* in *Keller* and *State v. Poole*, 298 N.C. 254, 258 S.E. 2d 339 (1979), has an obligation to treat Harris, Keller, Poole and Strickland, the defendant here, equally. Under these circumstances, if relief from the *Harris* rule is going to come at all, it should come from the legislature so that any statute overruling *Harris* would apply, prospectively only, to all criminal defendants alike. I therefore dissent for this additional reason.

STATE OF NORTH CAROLINA v. HOWARD LEE ALSTON

No. 176A81

(Filed 11 January 1983)

1. **Criminal Law § 73; Homicide § 17— victim's statement about argument with defendant—exception to hearsay rule—relevancy to show ill will, motive, etc.**

In a prosecution for two murders, testimony that one of the victims had told the sheriff two days before the murders that he and the defendant had engaged in a serious argument because he had told defendant to stop selling drugs in the parking lot of his store and that he was afraid that he would have serious trouble with defendant came within an exception to the hearsay rule since (1) the death of the victim provided the necessity for the testimony, and (2) there was a reasonable probability that the victim's statement was truthful because it was in the form of a report by a store owner of alleged criminal activity and resulting ill will by defendant toward the owner. Furthermore, the testimony was relevant for the limited purpose of showing ill will between the victim and the defendant and as tending to show a resulting motive, intent, malice, premeditation and deliberation on the part of defendant.

2. **Bills of Discovery § 6— failure to comply with discovery order—sanctions—discretion of court**

Which sanction provided by G.S. 15A-910, if any, is the appropriate response to a party's failure to comply with a discovery order is entirely within the sound discretion of the trial court, and the decision of the trial court will not be reversed absent a showing of abuse of that discretion.

3. **Bills of Discovery § 6— failure to comply with discovery order—informing court of unfair surprise**

When the court is not informed of any potential unfair surprise from the State's failure to comply with a discovery order, the defendant cannot properly

contend that the trial court's failure to impose a sanction is an abuse of discretion.

4. **Criminal Law § 117.1— prior consistent statements—instructions on corroborating evidence not expression of opinion**

The trial court's instructions on corroborating evidence which placed the onus on the jury to determine whether prior statements of two State's witnesses were consistent with the trial testimony of the witnesses did not constitute an expression of opinion that the witnesses gave testimony at trial which was consistent with their earlier statements.

5. **Criminal Law § 89.2— corroborative evidence—sufficiency of limiting instructions**

The trial court's instructions concerning corroboration given immediately before and after the testimony of various witnesses were sufficient to indicate to the jury the witness to whom the corroborative evidence was to relate and did not permit the jury to use the evidence to corroborate any previous witness rather than only the testimony of the witness who made the statement.

6. **Constitutional Law § 30; Bills of Discovery § 6— names and statements of witnesses not subject to discovery**

The trial court did not have the authority to order the State to disclose to defendant either the names of the State's witnesses or the statements of all persons interrogated or interviewed during the investigation. G.S. 15A-903(d); G.S. 15A-904(a).

7. **Constitutional Law § 30; Bills of Discovery § 6— investigative files of the State—names of investigating officers—no right of discovery**

No statutory provision or constitutional principle required the trial court to order the State to make available to the defendant all of its investigative files relating to defendant's case or the names of all agents who participated in the investigation. G.S. 15A-903(d).

8. **Constitutional Law § 30; Bills of Discovery § 6— criminal records of State's witnesses not discoverable**

The State was not required by statute or by due process to disclose to defendant the criminal records of its witnesses.

9. **Constitutional Law § 30; Bills of Discovery § 6— disclosure of benefits promised to any witness—failure to show noncompliance by State**

In a prosecution for two murders, testimony by a witness that she worked for the son of one of the victims, that she usually earned $3.50 an hour, and that her last paycheck was in the amount of $182.82 for less than one week's work did not establish that the State had not complied with defendant's pretrial motion for disclosure of all agreements, rewards or benefits promised to any witness for his or her testimony, since it was not clear that the witness was being rewarded or compensated in any way for her testimony, and there was no indication that the State was in any way involved with or even aware of any variance in the witness's pay for the period in question.

10. Criminal Law § 89.6— receipt from clerk's office—inadmissibility for impeachment—admission as harmless error

In a prosecution for two murders, a receipt issued by the clerk of court's office indicating a payment of $205.00 toward the costs and fine imposed against defendant in another criminal case was irrelevant and not admissible to impeach defendant's testimony that he was unemployed on the date of the murders and that the only money he had was $10.00 a week which his mother gave him since the receipt did not indicate that defendant actually paid the money himself; however, the admission of the receipt was not prejudicial to defendant where the fact of defendant's prior criminal conviction had already been disclosed to the jury and the State's witnesses had testified that no money was taken from the grocery store in which the murders took place. G.S. 15A-1443(a).

11. Indictment and Warrant § 13.1— denial of motion for bill of particulars

The trial court did not abuse its discretion in the denial of defendant's motion for a bill of particulars requesting "all events and circumstances surrounding the alleged homicide of [two named victims] and the defendant's alleged participation therein" since the motion did not specify items of factual information desired as required by G.S. 15A-925(b), and the granting of the motion would require the State to recite matters of evidence contrary to the provisions of G.S. 15A-925(b).

12. Homicide § 21.5— first degree murder—second degree murder—sufficiency of evidence

The State's evidence was sufficient to support the conviction of defendant for the first degree murder of one victim and for the second degree murder of a second victim where a State's witness testified that after hearing the sound of shots, she saw defendant coming from the direction of the first victim's store with a gun in his hand, and that defendant stated that he had killed the first victim to get him out of the way and then killed the second victim to prevent him from reporting the first killing, and the State presented evidence that the first victim and defendant had a serious argument two days before the killing because the victim had told defendant to stop selling drugs in the parking lot of the victim's store.

BEFORE *Robert H. Hobgood, Judge,* at the 17 August 1981 Criminal Session of Superior Court, FRANKLIN County. The defendant, Howard Lee Alston, was convicted by a jury of one count of first degree murder and one count of second degree murder. He was sentenced to life for the first degree murder and to a sentence of not less than twenty-five nor more than thirty years for the second degree murder conviction, to begin at the expiration of the life sentence. The defendant appeals the conviction and life sentence to this Court as a matter of right. The defendant's motion to bypass the Court of Appeals on the second degree murder was allowed 5 April 1982.

Rufus L. Edmisten, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State.

J. Henry Banks and Willie S. Darby, attorneys for defendant-appellant.

MITCHELL, Justice.

The principal issue in this case is whether the trial court erred in allowing testimony that one of the victims told Sheriff Dement that he and the defendant had engaged in an argument two days before the shooting. For the reasons stated herein, we find no reversible error.

The evidence presented by the State tended to show that Robert Warren Foster operated a store known as R. W. Foster's Grocery in the Kearney Community in Franklin County. On 9 February 1981, Robert Foster and Jack Franklin Stainback were in Foster's store. They were last seen alive at approximately 8:35 p.m. Sometime between 8:45 and 8:55 p.m. law enforcement officials received a call that two people had been shot at R. W. Foster's Grocery. Upon arriving at the scene, Deputy Astor Bowen and Deputy Leroy Terrell discovered the bodies of Foster and Stainback. An autopsy disclosed that both victims had died from gunshot wounds inflicted from a distance of two to four feet.

The State's principal witness was Mrs. Florence Hicks, who testified as follows: On 9 February 1981 she was looking at a trailer parked directly across Highway 401 from R. W. Foster's Grocery. She had known the defendant for nine or ten years. On that night, she heard some shots and ran outside toward the store. She stopped at the post on the path to the store. She heard noises from a person named Mann coming across the highway. He was calling Faye. He yelled to Faye that the defendant, Howard Alston, had shot Mr. Bobby (referring to Robert Foster) and Jack (referring to Jack Stainback). The defendant was following Mann down the path and the defendant said that he had killed Mr. Bobby and Jack. He said he was getting Bobby out of the way but that he did not want to do anything to Jack. He said that he had to do it to Jack so he would keep his mouth shut. The defendant said that he did not take any money because he did not want any money. He had a gun in his hand at the time of these statements. The defendant told Mrs. Hicks to keep her mouth shut. The de-

fendant also stated that he had made sure that the victims were dead before he left the store.

Sheriff Dement was also a witness for the State. He testified over objection that he spoke to Foster two days before the killing. At that time Foster told Sheriff Dement that he and Alston had had an argument and that he was afraid that he would have serious trouble with the defendant.

The defendant testified in his own behalf and presented witnesses who supported his testimony. The defendant's evidence tended to show that on 9 February 1981 he went to Foster's store at approximately 1:00 p.m. to buy some beer. After he made his purchases, he left the store and went from there to Bernard Hawkins' house. He stayed at Hawkins' house until approximately 4:30 or 5:00 when he went to a pool room. He rode with his sister to his uncle's house which is about one and one-half miles from Foster's store. He arrived at his uncle's house at 7:20 or 7:25 p.m. His uncle, George Macon, was in the house when he arrived. He remained at his uncle's house until his uncle drove him home at approximately 9:00 p.m. The defendant's mother and sister were present when the defendant arrived home. The defendant took a shower and went to bed around 9:30 p.m. and did not wake up until 11:00 p.m. when the telephone rang.

The defense also offered the testimony of Clementine Alston, the daughter of Florence Hicks and the wife of the defendant's third cousin. Clementine Alston testified that she was in the room with the State's witness Florence Hicks between the hours of 8:00 and 9:00 p.m. on 9 February 1981 and did not see her mother go outside the trailer. She also testified that she did not hear any shots and that her mother never told her that she saw the defendant on that night. John Henry Hicks, the husband of Florence Hicks, testified that his wife never told him of having seen Howard Alston on the night of 9 February 1981, nor did she say that the defendant had admitted that he had killed the two victims. The defendant also offered the testimony of other residents of the trailer park who were home on the night of 9 February 1981 but did not hear any shots or yelling.

[1] The defendant first assigns as error the admission of testimony by Sheriff Dement concerning statements made by one of the victims shortly before his death. The sheriff testified over ob-

jection that Foster spoke to him about the defendant at approximately 3:00 p.m. on 7 February 1981, two days before Foster was killed. Foster described to the sheriff trouble he was having because the defendant was selling drugs in the parking lot of Foster's store. He told the sheriff that he had confronted the defendant on that day and told him to stop selling drugs and that he and the defendant had a serious argument at that time. Foster further told the sheriff that he was afraid that he would have serious trouble with the defendant Alston. The trial court admitted this testimony for limited purposes over the objection of the defendant. The State tendered similar testimony by the sheriff concerning a statement made to him by Foster approximately thirty days before Foster's death in which Foster described a previous confrontation with the defendant. The tendered testimony by the sheriff with regard to the statement purportedly made to him by the victim thirty days prior to the killing was excluded by the trial court. For the reasons set forth below, we find no error in the admission of testimony by the sheriff concerning the statement made to him by the victim/declarant, Foster, two days prior to the killing.

The testimony of the sheriff as to the contents of the statement made by Foster two days prior to the killing was introduced to prove the truth of some of the matters asserted in Foster's statement. It was introduced to show that the defendant and the victim, Foster, had a serious argument two days before Foster was killed. The sheriff's testimony in this regard was hearsay evidence and as such was not admissible unless within the parameters of an exception to the hearsay rule. In *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), we held that hearsay testimony is admissible when two factors are shown to exist: (1) necessity, and (2) a reasonable probability of truthfulness. As in *Vestal*, the death of the victim/declarant in the present case meets the necessity requirement. Thus, we turn to a consideration of the reasonable probability of truthfulness of the victim's statement which is the second factor to be considered under the authority of *Vestal*.

In considering the factor of the reasonable probability of truthfulness in *Vestal*, we held that the victim's statements to his wife concerning the destination of his business trip and his traveling companion were part of the everyday routine and orderly ar-

rangement of one's domestic and business affairs. Because of the nature of these statements by the victim in *Vestal*, this Court held that the statements presented a sufficient probability of truthfulness to be admissible in evidence. In the present case, the statement by the victim Foster was in the form of a report by a store owner of alleged criminal activity and resulting ill will by the defendant toward the store owner two days before the store owner was shot dead. The statement also indicated that the argument between the defendant and the victim occurred at the same store at which the murders were committed. Such facts standing alone do not, of course, guarantee that the statements made to Sheriff Dement by Foster shortly before his death were true. They do, however, indicate a reasonable probability of truthfulness by the victim/declarant, with the ultimate issue of truthfulness to be determined by the jury.

In *Vestal*, we recognized that statements made by one spouse to another as to the destination of and traveling companions on a business trip may not always be true. Having recognized the possibility of falsity of such statements, however, this Court found a reasonable probability of truthfulness of such statements. *State v. Vestal*, 278 N.C. 561, 588, 180 S.E. 2d 755, 773 (1971). Similarly, we recognize the possibility of falsity but find a reasonable probability of truthfulness of statements made by a victim/declarant to a law enforcement officer shortly before the victim's death which described ill will between the defendant and the victim and the victim's fear of the defendant. For the foregoing reasons, we have determined that the testimony of Sheriff Dement was within a recognized exception to the hearsay rule.

Having determined that the testimony of Sheriff Dement was not excluded by the hearsay rule, we must turn our attention to the question of whether this testimony was otherwise inadmissible. Evidence which does not violate the hearsay rule will nevertheless be excluded unless it is shown that it is relevant to an issue arising in the case in question. Some courts have indicated that all expressions of fear of the defendant by murder victims are relevant and admissible against the defendant when in human experience they are sufficiently reliable. *State v. Gause*, 107 Ariz. 491, 489 P. 2d 830 (1971), *vacated on other grounds*, 409 U.S. 815, 34 L.Ed. 2d 71, 93 S.Ct. 192 (1972). Other courts allow the admission of such evidence only if a limiting instruction is given and

only after a careful weighing of the probative value and the prejudicial effect of the statements of the victim. *United States v. Brown*, 490 F. 2d 758 (D.C. Cir., 1973) (statements improperly admitted). Evidence of a victim's fear of the defendant is subject to misuse. Therefore, the naked assertion by a victim prior to his death that he fears the defendant should not be admitted into evidence absent some evidence tending to show a factual basis for such alleged fear. While the use of statements of the victim tending to show ill will between the defendant and the victim or fear of the defendant by the victim must be carefully scrutinized before being admitted into evidence, this Court has long allowed evidence of ill will between the defendant and the victim as tending to show premeditation and deliberation, motive and intent. *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10, *cert. denied*, 429 U.S. 932, 50 L.Ed. 2d 301, 97 S.Ct. 339 (1976); *State v. Fountain*, 282 N.C. 58, 191 S.E. 2d 674 (1972); *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969); *State v. Creech*, 229 N.C. 662, 51 S.E. 2d 348 (1949); *State v. Artis*, 227 N.C. 371, 42 S.E. 2d 409 (1947). Further, when the details of a prior dispute tend to demonstrate the ill will between the defendant and the victim, the details and the apparent reason for such ill will may be shown. 1 WHARTON'S CRIMINAL EVIDENCE, § 177 (13th ed. 1972). Additionally, evidence of motive for the commission of a crime may be admitted even though motive is not an element of the crime. *State v. Ruof*, 296 N.C. 623, 252 S.E. 2d 720 (1979). The mere fact that such evidence shows that the defendant committed another crime will not be grounds for its exclusion. See *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 796, 100 S.Ct. 2165 (1980).

In the present case, Sheriff Dement's testimony concerning the victim's statement shortly prior to his death tended to show ill will between the defendant and the victim and was admissible. Even if Foster was not telling the truth about the facts surrounding the argument he stated he had had with the defendant, the fact that he reported to the sheriff that the defendant was selling drugs on his property might well be viewed as tending to show ill will between Foster and the defendant. The sheriff's testimony was hearsay but within the well-founded exception to the hearsay rule permitting the admission of hearsay when the factors of necessity and reasonable probability of truthfulness are present.

The testimony was relevant to show ill will between the victim and the defendant and as tending to show a resulting intent, malice, premeditation and deliberation on the part of the defendant. The trial court carefully weighed the probative value of the testimony against its prejudicial effect and made detailed findings and conclusions in this regard. The trial court then admitted the sheriff's testimony with regard to the statement by the victim/declarant, but only after giving a proper limiting instruction to the jury. The trial court correctly instructed the jury that the jury was to consider the sheriff's testimony concerning the statement of the victim/declarant only to the extent the jury might find that it indicated motive, intent or ill will on the part of the defendant. This limiting instruction was essential, as the use of hearsay testimony concerning a statement by a victim prior to his murder is not unlimited. It should be admitted only to show the ill will between the defendant and the victim and the inferences which properly may be drawn therefrom. The trial court properly instructed the jury in this regard in the present case, and we find no error in the admission of the sheriff's testimony concerning the prior statement of the victim.

The defendant's next assignment of error concerns the use by the State in rebuttal of statements made by the defendant. The defendant claims that it was error to admit these statements into evidence. We find no error.

Prior to trial, the defendant made a discovery motion which resulted in a court order pursuant to G.S. 15A-903(a)(1) and (2) requiring the State to permit the defendant to inspect and copy any relevant written or recorded statements made by the defendant which the State intended to offer into evidence at the trial. During the rebuttal testimony of North Carolina State Bureau of Investigation Agent J. F. Walker, the State attempted to introduce into evidence the written notes made by Agent Walker of a statement that the defendant made to the agent on 27 February 1981. The defendant objected to the introduction of this evidence and the court held a *voir dire* to determine admissibility. Following direct and cross examination of Agent Walker on *voir dire*, the court heard arguments on the admissibility of the statement. The defendant based his objection on the grounds that the statement was incomplete because Agent Walker did not report everything the defendant said, that the defendant was not asked to verify

the accuracy of the statement at the time Agent Walker made his notes, that the defendant did not sign the statement and that the statement only corroborated and was not inconsistent with the defendant's testimony at trial. The State pointed out that the statement was not made during a custodial interrogation and contended the statement was inconsistent with the defendant's testimony. Specifically, the defendant told Agent Walker that he was at his grandfather's home on the night of 9 February 1981, rather than at his uncle's house, and that the defendant returned to his own home at 8:30 p.m. rather than around 9:00 p.m. as he had testified during trial. Upon the completion of the *voir dire* testimony and arguments, the trial court made findings and conclusions and admitted testimony concerning the defendant's statement into evidence over the defendant's objection.

[2] On appeal, the defendant claims that the State failed to produce this statement as required by the pretrial order. The defendant contends that the State's failure to comply with the court order entered pursuant to G.S. 15A-903(a)(2) required the trial court to exclude the evidence. G.S. 15A-910 provides that upon failure of a party to comply with an order pursuant to Article 48 (Pretrial Procedure), the court *may*:

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

(2) Grant a continuance or recess, or

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

(4) Enter other appropriate orders.

It is important to note that while the statute sets out possible curative actions, it does not require the court to impose any sanction. Which sanction, if any, is the appropriate response to a party's failure to comply with a discovery order is entirely within the sound discretion of the trial court. The decision of the trial court will not be reversed absent a showing of abuse of that discretion. *State v. Stevens*, 295 N.C. 21, 37, 243 S.E. 2d 771, 781 (1978).

[3] In the case *sub judice*, the record is devoid of any indication that the court abused its discretion. The defendant objected to the admission of the evidence and the court properly held a *voir*

dire. At no time during the *voir dire* examination or argument did the defendant request the imposition of a sanction under G.S. 15A-910. In fact, at no time did the defendant inform the court of the alleged failure of the State to comply with the discovery order. The purpose of the discovery procedures, authorized by N.C. General Statutes 15A, Article 48 (1975) is to protect the defendant from unfair surprise. *State v. Stevens*, 295 N.C. 21, 37, 243 S.E. 2d 771, 781 (1978). When the court is not informed of any potential unfair surprise, the defendant cannot properly contend that the trial court's failure to impose a sanction is an abuse of discretion. See *State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978); *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978).

[4] The defendant's third assignment of error relates to the trial court's jury instructions. The defendant contends that the court impermissibly expressed an opinion that two of the witnesses for the State gave testimony at trial that was consistent with earlier statements. Specifically, the portion of the instructions in question is as follows:

> Evidence has been received as corroboration tending to show that at an earlier time the witness, Florence Wright Hicks, made a statement to J. F. Walker consistent with her testimony at this trial;
>
> That the witness, Florence Wright Hicks, made a statement to Deputy Sheriff Wesley Denton consistent with her testimony at this trial; and
>
> That the witness, Harry Pearce made a statement to J. F. Walker consistent with his testimony at this trial.
>
> You must not consider such earlier statements as evidence of the truth of what was said at the earlier time because it or they were not made under oath at this trial.
>
> If you believe that such earlier statements were made and that they are consistent with the testimony of the witness at this trial, then you may consider this together with all other facts and circumstances bearing upon the witness's truthfulness in deciding whether you will believe or disbelieve his, her or their testimony at this trial.

The defendant's contention that this instruction was improper is without merit.

The instruction given by the court is identical to the North Carolina Pattern Jury Instructions on corroborative evidence. N.C.P.I.—CRIM. § 105.05 (June, 1970). This exact instruction was approved by the Court of Appeals in *State v. McNeil*, 46 N.C. App. 533, 536-37, 265 S.E. 2d 416, 419, *cert. denied*, 300 N.C. 560, 270 S.E. 2d 114 (1980), and similar instructions were approved by this Court in *State v. Detter*, 298 N.C. 604, 630-31, 260 S.E. 2d 567, 586 (1979). The instruction specifically states that the jury should consider the evidence "[i]f you believe such earlier statements were made and that they are consistent with the testimony of the witness at this trial." Therefore, the instruction correctly placed the onus on the jury to determine whether such statements were consistent with prior testimony of the witnesses. In fact, an instruction on corroboration omitting the cautionary language "if you find that this statement does corroborate his/her testimony" has been held to be sufficient. *State v. Detter*, 298 N.C. 604, 630, 260 S.E. 2d 567, 585 (1979); *State v. Case*, 253 N.C. 130, 136, 116 S.E. 2d 429, 433 (1960), *cert. denied*, 365 U.S. 830, 5 L.Ed. 2d 707, 81 S.Ct. 717 (1961). We find no prejudicial error in this instruction.

[5] The defendant's fourth assignment of error involves the trial court's instructions concerning corroboration given immediately before and after the various witnesses' testimony. The defendant does not object to the admission of the testimony, but argues that the limiting instructions were unclear as they allowed the jury to use the evidence to corroborate any previous witness, rather than the witness who had made the statement. There were three instances in which the trial court instructed the jury on corroboration. The first occurred during the redirect examination of Agent Walker. Prior to the corroborative testimony, the judge instructed the jury as follows:

> At this time, ladies and gentlemen of the jury, the objection is overruled. The evidence which you are about to hear is being admitted for the limited purpose of corroboration. That is to the extent that you find that it corroborates the previous testimony of the witness made under oath at this trial, you will consider it for that purpose and that purpose alone.

Prior to the corroborative testimony of Deputy Sheriff Denton, the court instructed the jury:

> Ladies and gentlemen of the jury, the following is being admitted for the limited purpose of corroboration. I have previously instructed you with the use with regard to the word, corroboration. You will at this time recall that instruction.

Immediately following the corroborative testimony of Deputy Sheriff Denton, the court stated, "This ends the point at which the evidence is admitted for the limited purpose of corroboration." During the State's rebuttal evidence, Agent Walker again testified and after the defendant's objection the court instructed the jury:

> Ladies and gentlemen of the jury—objection overruled—now, the following evidence is being admitted for the limited purpose of corroboration. That is to the extent that you find that the testimony of this witness corroborates the testimony of a previous witness given under oath at this trial, you will consider it for that purpose and that purpose alone.

Finally, following the end of Agent Walker's corroborative testimony, the court instructed the jury, "Now, ladies and gentlemen of the jury, this ends the point at which the evidence was admitted for the limited purpose of corroboration with respect to the witness, Harry Pearce."

The defendant bases his assignment of error on *State v. McMillan*, 55 N.C. App. 25, 284 S.E. 2d 526 (1981). In that case, the trial court instructed that the testimony should be considered if it corroborates the testimony of "a witness" or "a previous witness." The trial court in *McMillan* never specified which witness the testimony could corroborate. The Court of Appeals held that these instructions were erroneous, albeit harmless error, because the limiting instruction given did not clearly charge the jury that it was to consider the witness's statement only as corroboration of her earlier testimony. *Id.* at 30, 284 S.E. 2d at 530.

A prior consistent statement by a witness is admissible only to corroborate the trial testimony of the witness who made the

statement. *State v. Miller*, 288 N.C. 582, 596, 220 S.E. 2d 326, 336 (1975). While the instructions in the present case were not perfect, they were sufficient to indicate to the jury the witness to whom the corroborative testimony was to relate. The instruction prior to Agent Walker's testimony stated that the testimony should be considered only if the jury found that "it corroborates *the* previous testimony of *the* witness." (Emphasis added.) Additionally, the court informed the jury that "at a later time during my instructions to you, I will give you more detailed instructions with regard to the word, corroboration, and at that time you will recall the testimony which you are about to hear." The instructions as to Deputy Sheriff Denton's testimony asked the jury to recall the previous corroborative instruction. The instruction as to Agent Walker's rebuttal testimony concerning a prior statement by witness Harry Pearce consistent with Pearce's testimony at trial is the most troublesome. The court stated that the testimony should be considered as corroborative if the jury found that "the testimony of *this* witness corroborates the testimony of *a* previous witness . . . ." (Emphasis added.) While this form of the instruction may be ambiguous, the court later clarified its meaning. In its instruction before the testimony, the court stated again that a more detailed instruction and definition of corroboration would be given later. Following the testimony, the court removed all ambiguities as to the purpose for which the evidence was admitted. The court stated that "the evidence was admitted for the limited purpose of corroboration with respect to the witness, *Harry Pearce*." (Emphasis added.) The court could not have been more specific as to which prior witness's testimony this evidence could be considered corroborative.

Further, the trial court in its instructions, specifically discussed in detail the corroborative evidence admitted. The corroborative testimony of each of the witnesses was referred to by both the name of the corroborative witness and the name of the witness who made the prior statement to be corroborated. Viewing the instructions in their entirety, we find no error in the instructions on corroborative evidence.

By his fifth assignment of error, the defendant contends that he is entitled to a new trial based on the court's error in denying a portion of his pretrial discovery motion and the State's failure to provide certain requested information. The defendant's brief on

this assignment, when compared to the record, is convoluted at best. The court denied the defendant's request for several items. The specific items and the court's denial of them were not referred to or included in the defendant's assignments of error and therefore any grounds for appeal as to these items are deemed abandoned. Rule 28(a), N.C. Rules of App. Pro.; *State v. Fowler*, 285 N.C. 90, 203 S.E. 2d 803 (1974), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1212, 96 S.Ct. 3212 (1976). From the assignments and exceptions as gleaned from the record, we find no error.

[6] The defendant's pretrial discovery motion requested the court to order the State to make available certain evidence and information. Some of these requests were granted. Several of the paragraphs in the discovery motion and in the assignment of error referred to the identity of the State's prospective witnesses. Specifically, in his pretrial motion the defendant requested a list of all of the State's witnesses, the names of all persons with some knowledge of facts of the case against the defendant and all the statements of all persons interrogated or interviewed during the investigation. There is no common law right to discovery in criminal cases. *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976); *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334, *cert. denied*, 377 U.S. 978, 12 L.Ed. 2d 747, 84 S.Ct. 1884 (1964). The categories of information discoverable from the State are contained in G.S. 15A-903. While the defendant couched his request in varying forms, the defendant in these several requests was attempting to obtain a list of the State's witnesses and their statements. A defendant is not entitled to a list of the State's witnesses. *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980); *State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979); *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977); *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976).

Additionally, there is no statutory right to statements of the State's witnesses. G.S. 15A-903(d) provides:

> 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.

Standing alone, this provision would appear to require the State to disclose at least any written statements. This section is, however, restricted by G.S. 15A-904(a), which states: "Except as provided in G.S. 15A-903(a), (b), (c) and (e), this Article does not require the production of . . . statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State." Therefore, any statements made to law-enforcement officers are expressly excluded from the discoverable evidence. The trial court did not have authority to order the State to disclose either the names of the State's witnesses or their statements.

[7] The defendant in his brief assigned as error the failure of the trial court to grant his discovery motion with regard to the total and complete investigative files of all law-enforcement agencies which took part in the investigation and the names and addresses of all agents of the State involved in the investigation. As to the names of the agents who participated in the investigation, as with the names of the witnesses, there is no statutory authority for the granting of this motion. In regard to the request for the total and complete investigative files, it should be noted that no one paragraph of the Motion for Discovery includes such a request; therefore it would seem that the defendant is admitting that the disclosure of the entire investigative file was the true objective of his discovery motion. Due process does not require the State to make a complete disclosure to the defendant of all of the investigative work on a case. *Moore v. Illinois*, 408 U.S. 786, 33 L.Ed. 2d 706, 92 S.Ct. 2562 (1972). G.S. 15A-903(d) requires the disclosure to the defendant of all documents and tangible objects "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." This section does not alter the general rule that the work product or investigative files of the District Attorney, law-enforcement agencies, and others helping to prepare the case are not open to discovery. See the Official Commentary following G.S. 15A-904.

The defendant claims that the information sought was discoverable under *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d

215, 83 S.Ct. 1194 (1963), and that the failure of the State to disclose the information sought violated the defendant's right to due process by hindering his preparation of a defense. It should first be noted that *Brady* only requires the disclosure, upon request, of evidence *favorable* to the accused and not a disclosure of all evidence. Moreover, in *United States v. Agurs*, 427 U.S. 97, 49 L.Ed. 2d 342, 96 S.Ct. 2392 (1976), the Supreme Court clarified *Brady*. The Court held that a general request for all *Brady* information or all exculpatory information does not create a prosecutorial duty to respond with the production of all information. *Id.* at 107, 49 L.Ed. 2d at 351-52, 96 S.Ct. at 2399. More significantly, the Court held that the Constitution does not require that the defendant be allowed a broad discovery of all of the prosecution's files. *Id.* at 109, 49 L.Ed. 2d at 353, 96 S.Ct. at 2400. In determining whether the suppression of certain information was violative of the defendant's right to due process, the focus should not be on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, but rather should be on the effect of the nondisclosure on the outcome of the trial. *Id.* at 112, 49 L.Ed. 2d at 354-55, 96 S.Ct. 2401, n. 20; *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977). The evidence withheld must also be material. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-110, 49 L.Ed. 2d 342, 353, 96 S.Ct. 2392, 2400. The defendant has not shown that any evidence not disclosed was "material" and what effect, if any, the nondisclosure would have had on the outcome at trial. *Id.* at 104, 49 L.Ed. 2d at 350, 96 S.Ct. at 2398.

The defendant's requests were clearly part of a fishing expedition intended to allow the defendant to search through the State's files and evidence in the hope of discovering any information that might aid in the preparation of a defense. We find no statutory provision or constitutional principle that would require the trial court to order the State to make available to the defendant all of the material that it had gathered in preparation for trial. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. McDougald*, 38 N.C. App. 244, 248 S.E. 2d 72 (1978).

[8] The defendant also requested the complete criminal records of all of the State's witnesses. The defendant claims that the

State's key witness, Florence Hicks, had been convicted of driving under the influence and that this information had not been revealed to the defendant. The trial court is without authority to grant such a request and the failure of the court to order the disclosure of the State's witnesses' criminal records is not violative of due process. *State v. Ford*, 297 N.C. 144, 254 S.E. 2d 14 (1979). In fact the original draft of G.S. 15A-903 included a provision to require the State to disclose the criminal records of its witnesses, but this language was removed prior to the statute's enactment. See Official Commentary following G.S. 15A-903; *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569 (1982). It should also be pointed out that the fact that Mrs. Hicks had been convicted of driving under the influence was brought out by the defendant on cross-examination, and the failure of the State to disclose this conviction could not have harmed the defendant.

[9] Additionally, the defendant contends that his pretrial motion for disclosure of all agreements, rewards or benefits promised to any witness for his or her testimony was not complied with by the State. The defendant's claim is based on the testimony elicited from Mrs. Hicks during trial. Mrs. Hicks testified that she worked for the son of one of the victims and that she usually earned $3.50 an hour. She also stated that her last pay check was in the amount of $182.82 for less than one week's work. Although the defendant asked Mrs. Hicks if she worked less than 40 hours, the amount of time that she worked was never established, beyond the fact that she worked less than the full week. It is anything but clear from this evidence that Mrs. Hicks was being rewarded or compensated in any way for her testimony. Beyond this, there is no indication, other than the defendant's assertion on appeal, that the State was in any way involved with or even aware of any variance in Mrs. Hicks' pay for the period in question. Furthermore, this information was elicited on cross-examination and therefore the evidence was before the jury. The defendant's assignment of error is overruled.

[10] The defendant next assigns as error the admission into evidence of a receipt issued by the clerk of court's office indicating a payment of $205.00 towards the cost and/or fine imposed against the defendant in another criminal case. The defendant contends that the State's exhibit was inadmissible and

irrelevant and was introduced solely for the purpose of exciting prejudice against the defendant and confusing the jury.

The defendant testified that he was unemployed on the date of the murder, 9 February 1981, and that the only money that he had was the ten dollars a week that his mother gave him. He also testified that the $205.00 payment was made on 12 February 1981 to the clerk's office by his mother on his behalf. The State contends that the testimony of the deputy clerk of court and the receipt that she gave in the amount of $205.00 were properly admissible to impeach the defendant. The problem with the State's argument is that the exhibit and the testimony of the witness do not tend to impeach the defendant. The receipt indicated that it was a receipt *of* Howard Alston, but does not indicate that Howard Alston actually paid the money. The deputy clerk of court testified that, unless requested to do otherwise, she only writes on the receipt the name of the person for whom the payment is made and that people will often make payments for someone else. She further testified that she did not remember who made the payment for Howard Alston on 12 February 1981. Therefore, the receipt had little probative value and should not have been admitted.

Evidence without any tendency to prove a fact in issue is inadmissible, although the admission of such evidence is not reversible error unless it is of such a nature as to mislead the jury. *Brandis on North Carolina Evidence*, § 77 (2d ed. 1982). The defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial. *State v. Billups*, 301 N.C. 607, 272 S.E. 2d 842 (1981). The admission of irrelevant evidence is generally considered harmless error. The defendant has the burden of showing that he was prejudiced by the admission of the evidence. *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979). In order to show prejudice, the defendant must meet the statutory requirements of G.S. 15A-1443(a) which are as follows:

> 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.

> The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

Cf. Fahy v. Connecticut, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963).

In the present case, the defendant failed to carry his burden of showing any prejudice by the admission of the receipt. The fact of the criminal conviction had already been properly disclosed to the jury. The State's witnesses had testified that no money was taken from the grocery store in which the murders took place and Mrs. Hicks testified that when she saw the defendant he said that, although he killed the victims, he did not take anything because he was not interested in money. At most, the evidence was irrelevant but not prejudicial to the defendant.

[11] The defendant's next assignment of error concerns the trial court's denial of his motion for a bill of particulars. The defendant made two motions. The first motion was included in the record on appeal and was made on 1 June 1981 and was properly denied in the court's pretrial order of 3 July 1981. The first motion requested "all events and circumstances surrounding the alleged homicide of ROBERT W. FOSTER and JACK STAINBACK, JR. and the defendant's alleged participation therein." G.S. 15A-925(b) requires that a motion for a bill of particulars "request and specify items of factual information desired" and G.S. 15A-925(c) specifies that "[n]othing contained in this section authorizes an order for a bill of particulars which requires the State to recite matters of evidence." The defendant's request is quite general and the granting of it would require the State to recite matters of evidence. The granting of a motion for a bill of particulars is within the discretion of the trial court and is not subject to review except for palpable and gross abuse of the court's discretion. *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979). We find that the court did not abuse its discretion.

Following the court's denial of his first motion, the defendant filed another motion for a bill of particulars. The trial transcript includes the arguments of counsel on this motion and the court's order denying specific paragraphs of the motion. However, the

defendant's actual motion was not included in the record on appeal.

It is the appellant's duty and responsibility to see that the record is in proper form and complete. Rule 9(b)(3)(v) and (vii), N.C. Rules of App. Pro.; *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *death sentence vacated*, 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971). From the record before us, we cannot, without engaging in speculation, determine the substance of the specific paragraphs of the motion that were denied by the trial court. The trial court only referred to the motion by the labeled paragraphs and denied each on various legal theories. "An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court." *State v. Williams*, 274 N.C. 328, 333, 163 S.E. 2d 353, 357 (1968).

Since the motion is not before this Court, the defendant's assignment of error amounts to a request that this Court assume or speculate that the trial judge committed prejudicial error in his ruling. See *State v. Cockrell*, 230 N.C. 110, 52 S.E. 2d 7 (1949). While we are not compelled to do so, due to the nature of this case we have reviewed the record with regard to this assignment of error. To the extent that the court's ruling can be gleaned from the arguments of counsel and the court's order, we find no error in the denial of the defendant's second motion for a bill of particulars.

[12] Finally, the defendant assigns as error the trial court's denial of his motion for nonsuit. The test applied in a criminal action to determine the sufficiency of the evidence is the same for a motion for nonsuit, dismissal or directed verdict. *State v. Locklear*, 304 N.C. 534, 284 S.E. 2d 500 (1981). The test is whether substantial evidence of all material elements of the offense charged was presented. In applying this standard, all of the evidence is to be considered in the light most favorable to the State and the State is afforded every reasonable intendment and inference drawn from the evidence. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

The State presented evidence of statements made by the defendant admitting that he killed both victims. According to the State's evidence the defendant killed Foster and then killed Stain-

back to prevent him from reporting the first killing. This evidence was presented through the State's witness, Florence Hicks. The credibility of the witness and the weight to be given to her testimony are questions for the jury to resolve. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). The evidence presented, taken in the light most favorable to the State, is sufficient to withstand the defendant's motion for nonsuit. The motion was properly denied.

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

No error.

FARMERS BANK, PILOT MOUNTAIN, NORTH CAROLINA v. MICHAEL T. BROWN DISTRIBUTORS, INC. (FORMERLY NED PELL DISTRIBUTORS, INC.); BRENDA M. BROWN, EXECUTRIX OF THE ESTATE OF MICHAEL BROWN; BRENDA M. BROWN; VIDA M. McCANLESS; PHILLIP H. PELL; AND O. M. NEEDHAM, JR.

No. 372PA82

(Filed 11 January 1983)

Guaranty § 2; Rules of Civil Procedure § 52.1; Trial § 58 — guaranty agreement — question of condition precedent — sufficiency of trial court's findings of fact — not supporting conclusion of law

In an action tried without a jury where the trial court was to determine whether the parties intended to create a condition precedent to defendants' liability under a guaranty agreement, the trial court failed to make specific findings of the ultimate facts necessary to support its conclusion of law that no condition precedent existed to defendants' liability under the guaranty agreement. G.S. 1A-1, Rule 52(a)(1).

Justice MARTIN dissenting.

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

WE allowed defendants' petition for discretionary review from the decision of the Court of Appeals, 57 N.C. App. 313, 291 S.E. 2d 317 (1982), on 3 August 1982. *Long, Judge*, tried this action, without a jury, at the 9 February 1981 Session of Superior Court, SURRY County. Judgment was entered for plaintiff on 12

February 1981. Defendants appealed to the Court of Appeals and that court affirmed.

In this appeal, we review the sufficiency of the trial court's findings of fact to determine if they support the crucial conclusion of law made. In so doing, we hold that the findings of fact are not sufficient to support the trial court's legal conclusion.

Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown, by Richard G. Badgett and Herman L. Stephens, for defendants.

Otis M. Oliver and Finger and Parker, by Raymond A. Parker, II, for plaintiff.

CARLTON, Justice.

I.

Of the original defendants in this action, only Phillip H. Pell and O. M. Needham, Jr., are involved in this appeal.

R. W. Smith, vice-president of Farmers Bank in Pilot Mountain, N.C., was plaintiff's sole witness and testified as follows:

Defendants, Needham and Pell, came to Smith's office at the bank sometime before 15 February 1977. Defendants told Smith they were selling their interests in the company they helped manage, Ned-Pell Distributors, Inc., and asked Smith if the bank would continue to carry the line of credit it previously had extended to the company. It was suggested the transaction be accomplished by issuing a new promissory note which would consolidate and renew three notes Needham and Pell had signed earlier in their capacity as corporate officers. The bank was to continue to extend the line of credit if:

(a) Michael Brown, president of Ned-Pell Distributors, Inc., together with his wife, Brenda M. Brown, and his mother-in-law, Vida M. McCanless, signed the promissory note as makers; and

(b) Defendants signed a guaranty agreement in which they guaranteed full and prompt payment of the note.

Smith further testified that the condition that Brown, his wife and mother-in-law sign the promissory note as makers was strictly defendants' requirement:

> I stated in my deposition to the effect that cosigners were a requirement for Mr. O. M. Needham and Mr. Phil Pell. I meant by that statement, that it was a requirement of theirs, that this was a condition that they outlined, of one of the things that would happen if we would continue this line of credit.

Record at 15.

Smith also testified that the condition that defendants sign the guaranty agreement was the bank's requirement:

> It was a requirement of the bank that Mr. Needham and Mr. Pell sign the guaranty agreement. Mr. Needham and Mr. Pell had been overseeing the operation, although the actual management was divested [sic] in Mr. Brown. Mr. Needham and Mr. Pell had been overseeing the management of Ned-Pell and the bank felt that we were in a good financial position as long as Mr. Needham and Mr. Pell operated or oversaw the operation. But at the time they sold their interest in this to Mr. Brown, we felt that there had to be some type of obligation on the part of Mr. Needham and Mr. Pell toward this loan.

Record at 14.

The record indicates the bank's condition—that defendants sign the guaranty agreement—was fulfilled. Defendants' term—that Brown, his wife and mother-in-law sign the note as makers—was not met, however. In an earlier action, it was found that the purported signatures of Brown's wife and mother-in-law on the note were forgeries. Summary judgment was granted the two women on all plaintiff's claims against them. Brown has since died. Smith testified that he thought there were no funds in Brown's estate, and that Ned-Pell Distributors, Inc., was insolvent and no longer existed. It appears, therefore, that defendants are the only parties to whom the bank can realistically look for payment.

This action involves, as Judge Long stated just prior to hearing evidence at trial, "the fairly narrow issue . . . as to whether there was a condition precedent involving this guaranty agreement." From the outset, defendants have contended that a condition precedent to their liability under the guaranty agreement

was that the bank obtain the signatures of each of the individual co-makers, but that the bank failed to do so because the signatures of Brown's wife and mother-in-law were forgeries. Judge Long concluded that no such condition precedent existed and entered judgment for the bank and against Pell and Needham for the unpaid principal of $60,000, interest to date of judgment of $16,200, and attorney's fees in the amount of $7,631.25.

The Court of Appeals affirmed, reasoning primarily that the evidence supported the trial court's findings and the findings supported the conclusion that no condition precedent existed.

II.

The question dispositive of this appeal is whether the trial court's findings of fact are adequate to support its conclusion of law that the bank's procurement of valid signatures of Brenda M. Brown and Vida M. McCanless as co-makers on the note was not a condition precedent to defendants' liability under the guaranty agreement. The answer, readily apparent from a review of our applicable statutory and case law, is that the findings of fact are inadequate.

G.S. 1A-1, Rule 52(a)(1) (1969) requires that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." Under that rule, three separate and distinct acts are required of the trial court. It must (1) find the facts specially, (2) state separately the conclusions of law resulting from the facts so found, and (3) direct the entry of the appropriate judgment. *See Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E. 2d 639, 644 (1951) (stating similar duties under G.S. 1-185 (1953), the statute G.S. 1A-1, Rule 52(a)(1) (1969) replaced). Here, we are concerned with the first requirement, that the trial court find the facts specially.

In *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982), this Court recently emphasized again the cruciality of this requirement. We said:

> Rule 52(a) does not, of course, require the trial court to recite in its order all evidentiary facts presented at hearing. The facts required to be found specially are those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they

support the conclusions of law reached. "Findings of fact may be defined as the written statement of the ultimate facts as found by the court, signed by the court, and filed therein, and essential to support the decision and judgment rendered thereon." 76 Am. Jur. 2d Trial § 1251 (1975). In other words, a proper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment. 89 C.J.S. Trial § 627 (1955).

In *Woodard v. Mordecai*, 234 N.C. at 470, 472, 67 S.E. 2d at 644, 645, this Court explained:

> There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. (Citations omitted.) G.S. 1-185 requires the trial judge to find and state the ultimate facts only. (Citations omitted.)
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> . . . .
>
> . . . Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. (Citations omitted.) In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. (Citation omitted.) An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. (Citations omitted.) Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law. (Citations omitted.)

In summary, while Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

As stated by this Court, per Justice Exum, in *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980):

> The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead "to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system." *Montgomery v. Montgomery*, 32 N.C. App. 154, 158, 231 S.E. 2d 26, 29 (1977); *see, e.g., Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967).

Id. at 451-52, 290 S.E. 2d at 657-58 (original emphasis).

As noted above, the narrow issue at trial was "whether there was a condition precedent involving this guaranty agreement," in short, whether a condition precedent[1] existed with respect to defendants' liability under the guaranty agreement. We note "[t]he existence of such a condition [precedent] depends upon the intent of the parties as gathered from the words they have employed, and it will be interpreted according to general rules of construction." 17A C.J.S., Contracts, § 338, at 318 (1963). Specifically, then, the trial court was to determine whether the parties intended the term that three valid signatures appear on the note to operate as a condition precedent to defendants' liability under the guaranty agreement. Because the language of the parties' agreement admits of more than one reasonable inference

1. A condition precedent is a fact or event " 'occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.' " 3A A. Corbin, Corbin on Contracts § 628, at 16 (1960), *quoted in Parrish Tire Co. v. Morefield*, 35 N.C. App. 385, 387, 241 S.E. 2d 353, 355 (1978); *Cargill, Inc. v. Neuse Prod. Credit Ass'n*, 26 N.C. App. 720, 722-23, 217 S.E. 2d 105, 107 (1975). The issue in the case at bar does not concern the facts or events themselves that were to exist or occur before the right to the usual judicial remedies were to be made available. Rather, the issue is whether the parties *intended* the occurrence or nonoccurrence of certain facts or events to operate as a condition precedent to defendants' liability under the guaranty agreement.

as to the parties' intentions, and the evidence as to their intentions is conflicting, the question of what the parties' intentions were is a question of fact for the jury, or, as here, the court as trier of fact. This is so because in *Wallace v. Bellamy*, 199 N.C. 759, 155 S.E. 856 (1930), this Court held:

> In the interpretation of contracts the general rule is that a court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language; but if the terms are equivocal or ambiguous the jury may in proper cases determine the meaning of the words in which the agreement is expressed. This elementary principle is of frequent application in ascertaining the intention of the parties.

Id. at 763, 155 S.E. at 859 (citations omitted). *Accord Gore v. George J. Ball, Inc.*, 279 N.C. 192, 201, 182 S.E. 2d 389, 394 (1971); *Hunt v. Hunt*, 261 N.C. 437, 441-42, 135 S.E. 2d 195, 198-99 (1964); *Durham Lumber Co. v. Wrenn-Wilson Constr. Co.*, 249 N.C. 680, 686-87, 107 S.E. 2d 538, 542 (1959). *See also* 17A C.J.S., Contracts, § 611a, at 1224-28, § 617, at 1250-53 (1963). Whether the facts found establish a condition precedent is a question of law for the court. *See* 17A C.J.S., Contracts, § 611a, at 1224; 3 A. Corbin, Corbin on Contracts § 554, at 226-27 (1960). Stated simply, whether certain facts exist is a question for the trier of fact; whether the facts produce a legal effect is a question of law for the court.

As noted, G.S. 1A-1, Rule 52(a)(1) (1969) requires *specific findings* of the ultimate facts established by the evidence. In the case at bar, the trial court was to determine whether the parties intended to create a condition precedent to defendants' liability under the guaranty agreement. Applying the foregoing to the record before us, we note that the only finding of fact made by the trial court even remotely relating to the conclusion that no condition precedent existed was the second fact found as follows:

> Shortly before February 15, 1977, the defendants, Phillip H. Pell and O. M. Needham, Jr., informed R. W. Smith, Vice-President of Farmers Bank, that they wished to sell their stock in the corporation to Michael T. Brown, and inquired whether the bank would continue to extend its previous line of credit to the corporation under the new stockholder, if the new stockholder, Michael T. Brown, his wife, Brenda M.

> Brown, and his mother-in-law, Vida M. McCanless. [sic] signed the corporate notes [sic] as makers, and if the defendants, Phillip H. Pell, and O. M. Needham, Jr., signed a guaranty of payment of such indebtedness.
>
> R. W. Smith informed the defendants, Phillip H. Pell and O. M. Needham, Jr., that the bank would continue to extend credit under such arrangement.

Record at 33.

Based apparently on this single finding of fact, the trial court in its fifth conclusion of law determined that the condition that Brown, his wife and mother-in-law sign the note was not a legally effective one. The trial court concluded, "[t]hat valid signatures of Brenda M. Brown and Vida M. McCanless as co-makers or endorsers of the note were not a condition preceding [sic] which was communicated to the plaintiff so as to make the plaintiff responsible for obtaining these signatures and insuring their validity." Record at 35. This conclusion, of course, is the trial court's determination that no condition precedent existed to defendants' liability under the guaranty agreement.

Clearly, the trial court failed to make specific findings of the ultimate facts necessary to support this conclusion of law. The sole finding quoted above is simply a recitation of the trial court's understanding of the events leading to the agreement between the parties for a continuing extension of credit. The finding fails to state what the parties meant when they agreed that three valid signatures would appear on the new note. In short, the trial court's findings are completely devoid of any fact which would enable a trial court or an appellate court to conclude one way or another whether the parties intended procurement of three specified signatures on the note to operate as a condition precedent to defendants' liability under the guaranty agreement.

This serious omission by the trial court becomes particularly evident from a reading of the bank representative's testimony. Although various portions of Smith's testimony indicate he understood that Pell and Needham required the other signatures, other parts of his testimony indicate a different understanding. Needham testified that he and Pell had no intention of signing the guaranty agreement unless the others had signed the note. Yet,

in the face of this clear conflict in the evidence, the court failed to make the first finding of fact relating to the parties' intentions as to whether the term at issue was to operate as a condition to defendants' liability under the guaranty agreement.

This Court, therefore, is left with no means of reviewing the trial court's order to determine the propriety of the conclusions reached. We have no way of knowing which evidence the court found credible. As we said in *Coble*:

> In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence. *Crosby v. Crosby, supra.* It is not enough that there may be evidence in the record sufficient to support findings which *could have been made.* The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal. *Knutton v. Cofield,* 273 N.C. 355, 160 S.E. 2d 29 (1968); *Davis v. Davis,* 11 N.C. App. 115, 180 S.E. 2d 374 (1971).

300 N.C. at 712-13, 268 S.E. 2d at 189.

The dearth of factual findings is more pronounced when the conclusion of law is broken down into its three parts. The judge concluded: (1) that valid signatures on the note were not a condition precedent; (2) which was communicated to plaintiff; (3) so as to make plaintiff responsible for obtaining these signatures and insuring their validity. We are unable to glean a single finding of fact from the court's order which would support any of these conclusions. Indeed, as demonstrated below, the second fact the trial court found would seem to support a conclusion of law contrary to that which it made.

A.

Conditions precedent "are those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available." 3A A. Corbin, Corbin on Contracts § 628, at 16 (1960). As noted above, the trial court found that defendants inquired:

> *whether* the bank would continue to extend its previous line of credit to the corporation under the new stockholder, *if* the new stockholder, Michael T. Brown, his wife, Brenda M. Brown, and his mother-in-law, Vida M. McCanless. [sic] signed the corporate notes [sic] as makers, and *if* the defendants, Phillip H. Pell, and O. M. Needham, Jr., signed a guaranty of payment of such indebtedness.

Record at 33 (emphasis added). In *Jones v. Palace Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906 (1946), this Court held: "The weight of authority is to the effect that the use of such words as 'when,' 'after,' 'as soon as,' and the like, gives clear indication that a promise is not to be performed *except upon the happening of a stated event.*" *Id.* at 306, 37 S.E. 2d at 908 (emphasis added) (citation omitted). Use of the words "whether" and "if" obviously are words of "the like" which give "clear indication that a promise is not to be performed except upon the happening of a stated event," the definition of a condition precedent. The language of the agreement, as expressed in the trial court's second finding of fact, indicates that the valid signatures of the three designated makers was a condition precedent. As written, however, the finding also indicates the condition was the bank's, an implication not supported by any of the evidence. In adopting for its finding of fact ambiguous language similar to that which Smith used in testifying about his understanding of the agreement, the trial court merely perpetuated the ambiguity. In so doing it failed to resolve the issue as to what the parties meant when they included in their agreement the term that three valid signatures appear on the note.

B.

The trial court also concluded the term requiring valid signatures on the note of the three makers was not a condition precedent "which was communicated to the plaintiff . . . ." Again, the trial court's second finding of fact supports only the conclusion that this term was communicated to plaintiff.

C.

Finally, the trial court wrote that the term requiring valid signatures on the note was not such "as to make the plaintiff responsible for obtaining these signatures and insuring their

validity." It would be premature to determine here whether plaintiff had a duty to obtain valid signatures, assuming the condition precedent existed. However, it should be noted that plaintiff was the only party in a position to do so. Smith testified the bank drew up the note the day *after* defendants signed the guaranty agreement; the bank gave the note to Brown who later returned to the bank the note with the purported signatures of his wife and mother-in-law. The bank then apparently maintained possession of the note. In short, it appears the bank had the note in its control at all times. If the bank had wished to insure that valid signatures on the note were obtained, and, thus, that its right to hold defendants liable on the guaranty agreement was perfected, it could have insisted that all three makers of the note sign the note in its presence.

III.

The Court of Appeals was entirely correct in stating that an appellate court is bound by a trial court's findings of fact when there is some testimony to support them, even if there is evidence to the contrary that would support a different finding. That court erred, however, in holding that the fact found by the trial court supported its conclusion of law.[2]

We do note that there is some evidence in the record from which findings of fact *could* be made to support a conclusion that no condition precedent existed. There is also ample evidence to support a contrary conclusion. This is precisely the point of our holding: What the evidence does *in fact* show is a matter the trial court is to resolve, and its determination should be stated in appropriate and adequate findings of fact. Our statement in *Coble*, reiterated in *Quick*, is equally pertinent here:

2. Specifically, the Court of Appeals held:

> In this case there was evidence consisting of Mr. R. W. Smith's testimony to support the court's finding that defendants told Smith that they would sign a guaranty in addition to the other signatures on the corporate note. This in turn supported the trial court's conclusion of law that the valid signatures of Brown and McCanless on the note were not a condition precedent to defendants' liability.

Farmers Bank v. Michael T. Brown Distrib., Inc., 57 N.C. App. at 317, 291 S.E. 2d at 319.

> Our decision to remand this case for further evidentiary findings is not the result of an obeisance to mere technicality. Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. at 714, 268 S.E. 2d at 190; *Quick v. Quick*, 305 N.C. at 458, 290 S.E. 2d at 661.

We hold, therefore, that the findings of fact in the trial court's order are insufficient, for the reasons discussed in this opinion, to support the conclusion of law made. For the trial court to fully comply with the principles discussed in this opinion, its order must be vacated and a new hearing held so that it can make adequate and appropriate findings of fact and conclusions of law. *Quick v. Quick*, 305 N.C. at 457-59, 290 S.E. 2d at 661-62.

In light of the disposition of this appeal, we need not consider other matters the parties raised or the Court of Appeals discussed.

The decision of the Court of Appeals is reversed and the trial court order filed 18 March 1981 is vacated. This cause is remanded to the Court of Appeals with instructions to remand to the Superior Court, Surry County, for further proceedings consistent with this opinion.

Reversed and remanded.

Justice MARTIN dissenting.

I respectfully dissent. This case was tried by Judge Long, sitting without a jury. He had the duty to pass upon the credibility of the witnesses, to accept or reject testimony. He had to resolve any contradictions in the evidence, and the ultimate issue was for him to find. *Cogdill v. Highway Comm. and Westfeldt v. Highway*

Comm., 279 N.C. 313, 182 S.E. 2d 373 (1971); *Knutton v. Cofield*, 273 N.C. 355, 160 S.E. 2d 29 (1968); *Reynolds Co. v. Highway Commission*, 271 N.C. 40, 155 S.E. 2d 473 (1967); *McCallum v. Insurance Co.*, 262 N.C. 375, 137 S.E. 2d 164 (1964); *Boylan-Pearce, Inc. v. Johnson, Commissioner of Revenue*, 257 N.C. 582, 126 S.E. 2d 492 (1962).

The majority opinion found that there is evidence in the record to support findings of fact upholding a conclusion that no condition precedent existed. It then determined that Judge Long failed to make sufficient findings of fact to support the legal conclusion that there was not a condition precedent to defendant's liability under the guaranty agreement. I consider the findings by Judge Long to be sufficient. Judge Long found as facts, *inter alia*, the following:

> (1) On or before February 15, 1977, the defendants, Phillip H. Pell and O. M. Needham, Jr., had negotiated several loans from the plaintiff, Farmers Bank, for a corporation named Ned-Pell Distributors, Inc., of which they were the principle [*sic*] stockholders. The notes were signed by officers of the corporation.
>
> (2) Shortly before February 15, 1977, the defendants, Phillip H. Pell and O. M. Needham, Jr., informed R. W. Smith, Vice-President of Farmers Bank, that they wished to sell their stock in the corporation to Michael T. Brown, and inquired whether the bank would continue to extend its previous line of credit to the corporation under the new stockholder, if the new stockholder, Michael T. Brown, his wife, Brenda M. Brown, and his mother-in-law, Vida M. McCanless, signed the corporate notes as makers, and if the defendants, Phillip H. Pell and O. M. Needham, Jr., signed a guaranty of payment of such indebtedness. R. W. Smith informed the defendants, Phillip H. Pell and O. M. Needham, Jr., that the bank would continue to extend credit under such arrangement.
>
> (3) On or about February 15, 1977, the bank prepared a new note in the amount of Seventy-Five Thousand Dollars ($75,000.00) to consolidate old notes signed by corporate officers. The new note was signed by officers of the corporation

and by Michael T. Brown (Individually) in the presence of R. W. Smith. Michael T. Brown then took the note from the bank to have it signed by Brenda M. Brown and Vida M. McCanless. Michael T. Brown later returned the note to the bank bearing the purported signatures of Brenda M. Brown and Vida M. McCanless.

(4) As a part of this same transaction, the defendants, Phillip H. Pell and O. M. Needham, Jr., signed a loan guaranty agreement on February 14, 1977, jointly and severally guaranteeing full and prompt payment of any indebtedness of Ned-Pell Distributors, Inc., to Farmers Bank, to the extent of Seventy-Five Thousand Dollars ($75,000.00), plus interest, and all costs, expenses and reasonable attorney's fees incurred in endeavoring to collect said indebtedness or in enforcing the guaranty agreement.

It is not required that the judge find all evidentiary facts, but only those material and ultimate facts from which it can be determined whether they are supported by the evidence and whether such facts support the conclusions of law and the judgment. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). The facts found show:

(1) Prior to 15 February 1977 defendants had established a line of credit with plaintiff with the notes being executed by the corporate defendant.

(2) Pell and Needham advised plaintiff that they wished to sell their stock in defendant corporation to Brown and inquired whether the bank would continue to extend the line of credit to the corporation if Brown, his wife, and Mrs. McCanless executed the notes as makers and defendants signed a guaranty of such indebtedness.

(3) The bank agreed to this arrangement.

(4) The bank prepared a note to consolidate old notes executed by the corporation. This note was signed by the corporation and by Brown individually.

(5) Brown then took the note from the bank to have it signed by Mrs. Brown and Mrs. McCanless.

(6) Brown later returned the note to the bank with the purported signatures.

(7) As a part of the same transaction, Pell and Needham signed the loan guaranty agreement in question.

These facts support the conclusion that there was no condition precedent requiring plaintiff to secure valid indorsements by Mrs. Brown and Mrs. McCanless on the note. The note was to replace previous notes executed by Pell and Needham. The bank did not give the note to Brown as its agent to get the signatures. Brown "took the note from the bank" to have it signed. Had there been a condition precedent as argued by defendants, the bank would never have allowed defendants (whose corporate debt was being extinguished by the new note) to secure the signatures required. The actions of the parties speak louder than their words. *Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88 (1938). The judgment complies with Rule 52(a)(1) of the North Carolina Rules of Civil Procedure.

The court's finding that plaintiff would continue to extend credit to the corporation if Brown and his wife and Mrs. McCanless signed the notes as makers and if defendants would execute a guaranty, is a far cry from a finding that defendants would not be liable unless plaintiff got Mrs. Brown and Mrs. McCanless to indorse the notes. The scheme presented to the plaintiff was for the protection of the bank and not to benefit Pell and Needham. The purpose of the proposition was to determine the conditions under which the bank would extend credit to the corporation, not to establish conditions under which Pell and Needham would guarantee the loan. Pell and Needham were trying to entice the bank to extend the credit so they could sell the corporation and eliminate the liability on the notes then outstanding. Defendants and Brown were seeking to satisfy the plaintiff's conditions to extend credit to the corporation, not to protect Pell and Needham.

The majority apparently orders the case remanded to the superior court for a new hearing. At the very most, the case might be remanded for additional findings of fact.

I find the judgment of Judge Long to be proper and vote to affirm the decision of the Court of Appeals.

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

STATE OF NORTH CAROLINA v. KENNETH FREEMAN

No. 173A81

(Filed 11 January 1983)

1. **Criminal Law §§ 75.1, 84— seizure of defendant without probable cause—confession as fruit of the poisonous tree**

When a defendant has been seized without probable cause for his arrest and thereafter makes an incriminating statement, his statement must be suppressed as "the fruit of the poisonous tree" unless the effect of the unlawful seizure has been sufficiently attenuated by some intervening event occurring between the unlawful seizure and the incriminating statement.

2. **Criminal Law §§ 75.1, 84— seizure of person within meaning of the Fourth Amendment**

Neither the subjective beliefs of law enforcement officers nor those of a defendant with regard to whether the defendant is free to leave at will are dispositive of the question of whether he has been seized within the meaning of the Fourth Amendment. Rather, a person has been seized for purposes of Fourth Amendment analysis "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

3. **Criminal Law §§ 75.1, 84— seizure of defendant without probable cause—subsequent confession not admissible at trial**

Defendant was seized without probable cause within the meaning of the Fourth Amendment prior to making his confession that he committed arson where the uncontroverted evidence showed that, during a deputy sheriff's initial request that defendant accompany him to the county law enforcement center, the deputy told defendant that he was at defendant's home to "pick him up" at the request of another officer and that the reason defendant was being "picked up" was that defendant's sister had told officers that defendant had made a statement indicating that he would burn her house down, since the deputy's statements could have led defendant reasonably to believe that his compliance with the deputy's request might be compelled and that he was not free to leave. Furthermore, the State failed to show that the effect of the unlawful seizure had been sufficiently attenuated at the time defendant confessed to render the confession admissible at defendant's trial for arson where the evidence showed that the 17-year-old defendant was kept at the law enforcement center in an 8-foot by 8-foot office; for three and one-half hours, either one or two officers questioned the defendant in that room; and although defendant continued to deny any involvement in the crime under investigation,

the questioning continued without the defendant being given any indication that he was free to leave or that he could contact his mother or other members of his family as he had been permitted to do during prior questioning.

4. **Criminal Law §§ 75.1, 84— voluntary confession—unconstitutional seizure of defendant not attenuated**

The conclusion that the defendant's confession was voluntary for Fifth Amendment purposes is not sufficient by itself to attenuate the taint of a confession given after a defendant has been unconstitutionally seized.

Justice MEYER dissenting.

Justices COPELAND and MARTIN join in this dissenting opinion.

BEFORE *Farmer, Judge,* at the 5 October 1981 Criminal Session of Superior Court, CUMBERLAND County. The defendant was tried upon an indictment proper in form for the crime of arson in the first degree and entered a plea of not guilty. He was found guilty by a jury and received the mandatory sentence of imprisonment for life pursuant to G.S. 14-58.[1] The defendant appeals the conviction and life sentence to this Court as a matter of right.

Rufus L. Edmisten, Attorney General, by Jo Anne Sanford, Special Deputy Attorney General, for the State.

Adam Stein, Appellate Defender, by James H. Gold, Assistant Appellate Defender, for the defendant-appellant.

MITCHELL, Justice.

The defendant contends that his confession was a result of his having been seized without probable cause and was introduced into evidence in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States and that he is entitled to a new trial as a result. We agree and hold that the defendant is entitled to a new trial.

1. The defendant was convicted for an act of arson committed on 26 December 1980. At that time, G.S. 14-58 provided a mandatory life sentence for arson in the first degree. In 1979, the statute was amended to make arson in the first degree punishable as a Class C felony. 1979 N.C. Sess. Laws, ch. 760, § 5. This amendment was postponed several times and finally became effective on 1 July 1981 but was made to apply only to offenses committed on or after that date. 1979 N.C. Sess. Laws, ch. 760, § 6, as amended by 1979 N.C. Sess. Laws, 2nd Sess., ch. 1316, § 47, and 1981 N.C. Sess. Laws, ch. 63, § 1, and 1981 N.C. Sess. Laws, ch. 179, §§ 14 and 15.

Only a brief summary of the evidence introduced at trial is necessary for an understanding of the issues underlying our holding in this case. In summary, the evidence for the State tended to show in part that a fire occurred on 26 December 1980 in an apartment in Fayetteville occupied by Vernelda Lewis, a sister of the defendant. Several trained investigators testified that the fire appeared to be incendiary in nature and to have originated at several points in the apartment. The State introduced the defendant's confession in which he admitted that he set the fire at his sister's request. The defendant further stated in his confession that his sister Vernelda told him that she needed the money from the insurance on her furniture and would pay him $200 to set the apartment on fire.

The defendant introduced evidence consisting in part of alibi evidence offered through the testimony of his mother. He also introduced the testimony of his sister Vernelda Lewis who testified that she did not know who had burned her apartment and had not offered the defendant $200 to set her house on fire. On cross examination she testified that, shortly before the fire, she and the defendant engaged in an argument during which the defendant told her that "he would burn my new house down like he did my old house with me and Vera in it." The defendant offered other witnesses who testified in essence that they did not see him set fire to his sister's home.

Based on the foregoing evidence for the State and the defendant, the jury found the defendant guilty of arson in the first degree. The trial court entered judgment imposing the mandatory sentence of life imprisonment.

The defendant assigns as error the admission of his confession into evidence. He contends that his confession was the direct result of his having been interrogated after being seized by law enforcement officers without probable cause for his arrest.

[1] When a defendant has been seized without probable cause for his arrest and thereafter makes an incriminating statement, his statement must be suppressed as "the fruit of the poisonous tree" unless the effect of the unlawful seizure has been sufficiently attenuated by some intervening event occurring between the unlawful seizure and the incriminating statement. *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824, 99 S.Ct. 2248 (1979).

Thus, when it is determined both that a defendant was seized for Fourth Amendment purposes without probable cause and that his confession resulted from such seizure and was not attenuated by an intervening event, his confession must be suppressed. *Id.*

[2] The State has not contended at trial or during this appeal that probable cause existed to arrest the defendant prior to his confession. Therefore, we turn first to the issue of whether the defendant was seized within the meaning of the Fourth Amendment prior to making his confession. Neither the subjective beliefs of law enforcement officers nor those of a defendant with regard to whether the defendant is free to leave at will are dispositive of the question of whether he has been seized within the meaning of the Fourth Amendment. Instead, the test is objective in nature. For purposes of Fourth Amendment analysis, a person has been seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L.Ed. 2d 497, 509, 100 S.Ct. 1870, 1877, *reh'g denied*, 448 U.S. 908, 65 L.Ed. 2d 1138, 100 S.Ct. 3051 (1980). See *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982). Therefore, in determining whether this defendant had been seized at the time of his confession, we must examine all of the circumstances surrounding his confession.

A pretrial hearing of the defendant's motion to suppress his confession was conducted on 7 December 1981 before Honorable Coy E. Brewer, Jr., Resident Superior Court Judge for the Twelfth Judicial District. The testimony taken during the course of that hearing established certain undisputed facts upon which we rely.

On 3 January 1981 Earl M. Harris and H. B. Parham, members of the Cumberland County Sheriff's Department, sought to question the defendant concerning the fire in his sister's home. At the officers' request, the defendant's mother brought him to the Cumberland County Law Enforcement Center for questioning. The defendant was questioned briefly by the officers and denied any involvement in the burning of his sister's home. The defendant was then allowed to go home with his mother.

On 3 March 1981, Deputy Parham received information from the defendant's sister concerning statements the defendant made

to her prior to the fire which tended to indicate that he might have set the fire. Deputy Parham then contacted Deputy Harris who went to the defendant's home early in the afternoon of 3 March 1981. Harris testified that at that time:

> I told him that Detective Parham had asked me to come by and pick him up because his sister had talked to Detective Parham, telling him that Kenneth had made threats to her—
>
> . . . .
>
> —that morning in reference to the house in reference to an argument that—that he said she'd better quit messing with him. If not, he would burn her house down like he had the other one. I asked him to come to the office with me.

The seventeen-year-old defendant then stated that he would get his shoes and go with Harris who was then fifty years old. Harris remained in his car while the defendant went back into his home and got his shoes. Harris then took the defendant to the offices of the Detective Division in the Cumberland County Law Enforcement Center. The defendant was taken to an office which was eight feet by eight feet in size and contained a desk and other furniture. Harris gave the defendant the *Miranda* warnings at approximately 1:30 p.m. The defendant indicated that he had done nothing wrong and did not wish an attorney present during questioning. Harris questioned the defendant for a few moments and then left the room. Parham, who was forty-three years old, then entered the room and questioned the defendant alone for approximately ten to fifteen minutes. Harris then reentered the room, and the two men questioned the defendant in the small room until he confessed. The total time of questioning was approximately three and one-half hours with the defendant confessing at 5:05 p.m. The defendant was at no time advised that he did not have to go with Deputy Harris in the first instance or that he was free to leave or to contact his mother or any other member of his family.

Based upon the evidence introduced during the suppression hearing, the judge found among other things that the defendant's confession was made voluntarily and concluded that "applicable procedures concerning custodial interrogation of this defendant . . . were complied with." Based upon his findings and conclu-

sions, the judge denied the defendant's motion to suppress the confession. At trial the defendant's confession was admitted into evidence over his objection.

Only one finding of fact supporting the conclusions and order related to the custodial status of the defendant at the time of his confession. That finding was as follows:

> 3. At no time was the defendant placed under arrest by law enforcement officers. At all times the defendant had the right to terminate his involvement with law enforcement officers.

This finding was insufficient to support the conclusions and order. The finding that the defendant had not been formally arrested and that he was in fact free to terminate his involvement with law enforcement officers is relevant to the issue of whether he had been seized within the meaning of the Fourth Amendment but is not necessarily determinative of that issue.

The determination as to whether an individual has been seized within the meaning of the Fourth Amendment requires an application of fixed rules of law and a resulting conclusion of law and not a mere finding of fact. *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982). The issue is answered by determining whether, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Id.* No finding or conclusion concerning this question was contained in the order denying the defendant's motion to suppress his confession. This situation does not preclude us from determining the admissibility of the defendant's confession in the present case. As we have previously pointed out:

> Further, where the historical facts are uncontroverted and clearly reflected in the record, as in the present case, we may review the trial court's ruling on the admissibility of a confession in the absence of complete findings of fact and conclusions of law and even in the absence of a ruling by the trial court on the admissibility of the confession.

State v. Davis, 305 N.C. 400, 415, 290 S.E. 2d 574, 583 (1982). This rule applies with full force in the present case.

[3] Applying the appropriate rules, we determine that the uncontroverted evidence introduced at the suppression hearing leads to

the conclusion that the defendant was seized without probable cause within the meaning of the Fourth Amendment. During his initial request that the defendant accompany him to the Cumberland County Law Enforcement Center, Deputy Harris stated to the defendant that he was there to "pick him up." Harris accentuated this statement with an additional comment indicating that the reason the defendant was being "picked up" was that the defendant's sister had told officers that the defendant had made a statement indicating that he would burn her house down. The use of language indicating that compliance with an officer's request to accompany him might be compelled, is one of the circumstances to be considered in determining whether an individual has been seized within the meaning of the Fourth Amendment. *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L.Ed. 2d 497, 509, 100 S.Ct. 1870, 1877, *reh'g denied*, 448 U.S. 908, 65 L.Ed. 2d 1138, 100 S.Ct. 3051 (1980). The accusatory statement of the fifty-year-old deputy to the seventeen-year-old defendant combined with his statement that he was there to "pick up" the defendant, could have led the defendant reasonably to believe that his compliance with the deputy's request might be compelled.

So far as the record before us reveals, the defendant's only other exposure to these law enforcement officers had been on 3 January 1981. When they wished to question him on that occasion, they contacted his mother and had her bring the defendant by their offices to talk to them. Once he denied involvement in the crime under investigation on 3 January 1981, he was told he could leave and he went home with his mother. The fact that Deputy Harris did not use a similar approach on 3 March 1981, and, instead, came directly to the defendant at his home and told him that he was there to "pick him up" could well have indicated to a reasonable person that there had been some change from his former status and heightened his belief that he was not being asked to accompany the officer on a voluntary basis. In view of the peculiar set of facts and circumstances leading to and surrounding the "pick up" of the defendant on 3 March 1981, we think that a reasonable person would have believed that he was not free to leave. Therefore, we conclude that the defendant was seized without probable cause for purposes of the Fourth Amendment.

Having concluded that the defendant was seized without probable cause in violation of the Fourth Amendment, we must turn to the remaining question of whether the connection between this unconstitutional police conduct and the defendant's confession was nevertheless sufficiently attenuated to permit the use of the confession at trial. *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824, 99 S.Ct. 2248 (1979). We conclude that it was not.

Nothing which occurred in the Cumberland County Law Enforcement Center after the defendant was taken there by Harris on 3 March 1981 would have had a tendency to indicate to the defendant that he was free to leave. In fact, taken in light of the foregoing circumstances, the events occurring there made a belief that he was not free to leave even more reasonable. The seventeen-year-old defendant was at all times kept in an eight-foot by eight-foot office which was made even smaller for practical purposes by the presence of a desk. For three and one-half hours, one or the other of the officers or both of them questioned the defendant in that room. Although he continued to deny any involvement in the crime under investigation, the questioning continued without the defendant being given any indication that he was free to leave or that he could contact his mother or other members of his family as had been permitted during the 3 January 1981 questioning.

[4] Judge Brewer's conclusion that the defendant's confession was voluntary for purposes of the Fifth Amendment is binding upon us as it is supported by his findings of fact which are in turn supported by the evidence. The conclusion that the defendant's confession was voluntary for Fifth Amendment purposes, however, is not sufficient by itself to attenuate the taint of a confession given after a defendant has been unconstitutionally seized. The voluntariness of a confession for the purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis. *Brown v. Illinois*, 422 U.S. 590, 604, 45 L.Ed. 2d 416, 427, 95 S.Ct. 2254, 2262 (1975). "Indeed, if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached." *Dunaway v. New York*, 442 U.S. 200, 217, 60 L.Ed. 2d 824, 839, 99 S.Ct. 2248, 2259 (1979). Instead, the relevant focus must be on "the causal connection between the illegality and the confession." *Brown v. Illinois*, 422 U.S. 590, 603,

45 L.Ed. 2d 416, 427, 95 S.Ct. 2254, 2261 (1975). Here, as in *Brown*, there was no intervening attenuating event of significance during the approximately three and one-half hours between the seizure of the defendant and his confession. We conclude, therefore, that the State failed to show that the effect of the unlawful seizure had been sufficiently attenuated at the time the defendant confessed to render the confession admissible. The burden of showing such admissibility rests, of course, with the State. *Dunaway v. New York*, 442 U.S. 200, 218, 60 L.Ed. 2d 824, 839, 99 S.Ct. 2248, 2259 (1979).

Our disposition of the defendant's first assignment of error makes it unnecessary for us to consider his remaining assignments. Such errors, if any, are not likely to recur during a new trial. As a result of the erroneous admission into evidence of the defendant's confession, the defendant is entitled to a

New trial.

Justice MEYER dissenting.

I first take issue with the majority's failure to clearly distinguish the fourth and fifth amendment issues. The majority correctly summarizes the law in *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824 (1979), in stating that a lawfully obtained confession must be suppressed if it is the result of a fourth amendment violation unless found to be a product of free will. Thus the focus must be on whether there was a seizure within the meaning of the fourth amendment's prohibition against seizure prior to the confession. In applying this law to the facts, the majority relies on fifth amendment factors irrelevant to the question of the seizure: we are told repeatedly that the defendant was *questioned* in a small room, and that he was *questioned* for 3½ hours after being given his *Miranda* warnings and before he confessed. The events which transpired subsequent to the time the defendant was given his *Miranda* warnings do not bear on the question of the seizure. The majority concedes that defendant's confession was voluntary for purposes of the fifth amendment. Thus, absent an unreasonable "seizure," the interrogation was lawfully conducted and the confession was legally obtained.

"[A] person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained."

United States v. Mendenhall, 446 U.S. 544, 553, 64 L.Ed. 2d 497, 509 (1980). Seizure of an individual occurs at *a given point in time* when it is determined that there has been an intrusion of the constitutionally protected right to be secure in his person. *See Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889 (1968). Thus, for purposes of determining whether this defendant was seized, the proper circumstances, and the only circumstances relevant to the inquiry are those surrounding his decision to leave his home and accompany the officers elsewhere for questioning.

Secondly, I disagree with the majority's conclusion that defendant's confession must be suppressed as the result of an "unlawful seizure." On this question, the pertinent inquiry is:

1. Was there a fourth amendment violation; that is, was there a seizure tantamount to an arrest or a technical arrest?

2. If so, was there probable cause?

3. Was the confession the result of the seizure—or was the confession, nevertheless, a product of free will?

I

The most recent statement concerning fourth amendment violations is enunciated in *United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed. 2d 497. In that case the Court stated: "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554, 64 L.Ed. 2d at 509. As the majority correctly points out, this is an objective test. Age, education and race of the defendant are not decisive factors. It is not necessary that the defendant be expressly told that he is free to leave or that he need not cooperate. *Id.*

Certain objective factors have been considered in determining whether there has been a seizure of the person. These are:

1. The threatening presence of several officers

2. Display of a weapon

3. A physical touching of the person

4. The use of language or tone of voice indicating that compliance might be compelled.

Id. at 554, 64 L.Ed. 2d at 509.

A careful reading of the majority opinion suggests an unwarranted emphasis on the two factors which the *Mendenhall* Court specifically rejected: the age of the defendant (or the age difference between the defendant and the officers), and the fact that defendant was never expressly told that he was free to leave or that he need not cooperate. Furthermore, in applying the facts to the objective factors listed above, we find that:

1. Only one officer came to the defendant's home. This officer was known to the defendant, and had, on a prior occasion, questioned the defendant at the police station and released him after a short period of time.

2. There was no display of a weapon.

3. There was no physical touching of the defendant. In fact, he was permitted to return to the inside of his house for his shoes while the officer waited in his car.

4. The *only* possible basis for finding that defendant was "seized" was the statement of the officer that he had come "to pick up" the defendant. He then *asked* the defendant to accompany him to the office.

Disregarding the factors surrounding the questioning after *Miranda* warnings were given, and placing the age factor, and the fact that defendant was not told he was free to leave, in proper perspective, we are left with little else except a single phrase, "to pick up," to support a finding that defendant's fourth amendment rights were violated. Although this phrase *might* indicate that "compliance *might* be compelled," standing alone it does not suffice to justify the conclusion that defendant's fourth amendment rights were violated and that as a result of a purported "seizure" of his person, his confession must be suppressed.

II

The majority opinion states that "[t]he State has not contended at trial or during this appeal that probable cause existed to arrest the defendant prior to his confession." Assuming *arguendo* that this defendant was technically arrested or detained without a warrant, if the officer had probable cause to arrest the defendant, no fourth amendment violation could have taken place. I

would recommend, as did Justices Powell and Rehnquist in their concurring opinion in *Brown v. Illinois*, 422 U.S. 590, 45 L.Ed. 2d 416 (1975), that the case be remanded for findings on this important question. There is ample evidence in the record that would support a conclusion that the decision to question the defendant was based on more than an expedition embarked upon for evidence "in the hope that something might turn up." *Id.* at 605, 45 L.Ed. 2d at 428. The investigation into the arson had been continuing for some time; the defendant was a suspect and had been questioned; additional evidence had come to the attention of the officers suggesting that the defendant was, in fact, responsible for the arson.

III

In *Brown*, the Supreme Court rejected the *per se* rule that *Miranda* warnings alone are sufficient to attenuate the taint of an unconstitutional arrest, stating that "whether a confession is the product of a free will . . . must be answered on the facts of each case. No single fact is dispositive" although "the *Miranda* warnings are an important factor." *Id.* at 603, 45 L.Ed. 2d at 427. "The temporal proximity of the arrest and the confession, the presence of intervening circumstances . . . *and, particularly, the purpose and flagrancy of the official misconduct are all relevant.*" *Id.* at 603-604, 45 L.Ed. 2d at 427 (emphasis added).

Given the deterrent purposes of the exclusionary rule to remove the possibility of police misconduct, whether the police misconduct was flagrantly abusive of fourth amendment rights is a critical, if not the most important focus for inquiry. For purposes of this inquiry, our own statutory exclusionary rule offers guidance. It provides:

> § 15A-974. *Exclusion or suppression of unlawfully obtained evidence.*—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 wheth-

er a violation is substantial, the court must consider all the circumstances, including:

a. The importance of the particular interest violated;

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 defer future violations of this Chapter. (1973, c. 1286, s. 1.)

The official commentary is of particular interest:

> An important point to note is that subdivision (1) only requires suppression of evidence if its exclusion is constitutionally required. It is possible then that evidence may be gathered in violation of constitutional rights, *but suppression is not the sanction to be applied unless authoritative case law so declares. There are indications that the Burger Court will moderate some of the exclusionary rules, and this section is designed not to freeze North Carolina's statutory law into patterns set solely by current case law.*

(Emphasis added.)

I would hold that there is no authoritative case law *requiring* the suppression of this evidence; in fact, a reading of the Supreme Court decisions on this issue militates against the exclusion of the evidence. Nor can I agree that the alleged violation of defendant's fourth amendment rights was "substantial" when the following are considered:

a. Any intrusion on defendant's interest in personal privacy was not unnecessarily extensive.

b. The officer's conduct was not unreasonably abusive or threatening; that is, the officer acted in good faith and conducted himself with professional courtesy and demeanor.

c. There was indicia of probable cause sufficient to indicate that the violation was not willful.

d. The exclusion of the subsequent lawfully obtained confession would have no tendency to deter this alleged violation.

Under these circumstances, I would hold that the *Miranda* warnings given to the defendant were sufficient attenuation to remove the taint of any purported seizure.

I would vote to rely on the " 'learning, good sense, fairness and courage' " of the trial judge who made the determination in the first instance, and allow the confession into evidence (*Id.* at 612, 45 L.Ed. 2d at 432 (Powell, J. and Rehnquist, J. concurring)), or in the alternative to remand for findings on the existence of probable cause.

Justices COPELAND and MARTIN join in this dissenting opinion.

STATE OF NORTH CAROLINA v. WILLIAM HAMPTON MELTON

No. 417A82

(Filed 11 January 1983)

1. **Criminal Law § 138— aggravating factors in sentencing—element of "the offense"**

As used in the statute providing that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation," G.S. 15A-1340.4(a)(1), the phrase "the offense" refers to the criminal charge of which the defendant is convicted or to which he pleads guilty or no contest rather than to the crime charged in the indictment.

2. **Criminal Law § 138— guilty plea to second degree murder—premeditation and deliberation as aggravating factor in sentencing**

Where a defendant charged with first degree murder pled guilty to second degree murder, a determination by a preponderance of the evidence in the sentencing phase that defendant premeditated and deliberated the killing could be considered as an aggravating factor in determining an appropriate sentence for the defendant since (1) the finding of premeditation and deliberation was not based upon evidence necessary to prove an element of the offense of second degree murder as prohibited by G.S. 15A-1340.4(a)(1); (2) such factor was reasonably related to the purposes of sentencing within the meaning of G.S. 15A-1340.4(a); and (3) the fact that defendant's guilty plea had been accepted pursuant to a plea bargain did not preclude the sentencing court from considering facts underlying the original charge which was transactionally related to the charge to which defendant pled guilty.

3. **Criminal Law § 138— finding that aggravating factors outweighed mitigating factors—sentence within discretion of court**

Upon a finding by the preponderance of the evidence that aggravating factors outweigh mitigating factors, the question of whether to increase the sentence above the presumptive term, and if so, to what extent, remains within the trial judge's discretion.

4. **Criminal Law § 138— aggravating and mitigating factors—weighing by court**

The number of aggravating and mitigating factors found by the sentencing court is only one consideration in determining which factors outweigh others, and the court may properly emphasize one factor more than another in a particular case. The balance struck by the trial court will not be disturbed if there is support in the record for his determination. G.S. 15A-1444(a1).

ON appeal by defendant from a sentence of life imprisonment entered by *Rousseau, J.*, at the 7 December 1981 Criminal Session of Superior Court, CABARRUS County.

Defendant was charged in an indictment proper in form with murder in the first degree of Tommy Moss. Defendant was arraigned upon and pled guilty to the lesser included offense of murder in the second degree. Evidence supporting defendant's plea of guilty to murder in the second degree tended to show that on the morning of 14 September 1981 defendant borrowed a .44-caliber magnum pistol from a friend. He then purchased some bullets from Cooks, a chain store, and went to an out-of-the-way place where he fired the gun to make sure he had the right bullets. He put the gun under his shirt and drove to a trailer in Kannapolis in which he and the deceased shared living quarters. The defendant drank a beer with the victim, then went to the bathroom where he took out the gun. He returned to the living room of the trailer and shot Tommy Moss through the heart. The victim died soon thereafter of hemorrhaging from the wound.

Immediately after shooting Moss the defendant returned the gun to its lender and drove to the Kannapolis Police Department where he voluntarily confessed to the killing. Judge Rousseau deemed defendant's confession, along with other evidence, sufficient to support Melton's plea of guilty to murder in the second degree.

Testimony at the sentencing hearing showed that defendant had been living with a woman for three years preceding the shooting. Several days before the killing this woman had left him

and had begun seeing Tommy Moss. Further, within a day of the shooting Melton mailed confessional letters to his ex-wife, his mother, and the woman with whom he had been living. In each letter he acknowledged that he was "about to do something stupid" or was "about to screw up one more time" but that he knew what he was doing, that he didn't want anyone to help him, and that he knew what he was going to do was wrong.

At the sentencing hearing, Judge Rousseau found as mitigating factors that "prior to arrest the defendant voluntarily acknowledged wrongdoing in connection with the offense; and also, the defendant has been a person of good character in the community in which he lives." The court found one aggravating factor, that "the killing occurred after defendant premeditated and deliberated the killing." The court then held that the aggravating factor outweighed the mitigating factors and sentenced defendant to life imprisonment, a term in excess of the presumptive sentence of fifteen years for murder in the second degree.

Rufus L. Edmisten, Attorney General, by George W. Boylan and Marilyn R. Rich, Assistant Attorneys General, for the State.

Edwin H. Ferguson, Jr. for defendant.

MARTIN, Justice.

Defendant has appealed this sentence pursuant to N.C.G.S. 15A-1444(a1), claiming that the trial judge erred in considering premeditation and deliberation as an aggravating factor in his sentencing decision. Appeal under this subsection is limited to the issue of whether the sentence entered is supported by evidence introduced at the trial and the sentencing hearing. *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658 (1982).

A bill of indictment meeting the requirements of N.C.G.S. 15-144 concerning murder will support a conviction or plea of guilty to murder in the first degree as well as to murder in the second degree. *State v. Talbert*, 282 N.C. 718, 194 S.E. 2d 822 (1973). Because the indictment charging defendant in the present case with murder was proper in form, the defendant could have been prosecuted for murder in the first degree. Instead, however, the state agreed not to try defendant for murder in the first degree in exchange for defendant's plea of guilty to murder in the

second degree. *See* N.C. Gen. Stat. § 15A-1021(a) (Cum. Supp. 1981).

In this state murder in the second degree is a Class C felony and therefore the judge sentencing a defendant guilty of this crime must impose a fifteen-year term of imprisonment unless aggravating or mitigating factors merit imposition of a longer or shorter term. N.C. Gen. Stat. § 14-17 (1981); N.C. Gen. Stat. § 15A-1340.4(f)(1) (Cum. Supp. 1981); N.C. Gen. Stat. § 15A-1340.4(a) (Cum. Supp. 1981). The maximum term that may be imposed for a Class C felony is life imprisonment. N.C. Gen. Stat. § 14-1.1(a)(3) (1981). In deciding upon the length of a sentence of imprisonment differing from the presumptive term listed in N.C.G.S. 15A-1340.4(f), a judge must consider sixteen possible aggravating factors and fourteen possible mitigating factors listed in N.C.G.S. 15A-1340.4(a). He may also consider "any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing, whether or not such aggravating and mitigating factors are set forth [in N.C.G.S. 15A-1340.4(a)]." *Id.* However, "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." N.C. Gen. Stat. § 15A-1340.4(a)(1) (Cum. Supp. 1981). If the judge imposes a prison sentence longer than the presumed sentence listed in N.C.G.S. 15A-1340.4(f) for the class of felony of which the defendant is adjudged guilty, the judge must first find that the factors in aggravation outweigh the factors in mitigation. N.C. Gen. Stat. § 15A-1340.4(b) (Cum. Supp. 1981). He must also "specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence." *Id.*

Defendant here first argues that the trial court violated that part of N.C.G.S. 15A-1340.4(a)(1) which states that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." Defendant contends that because the state did not introduce any testimonial evidence during the sentencing hearing, its general referral to evidence presented during the guilt adjudication phase of the proceedings amounted to the use of the same evidence to prove the elements of murder in the second degree as well as the aggravating factor

of premeditation and deliberation. This argument betrays faulty reasoning.

[1] To begin, we observe that the statutory phrase in question refers to "the offense." In cases where a defendant is convicted of or pleads guilty to an offense different from that alleged in the bill of indictment it becomes necessary to determine the meaning of the phrase "the offense" as used in N.C.G.S. 15A-1340.4(a). Is "the offense" the crime charged in the bill of indictment or the crime of which the defendant is convicted or to which he pleads guilty or no contest? We hold that "the offense" refers to the criminal charge of which the defendant is convicted or to which he pleads guilty or no contest. The use of the phrase "the offense" at other places in the subsection leads inescapably to this conclusion. All aggravating factors listed refer to "the offense" as an accomplished fact. E.g.: "The offense was committed for the purpose . . . ." (15A-1340.4(a)(1)(b)); "The offense was committed for hire . . . ." (15A-1340.4(a)(1)(c)); "The offense was committed to disrupt . . . ." (15A-1340.4(a)(1)(d)); "The offense involved . . . ." (15A-1340.4(a)(1)(p)). Had the legislature intended that the crime charged was "the offense," language such as "the crime charged was committed" would have been used throughout the subsection.[1] The principal purpose of the Fair Sentencing Act, ar-

1. By this ruling we decline to adopt what some scholars refer to as "real offense sentencing." Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 Journal of Criminal Law and Criminology 1550 (1981). Real offense sentencing involves sentencing a defendant for what he actually does, regardless of the offense of which he is convicted or to which he pleads. *Cf. State v. Thompson*, 275 N.W. 2d 370 (Iowa 1979) ("A sentencing court *may*, within statutory limits, impose a severe sentence for a lower crime on the ground that the accused actually committed a higher crime on the occasion involved *if* the facts before the court show the accused committed the higher crime or the defendant admits it—whether or not the prosecutor originally charged the higher crime." 275 N.W. 2d at 372 (emphases in original).); *State v. Young*, 292 N.W. 2d 432 (Iowa 1980) (following *Thompson*). In North Carolina, no matter how aggravated the offense, the defendant cannot be sentenced to more than the maximum imprisonment for the offense to which he pled guilty or of which he was convicted. For example, armed robbery is a Class D felony punishable by a maximum imprisonment of forty years. N.C. Gen. Stat. §§ 14-87, 14-1.1(a)(4) (1981). Common law robbery, a lesser included offense of armed robbery, is a Class H felony and punishable by a maximum of ten years. N.C. Gen. Stat. §§ 14-87.1, 14-1.1(a)(8) (1981). A defendant charged with armed robbery who pleads guilty to common law robbery is subject to a presumptive sentence of three years. N.C. Gen. Stat. § 15A-1340.4(f)(6) (Cum. Supp. 1981). Although a defendant actually used a firearm in the commission of the robbery and this is found as an aggravating factor at the sentencing hearing, the defendant cannot be sentenced for

ticle 81A of chapter 15A of the General Statutes of North Carolina, is to provide guidelines and a basis for determining an appropriate punishment for the crime of which the defendant is adjudged guilty, not crimes with which he is charged.

[2] Defendant here pled guilty to murder in the second degree. In order to prove the commission of murder in the second degree, the state must prove beyond a reasonable doubt only that the defendant unlawfully killed the deceased with malice. *E.g., State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981); *State v. Jenkins*, 300 N.C. 578, 268 S.E. 2d 458 (1980); *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971). Premeditation and deliberation are not elements of murder in the second degree. *Id.; State v. Lester*, 289 N.C. 239, 221 S.E. 2d 268 (1976). Proof that defendant unlawfully killed the deceased does not prove that the killing was done with premeditation and deliberation. Similarly, the fact that the defendant here used a gun was sufficient to prove malice, the other essential element of murder in the second degree, *State v. Montague*, 298 N.C. 752, 259 S.E. 2d 899 (1979); *State v. Woods*, 278 N.C. 210, 179 S.E. 2d 358 (1971); however, the use of a gun does not by itself establish premeditation and deliberation. *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769, *cert. denied*, 368 U.S. 851, 7 L.Ed. 2d 49 (1961); *State v. Miller*, 197 N.C. 445, 149 S.E. 590 (1929). It follows that Judge Rousseau's finding that premeditation and deliberation were established by a preponderance of the evidence was not based upon evidence necessary to establish the two essential elements of murder in the second degree.[2] We note,

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the "real offense" that he committed, armed robbery, because the maximum sentence he can receive is ten years. An armed robbery conviction requires a minimum prison sentence of fourteen years. N.C. Gen. Stat. § 14-87(d) (1981). It is only coincidental that the maximum sentence for murder in the second degree is the same as the lesser punishment for murder in the first degree, viz, a life sentence. Formerly, murder in the second degree carried a maximum punishment of thirty years' imprisonment.

2. The case before us is fundamentally different from one in which a defendant *tried* for murder in the first degree was found guilty of murder in the second degree. In that situation, a fact-finding body would have decided that there was not sufficient evidence to conclude beyond a reasonable doubt that the defendant had premeditated and deliberated the killing. Under those circumstances the interesting question would arise whether the trial judge could find by the *preponderance of the evidence* that the killing was after premeditation and deliberation and use this finding as an aggravating factor. In the instant case, however, Melton pled guilty to murder in the second degree. No findings of fact were made during guilt adjudica-

further, that although the state did not introduce any testimonial evidence during the sentencing hearing, the defendant's witnesses were allowed to read into evidence the three letters Melton had written before the crime. These contain evidence in addition to that produced during plea acceptance that Melton had premeditated and deliberated killing Moss.

Because premeditation and deliberation are not specifically listed aggravating factors in N.C.G.S. 15A-1340.4(a)(1), Judge Rousseau must have determined that they were "reasonably related to the purposes of sentencing." N.C. Gen. Stat. § 15A-1340.4(a) (Cum. Supp. 1981). N.C.G.S. 15A-1340.3, captioned "Purposes of sentencing," states that:

> The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

We hold that when a defendant pleads guilty to murder in the second degree, a determination by the preponderance of the evidence in the sentencing phase that he premeditated and deliberated the killing is reasonably related to the purposes of sentencing. Such aggravating factors may be considered in determining an appropriate sentence for the killer. N.C. Gen. Stat. § 15A-1340.4(a) (Cum. Supp. 1981).

The defendant argues, however, that fundamental fairness requires that facts underlying charges which have been dismissed pursuant to a plea bargain cannot be used during sentencing for the admitted charge. We note, first, that although the parties here had the opportunity to bargain for the prosecutor's recommendation of a particular sentence for the defendant, the record

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tion concerning the presence or absence of premeditation and deliberation beyond a reasonable doubt because they are not elements of murder in the second degree. However, in considering factors "reasonably related to the purposes of sentencing," the trial court was free to examine evidence not used to establish the elements of the offense to which Melton pled guilty and to conclude by a preponderance of the evidence that Melton premeditated and deliberated killing Moss.

shows that no such agreement was made.[3] Therefore, once the trial judge determined that the defendant's guilty plea had been made voluntarily and that there was a factual basis for the plea, he was required by statute to accept the plea to murder in the second degree; however, the plea bargain did not limit the judge's opportunity to exercise his discretion in determining an appropriate sentence for the defendant. N.C. Gen. Stat. § 15A-1023(c) (1978).

The mere fact that a guilty plea has been accepted pursuant to a plea bargain does not preclude the sentencing court from reviewing all of the circumstances surrounding the admitted offense in determining the presence of aggravating or mitigating factors. *People v. Klaess*, 129 Cal. App. 3d 820, 181 Cal. Rptr. 355 (1982); *People v. Gaskill*, 110 Cal. App. 3d 1, 167 Cal. Rptr. 549 (1980); *People v. Guevara*, 88 Cal. App. 3d 86, 151 Cal. Rptr. 511 (1979). In fact, unless a sentence has been agreed to during plea bargaining, a sentencing judge is *required* to consider the statutory list of aggravating and mitigating factors during sentencing, of which many items concern circumstances that may surround the offense. N.C. Gen. Stat. § 15A-1340.4(a) (Cum. Supp. 1981). Such circumstances might include facts concerning both a dismissed charge as well as the admitted offense. E.g., N.C.G.S. 15A-1340.4(a)(1)(a) states the following to be an aggravating factor: "The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants." This factor might undergird a charge of conspiracy to possession of a controlled substance which is dismissed pursuant to a plea bargain; nevertheless, it must be considered by a judge contemplating imposing a sentence different than the presumptive term upon a defendant who has pled guilty to the charge of possessing the controlled substance. Or, to take another example, where a defendant has been charged with rape in the first degree under N.C.G.S. 14-27.2(a)(1)(a) but has pled guilty to rape in the second degree under N.C.G.S. 14-27.3(a)(2), if the sentencing judge concludes by a preponderance of the evidence

3. The record does show, however, that as required by N.C.G.S. 15A-1022(a)(6), the trial judge asked the defendant whether he understood that although the presumptive sentence for a Class C felony is fifteen years' imprisonment, the maximum term is life imprisonment. The defendant answered "yes" and initialled this answer in the transcript of the plea.

that the defendant had used a gun during the rape, this would be a factor that must be considered in deciding whether to sentence the defendant beyond the presumptive term for the admitted offense. N.C. Gen. Stat. § 15A-1340.4(a)(1)(i) (Cum. Supp. 1981). Similarly, as premeditation and deliberation are not elements of murder in the second degree, if a defendant charged with murder in the first degree pleads guilty to murder in the second degree, the sentencing judge may conclude, as here, that for purposes of sentencing premeditation and deliberation have been established by a preponderance of the evidence and therefore may be used as an aggravating factor.

As long as they are not elements essential to the establishment of the offense to which the defendant pled guilty, all circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing. N.C. Gen. Stat. § 15A-1340.4(a) (Cum. Supp. 1981). *See also, e.g., United States v. Doyle*, 348 F. 2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843, 15 L.Ed. 2d 84 (1965); *People v. Harvey*, 25 Cal. 3d 754, 602 P. 2d 396, 159 Cal. Rptr. 696 (1979); *People v. Klaess, supra*, 129 Cal. App. 3d 820, 181 Cal. Rptr. 355 (1982). In the case before us, although the state agreed not to prosecute Melton for murder in the first degree, the fact that the defendant premeditated and deliberated the killing was transactionally related to this offense of murder in the second degree and was therefore properly considered by the judge during sentencing.

We note that one court has held that a sentencing judge may not consider facts underlying an unrelated charge that was dismissed pursuant to a plea bargain. In *People v. Harvey, supra*, the defendant pled guilty to two counts of robbery under an indictment originally charging the commission of three unrelated robberies. The California Supreme Court held that it would be inequitable to consider facts underlying the unrelated robbery during sentencing because the defendant agreed to plead guilty to two counts in exchange for the dismissal of the third. "Implicit in such a plea bargain, we think, is the understanding (in the absence of any contrary agreement) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count." 25 Cal. 3d at

758, 602 P. 2d at 398, 159 Cal. Rptr. at 699.[4] However, the court clearly stated that its reasoning was limited to the situation where the dismissed charge pertained to crimes unrelated to the admitted offense. Quoting *People v. Guevara*, *supra*, 88 Cal. App. 3d 86, 151 Cal. Rptr. 511 (1979), the court went on to remark that " '[t]he plea bargain does not, expressly or by implication, preclude the sentencing court from reviewing all the circumstances relating to Guevara's *admitted* offenses to the legislatively mandated end that a term, lower, middle or upper, be imposed on Guevara commensurate with the gravity of his crime.' " 25 Cal. 3d at 758, 602 P. 2d at 399, 159 Cal. Rptr. at 699 (emphasis in original). *See also, e.g., United States v. Martinez*, 584 F. 2d 749 (5th Cir. 1978) (court can take notice of the factual basis of dismissed counts in determining appropriate sentence); *United States v. Marines*, 535 F. 2d 552 (10th Cir. 1976) (in imposing sentence on defendant who entered guilty plea to misdemeanor possession of marijuana, trial court was entitled to consider fact that felony indictment based on same set of facts was dismissed pursuant to plea bargain); *Micelli v. LeFevre*, 444 F. Supp. 1187 (S.D.N.Y. 1978) (during sentencing judge can consider all circumstances leading to defendant's arrest for charge to

4. *But see United States v. Majors*, 490 F. 2d 1321 (10th Cir. 1974), *cert. denied*, 420 U.S. 932, 43 L.Ed. 2d 405 (1975). In that case defendant broke out of a federal penitentiary and then stole a car, driving it across state lines. Defendant was charged with escape and interstate transportation of a stolen car, in violation of separate federal statutes. Defendant agreed to plead guilty to the escape charge in exchange for the prosecutor's agreement not to prosecute the interstate transportation charge. However, the trial judge considered the interstate transportation charge as an aggravating factor during sentencing. In affirming, the United States Court of Appeals for the Tenth Circuit stated:

> By his plea bargain and the subsequent dismissal of the indictment against him for interstate transportation of a stolen motor vehicle, Majors was neither acquitted nor convicted, and the dismissal of the indictment for this offense did not deprive him of any constitutional or other right. The dismissed indictment and the charge contained in it are within the kind of information which a court may properly consider in passing sentence. The plea bargain and the indictment dismissal resulting from it did not and, indeed, could not, deprive the judge of the right and probably the duty of giving consideration to it. While a constitutionally invalid conviction cannot be considered by a sentencing judge, it does not follow that there must be a constitutionally valid conviction in order that criminal conduct may be considered.

490 F. 2d at 1324. *Accord, United States v. Doyle*, 348 F. 2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843, 15 L.Ed. 2d 84 (1965).

which he pled guilty whether or not defendant's plea acknowledged them); *State v. Ethington*, 121 Ariz. 572, 592 P. 2d 768 (1979) (when all charges arise out of a single series of events, during sentencing the trial court may properly consider the charges that were dismissed pursuant to a plea bargain along with other matters); *State v. Hanley*, 108 Ariz. 144, 493 P. 2d 1201 (1972) (judge did not err in considering facts underlying charges of rape, robbery and felonious possession of drugs when sentencing defendant who agreed to plead guilty to assault with intent to rape one victim and attempted rape of another in exchange for dismissal of the other charges); *People v. Klaess*, *supra*, 129 Cal. App. 3d 820, 181 Cal. Rptr. 355 (1982); *People v. Lowery*, 642 P. 2d 515 (Colo. 1982) (during sentencing judge may consider as aggravating or mitigating factors charges dismissed at the time of the plea). We need not decide here whether facts supporting dismissed counts that are unrelated to a crime to which defendant has agreed to plead guilty may be considered during sentencing, for here the facts underlying the initial charge are transactionally related to the charge to which defendant pled guilty.

[3] Upon a finding by the preponderance of the evidence that aggravating factors outweigh mitigating factors, the question of whether to increase the sentence above the presumptive term, and if so, to what extent, remains within the trial judge's discretion. *State v. Davis*, *supra*, 58 N.C. App. 330, 293 S.E. 2d 658 (1982).

[4] The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. The court may very properly emphasize one factor more than another in a particular case. The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. *Id.;* N.C. Gen. Stat. § 15A-1444(a1) (Cum. Supp. 1981); *People v. Piontkowski*, 77 Ill. App. 3d 994, 397 N.E. 2d 36 (1979) (so holding under a similar state statute). *Accord*, *State v. Marquez*, 127 Ariz. 3, 617 P. 2d 787 (1980); *State v. Brookover*, 124 Ariz. 38, 601 P. 2d 1322 (1979).

Under the facts of this case, the trial judge did not abuse his discretion in entering the sentence to which defendant objects.

Defendant borrowed a .44-caliber magnum pistol, bought bullets for the gun, and test fired the weapon. Then he lulled his friend, the victim, into a false sense of security by drinking beer with him. He returned from the bathroom with gun in hand and killed the victim with one shot. At the time, defendant had malice in his heart because his woman had left him for the victim. The sentence was within the statutory limit, supported by the evidence properly before the judge, N.C.G.S. 15A-1444(a1) (Cum. Supp. 1981), and does not constitute abuse of discretion. *State v. Sudderth*, 184 N.C. 753, 114 S.E. 828 (1922). The trial judge did not violate N.C.G.S. 15A-1340.4(a) by considering the evidence of premeditation and deliberation as an aggravating factor.

Affirmed.

CECIL JEANETTE WALTERS (NOW ZIEGLER) v. MELVIN ROYCE WALTERS

No. 30PA82

(Filed 11 January 1983)

Divorce and Alimony § 19.5— separation agreements approved by court are court ordered judgments—abolishment of dual consent judgment approach

Instead of following the dual consent judgment approach in family law, the Court established a rule that whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated as court ordered judgments. These court ordered separation agreements are modifiable and enforceable by the contempt powers of the court in the same manner as any other judgment in a domestic relation case.

Justices CARLTON and MEYER dissent.

Justice EXUM dissenting.

ON defendant's petition for discretionary review of a decision of the Court of Appeals, 54 N.C. App. 545, 284 S.E. 2d 151 (1981) (opinion by *Hill, J.*, with *Vaughn, J.*, and *Whichard, J.* concurring), vacating and remanding the judgment of *Black, D.J.*, entered 18 December 1980 Civil Session of District Court, MECKLENBURG County.

The defendant seeks through this action to have the provisions of a consent judgment declared separable in accordance with the determination at district court. Such a result would enable the trial court to treat the periodic cash payments provision within the consent judgment as alimony. If treated as alimony the payments could be terminated under G.S. 50-16.9(b) since the plaintiff has remarried.

These parties were married 18 February 1956 and separated 11 December 1977. Plaintiff was awarded alimony *pendente lite* on 8 May 1978. Later that same year on 4 October 1978 a jury found the plaintiff was entitled to permanent alimony as the dependent spouse of the defendant. Before the court entered a judgment on the issue of permanent alimony the parties went to the bargaining table and agreed to a consent judgment. At the request of these parties this agreement was placed within an order of the District Court of Anson County which was filed 4 October 1978. The consent judgment as it appeared in the court's order was as follows:

> NOW, THEREFORE, by and with the consent of the parties as evidenced by their signatures affixed hereto, it is by consent, ORDERED, ADJUDGED AND DECREED, as follows:
>
> 1. The defendant, Melvin Royce Walters, is hereby ordered and directed to pay to the plaintiff, Cecil Jeanette Walters, said payments to constitute alimony, the sum of One Thousand ($1,000.00) Dollars per month, beginning October 1978, and continuing for sixty-two (62) months thereafter, for a total of sixty-three (63) payments, said payments to be made quarterly in advance, commencing October 1st, 1978, and the quarterly payments thereafter to be payable on January 1st, April 1st and July 1st, and October 1st of each successive year until all of the payments shall have been made, provided, however, the defendant, Melvin Royce Walters, shall be allowed six (6) weeks following the due date of any payment in which to make the same without being in default of the provisions of this Order.
>
> 2. The defendant, Melvin Royce Walters, will simultaneously with the entry of this Judgment execute a fee simple warranty deed for all of his right, title and interest in and to that real estate located in Burnsville Township, that was

conveyed to the parties to this action by deed dated January the 23rd, 1968, and recorded in Deed Book 160, page 636, Registry of Anson County. This conveyance, however, shall be subject to any outstanding liens and ad valorem taxes existing at the time of the conveyance.

3. It is further ORDERED that the provisions of this Judgment shall be enforceable by contempt proceedings.

4. It is further ORDERED that the plaintiff, Cecil Jeanette Walters, be permitted to use and enjoy that certain motor vehicle heretofore provided her by her husband until the first periodic payment as herein provided is made.

5. It is understood that the payments as herein provided shall be made by the defendant to the plaintiff regardless of whether or not the parties are divorced or the plaintiff should remarry during said period of time.

On 14 June 1979 plaintiff filed a motion requesting the court find defendant in civil contempt for unilaterally reducing the monthly payments to her from $1,000 to $500 in violation of the court's order. The court agreed to enforce its order through its contempt powers and ordered the defendant jailed until he complied with the consent judgment. On 20 August 1979, after the defendant asserted an inability to make payments of $1,000 a month, the district court reduced the payments to $500 a month while extending the time for payment to 101 months pursuant to another consent judgment. Then on 19 April 1980 plaintiff remarried and the defendant ceased making any payments. Plaintiff once again sought enforcement of the now modified consent judgment through the court's contempt power. The defendant responded with a motion to terminate the alimony payments in accordance with G.S. 50-16.9(b).

In an order filed 18 December 1980, Judge Black denied the plaintiff's motion for contempt but he allowed defendant's request to terminate the alimony payments. At this hearing the plaintiff argued that she was entitled to the payments even upon remarriage in accordance with the provisions of the consent judgment. However, aside from the consent judgment itself the plaintiff failed to present any evidence to support her claim that the payments were non-modifiable. In viewing the consent judgment,

Judge Black found the instrument ambiguous on the issue of whether the provisions of the agreement were reciprocal. As a result the court determined that under *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979), the plaintiff had failed to present sufficient evidence to rebut the presumption of separability of provisions as set out in *White, supra.* Under the presumption the periodic cash payments may be treated as alimony which is both modifiable and terminable pursuant to G.S. 50-16.9.

Plaintiff appealed to the North Carolina Court of Appeals where the case was argued 15 October 1981. In an opinion filed 17 November 1981, the Court of Appeals vacated and remanded Judge Black's judgment holding the consent judgment of 4 October 1979 to be an integrated property settlement which had no separate provision for alimony. In so holding, the Court of Appeals felt that even though the consent judgment was ambiguous the plaintiff had rebutted the presumption of separability of provisions through her explanation of what the provisions meant. The defendant then filed in this Court a petition for Discretionary Review which was allowed 4 May 1982.

James, McElroy & Diehl, P.A. by William K. Diehl, Jr., and Katherine S. Holliday, for defendant-appellant.

Thomas D. Windsor and Larry Harrington, for plaintiff-appellee.

COPELAND, Justice.

The primary issue presented in this case is whether the original consent judgment within a court order of 4 October 1978 which was later amended by a consent judgment within a court order of 20 August 1979, may be modified. This Court has confronted this question of modification of consent judgments several times in the last few years, most recently in *Rowe v. Rowe*, 305 N.C. 177, 287 S.E. 2d 840 (1982) and *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979). However, as evidenced by two different analyses employed at the district court and the Court of Appeals, apparently there is some confusion in this area of family law.

For years in numerous decisions this Court has recognized the existence of two types of consent judgments. In the first type of consent judgment, which is nothing more than a contract, "the

court merely approves or sanctions the payments . . . and sets them out in a judgment . . ." *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E. 2d 240, 242, (1964). These court approved contracts, which are not orders of the court, require the parties to seek enforcement and modification through traditional contract channels. *Levitch v. Levitch*, 294 N.C. 437, 241 S.E. 2d 506 (1978). "A judgment or decree entered by consent is not the judgment or decree of the court, so much as the judgment or decree of the parties, entered upon its records with the sanction and permission of the court, and being the judgment of the parties it cannot be set aside or altered without their consent." *Harrison v. Dill*, 169 N.C. 542, 545, 86 S.E. 518, 519 (1915). *Ellis v. Ellis*, 193 N.C. 216, 136 S.E. 350 (1926).

In the second type of consent judgment, "the Court adopts the agreement of the parties as its own determination of their respective rights and obligations and orders . . ." that the provisions of the separation agreement be observed. *Bunn v. Bunn*, 262 N.C. at 69, 136 S.E. 2d at 242. Court ordered consent judgments, which result from the adoption of the separation agreement, are no longer enforced or modified solely under contract law principles. "When the parties' agreement with reference to the wife's support is incorporated in the judgment, their contract is susperseded by the Court's decree." *Mitchell v. Mitchell*, 270 N.C. 253, 256, 154 S.E. 2d 71, 73 (1967).

As an order of the court, the court adopted separation agreement is enforceable through the court's contempt powers. This is true for all the provisions of the agreement since it is the court's order and not the parties' agreement which is being enforced. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964); *Rowe v. Rowe*, 305 N.C. 177, 287 S.E. 2d 840 (1982). In addition to being enforceable by contempt, the provisions of a court ordered separation agreement within a consent judgment are modifiable within certain carefully delineated limitations. As the law now stands, if the provision in question concerns alimony, the issue of modifiability is determined by G.S. 50-16.9. However, if the provisions in question concern some aspect of a property settlement, then it may be modified only so long as the court's order remains unsatisfied as to that specific provision. "An action in court is not ended by the rendition of a judgment, but in certain respects is still pending until the judgment is satisfied." *Abernethy Land and*

Finance Co. v. First Security Trust Co., 213 N.C. 369, 371, 196 S.E. 340, 341 (1938); *Walton v. Cagle*, 269 N.C. 177, 152 S.E. 2d 312 (1967). Therefore, property provisions which have not been satisfied may be modified.

We now see no significant reason for the continued recognition of two separate forms of consent judgments within the area of domestic relations law. This conclusion is a result of the realization that while in law those court sanctioned separation agreements in consent judgments create nothing more than a contract, in practice those non-court ordered consent judgments generate great confusion in the area of family law.

Instead of following this dual consent judgment approach in family law, we now establish a rule that whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case. Insofar as this rule is in conflict with the previous decisions of this Court in *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964) and *Levitch v. Levitch*, 294 N.C. 437, 241 S.E. 2d 506 (1978), those cases will no longer control. This new rule applies only to this case and all such judgments entered after this decision.

This is not a harsh rule. The parties can avoid the burdens of a court judgment by not submitting their agreement to the court. By not coming to court, the parties preserve their agreement as a contract, to be enforced and modified under traditional contract principles.

Under our new rule every court approved separation agreement is considered to be part of a court ordered consent judgment.

Through this decision we intend to clarify an aspect of family law which has suffered through many years of confusion. However, except as herein stated, consenting parties may still elect any of the options available to them prior to this opinion.

For example, the parties may keep the property settlement provision aspects of their separation agreement out of court and in contract, while presenting their provision for alimony to the court for approval. The result of such action would be that the alimony provision is enforceable and modifiable as a court order while the property settlement provisions would be enforceable and modifiable under traditional contract methods.

We therefore hold that the opinion of the Court of Appeals is reversed and this case remanded to that court for a remand to the District Court of Mecklenburg County for entry of the original judgment.

Reversed.

Justices CARLTON and MEYER dissent from this opinion.

Justice EXUM dissenting.

I must dissent from the result reached by the majority. The provisions of the consent judgment that require defendant to pay a specified sum of money to plaintiff over a specified time "regardless of whether or not the parties are divorced or the plaintiff should remarry during said period of time" are so clearly an agreement by defendant to pay a sum certain of money and *not* to pay alimony "even though denominated as such," that as a matter of law it may not be modified under our decision in *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979). In order for provisions for payments in a consent judgment to be modifiable, the consent judgment must first be a true order of the court. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964). I have no quarrel with the majority's conclusion that this consent judgment did constitute a judgment of the court. Beyond this I cannot concur in the majority's opinion.

The second requisite for modifiability of an unexecuted provision for periodic payments

> is that the order be one to pay alimony. Even though denominated as such, periodic support payments to a dependent spouse may not be alimony within the meaning of the statute [G.S. 50-16.9(a)] and thus modifiable if they and other provisions for a property division between the parties con-

stitute reciprocal consideration for each other. As explained by Justice, now Chief Justice Sharp in *Bunn v. Bunn, supra*, 262 N.C. at 70, 136 S.E. 2d at 243:

> '[A]n agreement for the division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change, but the order for future installments of alimony would be subject to modification in a proper case. (Citations omitted.) *However, if the support provisions and the division of property constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties.*' (Emphasis added.)

White v. White, supra, 296 N.C. at 666-67, 252 S.E. 2d at 701. It is this second requirement for modifiability, *i.e.*, that the court-ordered payments be alimony, that is not met as a matter of law in this case. The consent judgment is not ambiguous on this point. The district court, therefore, erred in conducting an evidentiary hearing on this question, and the Court of Appeals correctly reversed the district court's determination that the payments were modifiable.

The majority unnecessarily departs from well-considered and helpful principles firmly established in our case law which coalesced in *Bunn v. Bunn, supra*, 262 N.C. 67, 136 S.E. 2d 240, a well-analyzed opinion by Justice, later Chief Justice, Sharp. On the one hand the opinion quotes and cites *Bunn* approvingly, but then indicates that some portions of *Bunn* and *Levitch v. Levitch*, 294 N.C. 437, 241 S.E. 2d 506 (1978), may be inconsistent with the decision and are overruled.

Apparently the majority's position is that whenever parties enter into a consent judgment* in a domestic relations case any

* By the term "consent judgment," I mean to refer only to those judgments in which the court adopts the agreement of parties as its own judgment and directs performance of the agreement. These are the only kinds of judgments properly called "consent judgments" and the only ones which have caused any difficulty.

unexecuted provisions of the judgment are always modifiable by the court notwithstanding that the parties, for reasons satisfactory to themselves, have agreed that these provisions shall not be modified. The majority chooses, ostrich-like, simply to ignore the fact that consent judgments, even in domestic cases, have attributes of both judgments and contracts. All of our domestic relations cases, so far as my research reveals, have recognized this fact; of course *Bunn v. Bunn, supra,* does also. Thus this Court said in *McCrary v. McCrary,* 228 N.C. 714, 719, 47 S.E. 2d 27, 31 (1948):

> A judgment by consent is the agreement of the parties, their decree, entered upon the record with the sanction of the court. [Citation omitted.] It is not a judicial determination of the rights of the parties and does not purport to represent the judgment of the court, but merely records the pre-existing agreement of the parties, [Citations omitted.] It acquires the status of a judgment, with all its incidents, through the approval of the judge and its recordation in the records of the court.

The fact that the consent judgment rests on a contract between the parties makes it "no less a decree of the court." *Bunn v. Bunn, supra,* 262 N.C. at 70, 136 S.E. 2d at 243. One of the attributes of a court decree is that it is enforceable by contempt. The court's power to enforce its judgment by contempt is not lessened by the fact that the judgment was entered by consent. *Bunn v. Bunn, supra; Stancil v. Stancil,* 255 N.C. 507, 121 S.E. 2d 882 (1961); *Smith v. Smith,* 247 N.C. 223, 100 S.E. 2d 370 (1957); *Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E. 2d 576 (1942).

Because, however, a consent judgment is also a contract between the parties, the agreement, unless it is against public policy, *Rowe v. Rowe,* 305 N.C. 177, 287 S.E. 2d 840 (1982), may not be modified by the court where the parties intend that certain provisions not be modified. Thus the Court said in *King v. King,* 225 N.C. 639, 640, 35 S.E. 2d 893, 899 (1945):

Where a court merely approves the parties' agreement but does not direct its performance, nothing but a contract results; there is no consent judgment. *See Levitch v. Levitch, supra* in text; *Bunn v. Bunn, supra* in text.

> [I]t is a settled principle of law in this jurisdiction that a consent judgment cannot be modified or set aside without the consent of the parties thereto, except for fraud or mutual mistake, and the proper procedure to vacate such judgment is by an independent action . . . .

In *Webster v. Webster*, 213 N.C. 135, 195 S.E. 362 (1938), the parties entered into a consent judgment whereby the defendant (father) agreed to pay $20 per month for the support of a child born of the marriage of the parties during the time the child was in the custody of the plaintiff (mother). The judgment provided that the plaintiff would have custody of the child except for one week out of each month when the defendant would have custody. Thereafter the plaintiff left the child with the defendant for a total of twenty weeks during a thirty-three week period and the defendant refused to make the support payments during the twenty-week period. The plaintiff began contempt proceedings against the defendant. The trial court, while refusing to hold the defendant in contempt, modified the earlier consent judgment by requiring the defendant to pay $20 per month to the plaintiff irrespective of who had custody of the child. On appeal this Court held that the trial court had no power to modify the agreement in this manner. The Court said, 213 N.C. at 138, 195 S.E. at 364:

> To hold, as ruled by the court below, that the defendant is bound to pay the full amount of $20.00 per month for the care of the child, whether the plaintiff keeps the child any part of the time or not, would seem to impose upon the defendant an obligation which he did not assume, and result in the requirement of additional payments for the sole benefit of the plaintiff, with whom a complete settlement has been had. This cannot be held to have been in contemplation of the parties or in accord with their intent.
>
> The judgment of the Superior Court must be reversed with directions that defendant be required to pay to the plaintiff only such sums as may be found to be due her for the support of the child when kept by her in substantial compliance with the agreement, as evidenced by the consent judgment, and not for periods during which the plaintiff may have voluntarily relinquished the custody and support of the child to the defendant in excess of the time specified.

Provisions for the payment of true alimony in consent judgments may, of course, be modified because modifiability is an inherent attribute of alimony, G.S. 50-16.9; *White v. White, supra; Bunn v. Bunn, supra.* The modifiability of alimony cannot be destroyed even by the parties' agreement because such an agreement is against public policy. *Rowe v. Rowe, supra.* The parties' agreement to make periodic payments other than alimony, however, must be enforced according to the terms of their agreement; and, like other provisions of the agreement, may not be modified if the terms of the agreement indicate the parties did not intend modification. *White v. White, supra; Bunn v. Bunn, supra.*

Modifiability, however, is not a prerequisite to enforceability of a consent judgment by contempt. *Henderson v. Henderson* (No. 100PA82, filed 11 January 1983). The judgment is enforceable by contempt not because it is modifiable, but because it is a judgment. Likewise, if the parties so agree, it is not modifiable because it is also a contract. I would also hold that enforceability by contempt is an attribute of a judgment that the parties may not change by agreement. Such an agreement would, like an agreement not to modify alimony payments, be against public policy and unenforceable.

Just as the parties cannot deprive the court of its power to enforce a consent judgment by contempt, neither can the court modify an agreement of the parties without their consent unless the agreement is unenforceable as against public policy.

The majority's holding today does not only overrule *Bunn v. Bunn,* supra; it also overrules *King v. King, supra, Webster v. Webster, supra,* and I suppose a legion of other cases which adhere to the principle that consent judgments, being in part a contract of the parties, cannot ordinarily be modified without the parties' consent. The effect of today's ruling is to preclude parties in domestic cases from settling their dispute in a manner satisfactory to them, agreeing on the terms of the settlement, having their agreement treated like other ordinary contracts, yet at the same time making the agreement enforceable pursuant to the contempt powers of the court by putting the agreement in the form of a consent judgment. Not only is the majority's decision in conflict with all the cases which have heretofore spoken on the

subject, I am satisfied the rule it announces is unwise, if not practically unworkable.

I vote to affirm the Court of Appeals.

LUCY W. TAYLOR, EMPLOYEE, PLAINTIFF; (F. K. TAYLOR, SUCCESSOR IN INTEREST TO PLAINTIFF, LUCY W. TAYLOR, NOW DECEASED) v. J. P. STEVENS COMPANY, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 440A82

(Filed 11 January 1983)

1. **Master and Servant § 68— workers' compensation—permanent disability from occupational disease—maximum compensation not increased by statute**

In enacting G.S. 97-29.1, the legislature intended to increase only the weekly benefits of claimants who were totally and permanently disabled prior to 1 July 1973 but did not intend to increase the $12,000.00 maximum compensation provided for in G.S. 97-29 as written when plaintiff became totally disabled from an occupational disease in August 1963.

2. **Master and Servant § 99— workers' compensation—attorney fees for appeal to appellate court—discretion of Industrial Commission**

The Industrial Commission has the discretion to award attorney fees for work rendered in connection with an appeal before an appellate court, and the decision to grant or deny such an award will not be disturbed in the absence of an abuse of discretion. G.S. 97-88; G.S. 97-88.1.

Justice CARLTON dissenting.

APPEAL as a matter of right pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals 57 N.C. App. 643, 292 S.E. 2d 277 (1982) (opinion by *Clark, J.*, with *Whichard, J.*, concurring and *Becton, J.*, dissenting), which affirmed a holding of the Industrial Commission.

This appeal concerns a worker's compensation claim in which plaintiff-appellant seeks to recover both extended compensation benefits under G.S. 97-29.1 and reasonable attorneys' fees under G.S. 97-88. In a decision dated 6 May 1980 and reported at 300 N.C. 94, 265 S.E. 2d 144 (1980), we upheld a Court of Appeals' decision which established defendant's, J. P. Stevens and Company, liability to the plaintiff. We remanded the case to the In-

dustrial Commission for a determination of the exact date of plaintiff's disability. Prior to the hearing on remand before Deputy Commissioner Angela R. Bryant on 18 August 1980, the parties stipulated that plaintiff's disability arose on 2 August 1963.

Considering all the facts, including defendant's liability and plaintiff's date of disability, the Deputy Commissioner awarded plaintiff compensation in the amount of twelve thousand dollars ($12,000), the maximum allowable under G.S. 97-29 in August of 1963. In addition to the award of twelve thousand dollars ($12,000), the Deputy Commissioner found that plaintiff was also entitled to recieve an increase in the original award as provided by G.S. 97-29.1. With this award the Deputy Commissioner approved an attorney's fee in the amount of twenty-five percent (25%) of the plaintiff's final award.

Defendant-appellee appealed from the Deputy Commissioner's award of 18 August 1980 for a hearing before the full Commission. On 8 September 1980 defendant-appellee tendered to plaintiff-appellant a payment in the amount of twelve thousand dollars ($12,000). On 20 October 1980 plaintiff moved for attorneys' fees pursuant to G.S. 97-88 and G.S. 97-88.1. In its opinion filed 20 November 1980 the full Commission denied plaintiff's motion for attorneys' fees. In addition to the denial of attorneys' fees, the Commission struck that part of the Deputy Commissioner's award dealing with the plaintiff's recovery of compensation benefits and in its place awarded plaintiff a lump sum of twelve thousand dollars ($12,000), an amount equal to the maximum award allowable under G.S. 97-29 in August of 1963.

From this decision of the full Industrial Commission, plaintiff appealed to the Court of Appeals. On 12 November 1980 the original plaintiff, Lucy Wood Taylor, died. Her widower was substituted as plaintiff-appellant in the proceedings before the Court of Appeals. In a split decision the Court of Appeals affirmed the full Commission's decision and held that G.S. 97-29.1 was not intended to benefit a person in the position of the plaintiff. The Court of Appeals went on to say that the Commission has no authority to award attorneys' fees for work rendered in furtherance of an appeal before the appellate courts. However, the Court of Appeals did hold that the Commission is authorized to award attorneys' fees for work done in connection with a hear-

ing before it, but such an award is within the Commission's discretion and in this case the court felt there was no abuse of discretion.

Plaintiff appealed to this Court as a matter of right from the decision of the Court of Appeals which upheld the decision of the Industrial Commission.

Other evidence pertinent to our decision will be discussed in the opinion.

Hassell, Hudson & Lore by Charles R. Hassell, Jr. and Robin E. Hudson, for plaintiff-appellant.

Teague, Campbell, Conely & Dennis by C. Woodrow Teague and George W. Dennis III, for defendant-appellee.

COPELAND, Justice.

Plaintiff-appellant raises on this appeal two issues for our consideration. First, he aruges that both the Industrial Commission and the Court of Appeals erred in holding that G.S. 97-29.1 does not increase the twelve thousand dollar ($12,000) maximum recovery allowed under the August 1963 version of G.S. 97-29. Second, he contends that the Industrial Commission should have granted his 20 October 1980 motion for attorneys' fees which included costs for preparations and arguments before this Court in 1980 and before the Deputy Commissioner and the full Commission also in 1980. In response to plaintiff's contentions we hold that the Court of Appeals was correct in upholding the Industrial Commission's ruling that G.S. 97-29.1 did not increase the twelve thousand dollar ($12,000) maximum compensation provided for in G.S. 97-29 as written in August of 1963. We also hold that the Court of Appeals, while correct in affirming the Commissions' denial of attorney's fees, erred in reasoning that the denial was proper in part since the Industrial Commission does not have the authority to order attorneys' fees for work done in connection with an appeal before an appellate court. Instead, an award of attorneys' fees for work done in connection with an appeal before an appellate court is within the discretion of the Commission, just like an award for work in connection with a hearing before the Commission. In the absence of an abuse of discretion the Commission's denial of attorneys' fees will not be disturbed.

[1] Plaintiff-appellant argues that the legislature, in passing G.S. 97-29.1 intended to increase the total benefits to all persons who were entitled to receive benefits prior to 1 July 1973 and who were receiving or were to receive benefits after 1 July 1977. We cannot support such a sweeping assertion. As a result of the parties' stipulation that plaintiff's disability occurred on 2 August 1963 we must interpret the Workmen's Compensation Act as it was written in August of 1963 in order to determine plaintiff's proper compensation.

In August of 1963 the applicable statute under which the plaintiff would have become entitled to a recovery was G.S. 97-53(13). However, the amount of compensation for total incapacity in August of 1963 was set out in G.S. 97-29 which provided:

> Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to sixty per cent of his average weekly wages, but not more than thirty seven dollars and fifty cents ($37.50), nor less than ten dollars per week during not more than four hundred weeks from the date of the injury, provided that the total amount of compensation paid shall not exceed twelve thousand dollars.

Within this statute we find three clearly defined maximums which operate independently. The first maximum concerns the amount of weekly benefits which may be received. The maximum weekly benefit allowable is thirty seven dollars and fifty cents ($37.50). The second maximum concerns the total number of weeks from the date of the injury that an employee may receive weekly benefits. The maximum in this second category is four hundred (400) weeks. The third maximum is a ceiling on the total amount of benefits an employee may receive for total disability. That maximum is twelve thousand dollars ($12,000).

In support of our interpretation of G.S. 97-29, as written in August of 1963, we first rely on the clear meaning of the words of the statute. The statute unequivocally states that a totally incapacitated worker shall receive no more than thirty seven dollars and fifty cents a week for no more than four hundred weeks provided that the total compensation not exceed twelve

thousand dollars. "When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction." *Utilities Commission v. Edmisten, Attorney General*, 291 N.C. 451, 465, 232 S.E. 2d 184, 192 (1977); see also, *State v. Camp*, 286 N.C. 148, 209 S.E. 2d 754 (1974); *Peele v. Finch*, 284 N.C. 375, 200 S.E. 2d 635 (1973).

To further support our interpretation of G.S. 97-29, as it was written in August of 1963, we note that the statute was amended 1 July 1963. This amendment substituted "thirty seven dollars and fifty cents" for "thirty five dollars" and "twelve thousand dollars" for "ten thousand dollars." Clearly each maximum was amended separately with there being no amendment whatsoever to the four hundred week maximum. In addition, simple mathematics reveals that the two dollars and fifty cents increase in weekly benefits has no relation to the two thousand dollars total compensation benefit increase over the maximum four hundred week recovery period. We also point out that paragraph two of G.S. 97-29 provided:

> In cases in which total and permanent disability results . . . from an injury to the brain or spinal cord . . . compensation . . . shall be paid during the life of the injured employee, without regard to the four hundred weeks limited herein or the twelve thousand dollars maximum compensation under this article.

Although the twelve thousand dollars maximum and the four hundred weeks maximum do not apply to paralysis cases as set out in paragraph two of G.S. 97-29, the weekly maximum of thirty seven dollars and fifty cents does still apply. Clearly the legislature intended the maximums to be separate and independent provisions of G.S. 97-29.

G.S. 97-29.1, the 1977 amendment to G.S. 97-29, increases only the weekly compensation benefits in all cases of total and permanent disability occurring prior to 1 July 1973. The statute provides that in such cases, "*weekly Compensation Payments* shall be increased effective July 1, 1977. . . ." (Emphasis added.) Obviously, G.S. 97-29.1 is intended to increase the amount a person receives weekly. However, no provision has been made for an increase in total benefits. "It is a well-settled principle of statutory

construction that where a statute is intelligible without any additional words, *no additional words* may be supplied." *State v. Camp*, 286 N.C. 148, 151, 209 S.E. 2d 754, 756 (1974). (Emphasis added.)

In this case the plaintiff was injured prior to 1 July 1973 and she did receive benefits after 1 July 1977, however plaintiff's benefits have been ordered and tendered in a lump sum payment of twelve thousand dollars. Although plaintiff contends otherwise, we cannot violate the clear meaning of G.S. 97-29.1 by stating that an increase in the weekly maximum of thirty seven dollars and fifty cents necessarily requires an increase in the twelve thousand dollars total compensation maximum.

We therefore uphold the Court of Appeals decision which denied plaintiff's claim that he was entitled to a fifty percent increase in total benefits pursuant to G.S. 97-29.1.

[2] Plaintiff's second contention concerns the Industrial Commission's refusal to grant his motion for attorneys' fees. Plaintiff argues that the Industrial Commission erred in not awarding him attorneys' fees for work done between 24 October 1979 and 31 October 1980. During that period plaintiff's attorney represented him in appeals brought by the defendant-appellee before this Court on 11 February 1980, before a Deputy Commissioner on 18 August 1980 and before the full Industrial Commission on 31 October 1980. Plaintiff contends that G.S. 97-88 and G.S. 97-88.1 entitle him to an award of attorneys' fees. We are unable to agree with plaintiff-appellant's position.

The language of both G.S. 97-88 and G.S. 97-88.1 clearly indicates that an award of attorneys' fees is not required to be granted. Such language places the decision of whether to award attorneys' fees within the sound discretion of the Industrial Commission. G.S. 97-88 provides:

> If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or continue payments of benefits . . . the Commission or Court *may further order* that the cost to the injured employee of such hear-

> ing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs. (Emphasis added.)

As indicated, the language in G.S. 97-88 that, "the Commission or court may further order [a] reasonable attorney's fee. . ." clearly shows that an attorney's fee award is within the Commission's discretion. Similarly, G.S. 97-88.1 places the award of attorneys' fees in the discretion of the Commission by providing that, "the Industrial Commission . . . *may assess* . . . reasonable fees for defendant's attorney or plaintiff's attorney. . . ." (Emphasis added.)

Plaintiff argues that he is entitled to recover attorneys' fees for work done in defense of defendant-appellee's appeals because the intent of the legislature was to avoid the situation in which an injured worker who has won an award of compensation is forced to bear the cost of defending his victory through subsequent appeals brought by the defendant. In response to this assertion by the plaintiff we point out that the language of the statute clearly shows the legislature did not intend to require that attorneys' fees be awarded. Instead the statute was written to enable the Industrial Commission to award attorneys' fees in those cases it deems proper. Unlike the situation where the insurer litigates and appeals for the primary purpose of harrassing an economically feeble employee, in this case defendant appellee had sound legal principles behind each of its appeals. In a case like the one *sub judice* the Industrial Commission's denial of attorneys' fees is not an abuse of discretion.

Although the Court of Appeals properly upheld the Industrial Commission's denial of attorneys' fees, the court did err in holding that the Commission does not have the authority to award attorneys' fees for work done in furtherance of a case on appeal before the Supreme Court. The applicable statute G.S. 97-88 provides:

> [T]he Commission or Court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as part of the bill of costs.

In the above quoted statute the legislature provides that both the Court and the Commission shall have the authority to award attorneys' fees to be paid by the insurer. However, the same provision clearly provides that what amount is a reasonable attorney's fee shall be determined solely by the Commission. While the statute provides the Commission with the authority to allow attorneys' fees, even for work done in furtherance of an appeal before an appellate court, the decision to grant or deny a request for such an award will not be disturbed in the absence of an abuse of discretion.

We therefore affirm the Court of Appeals' opinion which upheld the Industrial Commission's denial of plaintiff's request for benefits in excess of the maximum allowed under G.S. 97-29 as written in August of 1963. In addition we affirm the Industrial Commission's refusal to grant plaintiff attorneys' fees while at the same time modifying the reasoning by the Court of Appeals which also affirmed the holding of the Industrial Commission.

Modified and affirmed.

Justice CARLTON dissenting.

The most honest statement I can make at the outset is that I am not absolutely certain what group or groups of persons our legislature intended to benefit in enacting G.S. 97-29.1 (1979). However, the majority has not convinced me that the group to which Mrs. Taylor belongs should be omitted from the statute's reach and, for that reason, I respectfully dissent.

I think it particularly interesting that the majority nowhere attempts to define the groups the statute was designed to benefit. The majority's time and space is devoted only to an attempt to justify and explain which people the statute was *not* designed to help. The Court of Appeals attempted to explain its same result by noting which group of people it felt the statute was designed to benefit. The majority nowhere indicates whether it agrees or disagrees with the Court of Appeals' determination on this point.

If I understand the majority, it reasons that the statute does not benefit Mrs. Taylor, a woman who received a lump sum payment of $12,000, because she runs afoul of two restrictions: (1) the statute was only intended to benefit those who receive weekly

compensation payments, and (2) the statute did not specifically provide for an increase in the total compensation of $12,000.

I think this reasoning will lead to great confusion. For example, according to the majority's view, one receiving the maximum of $37.50 per week for 320 weeks (which would equal the maximum of $12,000) would be entitled to an increase in weekly payments under G.S. 97-29.1 (1979) *but* would receive the weekly payments for a *lesser* number of weeks because that person would reach the $12,000 maximum sooner. Specifically, one receiving $37.50 before enactment of G.S. 97-29.1 (1979), but who later became entitled to a 20% increase, for example, under the statute, apparently would see his weekly payments rise from $37.50 per week to $45.00 per week but he would only receive the payments for 266.67 weeks because at the end of that time he would have reached the $12,000 maximum. In other words, this employee gets $7.50 more per week, *but loses more than an entire year's compensation*! The legislature may have intended that in enacting G.S. 97-29.1 (1979); I doubt it.

Another possibility under the majority view is this: if Mrs. Taylor had been awarded a lump sum of $8,000 instead of $12,000, she would appear to be entitled to the statute's benefits because she would not be in violation of the majority's second restriction—the $12,000 maximum. However, because of the majority's first restriction she still would not be entitled to the increase in payments because she would not have been receiving her payments on a weekly basis. I cannot imagine, and the majority does not explain, why the legislature would want to help someone receiving weekly payments and not help one like Mrs. Taylor who *otherwise* qualifies under the statute except for the lump sum manner of payment.

Again, I concede that I do not know for certain which groups of people the legislature intended to benefit with this statute. The majority must not know either because the opinion does not say. At any rate, I must dissent for the reasons stated above and for two other very important reasons: (1) the statute refers to *all* cases of total and permanent disability occurring prior to 1 July 1973 where the disabled is entitled to benefits as of 1 July 1977; Mrs. Taylor meets *all* these requirements, and (2) this Court has held for years that the Workers' Compensation Act is to be liberally construed in favor of the claimant.

ALICE JEAN HENDERSON v. GARY M. HENDERSON

No. 100PA82

(Filed 11 January 1983)

Contempt of Court § 6.3; Divorce and Alimony §§ 21.5, 21.6— consent judgment adopted by court—enforcement by civil contempt

A provision for periodic payments to the wife in a court-ordered consent judgment is enforceable by attachment for civil contempt for the husband's willful failure to pay without regard to whether those provisions are modifiable or unmodifiable. Modifiability and enforceability are not interdependent.

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

Justice CARLTON concurring.

Justice EXUM concurring in the result.

ON discretionary review of a decision of the North Carolina Court of Appeals which affirmed in part and modified in part an order entered 15 December 1980 by *Lambeth, Judge*, in District Court, NEW HANOVER COUNTY. We allowed defendant's petition for discretionary review filed pursuant to G.S. § 7A-31 on 13 July 1982.

The sole question presented for our review is whether a provision for periodic payments to the wife in a court-ordered consent judgment is enforceable by attachment for civil contempt for the husband's willful failure to pay without regard to whether those provisions are modifiable or unmodifiable. For the reasons set forth below, we answer in the affirmative.

Plaintiff and defendant were married on 2 November 1968. They have one son, Christopher V. Henderson, born 23 May 1973. The parties were divorced on 20 December 1979. Plaintiff brought an action against the defendant seeking *inter alia* custody of the child, alimony, certain marital property and attorney fees. Defendant answered and demanded a jury trial. The case came on for trial in District Court, New Hanover County, before District Judge Carter Lambeth and a jury in March 1980. After the close of defendant's evidence, the parties informed the judge that they had negotiated and agreed and consented to the entry of a judgment of the court. The consent judgment entered by the court on

24 March 1980 contains extensive findings of fact, conclusions of law and an ordering paragraph in the customary language: "WHEREFORE, UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:" and is signed by Judge Lambeth.

The judgment, bearing the consent of the parties as evidenced by their signatures as well as those of their respective counsel, includes *inter alia* the following pertinent findings of fact:

> 17. That both parties hereto . . . realizes (sic) that this is a full and final settlement of a disputed or doubtful claim, and wishes (sic) to terminate the pending litigation and to finally and fully settle all matters and things in controversy between them as herein set forth.
>
> 18. That each and every provision of this Judgment are mutually dependent upon each other, are not separate and independent provisions, and that the parties hereto intend for each provision herein to be in consideration of each of the other provisions herein and that this Judgment is an integrated Agreement of the parties hereto.
>
> 19. That except as specifically provided for in this Judgment the parties hereto waive all rights arising out of the marital relationship and this Judgment embodies the entire understanding between them and is absolute and irrevocable and may not be altered or terminated except with the consent of both of the parties hereto.

The judgment also contains *inter alia* the following pertinent conclusions of law:

> WHEREFORE, UPON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:
>
> . . .
>
> (C) That Plaintiff is the dependent spouse of Defendant and Defendant is the supporting spouse of Plaintiff as those terms are respectively defined by North Carolina General Statutes, Sections 50-16.1(3) and 50-16.1(4).
>
> (D) That Plaintiff is entitled to support for herself and an award of periodic alimony payments from Defendant, and

that Defendant is fully capable of providing reasonable periodic alimony payments to Plaintiff.

. . .

(G) That this Judgment is an integrated agreement of the parties, that each provision contained herein is intended to be in consideration for each of the other provisions, and that none of the terms and provisions set forth herein shall be modified in the future unless both of the parties consent to such modifications except for the matter of the custody and support of the minor child born of the marriage of Plaintiff and Defendant which said matter of custody and support will remain open for review and modification by this court until the majority of said child.

Following the foregoing conclusions there appears the following ordering paragraph:

"WHEREFORE, UPON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:"

In subsequent paragraphs defendant was ordered to pay $500.00 per month as "periodic alimony payments for the support and maintenance of Plaintiff . . . until the death of the Husband or the death or remarriage of Wife . . . ."; was further ordered to be responsible for the minor child's medical bills; to maintain a life insurance policy on his own life for the benefit of the child; to pay all debts incurred by the parties prior to their divorce; and to surrender substantially all furniture, furnishings, household goods and other contents of the homeplace as well as one of two 1976 Toyota automobiles owned by the parties. Plaintiff was ordered to execute and deliver to the defendant a warranty deed conveying her interest in the homeplace to him in exchange for the sum of $7,000.00 to be paid to the plaintiff. Defendant was awarded secondary custody of the minor child with generous visitation privileges. Then follows the pertinent closing paragraph:

Nineteenth: That this cause be, and the same hereby is retained for the further orders of this court with respect to the custody and support of the minor child of the parties hereto, and that in all other respects this Judgment may not

be modified except with the express written consent of the parties hereto.

On 17 July 1980 defendant filed a motion, alleging *inter alia* that plaintiff was in desperate need of psychiatric care; had "continually used their minor child as a pawn in [her] calculated game of vindictive harassment of Defendant;" appeared to be "succeeding in the poisoning of the mind of the seven year old minor child . . . . ;" and had denied defendant his visitation privileges. In his prayer for relief defendant asked that plaintiff be held in willful contempt for violation of the terms of the 13 March 1980 consent judgment and that he be awarded custody of the minor child. Thereafter, on 18 September 1980 plaintiff filed a motion alleging defendant's violation of the terms of the 13 March 1980 consent judgment by his failure to make alimony payments in "an attempt to coerce and induce" the plaintiff into giving up the custody of the child to the defendant. She asked that the defendant be adjudged in willful contempt for this failure to abide by the terms of the consent judgment.

In his Judgment and Order dated 15 December 1980, Judge Lambeth, after hearing the evidence on the two motions, recited *inter alia* the following as a finding of fact:

> 9. The March 13, 1980, Judgment was drafted by Frederick D. Anderson, Esquire, counsel for Defendant, and submitted to the court for approval and adoption. The provisions contained in Paragraph Eighteen, Page 3, of the Findings of Fact and Paragraph (G), Page 3, of the Conclusions of Law recite that the provisions of the Judgment are not separate but mutually dependent upon each other and in consideration of one another and that the judgment is an integrated agreement of the parties, unmodifiable in the future except for the matter of custody and support. The court in adopting this Judgment containing this language did not intend nor did it waive any right of the court to enforce a willful violation of any term of this Judgment by civil contempt.
>
> Defendant contends that the March 13, 1980, Judgment amounted to nothing more than a contract between the parties and is not enforceable by contempt. Defendant further contends that his obligation to pay alimony under the Judg-

ment terminated at such time as Plaintiff breached the child visitation provision of the Judgment.

This court finds as a fact that even if those portions of the March 13, 1980, Judgment dealing with the property settlement and alimony provisions amount to nothing more than a contract, then the violation by Plaintiff of the visitation provisions of this Judgment (though willful) was provoked by the conduct of the Defendant. This court further finds that both parties have breached provisions of the Judgment and that each breach has been provoked by the conduct of the other party and that neither party has clean hands or is without fault. The court further finds as a fact that both Plaintiff and Defendant are entitled to specific performance of the Judgment.

He concluded that both parties were in willful contempt of the 13 March 1980 Consent Judgment; that the minor child was "an emotionally abused child in need of protection from the court;" and that it was "presently in the best interest and welfare of the minor child that the legal custody of the child be placed in the New Hanover County Department of Social Services."

Plaintiff was ordered to comply with the visitation and other provisions relating to the minor child. Defendant was ordered confined to the common jail of New Hanover County for failure to pay alimony until such time as he paid $2,750.00 in arrearage.

In an opinion filed 2 February 1980, the Court of Appeals affirmed Judge Lambeth's order with the exception of that portion of the order dealing with defendant's willful failure to pay, finding from the record insufficient evidence of defendant's ability to comply with the order during the period of default or with the order to pay the arrearage.

Goldberg & Anderson, by Frederick D. Anderson, Attorney for Defendant-Appellant.

W. G. Smith, by Bruce H. Jackson, Jr., Attorney for Plaintiff-Appellee.

MEYER, Justice.

Defendant-appellant presents only one issue on appeal, cast in the following language:

I. Does a wife's failure to allow a husband visitation with his son, excuse husband's duty to pay periodic support payments to wife under a consent judgment, which specifically states that each party's respective duties thereunder are interdependent and not independent, that it is an integrated agreement of the parties, that it may not be modified without the express written consent of the parties, and that it is a full and final settlement of all property and marital rights between the parties?

In so styling the issue, defendant places this Court in the anomalous position of having to decide a question of law based on an underlying assumption, the non-modifiability of the alimony-type provision. Because the assumption and any legal implications arising from it are in no way pertinent to our holding, our discussion will focus only on the enforceability issue. The modifiability issue is not determinative of the question before us. Thus, we have purposely not quoted or summarized the provisions of the judgment relating to the periodic payments for the support of the wife because the nature of those payments as "alimony" or as part of an "integrated settlement" or their "modifiability" or "non-modifiability" does not affect their enforceability by contempt as court-ordered payments under a court-adopted consent judgment. It is perhaps because of some misinterpretation of the language in some of our prior opinions that attorneys repeatedly argue to this Court that if the support provisions of a court-ordered consent judgment are "modifiable" the judgment is enforceable by contempt but if they are "not modifiable" the judgment is not enforceable by contempt. We wish to dispel any such notion and to make it clear now that modifiability and enforceability are not interdependent.

In *Bunn v. Bunn*, 262 N.C. 67, 70, 136 S.E. 2d 240, 243 (1964), we stated that "any judgment which awards alimony, notwithstanding it was entered by the consent of the parties, is enforceable by contempt proceedings should the husband wilfully fail to comply with its terms. *If the judgment can be enforced by contempt, it may be modified and vice versa.*" (Emphasis added.) In *White v. White*, 296 N.C. 661, 665, 252 S.E. 2d 698, 701 (1979), we stated that a court-adopted consent judgment "*is both modifiable and enforceable by the court's contempt power.*" (Emphasis added.) *White*, like *Bunn*, involved the modification of a

provision which had been determined to be "alimony" and thus modifiable. The rule is more clearly stated in our most recent decision of *Rowe v. Rowe*, 305 N.C. 177, 183, 287 S.E. 2d 840, 844 (1982), which points out that when "the court adopts the agreement of the parties as its own and *orders* the supporting spouse to pay the amounts specified as alimony . . . [the] order is enforceable by the court's contempt powers." This Court further noted that "*[o]rdinarily* it is also modifiable." *Id.* (Emphasis added.) We read the language in these cases as establishing a rule which merely states that a payment of "alimony" in a court-ordered judgment is enforceable by civil contempt, *and*, as we stated in *Rowe*, it is also modifiable by virtue of our holding in *Bunn*, and now as a result of G.S. § 50-16.9. We have never held, nor do we now hold, that the court's power to enforce its orders in a consent judgment is dependent upon whether the provision is subject to modification. It was unnecessary for the Court of Appeals to determine or even discuss the issue of the modifiability of Judge Lambeth's order.

A court-adopted consent judgment in a domestic setting has been variously characterized as a species of *contract which has been superseded by the court's adoption of the agreement* between the parties "as its own determination of their respective rights and obligations . . . ." *Bunn v. Bunn*, 262 N.C. at 69, 136 S.E. 2d at 241. *See Rowe v. Rowe*, 305 N.C. 177, 287 S.E. 2d 840; *White v. White*, 296 N.C. 661, 252 S.E. 2d 698; *Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E. 2d 71 (1967). So far as the support payments to the wife are concerned, the agreement of the parties becomes an order of the court, thus losing its identity as a contract.

Once the court adopts the agreement of the parties and sets it forth as a judgment of the court with appropriate ordering language and the signature of the court, the contractual character of the agreement is subsumed into the court-ordered judgment. *McRary v. McRary*, 228 N.C. 714, 47 S.E. 2d 27 (1948). At that point the court and the parties are no longer dealing with a mere contract between the parties.[1]

1. That is not to say that such a contract (separation agreement) may not eventually result in a judgment of the court which would be enforceable by contempt. The alimony provisions of a separation agreement are enforceable by a decree for

The power of the court to enforce its judgment is no less and no greater for a court-adopted consent judgment than for a judgment resulting from a jury verdict in a hotly contested adversary proceeding. *Stancil v. Stancil*, 255 N.C. 507, 121 S.E. 2d 882 (1961); *Edmundson v. Edmundson*, 222 N.C. 181, 22 S.E. 2d 576 (1942).

It is clear beyond any question that Judge Lambeth's judgment of 13 March 1980 is a court-adopted consent judgment. As such, the court may, upon a showing of willful failure to comply, enforce such judgment by civil contempt. A court-ordered consent judgment is enforceable by civil contempt notwithstanding the fact that it contains unequivocal language that it is nonmodifiable. Hence here Judge Lambeth, in his subsequent order of 15 December 1980, acted within his authority in ordering both parties to comply with the 13 March 1980 judgment.

Civil contempt is based upon acts or neglect constituting a *willful* violation of a lawful order of the court. A failure to obey an order of the court cannot be punished by attachment for civil contempt unless the disobedience is willful. It is well settled that one does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. *See* G.S. § 5A-21. The trial court must find as a fact that the defendant presently possesses the means to comply. *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966).

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specific performance without the necessity of a prior suit to recover money damages for arrearages. *Moore v. Moore*, 297 N.C. 14, 252 S.E. 2d 735 (1979). Willful failure to comply with the decree of specific performance could subject the offense to attachment for civil contempt. While when suit is brought for an order for specific performance of a separation agreement the burden rests on the party seeking the order to first allege and prove that he or she has performed the obligation under the contract, *Whalehead Properties v. Coastland Corp.*, 299 N.C. 270, 261 S.E. 2d 899 (1980), such is not the case in the action for civil contempt for failure to comply with a court-ordered consent judgment for the payment of alimony. Moreover, as defendant correctly points out, parties to a contract-type separation agreement may rely on the contract remedy of excused performance. Thus in *Wheeler v. Wheeler*, 299 N.C. 633, 263 S.E. 2d 763 (1980), this Court held that one party's breach of a provision in a separation agreement excuses the other's performance under an agreement where the provisions were interdependent. Should it be the sole intention of the parties to contract between themselves and to rely solely on contract law for their rights and remedies under the agreement, they must make that decision prior to invoking the court's power to adjudicate their rights and order performance.

In finding of fact number 8, Judge Lambeth found that defendant's failure to make the payments in question "has been willful and without just cause or excuse." In addition, finding of fact number 10 is devoted exclusively to the issue of ability to pay and willfulness of defendant's failure to pay:

> 10. Defendant is an able-bodied man, employed as a pilot for Piedmont Airlines. Defendant is under no legal, mental or physical disabilities which precludes him from complying with the alimony provisions of the March 13, 1980, Judgment which Defendant consented to. The Defendant had the present ability to comply with the alimony provisions of the March 13, 1980, Judgment when it was entered. There have been no change of circumstances as to the Defendant's ability to comply with said provisions since entry of the March 13, 1980, Order. Defendant has the present ability to comply with the alimony provisions but has willfully failed and refused to comply with the March 13, 1980, Judgment since June of 1980. Defendant is presently in arrears under said order for the months of July, August, September, October, November and one-half of December 1980. The total arrearage as of date of hearing is $2,750. Defendant is in willful contempt of court for failure to pay alimony as ordered in the judgment.

Such finding must of course be supported by evidence in the record. Our review of the record discloses that the finding of willfulness is unsupported by the evidence. No evidence was adduced at the hearing with respect to any assets or liabilities of the defendant, any inventory of his property, his present ability to work, nor even his present salary.

If, as here, the finding that the failure to pay was willful is not supported by the record, the decree committing defendant to imprisonment for contempt must be set aside. *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391; *Yow v. Yow*, 243 N.C. 79, 89 S.E. 2d 867 (1955); *Vaughan v. Vaughan*, 213 N.C. 189, 195 S.E. 351 (1938); G.S. § 5A-21.

We agree with the author of the opinion of the Court of Appeals that there is insufficient evidence on the record of defendant's willful failure to comply. The Court of Appeals was correct in vacating the portion of Judge Lambeth's judgment holding

defendant in contempt and ordering his confinement until the arrearages were paid and in remanding the case for further proceedings with respect to the willfulness of defendant's failure to pay.

Affirmed.

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

Justice CARLTON concurring.

I concur in the majority holding, and the reasoning given in support, that a court's power to enforce a separation agreement set out in a consent judgment is not dependent upon whether the judgment is subject to modification. I cannot agree, however, that we "have never held" to the contrary. If we haven't, we have come awfully close. As the majority acknowledges, there is language in some of our earlier decisions which led to the understanding that provisions concerning modifiability and enforceability by contempt were interdependent. At any rate, the majority now lays that misunderstanding to rest.

Justice EXUM concurring in result.

I agree with the Court's holding that a consent judgment may be enforceable by contempt even though it is not modifiable. I cannot concur, however, with some of the language in the opinion which seems to say that once an agreement of the parties has been made a judgment of the court, *i.e.*, has become a consent judgment, it loses the attributes accorded it as a contract, or as the majority puts it, it loses "its identity as a contract." As I have tried to show in my dissenting opinion in *Walter v. Walters*, filed this date, a parties' agreement made a judgment of the court is *both* a contract and a judgment. It is not *either* a contract *or* a judgment. The majority here and in *Walters* seems to think that consent judgments must be either contracts or judgments; and, having to choose, it prefers to treat them as judgments. Until these cases today, however, this Court has always recognized the *dual* nature of consent judgments. *See* my dissenting opinion in *Walters*, and cases therein cited. It is neither necessary, advisable nor in accordance with our precedents to choose judgment over contract or contract over judgment in order properly to

resolve these cases. In the instant case, therefore, I would hold that this consent judgment, albeit not modifiable because it is in part a contract, is nevertheless enforceable by contempt because it is also in part a judgment.

STATE OF NORTH CAROLINA v. JOHNNY ALLISON

No. 432A82

(Filed 11 January 1983)

Criminal Law § 63— basis of psychiatrist's opinion—conversations with defendant —exclusion as prejudicial error

In a prosecution for felonious assault, second degree murder and wilfully setting fire to a dwelling house, the trial court erred in the exclusion of a psychiatrist's testimony concerning the substance of his conversation with defendant which provided the basis for his opinion that defendant did not know the difference between right and wrong at the time of the offenses. Furthermore, such error was not cured by the witness's testimony about his examination and treatment of defendant and his diagnosis of defendant's mental condition or by the testimony of a second psychiatrist concerning his conversations with defendant which embraced some of the same details about which the first witness was not allowed to testify, and the error was prejudicial since defendant was deprived of the weight and credibility of testimony which was crucial to his defense of insanity, and there is a "reasonable possibility" that had the jury heard such evidence it might well have accepted the first psychiatrist's conclusion that defendant did not know the difference between right and wrong at the time of the incidents, and, thus, would have found defendant not guilty by reason of insanity.

THIS matter comes to us on appeal as a matter of right pursuant to G.S. 7A-30(2) (1981) from the decision of the Court of Appeals, 57 N.C. App. 635, 292 S.E. 2d 288 (1982), one judge dissenting, finding no error in defendant's trial before *Friday, Judge,* at the 2 March 1981 Session of Superior Court, GASTON County. A jury convicted Johnny Allison, defendant, of two counts of assault with a deadly weapon with intent to kill inflicting serious bodily injury, murder in the second degree, and wilfully and wantonly setting fire to a dwelling house. On 5 March 1981 Judge Friday sentenced defendant to prison terms of not less than twenty-five nor more than thirty years for the second-degree murder charge; of seven to ten years for the two counts of assault with a deadly weapon with intent to kill inflicting serious bodily injury, the

sentence to run at the expiration of the sentence for the second-degree murder conviction; and of five to ten years for setting fire to a dwelling house.

In this appeal we are to determine whether under the facts in this case, it was prejudicial error to allow the jury to hear an expert witness's psychiatric opinion but not that part of the basis of the opinion which consisted of conversations the expert had with defendant. We hold that it was prejudicial error.

Rufus L. Edmisten, Attorney General, by Harry H. Harkins, Jr., Assistant Attorney General, for the State.

Curtis O. Harris, Public Defender, for defendant.

CARLTON, Justice.

I.

Only a brief recitation of the facts is necessary for an understanding of our decision. Johnny Allison, defendant, was charged with second-degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious bodily injury, and setting fire to a dwelling house. Defendant entered pleas of not guilty to all charges by reason of insanity at the time of the alleged offenses. The evidence tended to show the following:

Defendant was about thirty-seven years old and had a long history of mental illness. At the time of the alleged offenses, he was living with his parents but previously had been confined in mental institutions in this State as well as in Georgia and Virginia. He was attending the mental health clinic on a weekly basis and was receiving injections there. He stayed in his room most of the time and listened to gospel music.

During the early morning hours of 8 December 1980 defendant's father was awakened by screams and observed defendant stabbing defendant's mother with a butcher knife. A scuffle between defendant, his father and his younger brother ensued and both the father and younger brother were stabbed. At some point the house caught fire. The entire family left the house and the house burned. Defendant stated to officers who arrived at the scene that he had started the fire. His mother died as a result of a stab wound to the heart.

Two psychiatrists, Dr. James Groce of Dorothea Dix Hospital in Raleigh and Dr. Harris L. Evans of the Gaston and Lincoln Counties Mental Health Center, testified for defendant. Both testified that in their opinions defendant was unable to distinguish between right and wrong with respect to his behavior at the time of the alleged crimes.

Dr. Groce testified that, pursuant to a court order, he examined defendant on 10 December 1980. He worked as head of an evaluation and treatment team for the thirteen days defendant was at Dorothea Dix Hospital. Numerous tests were given to defendant. One test indicated defendant had mild retardation; another test suggested defendant might have a degree of brain damage. Dr. Groce felt defendant was suffering from a mental illness, observing that defendant was isolated from others in the ward. Defendant was given medication while in the hospital. Dr. Groce's initial diagnosis was that defendant was a paranoid schizophrenic. He later changed that diagnosis to chronic undifferentiated schizophrenia. Paranoid schizophrenia, according to Dr. Groce, is a "disturbance of an individual's thinking, mood and behavior. The main features are some paranoid thoughts, mistrust and suspiciousness." Chronic undifferentiated schizophrenia is a sub-type of schizophrenia. Dr. Groce also explained that paranoid thoughts are thoughts of some intent to be harmed and could be generalized with suspiciousness and mistrust.

Dr. Groce was then asked to tell the jury what defendant had told him that caused him to reach his psychiatric diagnosis. The State objected and the trial court sustained the objection. The record reveals Dr. Groce would have answered as follows:

> He reported to me that he had been hearing voices, arbitrary hallucination kind of voices, talking to him every day; that he had heard his family plotting to kill him; that he had heard his mother offer people money to have him killed; that his family made comments like, "He eats too much, he's greedy," he told me that he had heard shooting outside of the house, and that he knew from the conversation in the house that that was the hired killers who had been practicing to kill him and they were waiting for him to come out of the house. He told me that he did not remember the actual assault on his family members.

Dr. Groce further testified on voir dire that the information which the trial court did not allow the jury to hear assisted him in forming his opinion that defendant was suffering from chronic undifferentiated schizophrenia. He also stated on voir dire that he was a forensic psychiatrist and that this specialty differs from one in the practice of private psychiatry in that his job "is limited to dealing with legal issues and people's problems, emotional problems, related to those legal issues.

Dr. Evans stated to the jury that he first saw defendant in 1975 but that defendant had been seen at the center since 1972. Dr. Evans, in supervising defendant's medication regimen, had been treating defendant for what he considered to be a classic case of chronic schizophrenia which includes several symptoms. Defendant was alienated from other people and had a split personality, two of the symptoms of schizophrenia. In the doctor's opinion, defendant was psychotic at the time of the offenses which meant that defendant was "operating unrealistically" at that time. He noted that a psychotic person has false ideas and "these false ideas are often in terms of having some outside influence that is not real." He testified, "[t]he person may hear things and operate as if they were real."

Dr. Evans further testified that in his opinion the defendant was dangerous to himself and to others and would need continued treatment. He also noted that his interviews and evaluation revealed that defendant was mistrustful and frightened and that his mistrust and fright were directed toward his family.

After he was convicted and sentenced, as noted above, defendant appealed to the Court of Appeals. Defendant's primary contention, which he reiterates here, was that the trial court erred in not allowing Dr. Groce to give the omitted testimony, stated above, to the jury. He relied primarily on this Court's holding in *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979). The Court of Appeals' majority agreed that the trial court erred in not allowing the testimony but found that the error was not prejudicial to the defendant. *State v. Allison*, 57 N.C. App. 635, 292 S.E. 2d 288 (1982). Judge Hedrick, writing for the majority, distinguished the facts in *Wade* from those here and noted that the testimony of Dr. Groce which was presented to the jury adequately demonstrated to the jury that the doctor had spent con-

siderable time working with defendant and had "a deep and broad basis for his opinion as to the defendant's legal sanity." *Id.* at 639, 292 S.E. 2d at 291. He also noted that "Dr. Evans was allowed to testify as to his conversations with the defendant and that his conversations revealed some of the same points as those conducted by Dr. Groce." *Id.* at 640, 292 S.E. 2d at 291.

Judge Becton dissented, believing that the error committed by the trial court in failing to allow the testimony constituted prejudicial error. We agree with Judge Becton, reverse the Court of Appeals, and order a new trial.

II.

In *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979), this Court held that a defendant is entitled to have the jury hear the basis for a psychiatrist's (or psychologist's) conclusion regarding the defendant's ability to distinguish right from wrong. Put another way, if a psychiatrist's (or psychologist's) 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." 296 N.C. at 462, 251 S.E. 2d at 412 (citing *Penland v. Bird Coal Co.*, 246 N.C. 26, 97 S.E. 2d 432 (1957)). In quoting a passage from *State v. Griffin*, 99 Ariz. 43, 49, 406 P. 2d 397, 401 (1965), a decision of the Supreme Court of Arizona, this Court explained in *Wade* the reason for the rule it was articulating:

> In the same vein to allow a psychiatrist as an expert witness to answer without any explanation . . . would impart a meaningless conclusion to the jury. The jury must be given an opportunity to evaluate the expert's conclusion by his testimony as to what matters he took into consideration to reach it. Therefore the psychiatrist should be allowed to relate what matters he necessarily considered as a "case history" not as to indicate the ultimate truth thereof, but as one of the bases for reaching his conclusion, according to accepted medical practice.

296 N.C. at 463-64, 251 S.E. 2d at 412.

Since our holding in *Wade*, the General Assembly in 1981 enacted G.S. 8-58.14 (1981) which covers disclosure of the basis—the underlying facts or data—of an expert's opinion. G.S. 8-58.14 (1981) provides:

> Upon trial the expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests, otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

The statute essentially deals with the *order* in which an expert is to give the various parts of his testimony. It sets out the condition under which an expert is allowed to give his opinion *before* disclosing the basis upon which that opinion rests. The statute provides that an expert may give his opinion first, without *prior* disclosure of the underlying facts or data, so long as an adverse party does not require otherwise. This provision appears to assume that at some point during the direct examination the expert will disclose the basis of his opinion: the statute merely provides that the expert need not give the basis first. If, however, the expert does not disclose the basis of his opinion on direct examination he can be required to give the basis on cross-examination. Again, the statute assumes that, at the very least, the expert is *allowed* to disclose the basis on direct examination.[1] In a criminal case where the defendant claims he is not guilty by reason of insanity, it is especially imperative that the jury hear not only the expert's opinion as to the defendant's state of mind, but the basis for the expert's psychiatric opinion as well. Indeed, the United States Court of Appeals, sitting *en banc*, went so far as to *require* that the jury be provided with the basis for an expert's psychiatric opinion. The court wrote:

> The goal of avoiding undue dominance of the jury by expert testimony does not require ostrich disregard of the key issue of causality. . . . The rule contemplating expert testimony as to the existence and consequence of a mental disease or defect is not to be construed as permission to testify solely in terms of expert conclusions. . . . It is the

1. We note this new statute is almost identical to Fed. R. Evid. 705. There is, however, one difference. G.S. 8-58.14 (1981) allows opposing counsel to require the expert to disclose the basis of his opinion before giving his expert opinion; under Fed. R. Evid. 705, the trial court is to determine whether the basis must be disclosed before the opinion is given.

> responsibility of all concerned—expert, counsel and judge—to see to it that the jury in an insanity case is informed of the expert's underlying reasons and approach, and is not confronted with ultimate opinions on a take-it-or-leave-it basis.

United States v. Brawner, 471 F. 2d 969, 1006 (D.C. Cir. 1972) (adopting the American Law Institute's standard governing the insanity defense).

As noted above, the Court of Appeals held that omission of the testimony quoted above constituted error. Indeed, in its brief to this Court, the State so concedes. The State continues to argue, however, as the Court of Appeals held, that the error was not prejudicial. The State correctly notes that the psychiatrist in *Wade* was allowed to give almost no testimony concerning the basis for his opinion. Contrastedly, in the case at bar, Dr. Groce was allowed to testify at some length about his examination of defendant, defendant's treatment and his diagnosis of defendant's mental condition. Therefore, the State argues, the jury here had more information concerning the basis for the doctor's opinion that defendant did not know right from wrong at the time of the offenses than did the jury in *Wade*, and, thus, the error was not prejudicial. The State also notes that defendant's second psychiatric witness, Dr. Evans, was allowed to testify as to the substance of his conversations with defendant, and that Dr. Evans' testimony embraced some of the same details about which Dr. Groce was not allowed to testify. The State implies that the error was thereby cured. We are unable, however, to agree with the Court of Appeals' holding and the State's contention that the exclusion of Dr. Groce's testimony concerning his conversations with defendant was not prejudicial error.

III.

G.S. 15A-1443(a) (1978) provides, in pertinent part, that,

> [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.

For the reasons articulated below, we are able to say that there is a "reasonable possibility" that, had the jury heard at trial all of

the testimony of Dr. Groce, a different result would have been reached at trial.

A.

As mentioned before, the record indicates there were two expert psychiatric witnesses, Drs. Evans and Groce, both of whom testified that defendant did not know the difference between right and wrong at the time the offenses were committed. The jury apparently was not persuaded by either doctor's opinion as to defendant's sanity because it found defendant guilty of the crimes for which he was tried. Given that Allison's defense rested on these two doctors' testimony, the level of credibility the jury gave *each* doctor's opinion was crucial. It follows, therefore, that the basis of each opinion, evidence which would have gone to the credibility and coherence of each expert's opinion, was important as well.

In its opinion, the Court of Appeals wrote that the testimony of Dr. Groce which the jury heard was sufficient to demonstrate to it that he had spent "considerable time working with the defendant and had a deep and broad basis for his opinion as to the defendant's legal sanity." This statement essentially points out how limited the information was that the jury was allowed to hear: it heard only enough evidence to determine that the doctor had a basis. Specifically, the jury was told the *types* of facts or data the doctor used in reaching his opinion; it did not hear, however, what all the *data or facts* themselves were. In his dissent, Judge Becton correctly notes that "[t]he teaching of *Wade* is that the facts and factors that form and support the 'deep and broad basis for [a psychiatrist's] opinion' are as important as the opinion." *State v. Allison*, 57 N.C. App. at 641, 292 S.E. 2d at 292. Evidence as to the types of information an expert uses in reaching his opinion goes to the expert's general competence in a particular case. To evaluate the opinion itself, the jury needs to hear the facts or data upon which the expert relied in reaching his conclusion. For example, in the case at bar, Dr. Groce told the jury that he based his opinion, in part, on conversations he had with defendant. The jury did not hear, however, what the substance of those conversations was.[2] The information the jury

2. The omitted testimony would have revealed to the jury that defendant had told Dr. Groce: (1) that every day he had been hearing voices—arbitrary, hallucina-

heard helped it to evaluate only the competence of the doctor generally by allowing it to decide if the doctor used appropriate sources of information in arriving at his expert conclusion. The limited testimony it heard did not enable the jury, however, to intelligently assess the opinion itself. The exclusion of Dr. Groce's testimony concerning the substance of these conversations between defendant and himself was especially prejudicial in a case such as this, which involves the insanity defense, for this reason: such conversations tend to show the state of defendant's mind, a determination upon which defendant's innocence rests. The rule that the substance of such conversations is admissible to enable the doctor to explain to the jury his diagnosis (thus allowing the jury to assess that opinion) is predicated on this Court's recognition that "[c]onversation with one alleged to be insane is, of course, one of the best evidences of the present state of his mind." *State v. Wade*, 296 N.C. at 459, 251 S.E. 2d at 410 (quoting *State v. Alexander*, 179 N.C. 759, 765, 103 S.E. 383, 386 (1920)). Because it did not hear Dr. Groce's testimony concerning much of the significant data upon which he based his opinion the jury essentially was confronted with Dr. Groce's ultimate opinion on a take-it-or-leave-it basis.

B.

The Court of Appeals also noted that "Dr. Evans was allowed to testify as to his conversations with the defendant and that his conversations revealed some of the same points as those conducted by Dr. Groce." *State v. Allison*, 57 N.C. App. at 640, 292 S.E. 2d at 291. Any significance the Court of Appeals attached to that point is misplaced. As noted above, "[t]he jury must be given an opportunity to evaluate the expert's conclusion" by examining the underlying facts or data of the expert's opinion. *State v. Wade*, 296 N.C. at 463, 251 S.E. 2d at 412 (quoting *State v. Griffin*, 99 Ariz. at 49, 406 P. 2d at 401). In so doing, it determines the weight and credibility to be given that particular expert's opinion. Even though the jury heard some of the same information

tion kind of voices, (2) that he had heard his family plotting to kill him, (3) that he had heard his mother offer people money to have him killed, (4) that his family made comments to the effect that he ate too much and was greedy, (5) that he had heard shooting outside the house and knew from conversation in the house that "that [the shooting] was the hired killers who had been practicing to kill him and they were waiting for him to come out of the house."

from Dr. Evans which Dr. Groce used in reaching his psychiatric opinion,[3] the jury did not know that Dr. Groce used or even knew about the information to which Dr. Evans testified. Dr. Groce gave the basis of his opinion on voir dire, out of the jury's presence. The jury had no idea upon what facts or data Dr. Groce based his expert opinion, and, thus, it had no way of evaluating Dr. Groce's opinion.

The fact that the jury heard some of the same information to evaluate Dr. Evans' testimony does not make it the "same" information as that which was excluded because the purpose for which Dr. Evans' basis testimony could be used was limited. The data or facts which Dr. Evans testified he used as the basis for his opinion was not substantive evidence: it could only be used in evaluating Dr. Evans' opinion, not Dr. Groce's. In short, because the jury had no way of evaluating Dr. Groce's opinion his opinion was "a meaningless conclusion." *Id.* Defendant was deprived of the weight and credibility of Dr. Groce's testimony—testimony which was crucial in establishing his defense of insanity. Even if we were to assume that the information excluded was the same, this Court has held that if a party offers competent testimony but that testimony is excluded, the exclusion is not harmless error as a matter of law, even though others give the same or similar testimony, because *the offering party is entitled to the credibility and weight that would have been accorded the testimony of the excluded witness. State v. Rice*, 222 N.C. 634, 24 S.E. 2d 483 (1943); *State v. Dickey*, 206 N.C. 417, 174 S.E. 316 (1934); *Eaves v. Coxe*, 203 N.C. 173, 165 S.E. 345 (1932). The reason for the rule is that a jury might have believed the testimony of the witness whose evidence was excluded and for one reason or another might not believe the testimony of the witnesses whose testimony was received. *Eaves v. Coxe*, 203 N.C. at 177-78, 165 S.E. at 347. *See also Wells v. Bissette*, 266 N.C. 774, 147 S.E. 2d 210 (1966) (exclusion of testimony of two of the defendant's witnesses who

3. Furthermore, we emphasize the point that the jury heard only *some* of the same data in connection with Dr. Evans' subsequent testimony as that which was excluded. The fact that defendant told Dr. Groce he had heard shooting outside the house and knew from conversation in the house that "that [the shooting] was the hired killers who had been practicing to kill him and they were waiting for him to come out" was not mentioned at all. This omission is especially crucial in light of Dr. Groce's testimony that paranoid thoughts characteristic of defendant's illness are "thoughts of some intent to be harmed."

would have testified to the defendant's good character for purposes of supporting his credibility as a witness was prejudicial error); *Walker v. Continental Baking Co.*, 262 N.C. 534, 138 S.E. 2d 33 (1964) (exclusion of testimony corroborating the defendant's testimony was prejudicial error). Under the facts of this case, the credibility and weight accorded Dr. Groce's opinion testimony was crucial. Therefore, exclusion of some of the facts or data which provided the basis for Dr. Groce's opinion and which would help the jury evaluate that opinion was not harmless error.

IV.

In summary, we hold that the trial court erred in failing to follow the rule in *Wade* that juries are to hear the basis for a psychiatrist's (or psychologist's) expert opinion.[4] We also hold this error was prejudicial because there is a "reasonable possibility" that had the jury heard the evidence which was excluded it might well have accepted Dr. Groce's conclusion that defendant did not know the difference between right and wrong at the time of the incidents, and, thus, would have found defendant not guilty by reason of insanity. In other words, we hold "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached" by the jury. G.S. 15A-1443(a) (1978). Because of the prejudicial error committed defendant is entitled to a new trial.

In light of our holding above, it is unnecessary for us to address the remaining two contentions defendant presented to the Court of Appeals.

Finally, in examining the verdict sheets contained in the record we note each issue was submitted to the jury as a question which asked only whether defendant was guilty or not guilty of each charge for which he was tried. In effect, the jury was asked to render only general verdicts because the trial court neglected to include on the verdict sheet as one of the possible verdicts not guilty by reason of insanity. We suggest that the trial court, in the event of retrial, study closely the recommendations Justice Brock made in *State v. Linville*, 300 N.C. 135, 265 S.E. 2d 150

4. For an excellent discussion of this area of the law see Blakey, *Examination of Expert Witnesses in North Carolina*, 61 N.C.L. Rev. 1 (1982).

(1980), when he spoke for this Court on the order in which issues are to be submitted to the jury in insanity cases.

For the reasons stated, we reverse the decision of the Court of Appeals and remand to that court with instructions that it remand to the Superior Court, Gaston County, for a new trial.

Reversed and remanded.

TOWN OF ATLANTIC BEACH v. CECELIA YOUNG

No. 516PA82

(Filed 11 January 1983)

1. **Animals § 8; Municipal Corporations § 8.2— ordinance prohibiting keeping of animals, livestock and poultry within city limits—exception for house pets only**

Where a town ordinance prohibited the keeping of animals, livestock and poultry within the city limits "other than house pets," and the ordinance further provided that the prohibition, not the exception, "shall be interpreted to include horses, cows, goats, sheep, chickens and turkeys . . ." the ordinance clearly prohibited defendant from keeping goats and ponies within the town limits.

2. **Municipal Corporations § 30.3— validity of zoning ordinance—not unconstitutionally vague**

A zoning ordinance which prohibited defendant from maintaining two goats and a small pony at her residence was not unconstitutionally vague in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, § 19 of the North Carolina Constitution.

3. **Municipal Corporations § 30.3— zoning ordinance—not arbitrary and unreasonable**

A zoning ordinance which prohibited defendant from maintaining two goats and a small pony at her residence was not arbitrary and unreasonable in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, § 19 of the North Carolina Constitution where, pursuant to G.S. 160A-186, the legislature granted to municipal corporations the power to regulate domestic animals within its corporate limits, and where the health and welfare of the citizens of the State are legitimate public purposes.

4. **Municipal Corporations § 30.3— zoning ordinance—no violation of equal protection clause**

A zoning ordinance which prohibited defendant from keeping two goats and one pony in a house within the town's corporate limits did not violate the

equal protection clauses of the Fourteenth Amendment to the United States Constitution, and Article 1, §§ 1 and 19 of the North Carolina Constitution.

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

Justice CARLTON concurs in the result.

APPEAL by plaintiff pursuant to G.S. 7A-31 for discretionary review of the decision of the Court of Appeals (*Judge Whichard*, with *Judges Robert M. Martin* and *Harry C. Martin (now Justice)* concurring) reported at 58 N.C. App. 597, 293 S.E. 2d 821 (1982). The Court of Appeals affirmed the grant of defendant's motion for summary judgment and the denial of plaintiff's motion for summary judgment entered by *Rouse, J.*, on 1 June 1981 in Superior Court, CARTERET County.

Prior to 1 January 1978 defendant, Cecelia Young, lived in the Ocean Ridge Subdivision of Carteret County, North Carolina. On 1 January 1978 the town of Atlantic Beach annexed some property contiguous with its western border. Within this annexed area is the land on which defendant resides. Prior to the annexation ordinance being passed and up to the present time defendant has maintained livestock upon the premises on which she resides. At the present time she maintains two goats and one small pony.

Approximately eighteen months after the effective date of the annexation ordinance the town of Atlantic Beach enacted an ordinance which prohibits the keeping of animals, livestock and poultry within the city limits with an exception provided for house pets. The ordinance in part provides:

> Whereas it is deemed that the keeping of livestock, animals, and poultry within the city limits of the town is not consistent with the public health, safety and welfare, and indeed poses threats to both; then
>
> It shall be unlawful for any person, firm or corporation to keep, within the town limits, livestock, animals, or poultry other than housepets. This prohibition shall be interpreted to include horses, cows, goats, sheep, chickens and turkeys, but this list is not to be deemed all inclusive.

The ordinance prohibiting the keeping of animals, livestock and poultry was passed on 26 July 1979 and became effective on 26 August 1979. The town of Atlantic Beach brought this action on 8

October 1980, more than a year after the effective date of the ordinance, seeking a permanent injunction against defendant directing her to remove all animals other than house pets.

Defendant maintains now as she did then that her two goats and one pony are house pets within the meaning of the ordinance and that her pets present no greater threat to the health and welfare of the town of Atlantic Beach than any other house pet. In support of her contention plaintiff presented affidavits of two local doctors of veterinary medicine and the sanitation supervisor for Carteret County, all of whom stated that defendant's animals did not constitute a health hazard.

In late April, 1981, after discovery was completed both plaintiff and defendant moved pursuant to Rule 56 of the Rules of Civil Procedure for summary judgment. The motions were heard in the Superior Court of Carteret County by Judge Robert Rouse on 29 April 1981. On 1 June 1981 Judge Rouse ordered that plaintiff's motion for summary judgment be denied and that defendant's motion for summary judgment be granted.

The plaintiff then appealed to the North Carolina Court of Appeals which affirmed the judgment of Judge Rouse in an opinion filed 3 August 1982. Pursuant to G.S. 7A-31 plaintiff petitioned for discretionary review by this Court. The petition was allowed 5 October 1982.

Mason and Phillips, P.A. by L. Patten Mason, for plaintiff-appellant.

Cooper and Whitford by Neil B. Whitford, for defendant-appellee.

COPELAND, Justice.

[1] The plaintiff-appellant, Town of Atlantic Beach, raises one question for consideration by this Court. Did the trial court and the Court of Appeals err in allowing defendant-appellee's motion for summary judgment while denying plaintiff-appellant's motion for summary judgment? We believe that the trial court and the Court of Appeals misconstrued the clear meaning of the language of the ordinance in question and summary judgment should have been entered for the plaintiff pursuant to its motion under Rule 56 of the Rules of Civil Procedure.

In affirming the trial court's granting of defendant's motion for summary judgment, the Court of Appeals concentrated its discussion on the question of whether or not the two goats and one pony owned by the defendant were house pets. Such emphasis is misplaced and leads to a result which is contra to the intent of the ordinance as a whole. Whether the goats and pony are house pets is not the central issue in this case. Rather the focus is whether the two goats and one pony are prohibited under the ordinance. The language of the ordinance clearly states that goats and horses are prohibited. "This *prohibition* shall be interpreted to include *horses*, cows, *goats*, sheep, chickens and turkeys, but this list is not to be deemed all inclusive." (Emphasis added.) Without the above quoted sentence, the ordinance would arguably allow the keeping of ponies or goats within the city limits as house pets, if they could be shown to be house pets. However, the final sentence of the ordinance makes it clear that the prohibition is intended to include horses and goats.

Defendant contends that the final sentence does nothing more than define livestock and poultry and is therefore little more than surplusage. We cannot agree with the defendant's interpretation of the ordinance in question. The rules applicable to the construction of statutes apply equally to the construction and interpretation of municipal ordinances. *Perrell v. Beaty Service Co., Inc.*, 248 N.C. 153, 102 S.E. 2d 785 (1958). "In seeking to discover and give effect to the legislative intent, an act must be considered as a whole, and none of its provisions shall be deemed useless or redundant if they can reasonably be considered as adding something to the act. . . ." *State v. Harvey*, 281 N.C. 1, 19, 187 S.E. 2d 706, 718 (1972). *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968).

We believe that this ordinance must be read as a whole with each of its provisions given a full interpretation. The ordinance states that it is "unlawful . . . to keep, within the town limits, livestock, animals or poultry. . . ." This language unquestionably creates a prohibition against the keeping of various animals within the town's limits. However, the ordinance carves out an exception to the prohibition by allowing the keeping of house pets. After carving out this exception, the ordinance further provides that the prohibition, not the exception, "shall be interpreted

to include horses, cows, goats, sheep, chickens and turkeys. . . ." The language of this ordinance clearly provides that although there may be an exception for house pets, certain animals such as horses and goats will not be permitted even within the exception. "Where the language of a statute or ordinance is clear and its meaning unmistakable, there is no room for construction. . . ." *State v. Norfolk Southern Railroad Company*, 168 N.C. 103, 109, 82 S.E. 963, 966 (1914); *Perrell v. Beaty Service Co., Inc.*, 248 N.C. 153, 102 S.E. 2d 785 (1958).

The language of the ordinance prohibiting the keeping of animals, livestock and poultry is clear. The keeping of goats and ponies within the town limits of Atlantic Beach is prohibited. As a result, summary judgment should have been denied the defendant and granted to the plaintiff.

Defendant-appellee contends as she did before the Court of Appeals that the ordinance prohibiting the keeping of animals, livestock and poultry within the town limits of Atlantic Beach is constitutionally invalid. Defendant maintains that the ordinance in question is in violation of the due process and equal protection clauses of the United States Constitution as well as Article 1, Sections 1 and 19 of the Constitution of the State of North Carolina. We will address each of these challenges individually.

Before considering defendant's constitutional challenges to the ordinance, we point out that in order to raise constitutional claims against a municipal ordinance the defendant must produce evidence that she has sustained or is in immediate danger of sustaining a direct injury as a result of the ordinance. *Nicholson v. Education Assistance Authority*, 275 N.C. 439, 168 S.E. 2d 401 (1969). Even if the defendant has standing to raise constitutional challenges, the burden of establishing the unconstitutionality of an ordinance is upon him who assails it. *Schloss v. Jamison*, 262 N.C. 108, 136 S.E. 2d 691 (1964). The party challenging the constitutionality of an ordinance must provide the court with more than mere accusations, for the court, in its construction, will do everything possible to uphold the constitutionality of the ordinance. *Victory Cab Co., Inc. v. Shaw*, 232 N.C. 138, 59 S.E. 2d 573 (1950).

[2] Defendant-appellee first contends that the ordinance is unconstitutionally vague in violation of the due process clauses of

the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. We find no merit in defendant's challenge. As stated above the language of the ordinance unquestionably prohibits the keeping of horses and goats within the town limits of Atlantic Beach. Since defendant's claim only concerns two goats and one pony there is no doubt that she was put on notice of any violation since the ordinance expressly prohibits the keeping of horses and goats. Although defendant goes beyond the facts of this case in order to support her contentions, we emphasize that this Court, "will not undertake to pass upon the validity of the statute [or ordinance] as it may be applied to factual situations materially different from that before it." *Watch Co. v. Brand Distributors and Watch Co. v. Motor Market, Inc.*, 285 N.C. 467, 472, 206 S.E. 2d 141, 145 (1974).

[3] Defendant-appellee also challenges the validity of this ordinance on the grounds that it is arbitrary and unreasonable in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Once again we find no merit in defendant's claim.

The legislature has granted to municipal corporations like Atlantic Beach the power to regulate domestic animals within its corporate limits. G.S. 160A-186 provides:

> A city may by ordinance regulate, restrict or prohibit the keeping, running or going at large of any domestic animals, including dogs and cats.

In addition the legislature has provided in G.S. 160A-174 that, "A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens . . ." Through G.S. 160A-174 and G.S. 160A-186 the legislature has delegated to the Town of Atlantic Beach a part of its police power which may be exercised "to protect or promote the health, morals, order, safety and general welfare of society." *State v. Warren*, 252 N.C. 690, 694, 114 S.E. 2d 660, 664 (1960); *S. S. Kresge Co. v. Tomlinson and Arlan's Dept. Store v. Tomlinson*, 275 N.C. 1, 165 S.E. 2d 236 (1968). The Town of Atlantic Beach passed the ordinance in question pursuant to its police power as provided under G.S. 160A-186 and ex-

pressly stated that its purpose is to protect the health, safety and welfare of the citizens of Atlantic Beach.

In reviewing the validity of this ordinance this Court will look to see if the police power has been exercised within the constitutional limitations imposed by both the state and federal constitutions. *City of Raleigh v. Norfolk Southern Railway Co.*, 275 N.C. 454, 168 S.E. 2d 389 (1969). This review will not include an analysis of the motives which prompted the passage of this ordinance because, "so long as an act is not forbidden, the wisdom of the enactment is exclusively a legislative decision." *Mitchell v. Financing Authority*, 273 N.C. 137, 144, 159 S.E. 2d 745, 750 (1968); *S. S. Kresge Co. v. Tomlinson and Arlan's Dept. Store v. Tomlinson*, 275 N.C. 1, 165 S.E. 2d 236 (1968).

In order to determine whether this ordinance is unconstitutionally arbitrary and unreasonable we look to see if the ordinance is reasonably related to the accomplishment of a legitimate state objective. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E. 2d 542 (1970); *State v. Whitaker*, 228 N.C. 352, 45 S.E. 2d 860 (1947). We note that the mere assertion within the ordinance that it is for the public welfare is not enough in and of itself to bring the ordinance within a valid exercise of police power. *MacRae v. City of Fayetteville*, 198 N.C. 51, 150 S.E. 810 (1929). However, there is no question that the health and welfare of the citizens of this state are legitimate public purposes. We are therefore left the determination of whether the means employed, to-wit the contested ordinance, is reasonably related to the health and welfare of this state's citizens.

This Court has previously held that it is within the police power to regulate the keeping of cattle within the city limits of Charlotte. *State v. Stowe*, 190 N.C. 79, 128 S.E. 481 (1925). In this case we have no difficulty in finding on the face of this ordinance that prohibiting the keeping of animals other than house pets is reasonably related to the health and welfare of the citizens of the Town of Atlantic Beach. "In the exercise of an unquestioned police power much must necessarily be left to the discretion of the municipal authorities, and their acts will not be judicially interfered with, unless they are manifestly unreasonable and oppressive." *State v. Stowe*, 190 N.C. 79, 80-1, 128 S.E. 481, 482

(1925). We find nothing arbitrary, unreasonable or oppressive about this ordinance.

[4] Defendant appellee also challenges the ordinance of Atlantic Beach on the grounds that it violates the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Article I, Sections 1 and 19 of the North Carolina Constitution. There is no doubt that the police power as exercised by the Town of Atlantic Beach is subordinate to the equal protection guarantees of the federal and state constitutions. *State v. Scoggin*, 236 N.C. 1, 72 S.E. 2d 97 (1952); *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E. 2d 325 (1968). However, one of the basic principles involved in considering the validity of legislation assailed under equality provisions is that the state enjoys a wide range of discretion. *State v. Davis*, 157 N.C. 648, 73 S.E. 130 (1911).

Whenever a statute or ordinance is challenged as a violation of equal protection guarantees, the first determination to be made by a court is what standard of review will be used to decide constitutionality. "Traditionally, courts employ a two-tiered scheme of analysis. . . ." *Texfi Industries, Inc. v. City of Fayetteville*, 301 N.C. 1, 10, 269 S.E. 2d 142, 149 (1980). The first tier of review requires "strict scrutiny" in which the government must demonstrate that its action is necessary to promote a compelling state interest. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 39 L.Ed. 2d 306, 94 S.Ct. 1076 (1974). The second tier of review simply requires that the contested ordinance bear some rational relationship to a legitimate state interest. *New Orleans v. Dukes*, 427 U.S. 297, 49 L.Ed. 2d 511, 96 S.Ct. 2513 (1976). "When an equal protection claim does not involve a 'suspect class' or a fundamental right, the lower tier of equal protection analysis is employed." *Texfi Industries, Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E. 2d 142, 149 (1980).

We believe that the defendant does not fall within a suspect classification nor do we feel that the right to keep two goats and one pony in a house within a town's corporate limits is a fundamental right. We therefore will review this ordinance under the lower tier analysis. As indicated within this opinion the health and welfare of the citizens of this state is a legitimate state interest. In addition, a prohibition against animals, other than house

pets, within a town's corporate limits is rationally related to such a legitimate state concern. As a result we find that the ordinance passed by the Town of Atlantic Beach does not violate the equal protection rights guaranteed under the state and federal constitutions.

Defendant-appellee also challenges the validity of this ordinance on the basis that it was enacted under improper procedures since one vote was cast over the phone. We find no support for this contention in the record or briefs in this case. We must conclude that the ordinance was enacted within the guidelines established by the legislature and the Town of Atlantic Beach.

We therefore hold that the opinion of the Court of Appeals is reversed and this case remanded to that Court for a remand to Superior Court of Carteret County for summary judgment to be entered for the plaintiff, Town of Atlantic Beach.

Reversed and remanded.

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

Justice CARLTON concurs in the result.

J. FLOYD WILLIAMS AND WIFE, VARA BULLARD WILLIAMS v. BETHANY VOLUNTEER FIRE DEPARTMENT AND BENNY PLATO BULLARD

No. 327PA82

(Filed 11 January 1983)

1. **Evidence § 18— rules governing experimental evidence—inapplicability to jury view of fire truck**

The rules governing the admissibility of experiments were not applicable in determining whether the trial court acted properly in permitting the jury to view a fire truck and its flashing lights and to hear its siren.

2. **Trial § 13— competency of jury view of fire truck—no abuse of discretion**

In an action arising out of an intersection collision between plaintiff's automobile and defendant's fire truck, a jury view of the fire truck at the courthouse with its red lights flashing and its siren sounding was competent

(1) to illustrate the testimony of the witnesses concerning the appearance of the fire truck and its red flashing lights and the sound of its siren, and (2) as real evidence, and the trial court did not abuse its discretion in permitting the jury to see and hear the fire truck. G.S. 20-156(b); G.S. 20-157(a).

Justice CARLTON dissenting.

Chief Justice BRANCH joins in the dissenting opinion.

ON discretionary review of the decision of the Court of Appeals, 57 N.C. App. 114, 290 S.E. 2d 794 (1982), finding error in the judgment for defendants entered by *Clark, J.*, at the 2 February 1981 Session of Superior Court, CUMBERLAND County, and awarding a new trial to plaintiffs.

J. Floyd Williams commenced this action against defendants for damages suffered in a collision between his automobile and a fire truck owned by defendant Bethany Volunteer Fire Department and operated by defendant Bullard. Williams's wife, Vara, joined the action, alleging a claim for loss of consortium. Defendants answered, alleging contributory negligence and a counterclaim for damages to the fire truck.

Plaintiffs' evidence showed that the collision occurred at the intersection of rural paved roads 1006 and 1825 in Cumberland County, about eleven miles from Fayetteville. Floyd Williams was driving north on road 1006 as defendant Bullard was operating the fire truck in a westerly direction on road 1825. Traffic proceeding west on highway 1825 is required to stop at a stop sign before entering the intersection of the two roads, but in this instance the fire truck entered the intersection without stopping. Williams approached the intersection at about 42 m.p.h. and saw the fire truck when he was about seventy-five feet from the intersection. His view of road 1825 to the east was partially obscured by a house, trees, and a church located in the southeast quadrant of the intersection despite the fact that it was January and little warm-weather foliage was present. Although Williams applied his brakes, he could not avoid colliding with the back end of the truck. He had not heard any siren nor seen any flashing lights coming from the fire truck before the collision. Williams suffered personal injuries and damages to his automobile.

Defendants' evidence showed that Bullard had received a fire call. He got into the red fire truck, which was ten feet high, thirty

feet long, equipped with pumps, hoses, red lights, and siren. He activated the red flashing lights and siren. The siren was on "high-low frequency," making two sounds: "it goes up real loud and then back down, high-low." He proceeded west on road 1825 and it took five to ten seconds to travel to the intersection. As he approached the intersection, he reduced the truck's speed to about ten m.p.h. The lights and siren continued to function. He looked right and left, saw no approaching traffic, and proceeded into the intersection. Williams's car struck the left side of the truck at the rear wheels.

At the conclusion of defendants' testimony but before each side rested its case, motions were made to allow the jury to see the fire truck and its flashing lights and to hear its siren. Plaintiffs moved that the jury view be held at the intersection where the accident occurred, and defendants asked that it be done on Person Street outside the courthouse in Fayetteville. During the discussion, plaintiffs withdrew their motion. The trial judge then allowed defendants' motion for the jury view over plaintiffs' objection.

By its verdict the jury found that plaintiff Floyd Williams was not injured or damaged by the negligence of defendants and that Bethany Volunteer Fire Department was not damaged by the negligence of Floyd Williams.

On appeal to the Court of Appeals, plaintiffs argued that the trial judge committed prejudicial error in allowing defendants' motion for the jury view of the fire truck at the courthouse. The Court of Appeals found the granting of the motion to be error and remanded the case for a new trial. We allowed defendants' petition for discretionary review.

Anderson, Broadfoot, Anderson, Johnson & Anderson, by Henry L. Anderson, Jr., for plaintiff appellees.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert W. Sumner and Robert M. Clay, for defendant appellants.

MARTIN, Justice.

Only one question is presented to this Court: whether the Court of Appeals erred in holding that the trial judge committed prejudicial error in allowing defendants' motion for a jury view of

the fire truck. We conclude that the Court of Appeals did so err and, accordingly, reverse.

[1] Although it did not expressly so state, the Court of Appeals evidently treated the jury view of the fire truck as an experiment. It applied the rules governing admissibility of experiments to the facts and found that the trial judge's ruling did not comply with these standards. In treating the jury view as an experiment, the Court of Appeals erred.

After allowing defendants' motion, the trial court instructed the jury:

> All right. Now, members of the jury, at this the defendant is going to introduce into evidence for your benefit in this case the sound of the siren on a fire truck. This is going to be done in this manner. The jury is going to be taken as a whole in a body to a location out here beside the courthouse on Person Street where you will stand on the sidewalk. The siren on the vehicle will be activated and the vehicle will proceed from the location where it is to a point equal—or to your location.
>
> Now, during this time, you are simply to listen, to observe the truck. This is not in any way intended to duplicate the conditions that existed at the time on—as they were on the 29th of January of 1980, but is simply to allow you the opportunity to hear the siren under the circumstances and the conditions that it will be presented here on Person Street.
>
> During this time that this is being presented to you, you are not to discuss it among yourselves or with others who may be there at the scene, but simply to listen and to observe the truck.

As to what then happened, the record shows:

> (The fire truck proceeded to approach the jury coming down Person Street with lights on and siren sounding. The truck passed the jury, after which the following proceedings were had.)
>
> COURT: All right. Jurors will return to the courtroom, please.

Neither counsel nor the court regarded the exhibition of the fire truck as an experiment. The rules governing the admissibility of experiments contained in *Mintz v. R.R.*, 236 N.C. 109, 72 S.E. 2d 38 (1952), and 1 Brandis on North Carolina Evidence § 94 (1982) are not applicable to the facts of this appeal. *See also State v. Mayhand*, 298 N.C. 418, 259 S.E. 2d 231 (1979).

[2] The evidence placed before the jury by the jury view was relevant and competent for at least two reasons. First, it was admissible to illustrate the testimony of the witnesses. Illustrative evidence is competent to enable the jury to understand the oral testimony and to realize more completely its cogency and force. *Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326 (1953). Various witnesses had attempted to describe the flashing red lights and the sound of the siren.

Defendant Bullard testified:

> The light on top of the cab is a round circular light, measuring about 12 inches across and it has four lights in it. It throws out a red light and twists around a circle.
>
> . . . .
>
> . . . The fire truck had flashing lights on it. It's got two in the grille or mounted on the front of the truck. It's got one mounted in the center of the cab that measures about 12 inches across. When I say "cab" I mean the front of the truck, the cab, the part you sit in. The light is located right in the center, it is on top of the cab and there's two on the tail end of the truck mounted on the sides.
>
> . . . .
>
> . . . The light on the top of the cab, when I turn it on, rotates around in a circle. It emits a red light and it goes around in a circle. . . .
>
> . . . .
>
> . . . I turned the siren on the high-low frequency. It's two sounds, it goes up real loud, then back down, high-low.

The witness Forney testified: "The red light was spinning, flashing, and the siren was screaming. The siren from the position that I was standing was very audible, and I was able to see the flashing light."

Donna Nunnery testified:

> On the morning of January 29, 1980, I was at home doing the wash, depending at what point in time you mean, I was in and out of the house. While I was doing the wash that morning, I heard a fire truck's siren when I was outside hanging up clothes in my back yard. . . .
>
> . . . It goes "woo, woo, woo."

David Royal testified: "On January 29, 1980, I was at the crossroads store, the Bethany Grocery Store. . . . The lights were flashing on the truck. . . . I heard the truck's siren as it approached the intersection."

Here a proper foundation was laid for the jury view because all the evidence indicated that the identical fire truck was available and that the flashing lights and siren were in the same condition as at the time of the wreck. *State v. Barfield*, 298 N.C. 306, 336, 259 S.E. 2d 510, 533 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137 (1980); *Hunt v. Wooten, supra*, 238 N.C. 42, 76 S.E. 2d 326 (1953).

The evidence being illustrated by the jury view was relevant concerning the issue of whether the parties had complied with N.C.G.S. 20-156(b) and -157(a) (1978). These statutes require a motorist to yield the right-of-way to a fire truck that is giving a warning signal by appropriate light *and* by siren audible under normal conditions for a distance of not less than 1,000 feet. *Funeral Service v. Coach Lines*, 248 N.C. 146, 102 S.E. 2d 816 (1958). The evidence produced by the jury view was competent for consideration by the jury for the purpose of illustrating the testimony of the witnesses concerning the appearance of the fire truck, the red flashing lights, and the sound of the siren.

The trial court is not required to instruct the jury with respect to evidence admitted for illustrative purposes in the absence of a request to do so. *State v. Rupard*, 299 N.C. 515, 263 S.E. 2d 554 (1980); *State v. Cade*, 215 N.C. 393, 2 S.E. 2d 7 (1939). Here plaintiffs failed to so request, and they cannot now complain that they were hurt by the introduction of evidence whose thrust they may have been able to limit.

The jury view of the fire truck was also competent as real evidence. "Real evidence, in the strict sense of the term, is that

which is furnished by producing the thing itself for inspection instead of having it described by witnesses." 1 Brandis, *supra*, § 117. The fire truck played a direct, actual role in the collision which is the subject of this lawsuit. It is real evidence. *State v. Oliver*, 302 N.C. 28, 52-53, 274 S.E. 2d 183, 198-99 (1981); *State v. Harbison*, 293 N.C. 474, 238 S.E. 2d 449 (1977). Although the trial court did not make findings of fact with respect to the motion for jury view, the evidence fully supports the court's exercise of its discretion in determining the identity of the fire truck and the unchanged condition of the flashing lights and siren. *Id.*

Plaintiffs argue that the jury view of the fire truck was prejudicial to their case. This may be, but that does not make it error. It is not a valid ground for objection to evidence that it tends to prove the fact in question more conclusively when the object itself is exhibited to the jury instead of being left to the description by witnesses. *State v. Brooks*, 287 N.C. 392, 215 S.E. 2d 111 (1975). Evidence will not be excluded simply because it may have undue weight with the jury. *Id.* " 'Whatever the jury may learn through the ear from descriptions given by witnesses, they may learn directly through the eye [or ear] from the objects described.' " *Id.* at 407, 215 S.E. 2d at 122 (quoting 1 Stansbury's N.C. Evidence § 117 (Brandis rev. 1973)).

This is true even though the object, such as a fire truck, is too bulky to be brought into the courtroom. It seems reasonable that the size of the courtroom should not necessarily limit the evidence to be presented to the jury. In *State v. Taylor*, 226 N.C. 286, 37 S.E. 2d 901 (1946) (a case decided before the adoption of N.C.G.S. 15A-1229 (1978) which codified jury view in criminal cases), this Court upheld the allowance of a jury view of an automobile in the courtyard. *See State v. Smith*, 13 N.C. App. 583, 186 S.E. 2d 600, *cert. denied*, 281 N.C. 157 (1972); *Toler v. Brink's, Inc.*, 1 N.C. App. 315, 161 S.E. 2d 208 (1968). The concept of a courtroom without walls is not new. 1 Brandis, *supra*, § 120. In fact, one remembers with some nostalgia presiding over hearings in the Superior Court of Clay County on the tree-shaded courthouse lawn in summer! Whether to allow the jury to leave the courthouse to see and hear the fire truck was a matter in the sound discretion of the trial judge. *Huff v. Thornton*, 287 N.C. 1, 213 S.E. 2d 198 (1975); *Paris v. Aggregates, Inc.*, 271 N.C. 471, 157 S.E. 2d 131 (1967). The exercise of discretion by the trial court in

granting or denying a jury view will not be disturbed on appeal in the absence of gross abuse. *Huff v. Thornton, supra; Paris v. Aggregates, Inc., supra;* 75 Am. Jur. 2d *Trial* § 74 (1974). We find no abuse of the court's discretion in allowing this jury to see and hear the fire truck.

Again we note that plaintiffs made no request for limiting instructions with respect to the jury view. Plaintiffs did request instructions on other matters, and at the conclusion of its charge, the court gave counsel another opportunity by inquiring, "Anything further, gentlemen?" Plaintiffs' counsel responded "no."

We find no prejudicial error in the granting of the motion for the jury view of the fire truck and, accordingly, reverse the decision of the Court of Appeals.

Reversed.

Justice CARLTON dissenting.

I respectfully dissent for the reasons stated by the Court of Appeals, 57 N.C. App. 114, 290 S.E. 2d 794 (1982). I disagree with the majority which holds that this was not an experiment. The truck was placed 1,000 feet down the city street so the jury could hear the siren from and during the truck's travel over that distance. The applicable statutes set out 1,000 feet as the minimum distance over which the siren must be heard. The activity at issue certainly appears to be an attempt to conduct an experiment and, as the Court of Appeals explains, the requirement that an experiment be made under conditions "substantially similar" to those prevailing at the time of the occurrence at issue clearly was not met here.

The majority concedes that this evidence may have been prejudicial to plaintiff and I certainly agree. It is, I think, a matter of common knowledge that the same sound emanating from the same source may be heard with a different intensity in different settings. Indeed, according to plaintiff's brief, an expert witness stated in a written report submitted in support of plaintiff's motion for a new trial that the "sound heard by the jury could have been *four or more times greater* than the acoustic in-

tensity that could have been heard by the driver of the vehicle that struck the fire truck."

I vote to affirm the Court of Appeals.

Chief Justice BRANCH joins in this dissenting opinion.

JOHNNY CALVIN SHEW AND JUNIOR BROTHERTON v. SOUTHERN FIRE & CASUALTY COMPANY AND IREDELL COUNTY

No. 543A82

(Filed 11 January 1983)

Insurance § 105— insured hitting police car after high speed chase—duty of insured to reimburse county as condition of suspended sentence—insurance company's refusal to reimburse—summary judgment for insurance company proper

In an action arising from an insured's collision with a police automobile after a high speed chase wherein the insured pleaded guilty to driving 130 miles per hour in a 55 miles per hour zone to elude an officer and where the insured was given a suspended sentence on the condition, among other things, that he reimburse the county for damages to its automobile, and where the insurance company refused to reimburse the insured for damages paid by the insured to the county, the trial judge properly entered summary judgment for the insurer since an insurer has no legal obligation to defend a *criminal* proceeding brought against an insured arising out of the operation of an automobile causing injury or damages, and since, as a matter of law, defendant company was under no legal obligation to its insured to pay restitution assessed as a result of a criminal judgment.

DEFENDANT, Southern Fire & Casualty Company (hereinafter defendant Company), appeals from a decision of the Court of Appeals, one judge dissenting, which reversed a decision rendered by *Collier, J.*, entered 8 July 1981 in Superior Court, IREDELL County, granting summary judgment in favor of defendant Company.

On 7 May 1978, the plaintiff Junior Brotherton owned a 1978 Dodge automobile which was covered by a policy of liability insurance pursuant to Article 9A, Chapter 20 of the North Carolina General Statutes (the Motor Vehicle Safety and Financial Responsibility Act of 1953).

The insurance contract provided *inter alia* that the defendant Company would pay "on behalf of the insured all sums which the

insured shall become legally obligated to pay because of . . . property damage to which this insurance applies, caused by an occurrence and arising out of garage operations, including only the automobile hazard for which insurance is afforded . . . ."[1] The insurance policy further provided that persons insured with respect to the automobile hazard included "any person while using, with permission of the named insured, any automobile to which the insurance applies under the automobile hazard, provided his actual operation . . . is within the scope of such permission . . . . "

On 7 May 1978 Plaintiff Johnny Calvin Shew, Brotherton's stepson and a member of his household, was operating the 1978 Dodge automobile covered by defendant Company's policy of insurance. Shew was operating the vehicle with the permission of his stepfather and therefore was an "insured" under the policy. Shew was seventeen years old at the time and had been drinking beer. Shew failed to stop for a member of the Iredell County Sheriff's Department. A high speed chase ensued, and Shew eventually crashed into a roadblock of cars from the Sheriff's Department.

As a result of this incident, Shew pled guilty to charges of: driving 130 miles per hour in a 55 mile per hour zone while attempting to elude apprehension; misdemeanor assault with a deadly weapon (an automobile); and injury to personal property (two Iredell County vehicles). By judgment entered 17 August 1978, Shew received a two year probationary sentence, one condition of which was that he

> reimburse the county for property which was damaged or lost due to this offense in the amount of _____. This restitution shall be an addition to what insurance coverage fails to pay as a result of liability damages or if insurance refuses to pay such damages. In the event that restitution is made by this individual for the loss of this vehicle, two (2) estimates are to be given to the Probation Officer subject to approval

1. Plaintiff Brotherton conducted garage operations. Included in the garage insurance coverage is "Automobile Hazard 1," defined as: "(2) the occasional use for other business purposes and the use for non-business purposes of any automobile owned by or in charge of the named insured and used principally in garage operations, and (3) the ownership, maintenance or use of any automobile owned by the named insured while furnished for the use of any person."

by the Court for payment by this individual under his direction. All bills, either covered or otherwise by insurance are to be filed with the Probation Officer to demonstrate compliance with this restitution.

By complaint filed 9 July 1980, and amended complaint filed 25 February 1981, plaintiffs alleged that *as part of the criminal judgment* against Shew, he was ordered to pay the sum of $5,748.00 to Iredell County for property damages; that he had paid and was continuing to pay the sum of $275.00 per month toward the satisfaction of the judgment; that under the terms of the insurance contract, plaintiffs had made demand upon the defendant Company to pay the damages to the Iredell County Sheriff's Department, which damages the defendant Company had willfully refused to pay; and that the defendant Company was liable to indemnify the plaintiffs under the policy of liability insurance. In their prayer for relief, plaintiffs asked that the defendant Company be required to pay the amount of unpaid damages to Iredell County and to reimburse the plaintiffs for the amount already paid.

Defendant Company moved for summary judgment on 25 June 1981, by which time Shew's obligation to Iredell County had been fully satisfied. The trial court granted defendant's motion for summary judgment by order filed 13 July 1981. Plaintiffs appealed.

In an opinion reported at 58 N.C. App. 637, 294 S.E. 2d 233 (1982), a divided panel of the Court of Appeals reversed the order of the trial court and the defendant Company appealed to this Court.

Edwin G. Farthing, attorney for defendant-appellant.

Hall and Brooks, by John E. Hall and William F. Brooks, for plaintiff-appellee.

MEYER, Justice.

The sole issue before us is whether the defendant, Southern Fire & Casualty Company, is legally obligated under a contract of insurance to reimburse the plaintiffs for monies paid in restitution assessed as a result of a criminal judgment against the plaintiff Shew. We hold that it is not.

The Court of Appeals, in reversing the trial court's order granting summary judgment for the defendant Company, reasoned as follows:

> Without question, had Iredell County chosen to sue Shew and Brotherton . . . among other necessary matters, Southern Fire & Casualty Company would have assumed its responsibility to defend the suit and would have paid any judgment rendered against Shew and Brotherton. Here, plaintiffs simply elected to pay damages to Iredell County when Southern Fire & Casualty Company elected not to do so and to sue for reimbursement. For practical purposes, plaintiffs stand in the shoes of Iredell County prior to recovery of the damages with the same rights and subject to the same defenses. Under these circumstances, the purpose of liability insurance, to protect those damaged by the negligent operation of an automobile, is fulfilled by allowing coverage under the policy. *See Harrelson v. State Farm Mutual Automobile Insurance Co.*, 272 N.C. 603, 158 S.E. 2d 812 (1968); *see also* G.S. 20-309 to -319.

58 N.C. App. at 642, 294 S.E. 2d at 236.

As Judge Becton pointed out in his dissenting opinion:

> The majority's resolution of this appeal overshadows several practical problems. First, the insurance company is not a party to the criminal action and, even if it knew about the criminal action, it could not participate. Second, although the burden of proof is more onerous in criminal cases than in civil cases (and that was not a factor here, since Shew pleaded guilty), there is usually no defense (or not as vigorous a defense) on the issue of damages at criminal trials since the criminal defendant is naturally more concerned about guilt or innocence. Third, restitution is completely within the discretion of the trial court. Defendant may be correct when it argues: "If criminal restitution is covered by insurance, . . . a Homeowner's Liability Insurance Policy could be called upon to pay restitution when an insured homeowner intentionally and criminally shoots someone on his property and restitution is provided for the victim or the victim's family." Fourth, although contributory negligence on the part of the Sheriff's Department could be raised in Shew's lawsuit

> against the insurance company, the insurance company's suggestion which follows, that the Sheriff's Department was not acting reasonably and prudently, graphically shows why the resolution of the contributory negligence issue should be made in a civil trial *prior* to any judgment of restitution in a criminal action.

58 N.C. App. at 644, 294 S.E. 2d at 237.

Putting aside the practical problems alluded to by Judge Becton, we must first emphasize that at no time has plaintiffs' *civil liability* to Iredell County been addressed. We cannot, nor should we now attempt to, predict the results of a civil action brought by the County for damages it suffered as a result of plaintiff Shew's intentional acts. Rather, this is an action brought by an insured for recovery of monies paid as a result of a criminal judgment and an order to pay restitution *as a condition of probation.*

G.S. § 15A-1343(b)(6) permits the court, as a condition of probation, to require a defendant to "[m]ake restitution or reparation for loss or injury resulting from the crime for which the defendant is convicted." Reimbursement to Iredell County for the property damaged by Shew was in the nature of reparation—payment for the restoration to good condition of persons or property so injured. *See* Annot., Probation—Reparation to Injured Victim, 79 A.L.R. 3d 976 (1977). The amount determined must be limited to that supported by the evidence. G.S. § 15A-1343(b)(6). It may, but does not necessarily represent the amount of damages that might be recoverable as a result of a civil action. *See* Annot., 79 A.L.R. 3d 976.

We do not agree with the plaintiffs' position, as adopted by the Court of Appeals, that the sum of $5,748.00 paid to Iredell County in restitution as a condition of probation in order to escape an active jail sentence can properly be viewed as somehow analogous to damages incident to a civil judgment. The "duty to pay reparations does not affect, and is not affected by, the victim's right to institute a civil action for damages against the defendant based on the same conduct, although, if the victim recovers, a setoff might be ordered for the money already received by the victim under the condition of probation." 79 A.L.R. 2d at 992, citing to *People v. Stacy,* 64 Ill. App. 2d 157, 212 N.E. 2d 286 (1965). Although we do not address the question here,

Judge Collier's order contemplates at least the possibility that civil liability could be imposed. Restitution should not be used as a substitute for determination in the proper forum of a defendant's civil liability:

> Criminal and civil liability are not synonymous. A criminal conviction does not necessarily establish the existence of civil liability. Civil liability need not be established as a prerequisite to the requirement of restitution as a probation condition . . . .

People v. Heil, 79 Mich. App. 739, 748, 262 N.W. 2d 895, 900 (1977). *See People v. Pettit*, 88 Mich. App. 203, 276 N.W. 2d 878 (1979). In fact, this Court has drawn a distinction between restitution as a condition of probation, and damages, which might possibly be assessed as the result of a civil action, by stating in *State v. Simmington*, 235 N.C. 612, 614, 70 S.E. 2d 842, 844 (1952): "While the court was without jurisdiction to compel defendant to pay the damages inflicted on penalty of imprisonment, this does not mean that it might not suspend the execution of the sentence of imprisonment on condition the defendant compensate those whom he had injured." There is, however, authority to support, as a condition of probation, a requirement that defendant have the financial ability to pay a judgment rendered against him in a civil action for damages. *People v. Marks*, 340 Mich. 495, 65 N.W. 2d 698 (1954); *People v. D'Elia*, 73 Cal. App. 2d 764, 167 P. 2d 253 (1946). Furthermore, in *Flores v. State*, 513 S.W. 2d 66 (Tex. Crim. 1974), the court affirmed a judgment which placed defendant on probation on condition that he pay restitution to an insurance company as reimbursement for medical expenses paid to the victim of the crime.

Having recognized the crucial distinction between an insurance company's obligation to pay damages pursuant to a civil judgment, as opposed to restitution ordered as a condition of a criminal probationary judgment, we reach the threshhold question: whether the defendant Company is legally obligated under the terms of the insurance contract to pay (or reimburse plaintiff for his payment of) restitution assessed as a result of the criminal probationary judgment against Shew.

Unlike a judgment in a civil action, here Shew was not "legally obligated" to make restitution. It was clearly a condition of his

probation which he voluntarily undertook in order to avoid imposition of an active sentence. As we stated in *State v. Simmington*, 235 N.C. 612, 614, 70 S.E. 2d 842, 844, "[s]uch disposition of the case merely gave him the option to serve his sentence or accept the conditions imposed . . . . If he was not content, he had the right either to reject the conditions or to appeal."

As an insurer has no legal obligation to defend a *criminal* proceeding brought against an insured arising out of the operation of an automobile causing injury or damages, *see* 6C J. Appleman, Insurance Law and Practice § 4431 (Buckley ed. 1979), so no obligation arises from the disposition of the criminal proceeding. Moreover, it is a basic proposition of public policy, requiring no citation of supporting authority, that an insured is not allowed to profit from his own wrongdoing. To require the defendant Company to reimburse plaintiffs for the amount ordered as restitution or to hold that the defendant Company was legally obligated to pay the amount to Iredell County would be tantamount to condoning insurance against the results and penalties of one's own criminal acts. This is against public policy. *See* 1 Couch on Insurance 2d § 1:36 (2d ed. 1959); *see also* 7 Blashfield Automobile Law and Practice § 291.1 (3d ed. 1966).

As a matter of law, defendant Company is under no legal obligation to its insured to pay restitution assessed as a result of a criminal judgment. We therefore hold that the trial judge properly granted summary judgment in favor of the defendant Company.

The decision of the Court of Appeals is reversed and the judgment of the trial court granting summary judgment in favor of the defendant Company is reinstated.

Reversed and remanded.

STATE OF NORTH CAROLINA v. BOYD STEVEN FREEMAN

No. 514A82

(Filed 11 January 1983)

1. **Burglary and Unlawful Breakings § 5.11— insufficient evidence of intent to rape as alleged**

The evidence in a first degree burglary case was insufficient to permit the jury to find that defendant broke into the victim's apartment with the intent to commit the felony of rape therein as alleged in the indictment where it tended to show that defendant knocked on the glass patio door of the victim's apartment at 11:00 p.m.; the victim was fully clothed at the time and the drapes in front of the glass door were closed; defendant was wearing a sweat shirt with a hood and blue jeans; in response to defendant's gesture, the victim slid the glass door open a few inches; defendant told the victim that he had a truck running and needed to use a telephone; the victim refused, and defendant forced the door open and pushed his way inside her apartment; after a struggle, the victim managed to push defendant outside; defendant forced his way in again, and the victim was again successful in pushing him out; and as the victim continued to scream angrily and loudly, she heard defendant say that the victim should not have enticed him; and the victim then fled through her front door to a neighbor's apartment where she called the police. G.S. 14-51.

2. **Burglary and Unlawful Breakings § 5.11— acquittal of attempted rape—conviction of burglary with intent to commit attempted rape**

The jury's acquittal of defendant on a charge of attempted rape did not preclude a finding of guilt of first degree burglary under an indictment alleging that defendant broke and entered the victim's dwelling with the intent to commit the felony of attempted rape.

3. **Burglary and Unlawful Breakings § 7.1— verdict of burglary—insufficient evidence of intent to commit felony—consideration as verdict of misdemeanor breaking and entering**

By finding defendant guilty of first degree burglary, the jury necessarily found facts which would support a conviction of misdemeanor breaking and entering, and where the evidence was insufficient to show an intent to commit a felony, the verdict will be treated as a verdict of guilty of misdemeanor breaking and entering. G.S. 14-54(a) and (b).

APPEAL by defendant from judgments of *Lane, S.J.*, entered at the 30 March 1982 Criminal Session of Superior Court, MARTIN County, sentencing defendant to a term of life imprisonment upon his conviction of first degree burglary and to a term of not less than nor more than two years upon his conviction of assault on a female.

Defendant was charged with first degree burglary under the following indictment:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 20th day of October, 1981, in Martin County Boyd Steven Freeman unlawfully and wilfully did feloniously during the nighttime between the hours of 11:00 P.M. and 12:00 midnight break and enter the dwelling house of Melody Anne McGinnis located at 101-C Woodside Avenue, Williamston, N.C. At the time of the breaking and entering the dwelling house was actually occupied by Melody Anne McGinnis. *The defendant broke and entered with the intent to commit a felony therein, attempted rape* . . . .[1]

(Emphasis added.)

The indictment further charged the defendant with attempted rape.

At the close of the evidence, the trial judge instructed the jury on the elements of first degree burglary, attempted second degree rape, and assault on a female. The jury found the defendant guilty of the charges of burglary and assault on a female and acquitted him of attempted rape.

The primary question presented for our review is whether there was sufficient evidence presented at trial on the question of defendant's intent to commit the felony of rape to support his conviction of first degree burglary. We find that there was not. The following facts dictate this conclusion:

Melody Anne McGinnis testified that on 20 October 1981, at approximately 11 o'clock p.m., she was watching television in her living room when she heard a loud knock on her glass patio door. She was fully clothed at the time and the drapes in front of the

1. N.C. Gen. Stat. § 14-27.6 (1981) provides in pertinent part that "[a]n attempt to commit first-degree rape as defined by G.S. 14-27.2 . . . is a Class F felony. An attempt to commit second-degree rape as defined by G.S. 14-27.3 . . . is a Class H felony." Although defendant does not challenge the sufficiency of the indictment, there emerges the interesting question of whether a defendant can properly be indicted for first degree burglary based on an *intent* to commit the felony of *attempted* rape. It would seem that the better practice would be for a burglary indictment to simply charge the defendant with the intent to commit rape, which intent, coupled with an overt act falling short of the completed act, would further support a separate charge of attempted rape.

glass door were closed. She turned the patio light on, pulled back the drapes, and saw the defendant, who motioned to her to open the door. He was wearing a sweat shirt type jacket with a hood, and blue jeans. She had never seen the defendant before. In response to his gesture, she slid the glass door open a few inches. She heard the sound of a diesel truck engine in the background. The defendant told Miss McGinnis that he had a truck running and needed to use her telephone. She refused him. He asked if there was a phone nearby. As she answered, he forced the door open and pushed his way inside her apartment. They struggled and Miss McGinnis managed to push the defendant outside. She was "very angry," "furious," and screaming loudly. The defendant forced his way in again, this time knocking the sliding glass door off its track. Miss McGinnis was again successful in pushing him out. She continued to scream angrily and loudly, during which time she heard the defendant say, "You shouldn't have enticed me." Unable to close the glass door securely, Miss McGinnis fled through her front door to a neighbor's apartment where she called the police.

On cross examination, Miss McGinnis stated that the defendant had made no verbal threats to her, had made no obscene remarks, and had no weapon that she could see.

The defendant was apprehended shortly after the incident when law enforcement authorities conducted a search of a warehouse area located near Miss McGinnis' apartment and found him inside the sleeper cab of a truck. He agreed to accompany the officers back to the apartment where Miss McGinnis identified him as the intruder.

Rufus L. Edmisten, Attorney General by George W. Boylan, Assistant Attorney General, for the State.

J. Melvin Bowen and James R. Batchelor, Jr., Attorneys for defendant-appellant.

MEYER, Justice.

I

[1] Defendant first assigns as error the trial court's denial of his motion to dismiss the burglary charge for insufficient evidence on the question of his intent to commit the felony of rape.

For a jury to properly convict a defendant of first degree burglary, the State must produce sufficient evidence at trial that a breaking and entering of an occupied dwelling occurred during the nighttime and that the defendant had the intent to commit a felony therein. N.C. Gen. Stat. § 14-51 (1981); *State v. Jones*, 294 N.C. 642, 243 S.E. 2d 118 (1978); *State v. Garrison*, 294 N.C. 270, 240 S.E. 2d 377 (1978); *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976). The intent element of the crime of burglary is ordinarily a question of fact for the jury, and is generally proved by circumstantial evidence. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). The felonious intent proven must be the felonious intent alleged in the indictment. *State v. Joyner*, 301 N.C. 18, 269 S.E. 2d 125 (1980); *State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977).

"Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. at 750, 208 S.E. 2d at 508. For example, in *Bell*, this Court held that the following evidence was sufficient to carry the case to the jury and to support a permissible inference that defendant intended to commit the felony of rape.

> [D]efendant entered the sleeping apartment of Bonnie Louise Whicker in the nighttime by cutting the window screen; that he got in bed with his intended victim, placed a hand over her mouth when he was discovered, threatened to cut her throat if either she or her sister screamed, and pulled up his outside pants and ran from the room when the other girls appeared and turned on the light.

Id.

By contrast, in *State v. Dawkins*, 305 N.C. 289, 287 S.E. 2d 885 (1982), we reversed a defendant's first degree burglary conviction where the evidence of intent included the fact that the defendant broke into the victim's home in the early morning hours wearing shorts, a raincoat, a knee-high cast and a gym shoe. We held that this evidence was "too ambiguous, standing alone, to do more than raise a possibility or conjecture that the defendant had the intent to commit rape as charged in the bill of indictment." *Id.* at 290, 287 S.E. 2d at 886.

The circumstances surrounding the incident in the case now before us present an even weaker argument than those in *Daw-*

kins for finding an intent to commit the felony of rape. There was nothing in defendant's dress or demeanor to suggest an intent to commit rape. The only words spoken by the defendant, apart from requesting the use of a telephone, were "You shouldn't have enticed me." These words were spoken only after Miss McGinnis pushed defendant out of the apartment for the second time. In light of Miss McGinnis' testimony that she was fully clothed and in no way encouraged the defendant, the words are at best ambiguous and, in the context of the incident, are virtually meaningless.

"The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the house." *State v. Tippett*, 270 N.C. 588, 594, 155 S.E. 2d 269, 274 (1967). *See State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506. There is, however, no evidence in this case to support a finding that at the time defendant broke and entered the apartment, he intended to rape Miss McGinnis, or even that the assault upon Miss McGinnis was committed with the intent to commit rape. Rather, it appears from this victim's own testimony that the assault was committed to effectuate defendant's efforts to gain entrance into the apartment. On the record before us we find the evidence insufficient to permit a rational trier of fact to conclude beyond a reasonable doubt that the defendant broke into Miss McGinnis' apartment with the intent to commit the felony of rape. We hold that the trial court erred in denying defendant's motion to dismiss the burglary charge.

II

[2] Defendant further contends that the trial court erred in refusing to set aside the verdicts as inconsistent. He argues that the same intent to commit rape is an element of both the offenses of burglary and attempted rape, and therefore "by acquitting of attempted rape and convicting of assault on a female, the jury did not find that the defendant had the intent to commit rape."

We note first that there are two elements of attempted rape: the *intent* to commit the rape and an *overt act* done for that purpose which goes beyond mere preparation but falls short of the completed offense. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). The jury might well have found the requisite intent to commit the rape, thus justifying defendant's conviction of first

degree burglary, yet found insufficient evidence, under the instructions given, of an overt act going beyond mere preparation. As discussed above, Miss McGinnis' own testimony indicated that the defendant assaulted her in an effort to gain entrance into her apartment. On this issue the trial judge instructed as follows:

> So, I charge if you find from the evidence beyond a reasonable doubt that on or about the 20th of October, 1981, the defendant, Boyd Steven Freeman, intended to rape and carnally know Melanie Ann McGinnis, and that in furtherance of that intent he broke into the apartment of the said Miss McGinnis, grappled with her and grabbed her arms, legs, and her thighs to bring this about, and that in the ordinary and likely course of things, he would have completed the crime of rape had he not been stopped or prevented from completing his apparent course of action, it would be your duty to return a verdict of guilty of attempted rape. However, if you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

We note further that although intent to commit a felony for purposes of a first degree burglary charge may be inferred from a defendant's actions once he has gained entry,

> the fact that a felony was actually committed after the house was entered is not necessarily proof of the intent requisite for the crime of burglary. It is only evidence from which such intent at the time of the breaking and entering may be found. Conversely, actual commission of the felony, which the indictment charges was intended by the defendant at the time of the breaking and entering, is not required in order to sustain a conviction of burglary. *State v. Reid, supra; State v. Hooper*, 227 N.C. 633, 44 S.E. 2d 42; *State v. McDaniel*, 60 N.C. 245. The offense of burglary is the breaking and entering with the requisite intent. It is complete when the building is entered or it does not occur. A breaking and an entry without the intent to commit a felony in the building is not converted into burglary by the subsequent commission therein of a felony subsequently conceived. *State v. Allen*, 186 N.C. 302, 119 S.E. 504.

State v. Tippett, 270 N.C. at 594, 155 S.E. 2d at 274.

For the reasons stated, we hold that the jury's acquittal of the defendant on the charge of attempted rape does not preclude a finding of guilt of first degree burglary.

[3] First degree burglary and second degree burglary under G.S. § 14-51 and felonious breaking and entering under G.S. § 14-54(a) require, for conviction, proof of intent to commit a felony. Misdemeanor breaking and entering, G.S. § 14-54(b), requires only proof of the wrongful breaking or entry into any building. Thus we hold, as we did in *State v. Dawkins*, 305 N.C. at 291, 287 S.E. 2d at 887, that by finding the defendant guilty of burglary, the jury "necessarily found facts which would support a conviction of misdemeanor breaking and entering," where, as here, the evidence of intent to commit a felony is insufficient.

Upon the record before us, as demonstrated by the foregoing review of the testimony given at trial, there is ample evidence to support defendant's conviction of assault on a female, and as to defendant's trial on that charge we find no error.

Because of our disposition of the burglary conviction, we need not address defendant's contention that he is entitled to a new trial for the trial court's failure to submit non-felonious breaking and entering to the jury for a possible verdict.

For lack of sufficient evidence of intent to commit the alleged felony of attempted rape, the judgment upon the verdict of first degree burglary must be and is hereby vacated. The cause is remanded to Superior Court, Martin County, for entry of a judgment as upon a verdict of guilty of misdemeanor breaking and entering and resentencing thereon. Defendant is entitled to be present for resentencing and to be represented by counsel.

Vacated and remanded.

STATE OF NORTH CAROLINA v. ALEXANDER WILLIAMS

No. 454A82

(Filed 11 January 1983)

1. **Narcotics § 4.3— constructive possession—sufficiency of evidence**

In a prosecution for felonious possession of a controlled substance with intent to sell or deliver in violation of G.S. 90-95(a)(1) the State offered ample, substantial evidence to raise a reasonable inference that defendant was in constructive possession of the dwelling searched and an outbuilding behind the dwelling where the State's uncontroverted evidence showed that (1) defendant was seen in the yard at the residence on at least four occasions within two weeks of the time the heroin was seized, (2) two public works commission bills addressed to defendant were found in the dwelling, (3) a trash service bill addressed to defendant was in the house, (4) a bottle of pills bearing defendant's name was found at the residence, (5) the mailbox in front of the house bore the name Mr. and Mrs. Williams, and (6) a path led directly from the house to the dilapidated four-room building behind the residence in which the heroin was found.

2. **Narcotics § 4— possession with intent to sell or deliver—sufficiency of evidence**

The State's evidence was sufficient to permit, but not require, the jury to reasonably infer that defendant possessed 2.7 grams of heroin with intent to sell or deliver where the evidence tended to show that heroin was sold from a residence that defendant allegedly possessed; that when the police searched the residence, drug paraphernalia, some containing a heroin residue, were found in the residence; that in the shed or outbuilding behind the house, police located a large plastic bag containing two smaller bags; that one of these bags contained about 10-15 tinfoil squares, and material frequently used to package heroin for sale; and that an identifiable thumb print was found on one of the tinfoil squares, and this thumb print was later identified as being that of defendant.

APPEAL by the State pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals reported at 58 N.C. App. 307, 293 S.E. 2d 612 (1982) [*Judge Becton, Judge Hill* concurring, and *Judge Hedrick* dissenting], reversing the judgment entered by *Herring, J.*, at the 27 April 1982 Session of CUMBERLAND Superior Court.

Defendant was charged in the bill of indictment with felonious possession of a controlled substance with intent to sell or deliver in violation of G.S. 90-95(a)(1). Defendant entered a plea of not guilty and stipulated that he had previously been found guilty of the same offense.

The evidence presented by the State tended to show:

On 18 August 1980, around midnight, Fayetteville City Police Officers B. E. Hyde and Roy Baker were parked near a house at 800 Deep Creek Road. In front of this house was a mailbox that bore the name, Mr. & Mrs. Williams. At this time, Officer Hyde saw defendant standing on or near the porch of the residence at 800 Deep Creek Road. The officers had seen defendant outside the house on at least three occasions during the preceding two weeks.

On 18 August, a police informant bought heroin from Gloria Walker at the residence. Based on this knowledge, the officers obtained a search warrant for the residence on 19 August and went there to search the premises. Upon arrival, Officer Hyde knocked on the front door and announced, "Police, search warrant." After receiving no answer, he forced the door open and found six females inside the house. One of the women was Gloria Walker. Defendant was not present at the time of the search.

The officers discovered several items in the residence: drug paraphernalia, needles, syringes and cookers were found on the table in the dining room. One of the cookers was examined by Mr. J. D. Sparks, a forensic chemist and special agent with the State Bureau of Investigation. His examination revealed that it contained phenmetrozinc and heroin residue. Both of these are controlled substances. A bottle of non-controlled pills, dated 26 September 1979 and 26 March 1980, was found in a bedroom with defendant's name on the bottle. Two Public Works Commission bills were also found. Those contained the name Alex Williams and both were addressed to 800 Deep Creek Road. The first was dated 23 June 1978 and the second was dated 24 June 1980. A Travelers Trash Service bill in an envelope addressed to Alex Williams, 800 Deep Creek Road, was postmarked 26 June 1980.

After the officers searched the residence, they went to a dilapidated house located behind the residence. A single path led from the residence to this building. A search of this building disclosed a revolver, two separate plastic bags containing a white substance, and an amber-colored glass bottle which contained two pinkish-orange pills. Only one of the items discovered in the outbuilding is of significance here. One of the two plastic bags contained two smaller bags. In one of the smaller bags there was a

white substance. Mr. Sparks examined this substance and found it to be 2.7 grams of heroin at a concentration of 12%. The other small bag contained 10-15 small tinfoil squares but no controlled substance.

S. R. Jones, Supervisor of the Latent Evidence section of the Crime Laboratory with the State Bureau of Investigation, examined the tinfoil squares and found an identifiable thumb print on one of them. He testified that in his opinion the identifiable fingerprint found in the tinfoil wrapper was made by defendant. Other prints were found in the tinfoil wrapper but they were not identifiable. At the close of State's evidence, defendant elected not to offer evidence and moved for directed verdict. The trial judge denied his motion. The jury found defendant guilty of the offense charged and defendant gave notice of appeal.

The Court of Appeals reversed, holding that the evidence was insufficient to instruct the jury on possession of heroin with intent to sell or deliver.

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

Barrington, Jones & Armstrong, P.A., by Carl A. Barrington, Jr., for defendant appellee.

BRANCH, Chief Justice.

A motion for directed verdict has the same legal effect as a motion for judgment of nonsuit and challenges the sufficiency of the evidence to go to the jury. *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967). The motion presents to the Court the question of whether there is substantial evidence of each essential element of the crime charged or a lesser included offense, and the question of whether defendant was the perpetrator of the crime. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E. 2d 164, 169 (1980); *State v. Woods*, No. 229A82, slip op. at 4 (N.C. filed December 7, 1982). If there is such substantial evidence, the motion for directed verdict should be denied. If, however, the evidence is sufficient to raise only a suspicion as to whether the offense was in fact committed or whether the accused committed the offense, the motion should

be allowed. In ruling on this motion, the trial judge must consider the evidence in the light most favorable to the State, and "the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E. 2d 204, 208 (1978).

[1] Constructive possession exists when a person, while not having actual possession, has the intent and capability to maintain control and dominion over a controlled substance. *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974); *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972). In instant case, in order to withstand the motion for a directed verdict, the State was required to present substantial evidence that defendant (1) had either actual or constructive possession of the heroin and (2) possessed the heroin with intent to sell or deliver.

In *State v. Allen*, 279 N.C. 406, 183 S.E. 2d 680 (1971), officers found heroin in a Fayetteville, North Carolina, residence in which the public utilities were listed in the defendant's name. Papers bearing his name were found in the bedroom where the heroin was found and there was evidence that a sixteen-year-old boy obtained heroin from the residence searched and was selling heroin at the defendant's direction. The defendant offered evidence that he was in Maryland at the time the heroin was seized and that he did not live in the residence where the seizure was made. Concluding that defendant was in constructive possession of the heroin, this Court stated, in part:

> 'Where narcotics are found on the premises under the control of the defendant, this fact, in and of itself, gives rise to an inference of knowledge and possession by him which may be sufficient to sustain a conviction for unlawful possession of narcotics, absent other facts which might leave in the minds of the jury a reasonable doubt as to his guilt.'

Id. at 410, 183 S.E. 2d at 683.

This Court applied the doctrine of constructive possession in upholding the defendant's conviction of feloniously growing and possessing marijuana in *State v. Spencer, supra.* In that case the evidence tended to show that 82.2 grams of marijuana were found in a pig shed located 20 yards directly behind defendant's residence and that marijuana seeds were found in defendant's

bedroom. The defendant had been seen on many occasions around the outbuildings located directly behind his residence. We held that this evidence was sufficient to permit a reasonable inference that he was in constructive possession of the marijuana found in the pig shed. We further held that evidence of a path running from the shed to the cornfield, which was not adjoined by or intersected by other paths, was sufficient to support a reasonable inference that defendant was feloniously growing marijuana in the cornfield.

In the case before us, the State offered uncontroverted evidence that: (1) Defendant was seen in the yard at the residence located at 800 Deep Creek Road in Fayetteville, North Carolina, on at least four occasions within two weeks of the time the heroin was seized, one occasion being the night of 18 August 1980, or the early morning hours of 19 August 1980. (2) Two Public Works Commission bills addressed to defendant at 800 Deep Creek Road were found in the dwelling. The latest of these bills was dated 24 June 1980. (3) A trash service bill addressed to Alex Williams at 800 Deep Creek Road, dated 26 June 1980, was in the house. (4) A bottle of pills bearing defendant's name was found at the residence. (5) The mailbox in front of the house bore the name Mr. & Mrs. Williams. (6) A path led directly from the house to the dilapidated four-room building behind the residence in which the heroin was found.

We are of the opinion that this was ample, substantial evidence to raise a reasonable inference that defendant was in constructive possession of the dwelling at 800 Deep Creek Road and the outbuilding where the 2.7 grams of heroin were seized. This constructive possession gives rise to an inference of knowledge and possession of the heroin which may be sufficient to sustain a conviction of unlawful possession of heroin. *State v. Allen, supra.*

[2] We next consider whether the evidence presented by the State was sufficient to show possession with an intent to sell or deliver. We held in *State v. Baxter, supra,* that a jury may reasonably infer an intent to sell or deliver a controlled substance from the amount of the controlled substance possessed by the accused, and that a like inference may arise from the presence of material normally used for the packaging of controlled sub-

stances. *See also, State v. Roseboro,* 55 N.C. App. 205, 284 S.E. 2d 725 (1981), *appeal dismissed, disc. rev. denied,* 305 N.C. 155, 289 S.E. 2d 566 (1982).

In instant case, the State's evidence disclosed that on 18 August 1980, heroin was sold from the residence at 800 Deep Creek Road. When the police searched the residence, drug paraphernalia, some containing a heroin residue, were found in the residence. In the shed or outbuilding behind the house, the police located a large plastic bag containing two smaller bags. One of these bags contained about 10-15 tinfoil squares, a material frequently used to package heroin for sale. An identifiable thumb print was found on one of the tinfoil squares, and this thumb print was later identified as being that of defendant.

Proof of fingerprints corresponding to those of an accused found in the place where the crime is committed under such circumstances that they could only have been impressed at the time the crime was perpetrated is admissible to identify the accused as the person who committed the crime. *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572 (1951). We emphasize that in this case the State does not rely solely upon fingerprint evidence. In our opinion, the evidence presented supports a reasonable inference that defendant possessed materials used for sale and delivery of heroin. We note in passing that the fingerprint found in close juxtaposition with a substantial amount of heroin is also some evidence that defendant possessed the heroin.

Finally, the amount of heroin seized from the outbuilding was over two-thirds of the amount required to support a conviction of the crime of "trafficking in . . . heroin," a felony mandating punishment of not less than six years' imprisonment and a fine of $50,000. G.S. 90-95(h)(4)a. We are satisfied that this amount of heroin was a substantial amount and was more than an individual would possess for his personal consumption.

We hold that the State's evidence was sufficient to permit, but not require, the jury to reasonably infer that defendant possessed 2.7 grams of heroin with intent to sell or deliver. Therefore, the trial judge correctly denied defendant's motion for a directed verdict.

The decision of the Court of Appeals is reversed.

Reversed.

PATRICK RANDOLPH FLACK AND LOIS ELAINE FLACK, BY AND THROUGH THEIR GUARDIAN AD LITEM, LOIS R. FLACK GARRISS v. MARCUS A. GARRISS, BIANCA M. BROWN, GILBERT W. CHICHESTER, CMC FINANCE GROUP, INC.

No. 523A82

(Filed 11 January 1983)

Appeal and Error § 46— equally divided Court—decision affirmed—no precedent

Where one member of the Supreme Court did not participate in the consideration or decision of a case and the remaining six Justices are equally divided, the decision of the Court of Appeals is affirmed and stands without precedential value.

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

APPEAL of right by the plaintiffs pursuant to G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals, 58 N.C. App. 573, 293 S.E. 2d 827 (1982), finding no error in the trial of this case.

Josey, Josey, Hanudel and Jordan, by V. Thomas Jordan, Jr., for plaintiff-appellants.

Perry, Kittrell, Blackburn and Blackburn, by George T. Blackburn, II, for defendant-appellees.

PER CURIAM.

Justice Martin took no part in the consideration or decision of this case. The remaining members of this Court being equally divided, with three members voting to affirm the Court of Appeals and three members voting to reverse, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See State v. Johnson*, 286 N.C. 331, 210 S.E. 2d 260 (1974).

Affirmed.

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

DELMER TAYLOR v. GREENSBORO NEWS COMPANY

No. 363PA82

(Filed 11 January 1983)

ON 21 September 1982 we granted plaintiff's petition for discretionary review, G.S. 7A-31(c), of a decision of the Court of Apeals, 57 N.C. App. 426, 291 S.E. 2d 852 (1982), affirming summary judgment for defendant entered by *Judge Collier* at the 18 June 1981 Session of GUILFORD Superior Court, Greensboro Division. We likewise denied defendant's motion to dismiss plaintiff's appeal grounded on plaintiff's contention that a substantial constitutional question was involved in the case. G.S. 7A-30(1).

Anne R. Littlejohn for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter by Richard W. Ellis and Alan W. Duncan, for defendant appellee.

PER CURIAM.

This is an action for libel. Both parties moved for summary judgment in the trial court on stipulated facts. The stipulation is set out in full and verbatim in the Court of Appeals' opinion. The Court of Appeals decided that the trial court correctly allowed defendant's motion for summary judgment because on the stipulated facts plaintiff would not be able to show at trial that the allegedly defamatory statement was published with actual malice. After carefully reviewing the record and briefs and hearing oral arguments on the correctness of the Court of Appeals' decision, we are satisfied that we improvidently granted plaintiff's petition for further review and likewise improvidently denied defendant's motion to dismiss plaintiff's appeal. Our orders granting discretionary review and denying defendant's motion to dismiss the appeal are vacated; and, because we discern no substantial constitutional question in the case, plaintiff's appeal is dismissed.

Discretionary review improvidently granted; plaintiff's appeal dismissed.

STATE OF NORTH CAROLINA v. JOHN HEYWOOD FOX

No. 563A82

(Filed 11 January 1983)

APPEAL by defendant as of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, *Morris, C.J.*, with *Martin, J.*, concurring and *Becton, J.*, dissenting reported at 58 N.C. App. 692, 294 S.E. 2d 410 (1982), affirming the order denying defendant's motion to suppress by *Grist, J.*, at the 21 October 1982 Criminal Session of MECKLENBURG Superior Court. Following the denial of the motion to suppress, defendant entered a plea of guilty to felonious possession of a stolen vehicle, but preserved his right to appeal the ruling on his motion to suppress.

Rufus L. Edmisten, Attorney General, by William H. Borden, Associate Attorney, for the State.

Ellis M. Bragg for defendant appellant.

PER CURIAM.

The sole issue presented to this Court is whether the trial court erroneously denied defendant's motion to suppress evidence obtained from an alleged unlawful stop of defendant. The facts necessary for determination of this case are fully and accurately stated in the Court of Appeals' opinion. We have carefully reviewed the majority opinion of the Court of Appeals, the dissent, the briefs and authorities relating to defendant's contentions. We conclude that the result reached by the majority of the panel of the Court of Appeals, its reasoning, and the legal principles enunciated by it are correct.

The decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. ANTHONY EDELL WILLIS

No. 546A82

(Filed 11 January 1983)

APPEAL as of right pursuant to G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals, filed 17 August 1982, which affirmed the 5 March 1981 denial by *Judge Godwin*, in WAKE County Superior Court, of defendant's motion to suppress evidence. Following Judge Godwin's denial of the motion to suppress evidence defendant, pursuant to a plea bargain, entered a plea of guilty to simple possession of heroin from which *Judge Thomas Lee* entered judgment on 3 July 1981. Defendant preserved his right to appeal the ruling on his motion to suppress notwithstanding his plea of guilty.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Jane P. Gray, for the State.

Van Camp, Gill and Crumpler, P.A. by William B. Crumpler and Loflin and Loflin by Thomas F. Loflin, III and Robert S. Mahler for the defendant-appellant.

PER CURIAM.

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.

Affirmed.

STATE OF NORTH CAROLINA v. DOC BREWINGTON

No. 518A82

(Filed 11 January 1983)

DEFENDANT appeals to this Court as a matter of right under G.S. 7A-30(2) (1981) to review the decision of the Court of Appeals. The opinion of *Judge Robert Martin*, with which *Chief Judge Morris* concurred and in which *Judge Becton* dissented in part, held there was no error in the trial court's: (1) denial of defendant's motion to dismiss based on insufficiency of the evidence, (2) admission of testimony concerning an offer by defendant's aunt to make restitution, or (3) denial of defendant's motion for mistrial based upon the admission of this testimony. 58 N.C. App. 650, 294 S.E. 2d 238 (1982). Judgment in the case was entered by *Cornelius, Judge*, on 2 July 1981 in Superior Court WAYNE County.

Rufus L. Edmisten, Attorney General, by James Peeler Smith, Assistant Attorney General, for the State.

R. Gene Braswell and Tom Barwick for defendant.

PER CURIAM.

The decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. RUDOLPH BERRY

No. 508A82

(Filed 11 January 1983)

APPEAL pursuant to G.S. 7A-30(2) from a decision of a divided panel of the Court of Appeals[1] which found no error in a trial at the 8 June 1981 Criminal Session of NEW HANOVER Superior Court, *Judge Strickland* presiding, at which defendant was found guilty of felonious breaking or entering and sentenced to a term of imprisonment.

Rufus L. Edmisten, Attorney General, by Reginald L. Watkins, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by James H. Gold, Assistant Appellate Defender, for defendant appellant.

PER CURIAM.

The principal question on this appeal is whether defendant's fingerprints found at the scene of the crime provided sufficient evidence of defendant's guilt for the case to be submitted to the jury. The Court of Appeals, after fully and accurately giving the facts and after a full and sufficient consideration of appropriate precedents, concluded that the evidence was sufficient. For the reasons given in the Court of Appeals' opinion, its decision is

Affirmed.

1. 58 N.C. App. 355, 293 S.E. 2d 650 (1982).

STATE OF NORTH CAROLINA v. RALPH EDWIN TATE, JR.

No. 507A82

(Filed 11 January 1983)

APPEAL by the State of North Carolina pursuant to N.C.G.S. 7A-30(2) from the decision of the Court of Appeals (*Judges Robert Martin* and *Arnold* concurring, *Judge Vaughn* dissenting), reported in 58 N.C. App. 494, 294 S.E. 2d 16 (1982), which granted a new trial to defendant from the judgment entered by *Seay, Judge*, at the 11 May 1981 Criminal Session of FORSYTH Superior Court.

Rufus L. Edmisten, Attorney General, by Lucien Capone III and Richard L. Kucharski, Assistant Attorneys General, for appellant.

Morrow and Reavis, by John F. Morrow, for appellee.

PER CURIAM.

Affirmed.

ROSE T. ROBERTS AND HUSBAND JAMES ROBERTS v. DURHAM COUNTY HOSPITAL CORPORATION AND JAMES E. DAVIS

No. 273PA82

(Filed 11 January 1983)

ON discretionary review pursuant to G.S. 7A-31 of the decision of the Court of Appeals, *Martin (Robert M.), Judge,* with *Martin (Harry C.), Judge,* and *Arnold, Judge,* concurring, reported at 56 N.C. App. 533, 289 S.E. 2d 875 (1982), affirming judgment for defendants by *Herring, J.,* at the 6 April 1981 Civil Session of DURHAM Superior Court.

McCain, Essen & Orcutt by Jeff Erick Essen and Grover C. McCain, Jr., for plaintiff appellants.

Young, Moore, Henderson & Alvis by Walter E. Brock, Jr., and Edward B. Clark, for defendant appellee James E. Davis.

Haywood, Denny & Miller by George W. Miller, Jr., and Michael W. Patrick, for defendant appellee Durham County Hospital Corporation.

PER CURIAM.

Affirmed.

Justice MARTIN took no part in the decision of this case.

STATE OF NORTH CAROLINA v. ROBERT HANSON

No. 391PA82

(Filed 11 January 1983)

ON discretionary review pursuant to G.S. § 7A-31 of a decision of the Court of Appeals filed 1 June 1982 vacating a judgment of *Reid, Judge*, entered 7 January 1981 in Superior Court, WASHINGTON County, sentencing defendant to a term of imprisonment upon his conviction by the jury of "accessory before the fact of [sic] attempting to provide drugs to an inmate." We allowed the State's petition for discretionary review on 25 August 1982.

Rufus L. Edmisten, Attorney General by Michael Rivers Morgan, Associate Attorney, for the State.

Robert H. Cowen, Attorney for defendant-appellee.

PER CURIAM.

Having carefully considered the opinion of the Court of Appeals, the record and briefs, and the oral arguments before us, we conclude that our order of 25 August 1982 allowing the State's petition for discretionary review was improvidently allowed.

Discretionary review improvidently granted.

FIRST CITIZENS BANK AND TRUST COMPANY v. NORMAN A. POWELL AND WIFE, DONNA C. POWELL

No. 462PA82

(Filed 11 January 1983)

WE granted defendants' petition for discretionary review under G.S. 7A-31 (1981) on 21 September 1982 to review the decision of the Court of Appeals. The decision of *Judge Arnold*, with which *Judges Hedrick* and *Wells* concurred, held the trial court did not abuse its discretion in striking defendants' answer and entering default judgment against them. 58 N.C. App. 229, 292 S.E. 2d 731 (1982). In so doing the court affirmed the judgment of *Barefoot, Judge*, entered 30 July 1981 during the 27 July 1981 Term of Civil Superior Court, ONSLOW County.

Ward and Smith, P.A., by Robert H. Shaw, III, for plaintiff.

Fred W. Harrison for defendants.

PER CURIAM.

The decision of the Court of Appeals is affirmed.

Affirmed.

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

BRENNER v. SCHOOL HOUSE, LTD.

No. 632P82.

Case below: 59 N.C. App. 68.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 January 1983.

CECIL v. CECIL

No. 648P82.

Case below: 59 N.C. App. 208.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 11 January 1983.

GLENN v. GLENN

No. 621P82.

Case below: 59 N.C. App. 238.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 11 January 1983.

HILLMAN v. UNITED STATES LIABILITY INS. CO.

No. 654P82.

Case below: 59 N.C. App. 145.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 January 1983.

IN RE SOUTHERN RAILWAY

No. 650PA82.

Case below: 59 N.C. App. 119.

Petition by Railway Companies for discretionary review under G.S. 7A-31 allowed 11 January 1983.

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

IN RE COLLINS v. B & G PIE CO.

No. 672P82.

Case below: 59 N.C. App. 341.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 11 January 1983.

McCUISTON v. ADDRESSOGRAPH-MULTIGRAPH CORP.

No. 627PA82.

Case below: 59 N.C. App. 76.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 11 January 1983.

STATE v. BENNETT

No. 664PA82.

Case below: 59 N.C. App. 418.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 11 January 1983.

STATE v. COBLE

No. 626P82.

Case below: 59 N.C. App. 238.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 January 1983.

STATE v. DALTON

No. 625P82.

Case below: 59 N.C. App. 238.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 January 1983.

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

STATE v. DANCY & MOORE

No. 667P82.

Case below: 59 N.C. App. 362.

Petition by defendants for discretionary review under G.S. 7A-31 denied 11 January 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 11 January 1983.

STATE v. EDMONDS

No. 653PA82.

Case below: 59 N.C. App. 359.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 11 January 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 11 January 1983.

STATE v. FREEMAN

No. 623PA82.

Case below: 59 N.C. App. 84.

Petition by defendant and Attorney General for discretionary review under G.S. 7A-31 allowed 11 January 1983.

STATE v. GREER

No. 560PA82.

Case below: 58 N.C. App. 703.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 11 January 1983.

STATE v. HALL

No. 641P82.

Case below: 54 N.C. App. 672.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 11 January 1983.

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

STATE v. HAWKINS

No. 651P82.

Case below: 59 N.C. App. 190.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 January 1983.

STATE v. KISTLE

No. 690P82.

Case below: 59 N.C. App. 724.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 January 1983.

STATE v. McALISTER

No. 619P82.

Case below: 59 N.C. App. 58.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 11 January 1983.

STATE v. McCANN

No. 9P83.

Case below: 59 N.C. App. 739.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 January 1983.

STATE v. MORRIS

No. 608P82.

Case below: 59 N.C. App. 157.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 January 1983. Motion of Attorney General to dismiss appeal for lack of significant public interest allowed 11 January 1983.

STATE v. NORTON

No. 2P83.

Case below: 60 N.C. App. 217.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 January 1983.

STATE v. PEARSON

No. 597P82.

Case below: 59 N.C. App. 87.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 January 1983.

STATE v. REEKES

No. 689P82.

Case below: 59 N.C. App. 672.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 December 1982.

STATE v. SWINK & EVANS

No. 636P82.

Case below: 59 N.C. App. 557.

Petition by defendants for discretionary review under G.S. 7A-31 denied 11 January 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 11 January 1983.

STATE v. WILLIAMS

No. 544P82.

Case below: 58 N.C. App. 821.

Petition by defendant for discretionary review under G.S. 7A-31 denied 22 December 1982. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 22 December 1982.

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

TATE v. GARDNER

No. 592P82.

Case below: 58 N.C. App. 821.

Petition by Gardner for discretionary review under G.S. 7A-31 denied 11 January 1983. Motion of Third Party Defendant Tate to dismiss appeal for lack of substantial constitutional question allowed 11 January 1983.

WILKES COMPUTER SERVICES v. AETNA CASUALTY & SURETY CO.

No. 606P82.

Case below: 59 N.C. App. 26.

Petition by defendant for discretionary review under G.S. 7A-31 denied 11 January 1983.

PETITION TO REHEAR

PURDY v. BROWN

No. 243PA82.

Case below: 307 N.C. 93.

Petition by defendant to rehear denied 11 January 1983.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; THE PUBLIC STAFF v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC., AND PIEDMONT NATURAL GAS COMPANY, INC.

No. 216PA82

(Filed 28 January 1983)

1. **Gas § 1; Utilities Commission § 22— supplier refunds to natural gas utilities—statute governing distribution**

The appropriate distribution of refunds received by natural gas utilities in 1978 as a result of prior period overpayments to their natural gas supplier is governed by G.S. 62-136(c), not by G.S. 62-133(f), since the latter statute deals only with rate changes.

2. **Gas § 1; Utilities Commission § 22— conditions for distribution of refunds to utility's customers**

Prior to the 1981 amendment to G.S. 62-136(c), that statute permitted the distribution of refunds to a utility's customers only if the following conditions were met: (1) it was practicable to distribute the refunds; (2) the charges had been included in rates paid by the customers; and (3) the company had a reasonable return exclusive of the refund.

3. **Gas § 1; Utilities Commission § 22— refunds to utility customers**

The requirement in former G.S. 62-136(c) that refunds be made to utility customers "in proportion to their payment of the charges refunded" contemplates that refunds be made only to those customers who paid rates including the producer overcharges.

4. **Gas § 1; Utilities Commission § 22— natural gas refunds—distribution to customers not required**

The Utilities Commission erred in ordering natural gas utilities to pass to their current customers refunds received from their supplier representing overpayments for gas made from 1958 to 1971 since G.S. 62-136(c) required distribution of the refunds to the actual customers who paid rates including the overcharges, and such a distribution would be impracticable because the gas companies do not have records revealing the names of customers served during that period or the amounts of gas purchased by those customers.

Justice CARLTON concurs in the result.

Justice MEYER concurring in part and dissenting in part.

Justice EXUM joins in this opinion.

Justice MARTIN dissenting.

Justice EXUM joins in this dissenting opinion.

ON discretionary review, pursuant to G.S. 7A-31, of the decision of the Court of Appeals, 56 N.C. App. 448, 289 S.E. 2d 82

(1982), reversing an order of the Utilities Commission requiring Piedmont Natural Gas Company, Inc. (Piedmont) and Public Service Company of North Carolina, Inc. (Public Service) to distribute to current customers all refunds received from their natural gas supplier, Trans-Continental Gas Pipeline Corporation (Transco).

The refunds in question were made by Transco to Piedmont and Public Service as a result of the Federal Energy Regulatory Commission's (FERC) determination that certain of the producers and suppliers from whom Transco had purchased natural gas during the period 4 December 1958 through 31 July 1971 had charged Transco rates in excess of those which were many years later ultimately approved by the FERC. Because Transco had in turn passed these charges on to the utilities here involved in the form of higher prices, the FERC directed Transco to distribute these refunds to appellees and three other natural gas companies operating in North Carolina. These refunds were not made until 1978, even though they represented overpayments made during the period 1958 through 1971.

The total amount disbursed by Transco to Public Service Co. was $527,301. Piedmont received from Transco $777,186, $565,599 of which was attributable to Piedmont's North Carolina operations. Approximately $9,400 of this amount has previously been refunded to Piedmont's customers and is not at issue here. Thus, $556,200 is the amount which remains in dispute with respect to Piedmont.

Public Service took the questioned amount into its income statement for 1978 operations by treating this refund as a current reduction to cost of purchased gas for the fourth quarter of 1978. Piedmont, after initially crediting the refunded amount to Restricted Account No. 253, subsequently revised that initial accounting treatment and, like Public Service, took the refund into its income statement by treating the refund as a current reduction to the cost of purchased gas for the fourth quarter of 1978. The effect of this accounting treatment was to give the total benefit flowing from the refunds to the utilities' shareholders.

On 21 January 1981, the North Carolina Utilities Commission ordered Piedmont and Public Service to distribute to their current customers the total amount of the refunds received from Transco in 1978. The Commission determined that the three re-

quirements of G.S. 62-136(c) had been met and that a total refund was statutorily mandated.

The Court of Appeals (Arnold, J., with Clark, J., and Whichard, J., concurring) reversed the Commission on the theory that the statute did not contemplate refunds to current customers, but rather required that refunds be made to those customers who had actually paid the overcharges. Concluding that it would be impracticable to locate and identify these customers, they determined that the refunds were improperly ordered.

Public Staff of the N.C. Utilities Commission, by Executive Director Robert Fischbach, Acting Chief Counsel Theodore C. Brown, Jr. and G. Clark Crampton for plaintiff appellant.

Boyce, Mitchell, Burns & Smith, P.A., by F. Kent Burns for defendant appellee Public Service Company of North Carolina, Inc.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Jerry W. Amos for defendant appellee Piedmont Natural Gas Co., Inc.

BRANCH, Chief Justice.

The issue presented in instant case involves the proper distribution of refunds received by the appellee utilities as a result of prior period overpayments to their natural gas supplier.

[1] The Commission looked to G.S. 62-136(c) to determine whether the supplier refunds should be retained by the utilities or distributed to their customers. Prior to 1981, G.S. 62-136(c) provided as follows:

> (c) If any refund is made to a distributing company operating as a public utility in North Carolina of charges paid to the company from which the distributing company obtains the energy, service or commodity distributed, the Commission may, if practicable, in cases where the charges have been included in rates paid by the customers of the distributing company, and where the company had a reasonable return exclusive of the refund, require said distributing company to distribute said refund among said customers in proportion to their payment of the charges refunded.

The Public Staff argues that G.S. 62-136(c) does not apply to the refunds. They contend that G.S. 62-133(f) is the applicable statute. This provision, which became effective 21 July 1971, reads as follows:

> (f) Unless otherwise ordered by the Commission subsections (b), (c) and (d) shall not apply to rate changes of utilities engaged in the distribution of natural gas bought at wholesale by the utility for distribution to consumers to the extent such rate changes are occasioned by changes in the wholesale rate of such natural gas. The Commission may permit such rate changes to become effective simultaneously with the effective date of the change in the wholesale cost of such natural gas, or at such other time as the Commission may direct. This subsection shall not prohibit the Commission from investigating and changing unreasonable rates in accordance with the provisions of this Chapter. The public utility shall give such notice, which may include notice by publication, of the changes to interested parties as the Commission in its discretion may direct.

The Public Staff urges us to find G.S. 62-133(f) controlling on the theory that these supplier refunds are, in effect, retroactive rate reductions in the utilities' wholesale cost of gas for the period 1958-1971. As such, the refunds are matters "occasioned by changes in the wholesale rate of such natural gas" as contemplated by G.S. 62-133(f). They also contend that G.S. 62-133(f) is the more specific statutory provision because it applies solely to changes in the wholesale rates of *natural gas*, whereas G.S. 62-136(c) applies to refunds received by any type of North Carolina distributing company utility.

To the contrary, we are of the opinion that G.S. 62-136(c) more specifically applies to supplier refunds received by natural gas distributing utilities. G.S. 62-133(f) is a mechanism whereby a natural gas utility may pass on to its customers supplier increases or decreases without going through the costly and protracted procedures of a general rate case. *Utilities Commission v. CF Industries, Inc.*, 39 N.C. App. 477, 479, 250 S.E. 2d 716, 717-18 (1979). G.S. 62-133(f) deals only with *rate* changes. G.S. 62-136(c), however, specifically sets forth the criteria pursuant to which *refunds* should be distributed.

We hold that G.S. 62-136(c) is the proper statute to be applied in determining the appropriate distribution of these supplier refunds.

The appellee utilities contend, however, that G.S. 62-136(c) does not govern those refunds attributable to overpayments made prior to 1 January 1964, the effective date of the statute. An examination of the Commission's orders in instant case reveals that the Commission also determined that G.S. 62-136(c) did not apply to all of the refunds received in 1978. The orders specifically provided that the refunds attributable to the years 1958 through 1963 were being distributed pursuant to the Commission's implied powers under Chapter 62. Only those refunds attributable to overpayments made after 1 January 1964 were distributed pursuant to the dictates of G.S. 62-136(c).

We conclude that this bifurcated analysis is unnecessary. G.S. 62-136(c) speaks in terms of when the refund is *received* by the utilities, not to the period of time to which the refunds relate. The statute says that "*if any refund is made*" to a public utility, the Commission may order the refund to be distributed among the utility's customers if the statutory requirements are met. Since these refunds were received by Piedmont and Public Service well after the effective date of the statute, we hold that G.S. 62-136(c) governs the distribution of *all* of the refunds at issue here.[1]

We next address the question of whether the statutory requirements of G.S. 62-136(c) have been met in this case.

[2] Prior to the 1981 amendment, G.S. 62-136(c) permitted the distribution of refunds to a utility's customers only if the following three conditions were met:

(1) It was practicable to distribute the refunds,

(2) The charges had been included in rates paid by the customers, and

1. Implicit in this reasoning is the conclusion that all refunds received after 28 May 1981 will be governed by the 1981 amendment to G.S. 62-136(c). 1981 Sess. Laws c. 460, s. 1. As such, the Commission will be empowered to order distribution of supplier refunds to current or past customers, by customer class or on an individual basis. The amendment clearly provides that the method and manner of distribution will be left to the Commission's sound discretion.

(3) The company had a reasonable return exclusive of the refund.

The statute provided that the refund would be distributed among the customers of the utility "in proportion to their payment of the charges refunded."

The Court of Appeals interpreted this language to mean that the refunds must be made to those customers who actually paid the overcharges. In reversing the Utilities Commission, Judge Arnold wrote:

> Determination of the identity of those customers to whom refunds might be due here, and of the relative proportion of their interests, in our view, would be impracticable since the charges in question relate to periods ranging from ten-twenty-three years prior to the supplier refunds. Therefore, one of the statutory prerequisites is unfulfilled, no refund is called for, and the Commission's contrary conclusion was erroneous.

56 N.C. App. at 450, 289 S.E. 2d at 83.

[3] We agree with the Court of Appeals that prior to the 1981 amendment, G.S. 62-136(c) required that refunds be distributed only to those individuals who actually paid the overcharges. We see no reason to assume that the legislature intended for the utilities to refund money to individuals who could not possibly have paid any of the charges refunded, as would unquestionably be the case if these refunds were distributed to current customers as the Commission directed. The requirement that refunds be made to customers *in proportion to their payment of the charges refunded* compels us to conclude that the legislature contemplated that refunds be made only to those customers who paid rates including the producer overcharges.

Our interpretation also follows from the requirement that "the charges have been included in rates paid by the customers." Obviously, the overcharges were included, if at all, in the rates paid by customers who were receiving service from Piedmont and Public Service during the period to which these refunds relate. This evidences to us an intention of retrospective reimbursement which is not accomplished by the Commission's order in this case.

The Public Staff urges us to interpret the language "in proportion to their payment of the charges refunded" as referring to the proportion of company revenues received from each *class* of customers. Their position is that the Commission properly applied this language in ordering the utilities to distribute the refunds among current customers on the basis of, and in proportion to, the prior payment of the overcharges during 1958 through 1971 as determined by customer class.

[4] We do not agree with this interpretation. As stated earlier, we are of the opinion that the legislature intended for the refunds to be made in proportion to each customer's usage in the refund period during which he paid excess charges. We are reluctant to superimpose a requirement that the refunds be made on the basis of customer class for if this had been the legislature's intention, it would have been a simple proposition for them to have explicitly provided for such a method of distribution. We find no language in the statute requiring distribution by customer class.

Our conclusion is strengthened by the legislature's 1981 amendment to G.S. 62-136(c). It is no longer required that the refund be practicable and that the utility have a reasonable return exclusive of the refund in order for the Commission to direct a customer refund. More importantly, however, the statute no longer provides for distribution of the refunds to customers in proportion to their payment of the charges refunded. The Commission is now authorized to require the distribution of refunds "among the distributing company's customers in a manner prescribed by the Commission." Clearly, the Commission is now empowered to order the distribution of supplier refunds to either current *or* past customers, utilizing whatever method the Commission deems most appropriate.

In construing a statute with reference to an amendment, the presumption is that the legislature intended to change the law. *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E. 2d 481, 483-84 (1968). This is especially so, in our view, when the statutory language is so drastically altered by the amendment. We also consider it significant that the 1981 Session Laws, c. 460, s. 2, provide that the amendment shall not be applied retroactively. This is strong evidence that the legislature understood that the amendment occasioned a change in, rather than a clarification of, existing law.

Finally, we agree with the Court of Appeals that it would not be practicable to make refunds to those customers served by the utilities during the period to which these refunds relate. The undisputed evidence discloses that the gas companies do not have records revealing the names of customers served during that period or the amounts of gas purchased by those customers. Consequently, the practicability requirement of the statute has not been met in instant case and no refund is called for.

We hold that the Commission erred in ordering a total refund to the utilities' customers because the statute required their distribution to the actual customers who paid rates including the overcharges and such a distribution would be impracticable.

We find it unnecessary to discuss the remaining assignments of error since our holding requires that the judgment of the Court of Appeals be affirmed.

Affirmed.

Justice CARLTON concurs in the result.

Justice MEYER concurring in part and dissenting in part.

I concur with the majority opinion insofar as it holds that (1) the controlling statute in this case is G.S. § 62-136(c) which applies to refunds received by any type of North Carolina distributing company utility, (2) the distribution of all refunds *received* after the effective date of G.S. 62-136(c) and before the 1981 amendment thereto are governed by that statute as it existed before the 1981 amendment, and (3) all refunds received after 28 May 1981 will be governed by the 1981 amendment to G.S. § 62-136(c) (1981 Sess. Laws c. 460, s. 1.) which empowers the Commission in its sound discretion to order distribution of supplier refunds to current or past customers, by customer class or on an individual basis.

I cannot agree with the majority opinion insofar as it interprets G.S. § 62-136(c), as it existed prior to the 1981 amendment, to require the distribution of the refunds in question to the *actual* customers who paid rates and insofar as it holds that since such method is impractical under the facts of this case no refund is called for and the full benefit of the refunds received goes to the

utility's stockholders. This unjust result arises from the majority's misinterpretation of G.S. § 62-136(c) as it existed prior to the 1981 amendment. This misinterpretation is explained in the well-reasoned dissent of Justice Martin. Prior to 1981, G.S. § 62-136(c) provided as follows:

> (c) If any refund is made to a distributing company operating as a public utility in North Carolina of charges paid to the company from which the distributing company obtains the energy, service or commodity distributed, the Commission may, if practicable, in cases where the charges have been included in rates paid by the customers of the distributing company, and where the company had a reasonable return exclusive of the refund, require said distributing company to distribute said refund among said customers in proportion to their payment of the charges refunded.

I am of the firm opinion that the term "customers" was intended to include all customers of the company—past and present—who are ratepayers. I am likewise firmly convinced that "customers in proportion to their payment of the charges refunded" was intended to refer to the various classes of customers (*i.e.*, residential, business, industrial, etc.) in proportion to the percentage of charges refunded paid by that customer class.

As to the majority's holding that G.S. § 62-136(c) (1975) required that refunds be disbursed only to those customers who actually paid the overcharges, I join in Justice Martin's dissenting opinion.

Justice EXUM joins in this opinion.

Justice MARTIN dissenting.

I agree with the majority that the controlling statute in this case is N.C.G.S. 62-136(c) (1975). However, I dissent from the majority's holding that this statute required that refunds be disbursed only to those customers who actually paid the overcharges. This holding vitiates the statute.

My review of the record reveals substantial, competent, and material evidence to support the Commission's findings that customers of the defendants are entitled to the refunds referred

to in the majority's opinion. The orders of the Commission are deemed prima facie just and reasonable and will be upheld on appeal when a review of the whole record fails to disclose prejudicial error and the Commission's findings are supported by competent, material, and substantial evidence. N.C. Gen. Stat. § 62-94(e) (1982); *Utilities Comm. v. Telephone Co.*, 285 N.C. 671, 208 S.E. 2d 681 (1974); *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972); *Utilities Commission v. R.R.*, 267 N.C. 317, 148 S.E. 2d 210, *modified on other grounds*, 268 N.C. 204, 150 S.E. 2d 337 (1966). As the Commission explained:

> During the period to which the Transco refunds here in question relate, that is December 4, 1958, through July 31, 1971, this Commission, in the course of allowing rate relief to the North Carolina gas companies here involved, which rate relief was based at least in part upon Transco's rate increases, recognized the possibility that such Transco rate increases were subject to retroactive reduction by the Federal Power Commission. Therefore, the Commission specifically directed in its Orders that any refund resulting from any such retroactive reduction was to be refunded by the North Carolina gas distribution companies to their customers.

The funds in dispute here were paid by the customers of Public Service Company of North Carolina, Inc. and Piedmont Natural Gas Company, Inc. To allow these companies to keep the refunds would unjustly enrich them at the expense of those entitled to be recompensed for the overpayments.

I dissent from the majority's view that it is not practicable to order these refunds to be disbursed to the utilities' customers. Large public utilities have a constant turnover of customers, and under these circumstances it is unreasonable to assume that the legislative intent of the General Assembly in enacting N.C.G.S. 62-136(c) (1975) was to limit refunds only to those individual customers who were in existence during the period of overcharge. People die, move, marry, divorce, and change their names; business entities merge, dissolve, liquidate, go bankrupt, and otherwise change form and name. Even modern computer record-keeping equipment does not make it practicable to require refunds to be paid to every single customer overcharged over the years. To require a thorough tracing of the identity and

whereabouts of each customer entitled to a refund due to prior period overpayments, as the majority does, would never be "practicable."

A more reasonable approach is to allow refunds to be paid to ratepayer classes who were overcharged by these utilities. Indeed, in its orders the Commission specified a practicable method by which refunds are to be calculated and distributed in accord with this approach.

> 1. [Each company] should determine for each of the years 1958 through 1971 the proportion or ratio of Company revenues attributable to its North Carolina operation received from each class of its firm customers.
>
> 2. [Each company] should determine the amount of the producer refunds at issue herein which are applicable to each of the years 1958 through 1971.
>
> 3. [Each company] should calculate for each of the years 1958 through 1971 the proportion of the producer refunds which should be distributed among each customer class for each of the above-listed years. This calculation will involve multiplication of each of the customer class ratios computed in accordance with subparagraph 1 above by the amount of the refund for each of the corresponding years determined pursuant to subparagraph 2 above.
>
> 4. [Each company] should then make refunds to its present customers based on each customer's actual usage for the most recent 12-month period for which data is available. The total amount of money to be refunded to individual customers among each class of service should not exceed the total refund by customer class calculated pursuant to subparagraph 3 above. Said refunds shall be made by a credit to bills or by refund checks if the refund amount is in excess of one dollar.

The Commission then went on to remark that

> such procedures are entirely consistent with the refund practices and procedures historically followed by this Commission in those cases where it has been impractical to order refunds to each individual customer who may have been entitled to a refund. For instance, the refund plans which were approved

by this Commission throughout the 1960s pursuant to Orders issued in Docket No. G-100, Sub 4, generally required the utilities to make refunds to their then current customers based upon each customer class contribution to utility revenues.

This is a practical sense solution which I believe meets the test established by N.C.G.S. 62-136(c) (1975). In sum, I believe the majority's interpretation of N.C.G.S. 62-136(c) (1975) is contrary to the legislative intent that customers should receive such refunds. It will deprive consumers of a just refund while allowing these utilities a windfall of hundreds of thousands of dollars. This is an unjust result, particularly so because defendants knew that their customers would be entitled to any refund ordered by the Federal Energy Regulatory Commission based on Transco's increased rates. I vote to reverse the Court of Appeals and uphold the orders entered by the Utilities Commission.

Justice EXUM joins in this dissenting opinion.

MARY T. PITTMAN AND T. P. THOMAS, JR. v. JAMES MILLER THOMAS, INDIVIDUALLY AND AS EXECUTOR OF THE WILL OF CATHARINE MILLER THOMAS, DECEASED, SARAH ANNE THOMAS (ROWLETT), DORIS ELIZABETH THOMAS TAYLOR, MARY LUCILE PITTMAN, WALTER JAMES PITTMAN, JR., LUCILE WEST ABBITT BOND, CATHARINE LUCILE THOMAS GOSSAM, AND CAROLE ANN THOMAS, A MINOR

No. 502A82

(Filed 28 January 1983)

Wills § 28.4— holographic will—construction of provision concerning education of grandchildren—view toward "circumstances attendant" to writing of will

Where a testatrix stated in item VII of her holographic will that "I request that my executor see that Sarah Anne Thomas is given sufficient funds to complete her education. . . . The same situation in the case of Dorris Elizabeth Thomas Taylor is recognized by (the executor) and may be also provided for (the other grandchildren)," the trial court correctly found that Sarah Anne Thomas and Dorris Elizabeth Thomas Taylor could be reimbursed for educational expenses incurred beyond high school but that none of the other grandchildren were entitled to the payment of any educational expenses. The significant circumstances attendant to the writing of item VII of the will were that the youngest sister of Sarah Anne and Dorris Elizabeth had been serious-

ly ill and the father of these girls had incurred large medical expenses as a result. Such circumstances clearly indicated a desire to assist in the education of her grandchildren if at the time of her death the need to do so existed because the parents of both grandchildren were unable to shoulder the expense. Therefore, the Court of Appeals erred in holding that the testatrix intended to establish a trust fund for her grandchildren for their education in an unnamed amount and for an unnamed period of time.

Justices MEYER and MARTIN did not participate in the consideration or decision of this case.

THIS matter comes to us on appeal as a matter of right, pursuant to G.S. 7A-30(2) (1981), from the decision of the Court of Appeals, 58 N.C. App. 336, 293 S.E. 2d 695 (1982), in which one judge dissented. In its decision the Court of Appeals vacated and remanded the judgment of *Fountain, Judge,* filed 28 August 1981 in Superior Court, WILSON County.

In this appeal we determine the validity and meaning of an ambiguous provision in a holographic will.

Rose, Jones, Rand & Orcutt, P.A., by Z. Hardy Rose and William R. Rand, for plaintiffs.

Tharrington, Smith & Hargrove, by Wade M. Smith and Swann & Evans, P.A., by Steven L. Evans, for defendant James Miller Thomas.

George A. Weaver, guardian ad litem, for defendant Carole Ann Thomas.

CARLTON, Justice.

I.

Catharine Miller Thomas, a resident of Wilson County, died 11 July 1979. She was seventy-eight years of age. Her son, James Miller Thomas, qualified as executor of her holographic will which was dated 1 October 1976. The taxable estate of Mrs. Thomas as finally computed for federal estate tax purposes exceeded $1,000,000.

Mrs. Thomas was survived by four children, eight grandchildren and one great-grandchild who were named beneficiaries

in her will. Each beneficiary's relationship to Mrs. Thomas and age at the time of trial is shown below:

T. P. Thomas, Jr. (55)—Son

Sarah Anne Thomas (Rowlett) (28)—Granddaughter
Catharine Lucile Thomas Gossom (25)—Granddaughter
Dorris Elizabeth Thomas Taylor (27)—Granddaughter
Jennifer Taylor (8)—Great-granddaughter

Mary Thomas Pittman (57)—Daughter

Mary Lucile Pittman (27)—Granddaughter
Walter James Pittman, Jr. (23)—Grandson

Catharine Margaret Thomas Abbitt (54)—Daughter

Catharine Margaret Abbitt Teeter (31)—Granddaughter
Lucile West Abbitt Bond (29)—Granddaughter

James Miller Thomas (47)—Son

Carole Ann Thomas (17)—Granddaughter

In the undisputed portions of her will, Mrs. Thomas provided as follows for her children:

T. P. Thomas, Jr.

—$10,000 for the education or medical expenses of his daughter, Catharine Lucile Thomas Gossom

—a one-fourth interest in the "Miller Groves" and the "Miller Farm"

—a one-third interest in the residue of her estate including her partnership interests in the Southern Storage Company

Mary Thomas Pittman

—$10,000 to be used solely for the education expenses of her son, Walter James Pittman, Jr. Any of this money not used for this designated purpose to be given the grandson on his 25th birthday

—a one-fourth interest in the "Miller Groves" and the "Miller Farm"

—a one-third interest in the residue of her estate including her partnership interests in the Southern Storage Company

Catharine Margaret Thomas Abbitt

—the sum of $1,000

—a one-fourth interest in the "Miller Groves" and the "Miller Farm"

James Miller Thomas

—$10,000 to be used for the education of his daughter, Carole Ann Thomas. Any of this money not used for this purpose to be given the granddaughter on her 25th birthday.

—her home and lot on 1614 West Nash Street in Wilson, in fee simple

—a one-fourth interest in the "Miller Groves" and the "Miller Farm"

—a one-third interest in the residue of her estate including her partnership interests in the Southern Storage Company

—the discretion to distribute all of her personal property such as jewelry, furniture, silver, china, glass, etc. This son, her youngest, was also appointed executor of the estate.

In item VII, the paragraph of the will which gives rise to this lawsuit, Mrs. Thomas provided:

> I request that my Executors see that Sarah Anne Thomas is given sufficient funds to complete her education. The amount to be used cannot be determined at this time but is a confirmed promise. The same situation in the case of Dorris Elizabeth Thomas Taylor is recognized by James Miller Thomas and may be also provided for Mary Lou Pittman, Walter James Pittman, Jr., Carole Ann Thomas, James Miller Thomas, Lucile West Abbitt Bond and Catharine Lucile Thomas.

On 8 July 1980, plaintiffs, Mary T. Pittman and T. P. Thomas, Jr., filed a complaint pursuant to the North Carolina Declaratory Judgment Act, G.S. 1-253 to 1-267 (1969), seeking construction of this paragraph of the will. They alleged, *inter alia*, that a dispute existed between them and James Miller Thomas, the executor of the will, concerning the purpose of this provision. They alleged that the executor had undertaken to administer the provision by

allotting $95,000 for the education of his own daughter, Carole Ann Thomas, but failed to make similar allotments for the education of the other beneficiaries named in the article. Plaintiffs asked the court to determine the validity of the provision in question or, in the alternative, to construe the provision's meaning and intent and issue proper instructions to the executor.

George A. Weaver, guardian ad litem for Carole Ann Thomas, filed an answer denying that the provision was too vague and uncertain to be administered. He asked that the court impress a trust on the assets of the estate to the extent necessary to carry out the provision or, in the alternative, that the court direct the executor to set aside a sufficient amount of money for Carole Ann Thomas to complete her education through medical school "in compliance with her present intention."

None of the other defendants, beneficiaries included in the provision at issue, filed a responsive pleading.

Of all the named beneficiaries, only two grandchildren, Sarah Anne Thomas (Rowlett) and Carole Ann Thomas, testified at trial. The evidence tended to show that of the eight people named in item VII of the will all are grandchildren of Mrs. Thomas except James Miller Thomas, her youngest son and executor. The first two people named in item VII, Sarah Anne Thomas (Rowlett) and Dorris Elizabeth Thomas Taylor, are two of the three children of the testatrix's oldest son, T. P. Thomas, Jr. Sarah Anne Thomas (Rowlett) testified that during 1974, 1975 and 1976 her father incurred substantial medical expenses due to the illness of her other sister, Catharine Lucile Thomas Gossom. She said her grandmother was aware of this illness and the great expenses her father incurred because of it. She also testified that her grandmother knew that her financial problems were among the reasons why she dropped out of school.

Sarah Anne also testified that she attended various colleges between 1970 and 1975 but never obtained a degree. She said her grandmother sent her about $4,000 to help pay for her education; in addition, Sarah Anne borrowed about $5,500 for her educational expenses. She dropped out of college, in part, because of the financial strain her father was suffering and because of the disruption in the family due to her sister's illness. Moreover, her

"career goals were not concrete," she said. She married in May of 1979 and now farms with her husband in Kentucky.

At the time of trial Carole Ann Thomas was enrolled as a freshman at the College of William and Mary. She testified that it was her desire to attend medical school at Duke University. The director of budget and finance at Duke University Medical Center testified that the cost of a four-year medical school education at Duke would be about $90,000, assuming the student enters medical school in 1985.

Carole Ann testified that her grandmother financed her private school education. She said she has always been an excellent student. Carole Ann is the only child of the testatrix's youngest son and executor, James Miller Thomas. Her name appears three times in the testatrix's will: in one article as the beneficiary of a $10,000 trust for her education, in another as the recipient of a $1,000 general bequest and, finally, as one of the persons named in the article which is the subject of this lawsuit. Carole Ann testified the testatrix encouraged her to pursue a medical career and that her grandmother asked her parents to compile projected figures for a medical school education.

Judge Fountain entered findings of fact including those noted above and concluded as a matter of law: (1) item VII of Mrs. Thomas' will is not void; (2) Sarah Anne Thomas (Rowlett) can recover the legitimate costs of her education not previously paid by Mrs. Thomas in the amount of $5,500; (3) Dorris Elizabeth Thomas Taylor is to be reimbursed for any legitimate educational expenses she incurred beyond high school; (4) none of the other persons named in item VII of the will are entitled to the payment of any educational expenses.

Defendants James Miller Thomas and Carole Ann Thomas appealed to the Court of Appeals.

A divided panel of the Court of Appeals vacated and remanded the trial court order. The majority agreed with Judge Fountain's conclusion that item VII of the will was not void; however, it believed that the language of item VII, construed in the context of the entire will and the conditions and circumstances existing at the time the will was written, manifested an intention on the part of Mrs. Thomas to create a testamentary trust. It further held that Mrs. Thomas did not intend to pay for all the educational ex-

penses of all her grandchildren but that the will established a trust fund to ensure that no beneficiary named in item VII be forced to abandon an educational goal for financial reasons. Hence, the majority believed that the trial court erred in ordering that: (1) Sarah Anne was to be reimbursed for the educational expenses she incurred before the death of the testatrix, and (2) none of the others named in item VII were entitled to the status of beneficiary of the trust.

Judge Vaughn dissented without rendering an opinion. He voted to affirm the judgment of the trial court. Plaintiffs, Mary T. Pittman and T. P. Thomas, Jr., appeal to this Court as a matter of right.

II.

This Court is once again called upon to interpret the ambiguous provisions of a holographic will. Our decisions have long recognized the inherent difficulty of the task. Because the problem in each case is "to ascertain the intent of the particular testator and the circumstances surrounding each testator vary, decisions reached in other cases, whether by this Court or by courts of other jurisdictions, are informative but not controlling." *Wilson v. First Presbyterian Church*, 284 N.C. 284, 295, 200 S.E. 2d 769, 776 (1973). Justice Higgins, writing for this Court in *Morris v. Morris*, 246 N.C. 314, 98 S.E. 2d 298 (1957) stated:

> The courts approach with apprehension and misgivings the task of construing wills—of saying what one now deceased meant by the words he used during his lifetime in the disposition of his property to take effect at his death. Holographic wills especially are like the men who make them—individual. Two wills of exactly the same wording may be differently construed by reason of the different circumstances surrounding the testator at the time he made the will—differences in the number and ages of relatives, the amount and character of his property, his legal and moral obligations, and, above all, the purpose he sought to accomplish. At best, therefore, the courts can make use of previously decided cases only as meager aid in the ascertainment of the testator's intent.

Id. at 315-16, 98 S.E. 2d at 300.

Although previous decisions provide little help in interpreting the provision of the will at issue here, we rely on those decisions, of course, to remind us of the applicable principles of law which are well established in this jurisdiction:

If the terms of a will are set forth in clear, unequivocal and unambiguous language, judicial construction is unnecessary. *Rhoads v. Hughes*, 239 N.C. 534, 535, 80 S.E. 2d 259 (1954). When doubt exists as to what the testator intended, resort may be had to the courts for construction of the will. *Id.* Indeed, the authority and responsibility to interpret or construe a will rests solely on the courts. *Wachovia Bank and Trust Co. v. Wolfe*, 243 N.C. 469, 473, 91 S.E. 2d 246, 250 (1956).

Here, the terms of item VII of Mrs. Thomas' will unquestionably are not clear, unequivocal or unambiguous and, thus, judicial construction has been properly invoked.

It is an elementary rule in this jurisdiction "that the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy." *Clark v. Connor*, 253 N.C. 515, 520-21, 117 S.E. 2d 465, 468 (1960). In attempting to determine the testator's intention, "the language used, and the sense in which it is used by the testator, is the primary source of information, as it is the expressed intention of the testator which is sought." *Id.* Isolated clauses or sentences should not be considered out of context; the "will is to be considered as a whole, and its different clauses and provisions examined and compared, so as to ascertain the general plan and purpose of the testator, if there be one." *Id.*

In ascertaining the testator's intention, a will is to be considered in the light of the conditions and circumstances existing at the time the will was made. *E.g., Cannon v. Cannon*, 225 N.C. 611, 617, 36 S.E. 2d 17, 20 (1945). We have emphasized that the court's responsibility is "to place itself as nearly as practicable in the position of the testator" at the time the will was executed. *E.g., In re Will of Johnson*, 233 N.C. 570, 575, 65 S.E. 2d 12, 15 (1951). In a sentence which has been frequently quoted, this Court has said: "The will must be construed, 'taking it by its four cor-

ners' and according to the intent of the testator as we conceive it to be upon the face thereof and according to the circumstances attendant." *Patterson v. McCormick*, 181 N.C. 311, 313, 107 S.E. 12 (1921). In referring to the "circumstances attendant" we mean "the relationships between the testator and the beneficiaries named in the will, and the condition, nature and extent of [the testator's] property." *Wachovia Bank and Trust Co. v. Wolfe*, 243 N.C. at 473, 91 S.E. 2d at 250. In short, the undertaking before us requires that we put ourselves "in the testator's arm chair." *Id.* at 474, 91 S.E. 2d at 250.

Applying the foregoing to the record before us, we conclude that Judge Fountain properly construed Mrs. Thomas' intention at the time she put her will in writing with respect to the disposition of her property at the time of her death. In reviewing this will from its four corners, we nowhere find any evidence, unlike the Court of Appeals, of any intention on Mrs. Thomas' part to create a trust fund "to insure that no beneficiary be forced to abandon an educational goal for financial reasons." *Pittman v. Thomas*, 58 N.C. App. at 339, 293 S.E. 2d at 698. Certainly, we find no words in the will before us to indicate an intent on Mrs. Thomas' part to overcome the general rule that mere precatory words will not create an express trust. *See Andrew v. Hughes*, 243 N.C. 616, 91 S.E. 2d 591 (1956). Had Mrs. Thomas intended to create a trust in item VII of her will, we believe that she would have done so in language as clear as that employed in items III, IV and V of her will, each of which created a trust for the benefit of one of her grandchildren including Carole Ann.[1]

1. Item III of Mrs. Thomas' will provided:

> I give and bequeath to my son, T. P. Thomas, Jr., Ten Thousand Dollars ($10,000.00) with the request the Executors of my estate pay such portion of this sum as may be needed for the education or medical expenses of his daughter, Catharine Lucile Thomas. Any sum not so used at the time of the closing of this estate to be invested by my son *for the use of* this daughter.

Record at 15 (emphasis added).

Item IV provided:

> I give and bequeath to my daughter Ten Thousand Dollars ($10,000.00) Mary Thomas Pittman *for the use of* her son, Walter James Pittman, Jr. It is intended that this sum be used solely for his education. Any money not so used should be given to him upon his 25th birthday.

Record at 15 (emphasis added).

We believe that the "circumstances attendant" to the writing of item VII of Mrs. Thomas' will were those indicating a concern with the particular circumstances she believed threatened the educational plans of Sarah Anne Thomas (Rowlett) and Dorris Elizabeth Thomas Taylor. Indeed, the trial court's seventh finding of fact, to which no exception was taken, buttresses this belief. That finding read:

> 7. Defendant, Catharine Lucile Thomas Gossom, is the youngest daughter of plaintiff, T. P. Thomas, Jr. Ms. Gossom has incurred large medical expenses during the course of her lifetime, including expenses during the years 1974-1976 in the approximate amount of $29,000.00. These medical expenses caused a significant strain on the financial resources of T. P. Thomas, Jr. and the existence of this hardship was known to the testatrix prior to and at the time she executed her will on October 1, 1976.

We believe the trial court properly identified in the quoted finding of fact the significant circumstance attendant to the writing of item VII of the will. As noted in our statement of facts above, Catharine Lucile Thomas Gossom, the youngest sister of Sarah Anne and Dorris Elizabeth, became ill in 1974 and was seriously ill for several years thereafter. The father of these girls, T. P. Thomas, Jr., incurred large medical expenses as a result and Mrs. Thomas was aware of this strain on her son's financial resources. By specifically naming Sarah Anne and Dorris Elizabeth first in item VII, Mrs. Thomas was, we think, responding to this particular circumstance attendant at the time and attempted to provide for their education.

We agree with the Court of Appeals that the evidence discloses a generous attitude on Mrs. Thomas' part with respect to the future education of all her grandchildren. As noted above,

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Item V provided:

> I give and bequeath to my son, James Miller Thomas, the sum of Ten Thousand Dollars *to be used for the education of* his daughter, Carole Ann Thomas, with the request that it be invested by him in a savings and loan account. Any money not so used may be given to her when she reaches her 25th birthday.

Record at 15 (emphasis added).

however, we are unable to glean from this will any intention to create a trust for that purpose. By adding the other names in item VII of her will, we think Mrs. Thomas intended that, *if at the time of her death*, the educational goals of any of those so named were in jeopardy because of financial circumstances similar to those Sarah Anne and Dorris Elizabeth faced, then funds would be made available from her estate to assist them as well. No such evidence of similar circumstances with respect to the other named beneficiaries were presented to Judge Fountain at the time of the hearing. Indeed, it would appear that such threatening financial circumstances do not exist with respect to the other beneficiaries. In the case of Carole Ann Thomas the will specifically provides for a $10,000 educational trust fund and an outright bequest of $1,000. Moreover, her father, James Miller Thomas, was the beneficiary treated most generously in Mrs. Thomas' will. We see no situation confronting Carole Ann even remotely similar to the one that faced the children of T. P. Thomas, Jr., at the time the will was written.

The "circumstances attendant" to the writing of item VII of Mrs. Thomas' will clearly indicate a desire to assist in the education of her grandchildren if at the time of her death the need to do so existed because the parents of those grandchildren were unable to shoulder the expense. The Court of Appeals correctly recognized that item VII was created on an "if and when needed" basis. It erred, however, in holding that Mrs. Thomas intended to establish a trust fund for her grandchildren for their educations in an unnamed amount and for an unnamed period of time.

For the reasons stated above, the decision of the Court of Appeals is reversed and this cause is remanded to that court with instructions that it remand to the Superior Court, Wilson County, for reinstatement of the order of the trial court.

Reversed and remanded.

Justices MEYER and MARTIN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. RICHARD E. CABEY

No. 383A82

(Filed 28 January 1983)

1. **Criminal Law § 48— implied admission by silence**

A statement made by a co-perpetrator in defendant's presence that "they" had just robbed a store was competent as an implied admission by defendant where defendant not only failed to deny the statement but had himself just made the same statement.

2. **Criminal Law § 66— identity of co-perpetrator not on trial—relevancy**

In a prosecution for the armed robbery of a jewelry store, the identification of a photograph of a man not on trial as depicting the shorter of the two robbers was relevant and not impermissibly prejudicial to defendant where defendant and the man in the photograph were identified as being together at the jewelry store, and there was evidence that defendant and the other man were together shortly after the robbery, that both men had fruits of the robbery, and that both referred to their joint action in committing the robbery. G.S. 8-97.

3. **Criminal Law § 117.4— accessory after fact—instruction on accomplice testimony not required—interested witness instruction sufficient**

Evidence that a witness was an accessory after the fact did not subject her testimony to rules relating to accomplice testimony so as to require the trial court to give a requested instruction on the duty to examine accomplice testimony carefully. However, the witness was an interested witness, and the trial court's instruction that, in determining whether to believe any witness, the jury should consider "any interest, bias or prejudice the witness may have" was a sufficient instruction on the duty to scrutinize the testimony of an interested witness, although a more detailed instruction concerning the witness's status as an interested witness may have been preferable.

4. **Criminal Law § 117.1— refusal to instruct concerning prior inconsistent statements—no prejudicial error**

The trial court did not commit prejudicial error in failing to give a requested instruction concerning the effect on credibility of prior inconsistent statements made by a State's witness where some of the claimed inconsistencies were merely immaterial omissions which did not constitute an indirect inconsistency; other alleged inconsistencies concerned collateral facts and were of value to defendant, if at all, only to the extent that they tended to affect the jury's judgment as to the credibility of the witness; the jury heard the witness admit during both direct and cross-examination that her first statement was not complete or entirely truthful; and the instruction sought by defendant would have given the defendant no more advantage than this.

APPEAL by the defendant from *Barefoot, Judge*, 25 January 1982 Criminal Session of Superior Court, CUMBERLAND County,

Judgment entered 27 January 1982. The defendant, Richard E. Cabey, was convicted of five counts of armed robbery. The defendant was sentenced to life imprisonment for the guilty verdict on the first count. Counts two, three, four and five were consolidated for judgment and the defendant was sentenced to not less than 20 years nor more than 25 years imprisonment to commence upon the expiration of the life sentence.

From the trial court's sentence of life imprisonment, the defendant appeals to the Supreme Court as a matter of right pursuant to G.S. 7A-27(a). The defendant's motion to bypass the Court of Appeals on counts two through five was allowed on 3 November 1982.

Rufus L. Edmisten, Attorney General, by W. Dale Talbert, Assistant Attorney General, for the State.

James R. Parish, Assistant Public Defender, for the defendant-appellant.

MITCHELL, Justice.

The defendant contends that he was prejudiced by the admission of statements by and the identification of the "other" robber and by the trial court's failure to give proper instructions concerning the testimony of a witness who was charged as an accessory after the fact of the robbery. After a 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 26 May 1981 two males entered the Heritage Jewelry Store in Westwood Shopping Center in Fayetteville, North Carolina. These two men had been in the store twice before during that day. On their second visit, the store manager, Julie Kosma, became suspicious. The two men asked about watches but then stated that they were interested in wedding rings. When they returned the third time, the shorter man told Kosma that he wanted to buy the ring that she had shown him. When she began to gather the paperwork, the shorter man produced a gun and told her if she screamed he would "blow her brains out."

The two men took Kosma to the back of the store where they forced her and two men, Phillip Montaldo and Robert Neitman, to

lie down on the floor. The robbers took a briefcase from Montaldo and, as they tried to open the case, the gun in the shorter man's hand fired. The taller robber used this incident as a warning to the victims. Montaldo had corporate papers in his briefcase and neither the papers nor the briefcase were recovered. The robbers also stole some money, a watch and a ring from Neitman.

The taller robber, later identified as the defendant, took a clerk to the front of the store. When two customers entered, they were threatened and robbed. Finally, a door buzzer rang and the robbers fled. All the watches, gold chains and diamonds in the jewelry store were stolen. An inventory check revealed approximately $94,000 worth of merchandise was taken.

On 6 August 1981, Florence McDuffie pawned a few pieces of jewelry at Ruby's Pawn Shop in Fayetteville. Both Kosma and the store owner, Steve Bertie, separately identified several pieces of jewelry as items that were stolen in the May robbery.

The police arrested McDuffie and charged her with possession of stolen property. McDuffie told the police that she received the jewelry from the defendant Richard Cabey on 26 May 1981. He had approached her in her father's club, where she worked, and introduced her to his partner, Jimmy Hart. Cabey told her that they had just robbed a store and that she would read about it in the morning paper. Hart made a similar statement and Cabey said he was more or less breaking Hart in as his partner. Each man had on a watch and some jewelry. Cabey gave McDuffie some jewelry as payment for a $150 debt that he owed her for the purchase of one-quarter pound of marijuana. McDuffie identified the defendant from a photographic line-up. She had known Cabey since December of 1980. McDuffie was later charged as an accessory after the fact of armed robbery.

From the photographic line-up, Kosma was the only witness to the robbery who could positively identify the defendant. At trial Kosma identified the defendant as the taller of the two robbers. Over objection, Kosma also identified a photograph of Hart as being a photograph of the shorter of the two robbers. Montaldo testified that he had selected a photograph of Hart, but was not certain of the identification. Hart had not been arrested and was not present at the trial of the defendant.

The defendant offered no evidence.

[1] The defendant filed a motion in limine to exclude any hearsay conversation between the co-perpetrator of the robbery, Jimmy Hart, and third parties. This motion was denied. At trial, Florence McDuffie was allowed, over objection, to testify as to statements Hart made to her. Due to the nature and circumstances of the conversation, the evidence was properly admitted.

McDuffie testified that on 26 May 1981 the defendant and Hart approached her in her father's club. The defendant introduced Hart as his partner and stated that they had just robbed a store and that she might read about it in the morning newspaper. McDuffie then testified that Hart said "the same thing that Cabey said and that they should have got the safe and all that." The defendant argues that this statement does not meet the requirements of an implied admission and should have been excluded as impermissible hearsay.

For a statement to be admissible as an implied admission, it must have been made in the person's presence under such circumstances that a denial of an untrue statement would be naturally expected, and it must be shown that the person against whom the implied admission is used was in a position to hear and understand the statement and that he had the opportunity to speak. *State v. Spaulding*, 288 N.C. 397, 406, 219 S.E. 2d 178, 184 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3210 (1976). McDuffie testified that the defendant and Hart approached her and stated that "they" had just robbed a store. Her testimony indicated that she, the defendant and Hart were involved in a three-way conversation at that time. The trial court ascertained from the witness that the defendant was present when Hart made the statement. While a more complete showing could have been made, these facts are sufficient to formulate an implied admission.

While an implied admission makes a hearsay statement admissible because of the implication derived from the defendant's silence or failure to deny the statements, the present situation presents an even stronger argument for admissibility. The statement by Hart about which McDuffie testified was the same statement that the defendant had just made to her. The only

additional information contained in Hart's statement was a reference to their failure to empty the safe. This insignificant variance cannot detract from the admissibility of the testimony. The witness merely stated that, in the defendant's presence, Hart made the same statement that the defendant had just made. This testimony is clearly admissible.

[2] The defendant also assigns as error the identification by several witnesses of the shorter robber from a photograph of Jimmy Hart. Kosma identified Hart from a photographic line-up and testified at trial that Hart was the shorter of the two robbers. She also displayed the photograph to the jury. Montaldo testified that he described the features of both robbers and that he selected a couple of photographs from the photographic line-up that he thought resembled one of the robbers. Detective Gloria Royal testified, over objection, that she conducted the photographic line-up and that both Kosma and Montaldo selected photographs of Hart but that Montaldo said he was not sure of his identification. The defendant contends that the identification of Hart was irrelevant because Hart was not being tried as a co-defendant and the identification was an impermissible attempt by the State to influence the jury with a theory of guilt by association. We find the evidence relevant and properly admitted.

In *State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976), two men robbed a store and killed two people. The two men received separate trials. At his trial the defendant Bowden objected to the presence of the co-perpetrator and to the witnesses' identification of the co-perpetrator. The defendant argued that the identification violated his due process rights under the Fourteenth Amendment to the Constitution of the United States because of surprise and that such a violation was harmful error because it suggested guilt by association. This Court held that the identification was proper and corroborated the witnesses' identification of the defendant because the witnesses saw the defendant and the co-perpetrator "at substantially the same time and under similar circumstances." *Id.* at 711, 228 S.E. 2d at 420. The identification of Hart has even greater relevance and reliability than the identification in *Bowden*. Not only were the two men identified and seen together at the jewelry store, another witness, McDuffie, testified that she saw the two together shortly after the robbery. At that time, both men had fruits of the crimes charged and both

referred to their joint actions in committing the robbery. Therefore, the identification of Hart as the shorter of the two robbers was relevant and not impermissibly prejudicial to the defendant.

The use of the photograph for the witnesses' identification of Hart was not improper as Hart had not been arrested and was not present at the trial. Photographs may be used for illustrative purposes, and, upon laying a proper foundation and meeting applicable evidentiary requirements, may be used as substantive evidence. G.S. 8-97.

[3] The defendant also assigns as error the failure of the trial court to instruct, pursuant to a written request by the defendant, that McDuffie was an accomplice and that her testimony therefore should be carefully examined. McDuffie was charged with possession of stolen goods and accessory after the fact of armed robbery. The elements of the crime of being an accessory after the fact are separate and distinct from those involved in the crimes of being a principal or an accessory before the fact. G.S. 14-7 (accessories after the fact), former G.S. 14-5 (accessories before the fact, applicable to all offenses committed before 1 July 1981) and G.S. 14-5.2 (accessories before the fact, applicable to all offenses committed on or after 1 July 1981). Evidence that a witness was an accessory after the fact does not subject her testimony to rules relating to accomplice testimony. *State v. Eakins*, 292 N.C. 445, 233 S.E. 2d 387 (1977). Therefore, the failure to give the requested instruction was not error.

Although the defendant only specifically requested an instruction on the closer review of McDuffie's testimony based on a theory of testimony by an accomplice, McDuffie was an interested witness and a jury should be advised of the special scrutiny required for the testimony of such a witness. In the charge to the jury, the trial court stated that the jury must judge the credibility of each witness and, in determining whether to believe any witness, the jury should consider, among other factors, "any interest, bias or prejudice the witness may have." While a more detailed instruction concerning McDuffie's status as an interested witness may have been preferable, the instruction given was sufficient and was not error.

[4] Finally, the defendant assigns as error the trial court's failure to give a requested instruction concerning prior inconsistent statements made by McDuffie. At trial, McDuffie testified that she had not given a complete and totally accurate statement to the police when she was first arrested. She testified that her second statement and her trial testimony were more detailed and correct. The defendant cross examined McDuffie as to the variances between her first statement and her testimony and requested that the court instruct the jury as to the effect on credibility of inconsistent statements. The trial court did not include the requested instruction in its charge.

Some of what the defendant claims are inconsistencies in McDuffie's statements are merely omissions. Initially, she did not tell the police that Cabey gave her the jewelry as payment of a debt from a marijuana purchase. The defendant contends that such an omission constitutes an indirect inconsistency. We disagree. An omission may be termed an indirect inconsistency only when the declarant fails to mention a material circumstance which it would have been natural to include in the statement. *State v. Mack*, 282 N.C. 334, 340, 193 S.E. 2d 71, 75 (1972). The marijuana debt may be the reason that Cabey gave McDuffie the jewelry, but it is simply a further explanation of his actions and not such a material circumstance that the omission of that fact constituted an indirect inconsistency.

It appears from the record, although it is not at all clear, that there were some additional variances between McDuffie's first statement to law enforcement officers and her testimony at trial. However, the defendant did not include the transcript, excerpts from McDuffie's actual trial testimony or McDuffie's original statements to the authorities in the record on appeal. Because of the defendant's failure to provide a more complete record, it is impossible to discern precisely how the defendant contends that the earlier statements of McDuffie varied from her trial testimony. Nevertheless, we have undertaken insofar as possible to review the defendant's contentions in this regard. The primary facts as to which the defendant contends McDuffie's trial testimony differed from her earlier statements seem to involve the number of pieces of jewelry that the defendant gave to McDuffie and whether a stolen ring was actually sold to pay for her bond. Variances in statements of the witness with regard to

such collateral facts were not in themselves helpful to the defendant, as the facts with regard to which the testimony is alleged to have varied were not in any way controlling on the issues presented at trial. Such variances were of value to the defendant, if at all, to the extent that they tended to affect the jury's judgment concerning the witness's credibility. Here, the jury heard the witness admit during both direct and cross examination that her first statement was not complete or entirely truthful. Therefore, the defendant had the full value of the jury's having been made aware of a prior statement by the witness which was not entirely consistent with the witness's trial testimony or entirely truthful. The instruction sought by the defendant would have given the defendant no more advantage than this.

As the defendant's assignment of error relative to the trial court's failure to give the requested instruction concerning prior inconsistent statements by the witness involves a purported error relating to rights arising other than under the Constitution of the United States, the burden is upon the defendant to show that "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." G.S. 15A-1443. For the foregoing reasons, we find that the defendant has entirely failed to carry this burden and that there is no reasonable possibility that a different result would have been reached at trial had this purported error not occurred. This is particularly true in light of the other compelling evidence, including eyewitness testimony, admitted against the defendant at trial.

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

No error.

STATE OF NORTH CAROLINA v. BOBBY LEE MILLS

No. 486A82

(Filed 28 January 1983)

1. **Criminal Law § 91— speedy trial not denied—superseding indictment—120-day period began on day of new indictment**

When superseding indictments are appropriate and obtained in good faith, then for purposes of N.C.G.S. 15A-701(a1)(1), the 120-day period begins on the day the new indictments are returned. Therefore, where defendant pled not guilty to the charges in the original indictment; defendant had not been brought to trial before the day on which the new indictments were returned; the new indictments were appropriate and in good faith; and the new indictments charged defendant with the same crimes as were charged in the original indictments, there was no violation of the Speedy Trial Act where defendant was brought to trial within 120 days of the subsequent indictments. N.C.G.S. 15A-646.

2. **Constitutional Law § 30— failure to notify defendant before trial of existence of witness—failure to furnish defendant with copy of plea agreement pursuant to which witness testified—no error**

The trial court properly found that the State was not required to divulge to the defendant before trial the existence of a State's witness, a copy of the plea agreement pursuant to which the witness testified, or the substance of the witness's expected testimony where the witness was a prisoner in a cell adjoining one in which defendant and another inmate were incarcerated when he overheard defendant make certain statements to his cellmate concerning the three murders defendant was accused of committing. N.C.G.S. 15A-903(a)(2) requires the pretrial disclosure to defense counsel of a defendant's oral statements only when the statements were made to a person acting on behalf of the State.

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

APPEAL by defendant from judgments of *Farmer, J.*, entered at the 8 March 1982 Criminal Session of Superior Court, WAKE County.

Defendant was charged in indictments proper in form with murder in the first degree of Michael Allen Collins, Grover Shepard Broadwell, and Della Francis Murray, and with conspiracy to commit murder in the first degree of Michael Allen Collins. Defendant entered a plea of not guilty to each charge.

The state's evidence tended to show the following:

In January of 1973, Grover Shepard Broadwell was employed by Joe R. Murray, Sr. to run a used car lot owned by Murray.

Michael Allen Collins and Della Francis Murray also worked at the used car lot. At approximately 9:30 a.m. on Monday, 15 January 1973, Joe Murray was informed that the used car lot was not open for business as it should have been. He and one of his salesmen went to the car lot to find out why. Finding nothing unusual, the two then went to Broadwell's apartment. Murray became suspicious and called the police when he and his salesman received no response to knocks at the door and found the bedroom window broken out.

When police officers were admitted to Broadwell's apartment by the resident manager, they found three bodies, later identified as Grover Shepard Broadwell, Michael Allen Collins, and Della Francis Murray. Broadwell's head and face were wrapped with 138 inches of two-inch-wide silver duct tape. His hands, neck, legs, and feet were bound by appliance cords, neckties, and another 190 inches of tape. His hat had been placed upon his taped head. Collins's body was bound and tied in a similar fashion, with 184 inches of tape around his head and face, 236 inches around his hands and wrists, and 92 inches around his legs. He was tied to a bed and to a doorknob by appliance cords tied around his neck. Murray's head was wrapped with 213 inches of tape, her wrists and hands were wrapped with 79 inches, and her legs with another 92 inches of tape. She was found facedown three feet from the door leading outside the apartment.

Autopsies revealed that the cause of death for each victim was a combination of external airway obstruction from the tape and strangulation from the cords and tape around the neck. A pathologist testified that he estimated that it took six to fifteen minutes for the victims to die.

The defendant was found guilty of three charges of murder in the first degree and one charge of conspiracy to commit murder. He was sentenced to three consecutive sentences of imprisonment for life.

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

Tharrington, Smith & Hargrove, by Wade M. Smith, Roger W. Smith, and Douglas E. Kingsbery, for defendant.

MARTIN, Justice.

[1] Defendant's first assignment of error alleges that he was prosecuted for the three murders in violation of the North Carolina Speedy Trial Act, N.C.G.S. §§ 15A-701 to -704 (1978 & Cum. Supp. 1981). For the reasons stated below, we hold that the Speedy Trial Act was not violated.

Defendant was originally indicted for the murders of Collins, Broadwell, and Murray on 27 April 1981. These indictments alleged that the murders occurred 15 January 1973. On 9 November 1981 the grand jury returned superseding indictments which alleged that the murders occurred on 11 January 1973, rather than on 15 January 1973. A motion filed by the defendant 4 December 1981 to dismiss the pending charges on the basis of a violation of the North Carolina Speedy Trial Act was denied. Defendant's trial on the murder charges began 8 March 1982.

In pertinent part, the Speedy Trial Act states:

> [T]he trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1983, shall begin within the time limits specified below:
>
> (1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last.

N.C. Gen. Stat. § 15A-701(a1)(1) (Cum. Supp. 1981). Defendant argues that the speedy trial clock began to run on 27 April 1981, the date of the original indictments charging him with commission of the murders. Therefore, since more than 120 days (excluding those not counted under N.C.G.S. 15A-701(b)) had elapsed by 8 March 1982, the date on which he was brought to trial, he was tried in violation of the Speedy Trial Act. The defendant urges us to overrule the decision of the Court of Appeals of North Carolina in *State v. Moore*, 51 N.C. App. 26, 275 S.E. 2d 257 (1981), which held that when a superseding indictment is appropriate and obtained in good faith, the 120-day period begins on the date the new indictment is returned. In the present case, trial commenced within 120 nonexcludable days of the date on which superseding indictments were returned.

We find the reasoning in *Moore* persuasive and hold that when superseding indictments are appropriate and obtained in good faith, then for purposes of N.C.G.S. 15A-701(a1)(1) the 120-day period begins on the day the new indictments are returned.

In the instant case the state had a valid reason for obtaining new indictments which alleged correctly the date on which the three murders were committed: the date could have been critical to the state's ability to prove that the defendant was guilty if the defendant ultimately chose to offer evidence at trial intended to establish an alibi defense. It was also relevant to ensure protection of the defendant from double jeopardy. The obtaining of new indictments was thus appropriate and in good faith.

As the *Moore* court observed, N.C.G.S. 15A-646 states in part:

> If at any time before entry of a plea of guilty to an indictment or information, or commencement of a trial thereof, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted to be charged in the first instrument, the first one is, with respect to the offense, superseded by the second and, upon the defendant's arraignment upon the second indictment or information, the count of the first instrument charging the offense must be dismissed by the superior court judge.

Defendant here pled not guilty to the charges in the original indictments. He had not been brought to trial before 9 November 1981, the day on which the new indictments were returned. Therefore, the second indictments were issued "before entry of a plea of guilty . . . or commencement of a trial." Thus, because the new indictments charged defendant with the same crimes as were charged in the original indictments, the new indictments superseded the earlier ones. For purposes of N.C.G.S. 15A-701(a1)(1), 9 November 1981 was the day on which the last of the following occurred: arrest, service of criminal process, waiver of indictment, or indictment. Because defendant was brought to trial within 120 days of this date, N.C.G.S. 15A-701(a1)(1) was not violated. We concur with the *Moore* court

> that the opportunity afforded the State by G.S. 15A-646 to obtain a new indictment which supersedes one previously

> issued could be exercised for the purpose of defeating the time limitations for commencement of trial imposed by the Speedy Trial Act. Concern regarding that possibility is, however, appropriately addressed to the General Assembly.

51 N.C. App. at 29, 275 S.E. 2d at 260. Meanwhile, defendants are protected by the requirement that in order for the 120-day period to begin on the date superseding indictments are returned, such indictments must have been appropriate and sought in good faith.

[2] Defendant next assigns as error the trial court's denial of his motion to suppress the testimony of a particular witness. Grounds for the motion were that the state had failed to notify defendant before trial of the existence of the witness, had failed to furnish defendant before trial with a copy of the plea agreement pursuant to which the witness testified, and had failed to tell defendant the substance of oral statements that defendant had made and which were the subject of the witness's testimony. Defendant claims that the trial court violated N.C.G.S. 15A-903(a)(2), which reads as follows:

> (a) Statement of Defendant.—Upon motion of a defendant, the court must order the prosecutor:
>
> . . . .
>
> (2) To divulge, in written or recorded form, the substance of any oral statement made by the defendant which the State intends to offer in evidence at the trial.

In the present case the witness was a prisoner in a cell adjoining one in which defendant and another inmate were incarcerated when he overheard defendant make certain statements to his cellmate concerning the three murders. The witness contacted his lawyer and later offered to testify against defendant in exchange for certain promises of the prosecuting attorney relevant to the witness's conditions of imprisonment. The agreement containing the resulting bargain was not signed until moments before the witness took the stand. It was not until then that the state made the decision to call the witness to testify.

Defendant urges this Court to overrule a line of cases holding that N.C.G.S. 15A-903(a)(2) requires the pretrial disclosure to defense counsel of a defendant's oral statements only when the

statements were made to a person acting on behalf of the state. *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980); *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979); *State v. Crews*, 296 N.C. 607, 252 S.E. 2d 745 (1979). The witness here complained of was not a person acting on behalf of the state at the time he heard defendant's conversations, nor were the statements he overheard even addressed to him. There is no evidence in the record that the state knew of the contents of these conversations until after Mills made the last statements that the witness heard. Thus, under the *Moore*, *Detter*, and *Crews* line of cases the state was not required to divulge to defendant the substance of the witness's expected testimony before trial.

We think the interpretation of N.C.G.S. 15A-903(a)(2) enunciated in *Moore*, *Detter*, and *Crews* is sound, and decline defendant's invitation to change it. As Copeland, J., stated in *Crews:*

> According to the official commentary accompanying it, Article 48 of the North Carolina General Statutes, dealing with pretrial discovery, was modeled after a draft of proposed amendments to Rule 16 of the Federal Rules of Criminal Procedure. *See also State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977). Federal Rule 16(a)(1)(A) expressly deals with this problem by stipulating that a defendant may discover "the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest *in response to interrogation by any person then known to the defendant to be a government agent.*" (Emphasis added.) Although G.S. 15A-903(a)(2) does not include the language in Federal Rule 16(a)(1)(A) emphasized above, we find the intent of the Legislature was to restrict a defendant's discovery of his oral statements to those made by him to persons acting on behalf of the State.
>
> The official commentary to G.S. 15A-903 relates that a provision requiring disclosure to a defendant of the names and addresses of witnesses to be called by the State was omitted from Article 48 because the witnesses may be subject to "harassment or intimidation." We agree with the opinion of the Attorney General that "[i]t would be illogical to assume the Act intended to require discovery of remarks of

> the defendant to bystander witnesses but not disclosure of the witnesses' names." 45 N.C.A.G. 60 (1975). "Where possible, the language of a statute will be interpreted so as to avoid an absurd consequence." *State v. Hart*, 287 N.C. 76, 80, 213 S.E. 2d 291, 295 (1975). Furthermore, it is anomalous to think the Legislature granted a defendant indirect access to the names of the State's witnesses when it denied his right to this information directly.

296 N.C. at 619-20, 252 S.E. 2d at 753-54 (footnote omitted).

We note that when the witness to whose testimony defendant objects took the stand, defendant did not move for a continuance or recess for the purpose of preparing cross-examination. However, at the close of direct examination of the witness, the court adjourned until the next day, thus allowing defense counsel additional time for further preparation of cross-examination. Moreover, nothing in the record before this Court shows that the state was aware of the contents of the witness's testimony until the witness was questioned at trial. Finally, as soon as the state procured the necessary signatures on the agreement pursuant to which the witness testified, the prosecuting attorney notified defense counsel that the witness would be called. Until that time the state did not know whether the witness would be called to testify. The trial judge did not err in denying defendant's motion to suppress the testimony of the witness.

We do not deem it necessary to further discuss defendant's argument that his motions to dismiss should have been allowed. The record contains substantial competent evidence to support the verdicts returned by the jury. *State v. Jolly*, 297 N.C. 121, 254 S.E. 2d 1 (1979); *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977); *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956). The motions to dismiss were properly denied.

Defendant received a fair trial, free of prejudicial error.

No error.

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

STATE OF NORTH CAROLINA v. MARY COX COLTRANE

No. 459PA82

(Filed 28 January 1983)

1. **Criminal Law § 143.1— notice of probation revocation hearing—right to modify conditions of probation**

Where defendant was given notice of a probation revocation hearing and was present at the hearing with counsel, G.S. 15A-1344(d) permitted the court at the hearing to modify the conditions of defendant's probation without notice to defendant of the court's intent to modify the conditions.

2. **Criminal Law § 143.1— notice of probation revocation hearing—statement by court in prior hearing**

Defendant received sufficient notice of a 28 September 1981 hearing to revoke her probation for failure to be gainfully employed where the trial judge stated in open court at defendant's 10 September 1981 probation revocation hearing that the case would automatically be returned to the court at the next session without further orders of the court if defendant had not found full-time gainful employment within two weeks. G.S. 15A-1345(e).

3. **Criminal Law § 143.4— right to counsel at probation revocation hearing**

The trial court erred in revoking defendant's probation where defendant's counsel was not present at her probation revocation hearing and defendant did not waive her right to have counsel present during the hearing. G.S. 15A-1345(e).

4. **Criminal Law § 143.5— probation revocation hearing—right to present relevant information**

Defendant's rights under G.S. 15A-1345(e) were violated where defendant was not effectively allowed to speak on her own behalf at her probation revocation hearing and was not permitted to present information relevant to the charge that she had violated a condition of probation.

ON discretionary review of the decision of the Court of Appeals, 58 N.C. App. 210, 292 S.E. 2d 736 (1982), affirming an order entered by *Hairston, J.*, at the 28 September 1981 Criminal Session of Superior Court, RANDOLPH County.

Defendant pled guilty to felonious breaking or entering and larceny at the 8 October 1980 Session of Superior Court of Brunswick County. She was sentenced to imprisonment for five years, suspended on condition that she successfully complete five years' probation under terms specified by the court. Defendant appeals the decision of the Court of Appeals affirming revocation of probation and entry of an order placing her sentence of imprisonment into effect.

Rufus L. Edmisten, Attorney General, by John C. Daniel, Jr., Assistant Attorney General, for the State.

Stephen E. Lawing for defendant.

MARTIN, Justice.

[1] Defendant first assigns as error entry of an order modifying conditions of her probation. The original conditions of probation were that "[t]he defendant shall work faithfully at suitable employment or faithfully pursue a course of study or vocational training." A violation report and bill of particulars alleging violation of these conditions were served on the defendant on 21 May 1981. She appeared in superior court on 10 September 1981 for a probation revocation hearing. Defendant and her counsel were present during this hearing. Both defendant and the state presented evidence, and on 11 September 1981 the court entered an order modifying the conditions of defendant's probation such that "(b) of the Probation Judgment [be] stricken to gain full-time employment and she not pursue a course of study or vocational training full time while on probation . . . ." The apparent intent of this modification was to strike the original alternative condition that defendant pursue a course of study or vocational training.

Defendant claims that the entry of this order was in error because she was not given notice of the court's intent to modify the conditions of probation. N.C.G.S. 15A-1344(d) provides that "[a]t any time prior to the expiration or termination of the probation period, the court may after notice and hearing and for good cause shown extend the period of probation up to the maximum allowed under G.S. 15A-1342(a) and may modify the conditions of probation." Under this statute a defendant is entitled to receive notice that a hearing is to take place; the statute does not require that a defendant be given notice of the court's intent to modify the terms of probation. Defendant received the notice required under the statute and was present with counsel at the 10 September 1981 hearing. Defendant's assignment of error is without merit.

[2] Defendant next assigns as error failure of the state to provide her with notice of a probation revocation hearing held 28 September 1981. N.C.G.S. 15A-1345(e) provides, in part:

> (e) Revocation Hearing.—Before revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged. The notice, unless waived by the probationer, must be given at least 24 hours before the hearing.

The record shows that at the 10 September 1981 hearing, at which defendant was present and during which the conditions of defendant's probation were modified, Judge Hairston stated in open court that "[defendant] will have two weeks in which to find full time employment—full time gainful employment. And if she does not, the case will be automatically returned to this Court next session, without further orders of this Court." This statement was sufficient to notify defendant that if she failed to comply with the court's condition of probation, she would be required to appear for a hearing during the 28 September 1981 session of superior court. In fact, defendant did appear on 28 September 1981 for the probation revocation hearing held that day. We find that the notice given defendant was sufficient to comply with N.C.G.S. 15A-1345(e) and that no error was committed.

[3] Defendant's next contention is that the trial court erred in entering an order on 28 September 1981 revoking her probation. She claims that revocation was improper because at the 28 September 1981 hearing she was not represented by counsel, evidence against her was not presented, nor was she allowed to present evidence or confront adverse witnesses. N.C.G.S. 15A-1345(e) states in relevant part that at a probation revocation hearing

> evidence against the probationer must be disclosed to him, and the probationer may appear and speak in his own behalf, may present relevant information, and may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation. The probationer is entitled to be represented by counsel at the hearing and, if indigent, to have counsel appointed. Formal rules of evidence do not apply at the hearing, but the record or recollection of

evidence or testimony introduced at the preliminary hearing on probation violation are inadmissible as evidence at the revocation hearing.

For reasons stated below, we agree that entry of the order revoking probation was improper and reverse the decision of the Court of Appeals.

Under N.C.G.S. 15A-1345(e) the defendant was entitled to have counsel present at the probation revocation hearing. This statute, enacted by the North Carolina legislature in 1977, was intended to go beyond the federal constitutional right to counsel enunciated by the United States Supreme Court in *Gagnon v. Scarpelli*, 411 U.S. 778, 36 L.Ed. 2d 656 (1973). *See* N.C. Gen. Stat. § 15A-1345(e) official commentary (1978). In *Gagnon* the Court ruled that whether an indigent defendant has a federal constitutional right to have counsel present at a probation revocation proceeding must be determined on a case-by-case basis.[1] The *Gagnon* opinion effectively overruled *Hewett v. State of North Carolina*, 415 F. 2d 1316 (4th Cir. 1969), which held that the federal constitution required that counsel be available to any defendant during a probation revocation hearing held in North Carolina. Under N.C.G.S. 15A-1345(e), all defendants are once again entitled to counsel at probation revocation hearings.

The record before us shows that defendant's counsel was not present at the 28 September 1981 probation revocation hearing. There is no indication that defendant waived her statutory right to have counsel present. Indeed, the record shows that defendant was told by her probation officer to appear in superior court on

1. The *Gagnon* court stated the following guidelines:

> Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.

411 U.S. at 790-91, 36 L.Ed. 2d at 666.

Monday, 28 September 1981; however, both defendant and her attorney believed that the probation revocation hearing would not be held until later in the week. As defendant stated at the 28th hearing, "[m]y attorney talked to [the probation officer] Thursday and she told me that it [probation revocation] would be tried at the end of this week." Because defendant's counsel was absent and defendant had not waived her right to have counsel present during the hearing, entry of the order revoking defendant's probation was error.

[4] We note further that other provisions of N.C.G.S. 15A-1345(e) were not complied with during the probation revocation hearing. The following constitutes the entire record of the hearing:

> [PROSECUTING ATTORNEY]: Mary Coltrane. She appeared before Your Honor last term of court on a probation violation. Ms. Delilah Perkins was her probation officer. At that time I believe Your Honor advised her to come back to court today, this term of court, with a job. And Ms. Perkins spoke with me this morning, and according to Ms. Perkins this defendant has not procured employment yet, if Your Honor please.
>
> THE COURT: All right.
>
> MARY COLTRANE: My attorney talked to Ms. Perkins Thursday and she told me that it would be tried at the end of this week.
>
> THE COURT: M'am? Yes, I know. He talked to me too. I told him it would be today.
>
> MARY COLTRANE: I'm expecting a call about a job at—
>
> THE COURT: Do you have a job now?
>
> MARY COLTRANE: No, sir.
>
> THE COURT: Let the sentence be put into effect. She's in custody.

Under N.C.G.S. 15A-1345(e), a defendant is entitled to "present relevant information, and may confront and cross-examine adverse witnesses unless the court finds good cause for not allowing confrontation." Defendant was allowed to confront neither the prosecuting attorney who claimed that the probation officer had

told him that defendant had not procured employment nor the probation officer herself. No findings were made that there was good cause for not allowing confrontation. By its brevity the colloquy shows that defendant was not effectively allowed to speak on her own behalf nor to present information relevant to the charge that she had violated a condition of probation. The court interrupted defendant and did not permit her to offer any explanation of her failure to obtain employment in the previous two weeks or to explain the expected telephone call concerning a job prospect. In addition to violating defendant's rights under N.C.G.S. 15A-1345(e), this belies the court's conclusion that "the defendant has wilfully and without lawful excuse violated the conditions of the probation judgment." The evidence in a probation revocation hearing must satisfy the court that defendant has willfully or without lawful excuse violated a condition of probation. *State v. Hewett*, 270 N.C. 348, 154 S.E. 2d 476 (1967). There is no competent evidence in the record to support the conclusion that defendant violated the condition of probation willfully or without lawful excuse. The entry of the order revoking defendant's probation was error.

The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. MELVIN LEE SMITH

No. 499A82

(Filed 28 January 1983)

1. Burglary and Unlawful Breakings § 5.2— first degree burglary—sufficiency of evidence that crime occurred at night

In a prosecution for first degree burglary, the evidence was sufficient to support a finding that the crime occurred at night, even though the evidence was contradictory, since one witness testified it was dark at the time and streetlights were burning, an officer testified it was dark at the time, and where defendant testified that, at the time of the incident, "If I ran out the door, I'd have probably got shot, knowing the policemen in this town. Especially at night."

2. Criminal Law § 87.2— leading questions of elderly rape victim proper

In a prosecution for second degree rape, the trial court did not err in allowing the prosecutor, over objection, to ask the prosecuting witness, an elderly woman seventy-eight or seventy-nine years of age, leading questions concerning whether the defendant had penetrated her vagina with his penis and whether she had bled from her vagina as a result.

BEFORE *Battle, Judge,* presiding at the 29 March 1982 Criminal Session of Superior Court, WAKE County, the defendant was convicted of first degree burglary and second degree rape and sentenced to a term of life imprisonment for the burglary and a concurrent term of 30 years imprisonment for the rape. The defendant appealed directly to the Supreme Court as a matter of right from the judgment imposing the life sentence. His motion to bypass the Court of Appeals with regard to the conviction and judgment in the rape case was allowed on 30 August 1982.

Rufus L. Edmisten, Attorney General, by Robert G. Webb, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by James H. Gold, Assistant Appellate Defender, for defendant-appellant.

MITCHELL, Justice.

The defendant presents two contentions for review by this Court. First, he contends that the trial court erred in permitting the case to go to the jury on a theory of first degree burglary in that the evidence was insufficient to support a finding that the breaking in question occurred at night. Second, he contends that the trial court erred in permitting the prosecutor to ask leading questions of the victim. We find both contentions to be without merit.

Given the nature of the contentions of the defendant, an extensive statement of the evidence presented by the State and the defendant is not necessary. The State introduced evidence tending to show that Ms. Douschka Rand was seventy-eight or seventy-nine years of age on 1 August 1981. At approximately 4:30 a.m. on that date, Rand was in bed in her home in Raleigh. She heard a knock on her front door and lifted the shade of her window a little and peeped out. She saw the defendant standing on her front porch and told him to get off the porch. The defend-

ant broke the locks on the front door and a screen door and began to push his way into the home. Rand tried to push him out the front door but he forced his way into the house pushing Rand with him. While Rand continued to try to push the defendant away from her, the defendant forcibly raped her. During the course of the rape, the defendant told Rand three times that he was going to kill her if she did not stop shouting. The last words she heard him say were, "I'm going to fix you." At about that time, "the law flashed a light" and the defendant ran to the back of the house. He broke the glass out of a bathroom window at the back of the house and tried to escape but could not because he could not open the window. The defendant then ran back through the house and out the front door where he fell at the feet of a police officer and was taken into custody.

The defendant testified that he was passing the Rand home at approximately 5:30 a.m. on 1 August 1981 and was knocked down by someone who came running by. He heard Rand screaming and went to help. He entered the house by the open front door and found Rand on the floor beside her bed screaming. The defendant told her who he was and picked her up and put her on the bed. At this time he fell on the bed also. He got up and went back to the front porch where he saw the policemen "because they had a flashlight." The defendant then fell off the porch. The police put handcuffs on him and placed him in a police car.

[1] The defendant first contends that the trial court erred by denying his motion to dismiss the charge of burglary on the ground that there was insufficient evidence to support a finding that the crime charged occurred at night. This contention is without merit.

In testing the sufficiency of the evidence to sustain a conviction and to withstand a motion to dismiss, the reviewing court must determine whether there is substantial evidence of each essential element of the offense and substantial evidence that the defendant was the perpetrator of the offense. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). To warrant a conviction of burglary in either the first or second degree, the State must show *inter alia* that the crime charged occurred during the nighttime. *State v. Cox*, 281 N.C. 131, 187 S.E. 2d 785 (1972). Therefore, if the State fails to present substantial evidence that the crime charged occurred during the nighttime, a defendant is entitled to have charges of burglary against him dismissed.

The law considers it to be nighttime when it is so dark that a man's face cannot be identified except by artificial light or moonlight. *State v. Frank*, 284 N.C. 137, 200 S.E. 2d 169 (1973); *State v. McKnight*, 111 N.C. 690, 16 S.E. 319 (1892). In the present case, Lola May McCormick, a next door neighbor of Rand, testified that she heard Rand screaming between 4:30 a.m. and 5:00 a.m. on 1 August 1981. McCormick determined the time by looking at the clock beside her bed. She immediately telephoned the police. McCormick further testified that it was dark at the time and that the streetlights were still burning. Officer G. E. Teachey of the Raleigh Police Department testified that he was in his police car at 5:09 a.m. when he received a call directing him to go to Rand's home. When he arrived at the scene and apprehended the defendant it was dark. Officer Robert Miller of the Raleigh Police Department testified that at approximately 5:00 a.m. he was in his police car and received a break-in in progress call directing him to go to the Rand home. He drove immediately to the home and, together with Officer Teachey, apprehended the defendant. Officer Miller testified that it was dark at the time. Additionally, the defendant testified that, at the time of the incident, "If I ran out the door, I'd have probably got shot, knowing the policemen in this town. Especially at night." The defendant further testified that, "I was on the porch when I seen them, because they had a flashlight." We believe that this and similar evidence throughout the record constituted substantial evidence that the crime charged occurred during the nighttime and was sufficient to withstand the defendant's motion to dismiss for lack of substantial evidence on this element of burglary.

The defendant strenuously argues that Rand's testimony that she could recognize the defendant when she first saw him on her porch even though there were no lights on in the house or on the porch constitutes direct evidence that the break-in did not occur in the "nighttime" as that element of burglary is defined at common law. The defendant ignores the fact, however, that the uncontroverted testimony of McCormick, the victim's next door neighbor, indicated that the "streetlights were burning" at the time Rand's home was entered and she was attacked. Thus, from such evidence it would be as reasonable to believe that Rand saw the defendant in the nighttime by the artificial light of the streetlights as to believe that she saw him by natural light.

In any event, the fact that there is direct evidence of the absence of an element of the offense charged does not in itself require the granting of defendant's motion to dismiss or render the evidence insufficient to sustain a conviction. The question remains one of whether there is substantial evidence of each element of the offense and of the defendant's being the perpetrator of the offense. When there is such substantial evidence of each element of the offense and of the defendant being the perpetrator, evidence tending to show the absence of an element merely creates a contradiction or discrepancy in the evidence. Upon a defendant's motion to dismiss, the court must consider the evidence in the light most favorable to the State with the State entitled to every reasonable intendment and every reasonable inference to be drawn therefrom, and contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). When so considered, the evidence in the present case was sufficient to support a reasonable inference of the defendant's guilt of each element of first degree burglary and to overcome the defendant's motion to dismiss.

The defendant points out that other portions of the evidence constitute direct evidence that the crime charged was not committed during the nighttime. For example, Rand was asked, "Was it getting light outside?" She responded, "It was—yeah. Around 4:30. Between 4:30 and 5:00 o'clock." Similarly, William P. Miller, a neighbor of the victim, testified that when the crime occurred, "It's what you call daybreak, you know. It's between 4:30 and 5:00 o'clock." This testimony did constitute direct evidence of the absence of the element of nighttime. Such direct evidence of the absence of this element required the trial court to submit to the jury the issue of the defendant's guilt of the lesser included offense of felonious breaking or entering in addition to the issue of his guilt of burglary. It was not sufficient, however, to require the granting of the defendant's motion to dismiss, since it merely tended to create a contradiction or discrepancy in the evidence which the State was entitled to have resolved in its favor by the trial court when ruling on the motion to dismiss. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). The trial court correctly instructed the jury and permitted them to consider possible verdicts on the issues of first degree burglary and the lesser

included offense of felonious breaking or entering. These instructions and the trial court's denial of the defendant's motion to dismiss were proper and did not constitute error.

The State has suggested that, in addition to considering the evidence offered at trial to show that the offense charged occurred during nighttime, this Court take judicial notice that the schedule for "Sunrise and Sunset" computed by the Nautical Almanac Office, United States Naval Observatory reveals that sunrise occurred in Raleigh (Wake County) on 1 August 1981 at 5:22 a.m., Eastern Standard Time. *State v. Garrison*, 294 N.C. 270, 240 S.E. 2d 377 (1978) (judicial notice of such schedules taken). The State also suggests that we take judicial notice of the fact that North Carolina was operating under Daylight Savings Time on 1 August 1981 which would mean that sunrise occurred at 6:22 a.m. Eastern Daylight Savings Time in Wake County on that date. We find it unnecessary to consider taking judicial notice of such facts, however, in light of our foregoing conclusion that there was substantial evidence introduced at trial tending to show that the offense charged occurred during the nighttime.

[2] The defendant next contends that the trial court erred in permitting the prosecutor to ask leading questions of the victim Rand with regard to the charge against the defendant for second degree rape. The record clearly reveals that the trial court did allow the prosecutor, over objection, to ask Rand leading questions concerning whether the defendant had penetrated her vagina with his penis and whether she had bled from her vagina as a result.

It is within the discretion of the trial court to allow counsel to ask leading questions of a witness, especially in cases in which the witness's age and the delicate nature of the subject, such as sexual matters, may require leading questions. *State v. Williams*, 303 N.C. 507, 279 S.E. 2d 592 (1981); *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974); *State v. Pearson*, 258 N.C. 188, 128 S.E. 2d 251 (1962). Absent an abuse of that discretion, the trial court's ruling will not be disturbed on appeal. *State v. Williams*, 303 N.C. 507, 279 S.E. 2d 592 (1981). Here, the victim was an elderly woman seventy-eight or seventy-nine years of age. It is readily apparent, even from the cold record before us on appeal, that the questions of a very specific sexual nature embarrassed the victim

and that she was reluctant to discuss such matters or was unfamiliar with some of the specific sexual terminology which was a part of the questions. In view of the obvious reluctance of the elderly victim Rand to testify concerning specific sexual acts, we cannot say it was an abuse of the trial court's discretion to permit the prosecutor to ask leading questions tending to show what had taken place and the existence of the elements of the crime charged. We find that the trial court committed no error in this regard.

The defendant received a fair trial free of prejudicial error.

No error.

FRED GUTHRIE, JR. AND KATHY GUTHRIE v. NORTH CAROLINA STATE PORTS AUTHORITY

No. 97PA82

(Filed 8 February 1983)

1. **State § 4— State Ports Authority—agency of the State—sovereign immunity**

The State Ports Authority is an agency of the State and, as such, is entitled to claim the defense of sovereign immunity. G.S. 143B-453; G.S. 143B-454.

2. **State § 4— State Ports Authority—sovereign immunity—no waiver by engaging in proprietary enterprise**

The State has absolute immunity in tort actions without regard to whether it is performing a governmental or proprietary function except insofar as it has consented to be sued or otherwise expressly waived its immunity. Therefore, the State Ports Authority, as an agency of the State, may not implicitly waive its defense of sovereign immunity by engaging in a proprietary enterprise and is entitled to claim the defense of sovereign immunity absent express statutory waiver.

3. **State § 4— State Ports Authority—waiver of immunity for tort claims within ambit of Tort Claims Act**

As an agency of the State of North Carolina, the State Ports Authority is clothed with immunity from actions based on its alleged negligence from whatever source except to the extent that such immunity has been waived, and the State, by virtue of the enactment of the State Tort Claims Act, has specifically and explicitly waived that immunity as to tort claims falling within the ambit of that Act without regard to the nature of the function out of which they arise.

4. State § 5-- tort action against State Ports Authority—applicability of Tort Claims Act

The State Tort Claims Act, G.S. 143-291 *et seq.*, and G.S. 143-454(1), which vests the State Ports Authority with authority to sue or be sued, when read together, evidence a legislative intent that the Ports Authority be authorized to sue as plaintiff in its own name in the courts of the State but contemplate that all tort actions against the Ports Authority for money damages will be pursued under the State Tort Claims Act. Therefore, the superior court had no jurisdiction over plaintiffs' tort claims against the State Ports Authority since such claims came within the exclusive and original jurisdiction of the Industrial Commission.

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

ON discretionary review of a decision by the Court of Appeals reversing a judgment of *Brown, J.*, filed 17 March 1981 in the Superior Court, CARTERET County. Plaintiffs instituted this civil action on 7 November 1980, seeking to recover damages for injuries sustained by the male plaintiff, a longshoreman, who at the time of his injury was operating a forklift in defendant's warehouse at its port facility in Morehead City, North Carolina. The female plaintiff, wife of the male plaintiff, joined in the complaint a second cause of action seeking damages for loss of consortium. Defendant filed motions to dismiss plaintiffs' action for lack of jurisdiction over the subject matter and over the person pursuant to Rules 12(b)(1) and (2) of the North Carolina Rules of Civil Procedure and for failure of the complaint to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Defendant made a written request that the court make findings of fact and conclusions of law upon which the court's rulings on the motions to dismiss might be based. The court, after a hearing in open court, denied all of defendant's motions to dismiss. Defendant excepted and appealed to the Court of Appeals. The Court of Appeals, in an opinion by *Hill, J.*, concurred in as to result only by *Vaughn* and *Webb, JJ.*, reversed the trial court's denial of defendant's motion to dismiss. 56 N.C. App. 68, 286 S.E. 2d 823 (1982). Plaintiffs petitioned this Court for discretionary review which we allowed on 4 May 1982.

Bennett, McConkey & Thompson, P.A., by Thomas S. Bennett and James W. Thompson, III, Attorneys for plaintiffs-appellants.

Stith and Stith, by F. Blackwell Stith, Attorneys for defendant-appellee.

MEYER, Justice.

The sole question presented for our review is whether the trial court properly assumed jurisdiction to adjudicate plaintiffs' claims,[1] or whether exclusive original jurisdiction lies with the Industrial Commission under the North Carolina Tort Claims Act, N.C. Gen. Stat. §§ 143-291 to -300.1 (1978 and Supp. 1981). In order to resolve this issue, we must make three determinations:

1. Is the State Ports Authority an "agency of the State" and thus entitled to claim the defense of sovereign immunity? We answer in the affirmative.

2. Has the State Ports Authority implicitly waived its defense of sovereign immunity with respect to plaintiffs' claims? We find that it has not.

3. Does the explicit limited waiver of sovereign immunity by the State for the negligence of its employees and agents as set forth in the Tort Claims Act apply to plaintiffs' claims? We answer in the affirmative.

The male plaintiff-appellant's complaint, in pertinent part, alleges that on 27 March 1980 at approximately 9:00 a.m. he was employed by Lavino Shipping Company as a longshoreman assigned to work as a forklift operator to move stacked bundles of lumber from a warehouse owned and operated by the defendant. The warehouse was located on the defendant's premises at its port facility in Morehead City, North Carolina. The stacked bundles of lumber were approximately four feet deep, four feet high, and sixteen feet long, and weighed approximately seven thousand pounds each. They were stacked five high in defendant's warehouse by defendant's employees in accordance with instruc-

1. We find it unnecessary to determine whether the defense of sovereign immunity raises a question of personal or subject matter jurisdiction. *See Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982).

tions given by defendant's management. The plaintiff was in the process of moving the bundles of lumber from the warehouse site to dockside for loading on a vessel moored at defendant's facility. As he attempted to move one of the bundles of lumber, a stack of bundles approximately twenty feet high, located directly behind the bundle plaintiff was attempting to move, fell over and crashed down upon the forklift which the plaintiff was operating. As a result, he sustained severe, crippling and permanent injuries including a fractured back. Plaintiff is now a paraplegic and confined to a wheelchair.

The plaintiff contends that the injuries he sustained were a result of the negligence of the defendant, its agents and employees and seeks damages in the amount of several million dollars as set forth with particularity in the complaint. As a part of the same complaint, the plaintiff's wife joined in the action and seeks damages for loss of consortium in the amount of one million dollars.

The defendant-appellee, in apt time, filed motions to dismiss for lack of jurisdiction and for failure of the complaint to state a claim upon which relief could be granted. Upon the trial court's denial of defendant's motions to dismiss, appeal was taken to the Court of Appeals. Recognizing that while ordinarily there is no right of appeal from the denial of a motion to dismiss, that court nevertheless elected to hear the case on the merits because of the importance of the question presented. The Court of Appeals considered the following language from the State Tort Claims Act: "The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Department of Transportation, and all other departments, institutions and *agencies of the State.*" G.S. § 143-291 (emphasis added). Based on the court's comparison of the organization and powers of the State Board of Education and the Department of Transportation with those of the defendant, it determined that the three were *ejusdem generis.* Therefore, "[e]ven though its act of creation has the effect of rendering defendant 'a substantially independent and autonomous public or quasi-municipal corporation,' . . . neither this description nor defendant's 'proprietary function' erase[s] its substantial ties to the State of North Carolina . . . ." 56 N.C. App. at 74, 286 S.E. 2d at 827. The order of the trial judge deny-

ing plaintiffs' motions to dismiss was reversed and the plaintiffs' complaint was dismissed upon the court's finding that the defendant was an agency of the State of North Carolina and as such plaintiffs' right of recovery was restricted entirely to the State Tort Claims Act, with exclusive original jurisdiction vested in the North Carolina Industrial Commission. Plaintiff-appellants' petition for discretionary review was allowed by this Court on 5 May 1982.

The plaintiff-appellants contend that the Ports Authority is in fact, and by legislative enactment, a substantially independent and autonomous public or quasi-municipal corporation engaging in a proprietary function to the extent that it cannot avail itself of the defense of the State's sovereign immunity in a tort action for negligence. Thus, argue plaintiff-appellants, their remedy cannot be limited to the State Tort Claims Act.

The defendant-appellee Ports Authority contends that this Court should affirm the decision of the Court of Appeals because the Ports Authority is indeed an agency and instrumentality of the State created and empowered to accomplish a public purpose, is engaged in a governmental function, and is clothed with sovereign immunity to the extent it has not waived it under the provisions of the State Tort Claims Act. Thus, argues defendant, the Superior Court has no jurisdiction, and plaintiffs' exclusive remedy is a claim pursuant to the Tort Claims Act.

In substance, Judge Brown's sixteen findings of fact are premised on the theory that there is a distinction between the "governmental" and "proprietary" functions as engaged in by the State Ports Authority and point unmistakably to the conclusion that, because it is a "proprietary" enterprise, the Ports Authority has implicitly waived its defense of sovereign immunity.

In his "Order Denying Defendant's Motion to Dismiss," filed 17 March 1981, Judge Brown recited that, on the Rule 12(b)(1) and (2) motions *only*, he had allowed into evidence some thirty-four of plaintiffs' exhibits, and the affidavit of a witness for the plaintiffs with an exhibit attached, all over the objection of defendant. The defendant Ports Authority put on no evidence of any kind. Judge Brown further recited that on his consideration of defendant's Rule 12(b)(6) motion, he heard no evidence and considered only the pleadings. The parties have chosen to stipulate to the content of a

record on appeal which does not include any of plaintiffs' thirty-four exhibits or the affidavit, although it is obvious from the nature and content of Judge Brown's lengthy findings of facts that he relied heavily on those items of evidence. Fortunately, we need not consider whether the findings of fact are supported by the evidence—we assume *arguendo* that they are. *Greene v. Greene*, 15 N.C. App. 314, 190 S.E. 2d 258 (1972); *Bundy v. Ayscue*, 5 N.C. App. 581, 169 S.E. 2d 87, *appeal dismissed* 276 N.C. 81, 171 S.E. 2d 1 (1969). Here, we need only concern ourselves with whether the findings made support the conclusions of law that (1) the court had jurisdiction of the claim; (2) the State Ports Authority is not entitled to claim the defense of sovereign immunity; and (3) the State Tort Claims Act is not applicable to plaintiffs' claims. We find that Judge Brown's findings do not support these conclusions.

Our determination that the findings do not support the conclusions is based upon our examination of three issues raised by those conclusions: (1) whether the Ports Authority is an agency of the State entitled to claim the defense of sovereign immunity; (2) whether the Ports Authority may implicitly waive its defense of sovereign immunity by engaging in a "proprietary" enterprise; and (3) whether the explicit limited waiver of immunity of the State Tort Claims Act applies to plaintiffs' claims. We will address each of these questions *seriatim*.

1.

[1] We first address the question of whether the Ports Authority is an agency of the State entitled to claim the defense of sovereign immunity.

It cannot be disputed that our Legislature has the power to create a State Ports Authority and to maintain it as an agency of the State, under the control of the State. It is clear from the language of the act creating the Authority that the Legislature intended that the State itself, through the instrumentality of the Ports Authority, conduct the desired activities:

> *Through the Authority* hereinbefore created, *the State of North Carolina may* engage in [numerous enumerated activities hereinafter set forth specifically]. *Said Authority is created as an instrumentality of the State of North Carolina*
>
> . . . .

N.C. Gen. Stat. § 143B-453 (Supp. 1981) (emphasis added).

Such a legislative declaration, although not conclusive upon the court, carries great weight. *See Stanley, Edwards, Henderson v. Dept. Conservation & Development,* 284 N.C. 15, 199 S.E. 2d 641 (1973); *Foster v. Medical Care Comm.*, 283 N.C. 110, 195 S.E. 2d 517 (1973); *Mitchell v. Financing Authority,* 273 N.C. 137, 159 S.E. 2d 745 (1968).

The North Carolina State Ports Authority was created in 1945 by an act of the General Assembly. *See* G.S. § 143B-452 *et seq.* It is a division of the Department of Commerce. *See* G.S. § 143B-431(2)(1). The purposes of the Authority are set out in the General Statutes:

> Through the Authority hereinbefore created, the State of North Carolina may engage in promoting, developing, constructing, equipping, maintaining and operating the harbors and seaports within the State, or within the jurisdiction of the State, and works of internal improvements incident thereto, including the acquisition or construction, maintenance and operation at such seaports or harbors of watercraft and highways and bridges thereon or essential for the proper operation thereof. Said Authority is created as an instrumentality of the State of North Carolina for the accomplishment of the following general purposes:
>
> (1) To develop and improve the harbors or seaports at Wilmington, Morehead City and Southport, North Carolina, and such other places, including inland ports and facilities, as may be deemed feasible for a more expeditious and efficient handling of waterborne commerce from and to any place or places in the State of North Carolina and other states and foreign countries.
>
> (2) To acquire, construct, equip, maintain, develop and improve the port facilities at said ports and to improve such portions of the waterways thereat as are within the jurisdiction of the federal government.
>
> (3) To foster and stimulate the shipment of freight and commerce through said ports, whether originating within or without the State of North Carolina, in-

cluding the investigation and handling of matters pertaining to all transportation rates and rate structures affecting the same.

. . . .

(7) And in general to do and perform any act or function which may tend or be useful toward the development and improvement of harbors, seaports and inland ports of the State of North Carolina, and to increase the movement of waterborne commerce, foreign and domestic, to, through, and from such harbors and ports.

N.C. Gen. Stat. § 143B-453 (Supp. 1981).

The powers of the Ports Authority are enumerated as follows:

§ 143B-454. *Powers of Authority.*—In order to enable it to carry out the purposes of this Part, the said Authority shall:

(1) Have the powers of a body corporate, including the power to sue and be sued, to make contracts, and to adopt and use a common seal and to alter the same as may be deemed expedient;

(2) Have the authority to make all necessary contracts and arrangements with other port authorities of this and other states for the interchange of business, and for such other purposes as will facilitate and increase the business of the North Carolina State Ports Authority;

(3) Be authorized and empowered to rent, lease, buy, own, acquire, mortgage, otherwise encumber, and dispose of such property, real or personal, as said Authority may deem proper to carry out the purposes and provisions of this Part, all or any of them;

(4) Be authorized and empowered to acquire, construct, maintain, equip and operate any wharves, docks, piers, quays, elevators, compresses, refrigeration storage plants, warehouses and other structures, and

any and all facilities needful for the convenient use of the same in the aid of commerce, including the dredging of approaches thereto, and the construction of belt-line roads and highways and bridges and causeways thereon, and other bridges and causeways necessary or useful in connection therewith, and shipyards, shipping facilities, and transportation facilities incident thereto and useful or convenient for the use thereof, excluding terminal railroads;

(5) The Secretary of Commerce with the approval of the Authority shall appoint such management personnel as he deems necessary to serve at his pleasure. The salaries of these personnel shall be fixed by the Governor with the approval of the Advisory Budget Commission. The Secretary of Commerce or his designee shall appoint, employ, dismiss and, within the limits of available funding, fix the compensation of such other employees as he deems necessary to carry out the purposes of this Part. There shall be an executive committee consisting of the chairman of the Authority and two other members elected annually by the Authority. The executive committee shall be vested with authority to do all acts which are authorized by the bylaws of the Authority. Members of the executive committee shall serve until their successors are elected;

(6) Establish an office for the transaction of its business at such place or places as, in the opinion of the Authority, shall be advisable or necessary in carrying out the purposes of this Part;

(7) Be authorized and empowered to create and operate such agencies and departments as said board may deem necessary or useful for the furtherance of any of the purposes of this Part;

(8) Be authorized and empowered to pay all necessary costs and expenses involved in and incident to the formation and organization of said Authority, and incident to the administration and operation thereof, and to pay all other costs and expenses reasonably

necessary or expedient in carrying out and accomplishing the purposes of this Part;

(9) Be authorized and empowered to apply for and accept loans and grants of money from any federal agency or the State of North Carolina or any political subdivision thereof or from any public or private sources available for any and all of the purposes authorized in this Article, and to expend the same in accordance with the directions and requirements attached thereto, or imposed thereon by any such federal agency, the State of North Carolina, or any political subdivision thereof, or any public or private lender or donor, and to give such evidences of indebtedness as shall be required, provided, however, that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State of North Carolina, or any political subdivisions thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State of North Carolina, or any political subdivision thereof: Provided, however, at no time may the total outstanding indebtedness of the Authority excluding bond indebtedness exceed a total of five hundred thousand dollars ($500,000) without approval of the Advisory Budget Commission;

(10) Be authorized and empowered to act as agent for the United States of America, or any agency, department, corporation, or instrumentality thereof, in any matter coming within the purposes or powers of the Authority;

(11) Have power to adopt, alter or repeal its own bylaws, rules and regulations governing the manner in which its business may be transacted and in which the power granted to it may be enjoyed, and may provide for the appointment of such committees, and the functions thereof, as the Authority may deem necessary or expedient in facilitating its business;

(12) Be authorized and empowered to do any and all other acts and things in this Part authorized or required to be done, whether or not included in the general powers in this section mentioned; and

(13) Be authorized and empowered to do any and all things necessary to accomplish the purposes of this Part: Provided, that said Authority shall not engage in shipbuilding.

The property of the Authority shall not be subject to any taxes or assessments thereon.

N.C. Gen. Stat. § 143B-454 (1978 and Supp. 1981).

Our examination of the act of the General Assembly creating the Ports Authority and enumerating its purposes and powers leaves us with no doubt that the Authority was created and exists as a true agency and instrumentality of the State. Indeed, this Court has held that the State Ports Authority is an agency of the State created and empowered to accomplish a public purpose.

> The North Carolina State Ports Authority, defendant in this action, was created by Article 22 of Chapter 143 of the General Statutes, and is an instrumentality and agency of the State, created and empowered to accomplish a public purpose. G.S. 143-217; *Webb v. Port Commission*, 205 N.C. 663, 172 S.E. 377 (1934).

Harrison Associates v. State Ports Authority, 280 N.C. 251, 258, 185 S.E. 2d 793, 797, reh. den. 281 N.C. 317 (1972). We hold that the State Ports Authority is an "agency of the State," and, as such, is entitled to claim the defense of sovereign immunity.

2.

Having determined that the Ports Authority is an agency of the State and therefore is entitled to claim the defense of sovereign immunity, there still remains the question of whether the Authority has implicitly waived its defense.

The plaintiff-appellants devote a substantial portion of their brief before this Court to a discussion of the difference between proprietary and governmental functions and their contention that if an activity is proprietary in nature, the State has waived its im-

munity and the State Tort Claims Act does not apply. The cases cited by plaintiffs for this proposition for the most part deal with claims arising out of proprietary functions on the city or county level of government. We do not find these cases applicable to the questions presented on this appeal. It is of course elementary with us that in determining the liability of a municipality for tort, one of the primary questions usually presented is whether the incident causing the plaintiffs' injury or damage arose out of a governmental or proprietary function of the municipality—the general rule being that liability may be found if the function was proprietary but not if it was governmental. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, *reh. den.* 281 N.C. 516 (1972); *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E. 2d 239 (1971); *Moffitt v. Ashville*, 103 N.C. 237, 9 S.E. 695 (1889). While a number of State jurisdictions recognize the distinction as being applicable in an action against the State,[2] the law of North Carolina from a very early date has rejected the test of the nature of the operation as governmental or proprietary in determining the liability of the State for tort.

In our early case of *Clodfelter v. State* decided in 1882, a claim for personal injury was made against the State and the claimant argued that he was not bound by the State's sovereign immunity because his injuries arose out of the operation of a "private enterprise," *i.e.* proprietary function, by the State. There, this Court in rejecting that contention, said:

> The only question then presented is, whether the State, in administering the functions of government through its appointed agents and officers, is legally liable to a claim in compensatory damages for an injury resulting from their misconduct or negligence.
>
> That the doctrine of *respondeat superior* applicable to the relations of principal and agent created between other persons, does not prevail against the sovereign in the necessary employment of public agents, is too well settled upon authority and practice to admit of controversy.

2. *See* Annot., "State's Immunity From Tort Liability as Dependent on Governmental or Proprietary Nature of Function," 40 A.L.R. 2d 927 (1955) and A.L.R. 2d Later Case Service.

. . . .

> Admitting the general principle, the plaintiff's counsel undertakes to withdraw the present claim from its operation, for that the convict was put to work in constructing a railroad, a private enterprise, and not employed at any public work when the accident occurred, and thus the State has voluntarily assumed the responsibilities of one of its own citizens incurred under like circumstances. We cannot recognize the distinction as affecting the results, nor feel the force of the reasoning by which it is sustained.

86 N.C. 51, 52-53, 41 Am. Rep. 440 (1882).

It has long been established that an action cannot be maintained against the State of North Carolina *or an agency thereof* unless it consents to be sued or upon its waiver of immunity, and that *this immunity is absolute and unqualified. Teer Co. v. Highway Commission*, 265 N.C. 1, 143 S.E. 2d 247 (1965); *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. 168, 118 S.E. 2d 792 (1961); *Ferrell v. Highway Commission*, 252 N.C. 830, 115 S.E. 2d 34 (1960); *Williams v. Highway Commission*, 252 N.C. 772, 114 S.E. 2d 782 (1960); *Insurance Co. v. Unemployment Compensation Com.*, 217 N.C. 495, 8 S.E. 2d 619 (1940); *Dredging Co. v. State*, 191 N.C. 243, 131 S.E. 665 (1926).

> 'An action against a commission or board created by statute as an agency of the State where the interest or rights of the State are directly affected is in fact an action against the State.' *Insurance Co. v. Unemployment Compensation Commission, supra.* The State is immune from suit unless and until it has expressly consented to be sued. *It is for the General Assembly to determine when and under what circumstances the State may be sued.*

Insurance Co. v. Gold, Commissioner of Insurance, 254 N.C. 168, 172-73, 118 S.E. 2d 792, 795 (emphasis added). *See Harrison Associates v. State Ports Authority*, 280 N.C. 251, 185 S.E. 2d 793.

[2] The State has absolute immunity in tort actions without regard to whether it is performing a governmental or proprietary function except insofar as it has consented to be sued or otherwise expressly waived its immunity. Claims for tort liability are

allowed only by virtue of the express waiver of the State's immunity. *Turner v. Board of Education*, 250 N.C. 456, 109 S.E. 2d 211 (1959).

"Sovereign immunity is a legal principle which states in its broadest terms that the sovereign will not be subject to any form of judicial action without its express consent." 12 Wake Forest L. Rev. 1082, 1083 (1976). With respect to actions *ex delicto*, we continue to recognize no distinction between "governmental" or "proprietary" functions of the State as sovereign. We hold that the State Ports Authority, as an agency of the State, is entitled to claim the defense of sovereign immunity absent express statutory waiver.

3.

We turn now to the question of whether the explicit limited waiver of sovereign immunity by the State for the negligence of its employees and agents as set forth in the State Tort Claims Act is applicable to plaintiffs' claims.

Traditionally, the State has maintained its sovereign immunity in tort actions. *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E. 2d 239. However, the Tort Claims Act, as provided in North Carolina General Statute 143-291 *et seq.*, waived the sovereign immunity of the State in those instances in which injury is caused by the negligence of a State employee and the injured person is not guilty of contributory negligence, giving the injured party the same right to sue as any other litigant. *Ivey v. Prison Department*, 252 N.C. 615, 114 S.E. 2d 812 (1960); *Alliance Co. v. State Hospital*, 241 N.C. 329, 85 S.E. 2d 386 (1955); *Lyon & Sons v. Board of Education*, 238 N.C. 24, 76 S.E. 2d 553 (1953). The State may be sued in tort only as authorized in the Tort Claims Act. *Davis v. Highway Commission*, 271 N.C. 405, 156 S.E. 2d 685 (1967).

The State Tort Claims Act provides in pertinent part as follows:

> The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State. The Industrial Commission shall deter-

> mine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina. If the Commission finds that there was such negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, which was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages which the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct the payment of such damages by the department, institution or agency concerned, but in no event shall the amount of damages awarded exceed the sum of one hundred thousand dollars ($100,000) cumulatively to all claimants on account of injury and damage to any one person.

N.C. Gen. Stat. § 143-291 (Supp. 1981).

Under the Tort Claims Act, jurisdiction is vested in the Industrial Commission to hear claims against the State of North Carolina for personal injuries sustained by any person as a result of the negligence of a State employee while acting within the scope of his employment. *Greene v. Board of Education*, 237 N.C. 336, 75 S.E. 2d 129 (1953).

The State Tort Claims Act authorizes the Industrial Commission to entertain claims arising as a result of a negligent act of any officer, employee, involuntary servant, or agent of the State while acting within the scope of his office, employment, service, agency, or authority under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

> The legal limitation on the right to allow a claim under the provisions of [the State Tort Claims Act] is limited to the same category with respect to tort claims against the agency covered as if such agency were a private person and such

> private person would be liable under the laws of North Carolina.

Trust Co. v. Board of Education, 251 N.C. 603, 609, 111 S.E. 2d 844, 849 (1960).

This Court has previously indicated the type of agency it would consider a "state agency" within the meaning of that term as used in the State Tort Claims Act. In *Turner v. Board of Education*, 250 N.C. 456, 463, 109 S.E. 2d 211, 216, this Court, while holding that the Gastonia City Board of Education was a local board which did not meet the classification of "state agency," said this:

> [W]e may well consider the State Board of Agriculture, G.S. 106-2, the Board of Conservation and Development, G.S. 113-4, and The State Board of Public Welfare, G.S. 108-1, in the same general category as the State Board of Education and the State Highway & Public Works Commission.

The Ports Authority contends that, like the State Board of Education, the State Board of Transportation and those other State agencies mentioned in *Turner*, it was created by the General Assembly as an agency of the State to perform a well-recognized governmental function, to-wit, to provide facilities for the transportation of goods, wares and merchandise both into and out of the State by means of carriers over land and water. We agree.

[3] We hold that, as an agency of the State of North Carolina, the State Ports Authority is clothed with immunity from actions based on its alleged negligence from whatever source except to the extent that such immunity has been waived, and that the State, by virtue of the enactment of State Tort Claims Act, has specifically and explicitly waived that immunity as to tort claims falling within the ambit of that Act without regard to the nature of the function out of which they arise. Thus the State Tort Claims Act is applicable to plaintiffs' claims.

Plaintiff-appellants further contend that the Legislature has waived the sovereign immunity of the State by enacting G.S. § 143B-454(1) permitting the Ports Authority to "sue or be sued" and has consented that tort claims against the Authority may be prosecuted in the civil courts. We reject that contention. Waiver of sovereign immunity may not be lightly inferred and State

statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed. *Floyd v. Highway Commission*, 241 N.C. 461, 85 S.E. 2d 703 (1955). *See also Etheridge v. Graham, Comr. of Agriculture*, 14 N.C. App. 551, 188 S.E. 2d 551 (1972).

The State of North Carolina has not given its consent for the Ports Authority to be sued in the courts of the State. Contrary to the argument advanced by the plaintiffs, such consent cannot be extracted from G.S. § 143B-454(1) which vests the Ports Authority with the authority to "sue or be sued." Statutory authority to "sue or be sued" is not always construed as an express waiver of sovereign immunity and is not dispositive of the immunity defense when suit is brought against an agency of the State. This is true whether the suit is brought in a state court, *see O & B, Inc. v. Maryland-Nat'l Capital Park, etc.*, 279 Md. 459, 369 A. 2d 553 (1977); or in federal court, *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F. 2d 1001 (4th Cir. 1968); *see also Maryland Port Administration v. S S American Legend*, 453 F. Supp. 584 (D. Md. 1978); *International Long. Ass'n v. North Carolina St. Ports Au.*, 370 F. Supp. 33 (E.D.N.C. 1974).

[4] We conclude that the language of the State Tort Claims Act and G.S. § 143-454(1), vesting the Ports Authority with authority to sue or be sued, when read together, evidence a legislative intent that the Authority be authorized to sue as plaintiff in its own name in the courts of the State but contemplates that all tort claims against the Authority for money damages will be pursued under the State Tort Claims Act.

We do not find apposite the line of cases from the federal courts urged upon us by plaintiffs which hold in effect that when the State leaves its traditional governmental activity and enters upon a proprietary enterprise that is subject to congressional regulation, it waives its sovereign immunity and its immunity under the Eleventh Amendment,[3] and subjects itself to that

3. The State of North Carolina is protected against suits for damages by its citizens in the federal courts by the Eleventh Amendment to the United States Constitution as well as by the doctrine of sovereign immunity. *See International Long. Ass'n v. North Carolina Ports. Au.*, 511 F. 2d 1007 (4th Cir. 1975); *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 36 L.Ed. 2d 251 (1973) (Brennan, J., dissenting).

regulation as fully as if it were a private person or corporation, and thereby is subject to suit in federal court.[4] We are here in no way concerned with congressional regulations or the immunity of the State from suit in the federal courts. We do not equate waiver of Eleventh Amendment immunity for purposes of subjection to congressional regulation and suit in federal courts to waiver in State court for purposes of general tort liability. Moreover, the United States Supreme Court has made it clear that the mere entry of a State into the field of congressional regulation will not subject it to suit by private individuals. *Parden v. Terminal R. Co.*, 377 U.S. 184, 12 L.Ed. 2d 233 (1964); *Red Star Towing and Transportation Co. v. Dept. of Transportation of New Jersey*, 423 F. 2d 104 (3rd Cir. 1970).

Based on the foregoing, we hold that the Superior Court had no jurisdiction over plaintiffs' claims.

> When statutory provision has been made for an action against the State, the procedure prescribed by statute must be followed, and the remedies thus afforded are exclusive. The right to sue the State is a conditional right, and the terms prescribed by the Legislature are conditions precedent to the institution of the action. *Kirkpatrick v. Currie, Comr. of Revenue*, 250 N.C. 213, 108 S.E. 2d 209; *Duke v. Shaw, Comr. of Revenue*, 247 N.C. 236, 100 S.E. 2d 506; *Insurance Co. v. Unemployment Compensation Commission, supra; Rotan v. State, supra.*

Insurance Co. v. Gold, Commissioner of Insurance, 254 N.C. 168, 173, 118 S.E. 2d 792, 795; *see Harrison Associates v. State Ports Authority*, 280 N.C. 251, 185 S.E. 2d 793. Because an action in tort

4. The United States Court of Appeals for the Fourth Circuit has held that a state agency such as the Ports Authority waives the protection of sovereign immunity and Eleventh Amendment immunity when it enters the federally regulated domain of interstate and foreign commerce and engages in business of a proprietary or commercial nature. *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F. 2d 1001; *Parden v. Terminal R. Co.*, 377 U.S. 184, 12 L.Ed. 2d 233 (1964); *Dawkins v. Craig*, 483 F. 2d 1191 (4th Cir. 1973). *See also Maryland Port Administration v. S S American Legend*, 453 F. Supp. 584. In three recent cases this rule was applied to hold that the Ports Authorities of North Carolina, South Carolina and Maryland are not immune from suits in federal court under admiralty jurisdiction. *International Long. Ass'n v. North Carolina Ports Au.*, 511 F. 2d 1007; *Doris Trading Corp. v. S S Union Enterprise*, 406 F. Supp. 1093 (S.D.N.Y. 1976); *Maryland Port Administration v. S S American Legend*, 453 F. Supp. 584.

against the State and its departments, institutions, and agencies is within the exclusive and original jurisdiction of the Industrial Commission, a tort action against the State is not within the jurisdiction of the Superior Court.[5]

Since the Tort Claims Act provides that tort actions against the State, its departments, institutions, and agencies must be brought before the Industrial Commission, it is settled law that the Superior and District Courts of this State have no jurisdiction over a tort claim against the State, or its agencies, and in this case, the North Carolina State Ports Authority, an agency of the State of North Carolina. *See Etheridge v. Graham, Comr. of Agriculture*, 14 N.C. App. 551, 188 S.E. 2d 551, and cases there cited.

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5. We are not unmindful of the third party practice rules. We note that even though, under Rule 14(c) of the North Carolina Rules of Civil Procedure (Third Party Practice), the State may be made a third party in a tort action, the rules governing liability and the limits of liability of the State and its agencies as provided in the State Tort Claims Act apply. Rule 14(c) provides as follows:

> (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 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.

N.C. Gen. Stat. 1A-1, Rule 14(c) (Supp. 1981).

We also note that, although under the Uniform Contribution Among Tort-Feasors Act, (G.S. § 1B-1), the State may be sued for contribution as a joint tort feasor, these same rules governing and limiting the liability of the State and its agencies apply. G.S. § 1B-1(h) provides as follows:

> (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.

N.C. Gen. Stat. § 1B-1 (Supp. 1981).

In our recent case of *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 293 S.E. 2d 182 (1982), there was both a claim against the State for contribution and a claim for indemnification. We held there that the State may be joined as a third party defendant, in the State courts, whether in an action for contribution or in an action for indemnification.

We hold (1) that the North Carolina State Ports Authority is an "agency of the State" and entitled to claim the defense of sovereign immunity; (2) that the State has waived its immunity for tort claims covered by the State Tort Claims Act, and that said Act is applicable to plaintiffs' claims; and (3) that plaintiffs' claims must be pursued under the provisions of the Tort Claims Act, and thus the Superior Court, Carteret County, lacks jurisdiction to adjudicate plaintiffs' claims as the North Carolina Industrial Commission is vested with exclusive original jurisdiction of plaintiffs' tort actions against the State Ports Authority.

The trial judge erred in denying defendant Ports Authority's motion to dismiss. The Court of Appeals was correct in reversing the trial judge's order. The decision of the Court of Appeals is affirmed without prejudice to plaintiff to file a new claim with the Industrial Commission within one year of the date of the filing of this opinion upon compliance with the requirements of G.S. § 143-291 *et seq.*

Affirmed.

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

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND THE PUBLIC STAFF v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

No. 408A82

(Filed 8 February 1983)

1. Telecommunications § 1.2— telephone rates—revenues from advertising in yellow pages

The Utilities Commission has the authority to include, in a telephone company's operating statistics for the purpose of ratemaking, the investments, the cost and the revenues related to the company's directory advertising operation. The telephone company enjoys a great advantage over all competitors in the field of directory advertising, and this preferred position with all its benefits and revenues is directly related to and a result of the company's public utility function. G.S. 62-30, G.S. 62-32, and G.S. 62-3(23)d.

2. Appeal and Error § 9; Telecommunications § 1.7— rate of return question neither moot nor confiscatory

The Court of Appeals erred in holding that a rate of return on common equity question was mooted by virtue of later rate increases; however, a 13.5% rate of return on common equity was not confiscatory in violation of our State and Federal Constitutions where the Commission's determination of a fair rate of return was supported by competent evidence.

Justices MARTIN and FRYE did not participate in the consideration or decision of this case.

Justice EXUM dissenting in part and concurring in part.

APPEAL as of right by Southern Bell Telephone and Telegraph Company (hereinafter "Southern Bell") pursuant to G.S. 7A-30(3) from a decision of the Court of Appeals (*Judge Wells* with *Judge (*now *Justice) Harry C. Martin* and *Judge Whichard* concurring), 57 N.C. App. 489, 291 S.E. 2d 789 (1982) affirming an order of the North Carolina Utilities Commission (hereinafter the "Commission") in a general ratemaking case. The proceeding before the Commission is identified as Docket No. P-55, Sub 784.

On 4 September 1980 Southern Bell filed an application for an adjustment in its rates and charges for local and intrastate toll telephone service pursuant to G.S. 62-130 *et seq.* The application requests increases in the amount of $110,333,040. However, in order to comply with voluntary inflation guidelines in effect at that time the proposed rates were designed to raise only an additional $68,174,088. These new rates were to become effective 4 October 1980. On 26 September 1980 the Commission determined, *inter alia*, that the application constitutes a general rate case under G.S. 62-137, and suspended the proposed adjustment in rates for a period of 270 days from 4 October 1980. The Commission ordered public hearings on the proposed adjustments and set out a schedule for those public hearings to be conducted during the months of December 1980 and January 1981. In addition the Commission set as the test period the twelve months period ending 31 July 1980.

On 3 April 1981, the Commission issued an order which granted a partial increase in Southern Bell's rates. In the order of 3 April 1981 the Commission disallowed $26,893,088 of the increase requested while allowing an increase of $41,281,000. In finding of fact number nine within the order of 3 April 1981, the

Commission found that the revenues, expenses and net operating income of the directory advertising operation are properly includable in the cost of service. In addition the Commission stated in finding of fact number ten that Southern Bell could earn a return on its common equity of up to 13.5%.

While this case was pending appeal in the North Carolina Court of Appeals, the Commission, on 3 March 1982, entered an order granting Southern Bell an additional annual rate increase of $66,835,744. In this same order the Commission approved a rate of return on common equity of 15.5%.

Southern Bell appealed to the North Carolina Court of Appeals from the Commission's order of April 1981. In an opinion filed 1 June 1982, the Court of Appeals concluded that the Commission acted properly by including the revenues, expenses and net operating income of Southern Bell's directory advertising operation in its ratemaking proceeding. The Court of Appeals also concluded that the 3 March 1982 rate increase allowed Southern Bell by the Commission renders the fair rate of the return issue moot.

Southern Bell filed notice of appeal in this Court on 6 July 1982 and oral arguments were heard 8 November 1982.

Thomas K. Austin for the North Carolina Utilities Commission, Public Staff, intervenor-appellee.

Hunton and Williams by Robert C. Howison, Jr., R. Frost Brannon, Jr., Robert W. Sterrett, Jr., and Gene V. Coker, for Southern Bell Telephone and Telegraph Company, defendant-appellant.

COPELAND, Justice.

This appeal presents two issues for consideration: (1) May the Commission through its ratemaking and supervisory authority include in Southern Bell's operating expenses and revenues for ratemaking purposes those expenses, revenues and investments relating to its directory advertising operations (commonly referred to as the Yellow Pages)? We conclude that the Commission may include those expenses, revenues and investments, arising from directory advertising, in ratemaking proceedings. (2) Was the Court of Appeals incorrect in treating as moot Southern Bell's

claim that the Commission's determination granting a 13.5% rate of return on common equity is arbitrary, unreasonable and confiscatory in violation of our State and Federal Constitutions? Although the Court of Appeals was incorrect in determining that the fair rate of return issue was moot, the established rate of return on equity of 13.5% is not in violation of either the State or Federal Constitutions.

[1] The first issue raised by the appellant, Southern Bell, concerns whether the Commission has the authority to include, in the Company's operating statistics for the purpose of ratemaking, the investments, the costs and the revenues relating to Southern Bell's directory advertising operation. Southern Bell vigorously argues that the Commission does not possess the necessary authority to include within the rate base the expenses and revenues from its directory advertising operation because that operation is not an essential part of the public utility function of providing telecommunications service. In support of this position Southern Bell points out that the actual transmission of messages across telephone lines does not rely on the yellow pages being available. Although Southern Bell is technically correct in its contention that actual transmission of messages across telephone lines is not dependent on the existence of the yellow pages, such an interpretation of the public utility function is far too narrow. Southern Bell's utility function is to provide adequate service to its subscribers. To suggest that the mere transmission of messages across telephone lines is adequate telephone service is ludicrous.

We wish to point out that the yellow pages have never been and are not now regulated by the Utilities Commission. However, the fact that a specific activity of a utility is not regulated does not mean that the expenses and revenues from that activity cannot be included in determining the rate structure of the utility. In fact, the revenues and expenses from directory advertisements have historically been included in ratemaking determinations in this state.

The Supreme Court of New Mexico was recently faced with this very issue and concluded that the "revenues, expenses and investments related to directory advertising" should be included in rate determinations. *Mountain States Telephone and Telegraph*

Company v. Corporation Commission, 653 P. 2d 501, 506 (N.M. 1982). In addition to New Mexico, thirty states plus the District of Columbia include directory advertising revenues in ratemaking proceedings. 127 *Cong. Rec.* S11139-40 (Daily Ed. October 6, 1981).

It is true, as Southern Bell points out, that the Utilities Commission possesses only those powers granted it by the legislature. *State ex rel. Utilities Commission v. General Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972). Through G.S. 62-30 and G.S. 62-32 the legislature has granted the Commission "such general power and authority to supervise and control public utilities of the State as may be necessary. . . ." G.S. 62-30. "The Commission is hereby vested with all power necessary to require and compel any public utility to provide and furnish . . . reasonable service of the kind it undertakes to furnish and fix and regulate the reasonable rates and charges to be made for such service." G.S. 62-32(b).

Although G.S. 62-30 and G.S. 62-32 appear to provide the Commission with ample authority to include directory advertising in ratemaking proceedings, Southern Bell argues that G.S. 62-3(23)d limits that authority by providing: "If any person conducting a public utility shall also conduct any enterprise not a public utility, such enterprise is not subject to the provisions of this Chapter." § 62-3(23)d. In response to this contention we simply point out that the directory advertising operation of Southern Bell is not a separate enterprise from the transmission of telephone messages. The yellow pages are a very useful and beneficial component in providing telephone service to the public. In fact as Southern Bell points out on Page 137 in its February 1982, Raleigh, North Carolina Yellow Pages, "4 out of 5 [adults] Look in the Book." On page 265 of that same book we find that every year the yellow pages are referred to "a total of almost 3.69 *billion* times." Indeed, the yellow pages are more than a convenience to newcomers in town who need a doctor, lawyer, plumber, electrician or any number of services. Newcomers could not be expected to begin in the front of the alphabetical listings and search until they find the desired service. In fact Southern Bell uses that very situation to promote the sales of its advertisements, "Let newcomers get acquainted with you—Include all of your lines in these Yellow Pages." P. 202 of 1982 Raleigh, North Carolina Yellow Pages.

Southern Bell contends that since the yellow pages were not available in all of its exchanges until 1955, it must not be essential to adequate telephone service. However, the Commission, in discussing the evidence presented relating to this question, stated "The classified directory in which advertising appears, is an *integral part* of providing adequate telephone service." "On the Appeal to the Superior Court the Commission's findings of fact are conclusive and binding if they are supported by competent, material, and substantial evidence in view of the entire record." *State ex rel. Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 454, 130 S.E. 2d 890, 894 (1963). There was ample evidence before the Commission to support the inclusion of the expenses and revenues from directory advertising in the ratemaking process.

Southern Bell further argues that inclusion of revenues and expenses from directory advertising is unfair in light of the competition it faces from newspapers, magazines, pamphlets and other classified directories. The Commission answered this contention by stating, "competitive pressures may eventually be a factor in the marketing of directory advertising by Southern Bell . . . however, based on the evidence presented there is presently no substantial competition posing a threat to Southern Bell's advertising market in North Carolina." We agree there is no real competition. In its areas of service Southern Bell commands an unmatchable position by being able to guarantee that every subscriber of telephone service will receive the advertisement since the Company is required to provide an alphabetical listing (white pages) to all of its telephone subscribers. In addition, unlike any competitor, Southern Bell is able to place those advertisements with or within the same book in which the required alphabetical listing is carried.

The result is clear. Southern Bell enjoys a great advantage over all competitors in the field of directory advertising. In addition, this preferred position with all its benefits and revenues is directly related to and a result of the Company's public utility function. For these reasons we agree with the Utilities Commission and the Court of Appeals that the Commission does have the authority to include the expenses, revenues and investments related to directory advertising in its ratemaking proceedings.

Southern Bell argues that allowing the Commission the authority to include the expenses and revenues related to directory advertising in ratemaking proceedings is contrary to our holding in *Gas House, Inc. v. Southern Bell Telephone Co.*, 289 N.C. 175, 221 S.E. 2d 499 (1976). In *Gas House* this Court held that, "The business of carrying advertisements in the yellow pages of its directory is not part of a telephone company's public utility business." 289 N.C. at 184, 221 S.E. 2d at 505. The *Gas House* case concerned the validity of an exculpatory clause in a contract for the publication of an advertisement within the yellow pages. Although the above language is no more than *obiter dictum*, it is not inconsistent with the result we reach today. To the extent that the language in *Gas House* is inconsistent with our holding in the case *sub judice* that language is overruled. This language does not go so far as to say that the furnishing of a classified listing of subscribers, like that found in the yellow pages, to its customers is not an integral part of the public utility's function of providing adequate telephone service to the citizens of North Carolina. In fact, that is exactly what the Commission found in finding of fact number nine. We therefore uphold the inclusion of the expenses, revenues and investments related to directory advertising in the ratemaking process. We also note that under G.S. 62-42(5) the Commission has the authority to order the utility to take action necessary to secure reasonably adequate service for the public's need and convenience. Undoubtedly yellow pages could fall within this provision.

[2] The second issue raised by Southern Bell is whether it was incorrect for the Court of Appeals to hold that its claim that a 13.5% rate of return on common equity is confiscatory in violation of our State and Federal Constitutions was moot by virtue of a later rate increase. The Court of Appeals, in our view, was mistaken and the question of whether 13.5% is a confiscatory rate of return on common equity is not moot.

In its opinion the Court of Appeals relied on *Utilities Commission v. Southern Bell Telephone Company*, 289 N.C. 286, 221 S.E. 2d 322 (1976), in holding that the issue concerning a fair rate of return on common equity becomes moot by a subsequent rate increase. We believe that the Court of Appeals has misconstrued the meaning of *Utilities Commission v. Southern Bell Telephone Company, supra*, as it applies to this case. The primary error in

rendering Southern Bell's claim moot is that the question to be considered in this case arises out of a general ratemaking case, docket number P-55 Sub 784, while the subsequent rate hike in March of 1982, almost a year after the Commission's order was filed in the original case, is from docket number P-55 Sub 794 which relates to a different time frame. The later rate increase does not cover entirely that period of time covered by the original general rate case. This must be true since rates are set prospectively and not retroactively. Therefore, the original rate case must be fully and finally decided by the courts. Under these circumstances the issue in the case *sub judice* of whether a 13.5% rate of return on common equity is a fair rate of return must be considered.

Before determining the question of whether 13.5% is a confiscatory rate of return under our Federal and State Constitutions we emphasize that it is the Commission, not the Courts, which is authorized by the legislature to determine what is a fair rate of return. *Utilities Commission v. Duke Power Company*, 285 N.C. 377, 206 S.E. 2d 269 (1974); *Utilities Commission v. Va. Electric and Power Co.*, 285 N.C. 398, 206 S.E. 2d 283 (1974). Therefore, we cannot and will not substitute our judgment of what is a fair rate of return for the judgment of the Commission. *Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 287 S.E. 2d 786 (1982). "Rates fixed by the Commission are deemed *prima facie* just and reasonable." *Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 10, 287 S.E. 2d 786, 792 (1982). See also G.S. 62-94(e). As a result, in reviewing the Commission's determination of a fair rate of return, this Court will only review the record and the evidence to determine if the Commission's order is supported by competent evidence.

The Commission heard testimony from five distinguished experts concerning a proper rate of return on common equity for Southern Bell. This testimony was recapitulated by the Commission in its "Evidence and Conclusions For Finding of Fact No. 10" beginning on Page 586 and continuing through Page 592 of the record. Within these pages, among other things, the Commission set out the final recommendations of four of the five experts who employed the "discounted cash flow" analysis for determining proper rate of return. The results as set out in the record are:

Witness	*Final Recommendation*
Carleton	16.0 - 16.5%
Langsam	13.5 - 14.0%
Vander Weide	16.0 (17.5%)
Watson	13.5%

As can be seen from this chart, the Commission's final determination of 13.5% is the exact rate recommended by witness Watson and is within the range of recommendation of witness Langsam. The other two witnesses, Carleton and Vander Weide testified on behalf of Southern Bell. Perhaps one reason for their significantly higher recommendations, other than their ties to Southern Bell, is that each one treated Southern Bell as an industry that is as risky an investment as any other industry. The Commission within its conclusions stated that it could not accept the argument that a company like Southern Bell is as risky an investment as those industries which are subject to the pressures of competition.

As we stated most recently in an opinion written by Justice Meyer:

> It is well settled that the credibility of witnesses and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or in part the testimony of any witness. While an administrative body must consider all of the evidence and may not disregard credible undisputed evidence, it is not required to accept particular testimony as true.

State ex rel. Utilities Commission v. Duke Power Co., 305 N.C. 1, 21, 287 S.E. 2d 786, 798 (1982). It is clear from the record that the Commission weighed all the evidence presented before reaching a conclusion. It is also clear that the Commission gave greater weight to the testimony of the witnesses not associated with Southern Bell. However, as Justice Meyer wrote:

> An expert's opinion testimony may be given less credibility and therefore minimum consideration when the expert is friendly or sympathetic to the party on whose behalf he is testifying. The opinion of the expert may simply be intrinsically non persuasive even though it is uncontradicted.

State ex rel. Utilities Commission v. Duke Power Co., 305 N.C. 1, 23, 287 S.E. 2d 786, 799. If the Commission may refuse to accept the uncontradicted evidence presented to it by a utility, it most certainly may reject the utility's evidence in favor of evidence presented by other witnesses. That is exactly the circumstance in this case.

Such an action by the Commission is even more understandable in light of the fact that, unlike the utility, the Commission must balance the needs and interests of the utility with the needs and interests of the public. G.S. 62-133(b)(4).

Considering the evidence presented to the Commission, the fact that two witnesses recommended a rate of return consistent with 13.5% and the fact that the Commission must strike a balance between the needs of the utility and the needs of the public, we must conclude that the Commission's determination that a 13.5% rate of return on common equity is a fair rate of return, is not arbitrary and capricious and is not confiscatory in violation of Article I, Section 19 of the North Carolina Constitution or the United States Constitution.

We therefore hold that the action taken by the Commission is not arbitrary and is sufficiently supported by the evidence. The opinion of the Court of Appeals is modified in part and affirmed.

Modified and affirmed.

Justices MARTIN and FRYE did not participate in the consideration or decision of this case.

Justice EXUM dissenting in part and concurring in part.

I dissent from so much of the majority opinion which holds that the Utilities Commission correctly concluded that yellow page advertising was an integral part of providing adequate telephone service so that revenues from this advertising are properly considered in setting rates for the utility. Even if such a conclusion now constitutes good rate making policy because, as the Commission found, Southern Bell presently has a monopoly on such advertising, the monopoly, if it exists, is *de facto* and not *de jure*. This Court, concededly in a different context, nevertheless held that "the business of carrying advertisements in the yellow

pages of its directory is not a part of a telephone company's public utility business." *Gas House, Inc. v. Southern Bell Tel. Co.*, 289 N.C. 175, 184, 221 S.E. 2d 499, 505 (1976). This statement is not dictum as I read the case; it is a necessary conclusion to the decision in the case sustaining Southern Bell's limitation of liability clause in a contract for yellow page advertising. To "overrule" this language in *Gas House* is, in effect, to overrule the decision in that case. I cannot subscribe to the majority's rather cavalier attitude to precedents of this Court with which it now disagrees. If such advertising is not a part of the company's public utility business, as we held in *Gas House*, then it is not subject to regulation and revenues derived from it are not properly considered in setting rates for the public utility services which the company provides. G.S. 62-3(23)d.

I also disagree with the majority's conclusion that the question whether the utility's rate of return allowed by the Commission was so low as to be confiscatory is not moot. Because our ruling in its favor on this question could provide no relief for the utility in this proceeding, I think it is moot under *Utilities Commission v. Southern Bell Tel. Co.*, 289 N.C. 286, 221 S.E. 2d 322 (1976). Even if moot, this Court may, if it chooses, consider the question on the basis that it is a question of general importance, likely to recur in future rate making cases, and deserving of prompt resolution. *Leak v. High Point City Council*, 25 N.C. App. 394, 213 S.E. 2d 386 (1975); *Matthews v. Dep't of Transportation*, 35 N.C. App. 768, 242 S.E. 2d 653 (1978); *see also Netherton v. Davis*, 234 Ark. 936, 355 S.W. 2d 609 (1962); *Walker v. Pendarvis*, 132 So. 2d 186 (Fla. 1961); *Payne v. Jones*, 193 Okla. 609, 146 P. 2d 113 (1944); 5 CJS, Appeal and Error, § 1354(1) (1958).

The utility argues that because the rate of return allowed on its equity is less than that which it earns on its bonds, the equity rate of return is confiscatory. This kind of question is one properly addressable by this Court even if our answer to it can provide no relief to the utility in this proceeding. I agree with the majority's decision to take up the question and with the majority's conclusion that the rate of return on equity was not confiscatory simply because the rate was lower than the yield on the utility's bonds. I further agree there was ample evidence in the record to support the rate of return allowed by the Commission.

STATE OF NORTH CAROLINA v. CARLTON CHEEK, SR.

No. 449A82

(Filed 8 February 1983)

1. **Rape and Allied Offenses § 3— indictment for first degree rape—failure to allege "with force and arms"**

An indictment for first degree rape was not fatally defective for failure to contain the averment "with force and arms," since G.S. 15-155 specifically states that no "indictment for felony or misdemeanor . . . shall be stayed or reversed . . . for omission . . . of the words 'with force and arms' . . . ."

2. **Criminal Law §§ 76, 93— admissibility of confession—order of proof—no prejudice**

The defendant was not prejudiced in a voir dire hearing to determine the admissibility of his confession by the error of the trial court in placing the burden of production on him since the trial judge considered all evidence, placed the burden of persuasion on the State, and made his ruling accordingly.

3. **Criminal Law § 162— no objection to questions asked on voir dire—no right to complain—no prejudice**

Where defendant failed to object to a line of questioning asked defendant during the voir dire hearing on defendant's motion to suppress his confession, he could not complain on appeal about the interchange. Furthermore, the questions could not have prejudiced defendant because they were asked on voir dire, and it is presumed that the trial judge disregarded any incompetent evidence that was admitted.

4. **Criminal Law § 122.1— request for additional instructions—no undue emphasis on testimony**

Where, after the jury had been fully instructed and sent to deliberate, they requested that they be allowed to hear the defendant's confession and the prosecuting witness's testimony about the rape again, and where the trial court asked both the district attorney and the defense counsel if they had any objection to his giving the highlights of the prosecuting witness's testimony and in repeating the defendant's confession and defendant did not object, defendant waived his right to have an objection to the charge considered on appeal. Nor did the trial judge impermissibly express an opinion by only summarizing the prosecuting witness's testimony while reading defendant's statement verbatim. G.S. 15A-1222.

5. **Criminal Law § 169.6— exclusion of testimony—failure to put answer in record**

The Court could not determine whether an alleged error was prejudicial where defendant failed to include in the record what his answer would have been to a question had he been allowed to answer.

6. Rape and Allied Offenses § 4.2— first degree rape—evidence of bruises on prosecuting witness's neck properly admitted

In a prosecution for first degree rape, the trial court did not err in allowing a detective to state on rebuttal that he noticed bruises on the prosecuting witness's neck several days after the alleged rape had occurred.

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

BEFORE *Judge Hal H. Walker* and a jury at the 8 March 1982 Criminal Session of RANDOLPH Superior Court, defendant was convicted of first degree rape. He was sentenced to life imprisonment and appeals as a matter of right pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Reginald L. Watkins and Wilson Hayman, Assistant Attorneys General, for the State.

Bowden and Bowden, by R. Steve Bowden, for defendant appellant.

EXUM, Justice.

Defendant's assignments of error relate to the trial court's failure to dismiss the charge against him on the ground that the indictment was fatally defective, the denial of his motion to suppress his pretrial confession, the court's summarization of the evidence for the jury, and the court's rulings on various evidentiary questions. We find no reversible error in the trial; therefore, we affirm the conviction.

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

On 30 April 1981 Kathy Namath, the chief prosecution witness, was taking a midday nap in her home outside Liberty, North Carolina. She was suddenly awakened by an assailant who held a knife against her neck; because she was lying on her stomach, she could not see his face. He held her down on her stomach while he pulled off her pants and underwear. He then had sexual intercourse with her. When he was finished he told her to "lay there for ten minutes and not to call the police." When she heard the screen door shut she knew he had left the house so she got up, locked the door, and looked out the window. She saw a black man wearing a khaki-colored shirt running across her

lawn, but she still could not see his face. Later, she determined that a serrated knife was missing from her kitchen, as was a wallet containing approximately thirty-five dollars.

She immediately called her husband at work and then called the Liberty Police Department. An investigating detective took her clothing for analysis by the State Bureau of Investigation (SBI), and she was taken to Moses Cone Hospital for an examination.

Dr. Francis X. Barry, an expert in obstetrics and gynecology, testified that he examined Kathy Namath on 30 April. He took various smears, a culture and pubic and head hair from Ms. Namath as part of a "rape kit" which was sent to the SBI. David Spittle, a forensic serologist for the SBI, testified that the smears taken from Ms. Namath showed the presence of semen. Scott Worsham, a forensic chemist for the SBI specializing in the field of hair and fiber comparison, testified that two pubic hairs removed from Ms. Namath's bed linens were consistent with pubic hairs taken from defendant.

Defendant's supervisor testified that defendant was a state employee mowing grass along the highways in the vicinity of Ms. Namath's home the week of the rape. A neighbor saw a black male wearing a khaki shirt entering the highway from the direction of the Namath yard at 1:30 p.m. on 30 April. A state mowing machine was parked at the time in a driveway about 400 feet away, on the opposite side of the road from the Namath driveway.

A statement made by defendant to detectives of the Randolph County Sheriff's Department was introduced into evidence following a voir dire on its admissibility. After defendant executed a "Miranda Rights" form he gave a detailed statement in which he admitted using a knife to force Ms. Namath into submitting to sexual intercourse and then stealing her purse which contained approximately thirty-five dollars. He stated: "I make this statement of my own free will, after being advised of my rights. No threats or promises have been made to me by Lt. Andrews or Sgt. Pugh. I know and understand what I am doing."

Defendant testified in his own defense. Following a hearing and determination by the trial court that certain evidence was

not barred by the rape shield statute, G.S. 8-58.6, he testified that he met Ms. Namath at the Biscuit Barn in Liberty. Following two meetings there, he arranged to meet her at her home. They engaged in consensual sexual intercourse three times during April 1981 and met on other occasions. He admitted visiting her on 30 April and taking thirty dollars from her purse while she was talking on the telephone, but he denied having sexual intercourse with Ms. Namath on 30 April. He also denied that his previous statement given to the officers was truthful. He said he made it up because he believed that was what the officers wanted to hear.

During its rebuttal the state called Jeff Namath, Kathy Namath's husband. He testified that he had taken a new job in Charleston, South Carolina, in March 1981 and Ms. Namath had visited him with their two children at a time when defendant said she had been with defendant. Two investigating officers testified that they had noted bruises on Ms. Namath's neck on 30 April and afterwards. Finally, Ms. Namath absolutely denied that she had had an affair with defendant.

[1] The first issue raised by defendant is whether the indictment properly charges the offense of first degree rape. Specifically, he argues that under G.S. 15-144.1 an indictment in a rape case must contain the phrase "with force and arms." The indictment in the instant case states: "On or about the 30th day of April, 1981, in Randolph County Carlton Cheek, Sr. unlawfully and wilfully did feloniously ravish and carnally know Kathy A. Namath, by force against the victim's will." It does not include the words "with force and arms." Thus, defendant argues the indictment is fatally defective.

This argument was recently addressed and rejected by this Court in *State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982). Furthermore, G.S. 15-155 specifically addresses "[d]efects which do not vitiate" indictments: "No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed . . . for omission . . . of the words 'with force and arms,' . . . ." This assignment is, therefore, overruled.

[2] Defendant also assigns error to the trial court's decision that defendant's inculpatory statement to police officers was admissi-

ble against him. Defendant filed a motion to suppress the statement and a supporting affidavit before trial, and the trial judge conducted a voir dire on the motion. At the beginning of the hearing the trial judge asked the district attorney and the prosecutor if they were ready to proceed. When they responded that they were the trial judge commented, "All right. The burden is on the defendant on a motion to suppress." Defense counsel then began his direct examination of defendant.

Defendant argues the trial judge impermissibly placed the burden of proving that the statement was not voluntarily made on defendant. The state responds that when read in context the most reasonable inference from the remark is that the trial judge only placed the burden of going forward with the evidence on defendant, which the state contends is permissible. At the outset we note that technically it is not necessary for us to decide this issue because defendant failed to *object* or *properly except* to the statement by the trial judge or his findings of fact and conclusions of law on the admissibility of defendant's confession. Under Rule 10(b) of the North Carolina Rules of Appellate Procedure, "[e]ach exception shall be set out immediately following the record of judicial action to which it is addressed and shall identify the action . . . by any clear means of reference." Rule 10(a) of the North Carolina Rules of Appellate Procedure states, "No exception not so set out may be made the basis of an assignment of error . . . ." Here, the exception does not follow the remark or the findings; instead, it appears after the district attorney's opening statement to the jury. Thus, defendant's challenge to the trial court's remark and findings has not been properly presented on appeal.

Nevertheless, we are satisfied the remark of the trial judge is not indicative of prejudicial error. Defendant's pretrial motions met the procedural requirements of Article 53, Chapter 15A of the General Statutes. The motion alleged sufficient legal grounds and was supported by a factually sufficient affidavit; it was not subject to summary determination. *See* G.S. 15A-977. When such a motion is not subject to summary determination under G.S. 15A-977(b) and (c), the trial judge must conduct a hearing, make findings of fact and conclusions of law and set forth his findings and conclusions in the record. G.S. 15A-977(d), (f); *State v. Johnson*, 304 N.C. 680, 285 S.E. 2d 792 (1982). At this hearing,

held in the absence of the jury, the burden is upon the state to demonstrate the admissibility of the challenged evidence; and, in the case of a confession, the state must affirmatively show (1) the confession was voluntarily made, (2) the defendant was fully informed of his rights and (3) the defendant voluntarily waived his rights. *State v. Johnson, supra; State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976); 1 Brandis, Stansbury's N.C. Evidence § 19a (2d rev. ed. 1982). To do this the state must persuade the trial judge, sitting as the trier of fact, by a preponderance of the evidence that the facts upon which it relies to sustain admissibility and which are at issue are true. *Id.*

Ordinarily the party with the burden of persuasion is required to present evidence first, but the trial court in its discretion may depart from this general rule if the court "considers it necessary to promote justice." *State v. Temple*, 302 N.C. 1, 4, 273 S.E. 2d 273, 276 (1981). Such a departure "is not grounds for reversal unless the court abuses its discretion and defendant establishes that he was prejudiced thereby." *Id.* at 4-5, 273 S.E. 2d at 276. We held in *Temple* that requiring defendant to present his evidence first under the circumstances of that case was not prejudicial error when neither the burden of persuasion nor the burden of going forward with the evidence, *i.e.*, the burden of production, was placed on defendant. In *State v. Breeden*, 306 N.C. 533, 293 S.E. 2d 788 (1982), defendant had filed legally sufficient motions, supported by factually sufficient affidavits, to suppress certain identification testimony. Nevertheless, the trial court at the voir dire hearing ordered defendant *to go forward* with evidence, recognizing at the same time that the burden of persuasion was on the state. When defendant declared that he was not prepared to go forward, the trial court summarily denied the motion "for failure of proof." *Id.* at 539, 293 S.E. 2d at 792. *Breeden* held that this procedure was prejudicial error because the motions to suppress, "having raised legal issues and being properly supported by affidavits were not subject to summary denial" under G.S. 15A-977. *Id.* at 538, 293 S.E. 2d at 792. The Court also noted that when defendant complied "with the affidavit requirement of G.S. 15A-977" he had, in effect, already gone forward with his evidence so that it was error for the trial court to deny the motion "for the failure of proof." *Id.* at 539, 293 S.E. 2d at 792.

Here, when the trial court's statement that "the burden is on the defendant on a motion to suppress" is read in context, it is apparent that it has reference to the burden of production of evidence, not the burden of persuasion. The trial court's findings of fact and conclusions of law bolster this interpretation. They affirmatively state that defendant's confession was voluntarily given, was not the product of threats or hopes of reward, and that defendant purposely and freely waived his constitutional rights which had been read to him. Thus the trial judge did not couch his findings in language, such as "defendant has failed to show that the statement was not voluntarily given," which would have indicated that he impermissibly placed the burden of persuasion on defendant. Even so, since defendant had filed a legally sufficient motion supported by a factually sufficient affidavit under G.S. 15A-977, the trial judge erred, under *Breeden*, in placing a burden of production on defendant at the hearing. Nevertheless, defendant here did go forward with his evidence, presented his witnesses and cross-examined those presented by the state. The motion was not, as it was in *Breeden*, summarily denied for failure of proof. The trial judge considered all evidence, placed the burden of persuasion on the state, and made his ruling accordingly. We conclude, therefore, that defendant was not prejudiced by the error in placing the burden of production on him. This assignment of error is overruled.

[3] Defendant next contends the trial court erred in allowing the prosecutor, during the hearing on the motion to suppress, to cross-examine defendant about statements defendant made to a psychiatrist at Dorothea Dix Hospital. Defendant was examined at the hospital pursuant to the motion of his attorney for a determination of his capacity to stand trial. Copies of the psychiatric discharge summary were sent to defendant, his attorney, the prosecutor, and the presiding judge. During the voir dire held on defendant's motion to suppress, the following exchange took place *without objection* by defendant:

Q. [Mr. Yates] You went to Raleigh at Dix Hill, didn't you?

A. [Defendant] Yes. I've been there.

Q. What did you tell the psychiatrist down there?

A. I told him what I had told Don Andrews. You talking about Dr. Rollins? I told him I couldn't remember if I did it or not.

EXCEPTION NO. 3

Q. You told him there was nothing wrong with you. You just went down there because your attorney wanted you to?

A. No. I did not tell him that. That's a lie.

Defendant made no objection to this line of questioning; therefore, he cannot complain on appeal about the interchange. *State v. Reynolds*, 307 N.C. 184, 297 S.E. 2d 532 (1982); *State v. Foddrell*, 291 N.C. 546, 231 S.E. 2d 618 (1977). Furthermore, even if the questions asked by the district attorney were improper, a point we do not decide, they could not have prejudiced defendant because no questions were asked before the jury. Rather, they were only asked in the voir dire held before the trial judge; it is presumed that the trial judge disregarded any incompetent evidence that was admitted. *See Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668, *cert. denied*, 358 U.S. 888 (1958).

[4] Defendant also argues the trial judge erred in placing undue emphasis on defendant's confession in repeating it and Ms. Namath's testimony about the rape. After the jury had been fully instructed and sent to deliberate, they requested, through their foreman, that they be allowed to hear these statements again. The trial judge ascertained that they just wanted the highlights of the statements; he asked both the district attorney and defense counsel if they had any objection to his giving the highlights as he recalled them. They responded that they did not.

After the trial judge completed summarizing Ms. Namath's testimony, the foreman asked to hear the written statement defendant had given to police officers. The trial judge again asked defense counsel if he had any objection and he responded, "No objection." The trial judge then read defendant's statement to the jury without any elaboration. At no time did defendant or his attorney object to this reading, a point defendant admits in his brief. Clearly the trial judge was attentive to providing defendant ample opportunity to object to the reading and summarization. "It is the general rule that objections to the charge in reviewing the

evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal." *State v. Hewett*, 295 N.C. 640, 642, 247 S.E. 2d 886, 887 (1978); *see also State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968). This assignment of error is overruled.

Nor did the trial judge impermissibly express an opinion, as defendant contends, by only summarizing Ms. Namath's testimony while reading defendant's statement verbatim. General Statute 15A-1222 prohibits the trial judge from expressing "any opinion in the presence of the jury on any question of fact to be decided by the jury." We have previously held that "[s]light inaccuracies in the statement of the evidence in the instructions of the court to the jury will not be held for reversible error when not called to the attention of the judge at the time and the charge substantially complies with the requirements of G.S. 15A-1222 . . . ." *State v. Oxendine*, 300 N.C. 720, 725-26, 268 S.E. 2d 212, 216 (1980). Defendant in the instant case does not allege there were any inaccuracies in the trial judge's handling of the foreman's request for a recapitulation of the key statements. Rather, he asserts the trial judge expressed an opinion by summarizing Ms. Namath's testimony while reading verbatim defendant's statement. We are satisfied the trial judge did not convey any opinion, express or implied, to the jury by this method of recapitulating the evidence. This assignment of error is without merit.

[5] Defendant next assigns error to the trial court's sustaining an objection by the district attorney to the following question: "Mr. Cheek, this statement that you gave Don Andrews, would you tell the jury why you gave that statement?" The trial court sustained the objection, commenting, "He's answered that." Defendant contends "that his explanation of why he gave the statement to the officers in this case would have raised a question of credibility which should have been presented to the jury."

We note that defendant has again failed to comply with Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure. Defendant has failed to set out an exception following the question, objection, and ruling in the record.

Defendant has also failed to include in the record what his answer would have been to this question. Even if the trial court erroneously sustained the state's objection to the question, we cannot determine whether the error was prejudicial. *State v. Martin*, 294 N.C. 253, 257, 240 S.E. 2d 415, 419 (1978); *State v. Hedrick*, 289 N.C. 232, 237, 221 S.E. 2d 350, 354 (1976). Thus, this assignment of error is overruled.

Defendant's next assignment of error is also meritless because he failed to preserve sufficient information in the record. During the direct examination of defendant by his attorney at trial, the following exchange took place:

Q. Were you telling the truth when you gave that statement?

EXCEPTION NO. 6

MR. YATES: OBJECTION, Your Honor.

THE COURT: SUSTAINED.

MR. BUNCH: We have no further questions at this time.

Defendant acknowledges in his brief "that the record does not reflect what his answer would be and thus the Court has difficulty determining the importance of the response." He argues, however, "that he should be permitted to answer whether the original statement was truthful and the failure to permit him to give this answer denied him a fair trial, since the jury could not weigh his response for truthfulness." We reiterate the rule that we cannot determine whether an error was prejudicial, even if the objection to the question was erroneously sustained, when the record fails to show what his response to the question would have been. *State v. Martin*, *supra*, 294 N.C. at 257, 240 S.E. 2d at 419; *State v. Hedrick*, *supra*, 289 N.C. at 237, 221 S.E. 2d at 354. Furthermore, defendant was later allowed on cross-examination to testify that he "lied" when he made the confession to Detective Andrews. He was given the opportunity to deny before the jury the truthfulness of his confession; thus he could not have been prejudiced by the trial court's sustaining the district attorney's objection to this particular question.

[6] Finally, defendant contends the trial court erred in allowing a law enforcement officer to testify about bruises he observed on

Ms. Namath's neck four days after the rape was committed. Ms. Namath had testified that the man who raped her had held a knife to her neck and that she had "a small bruise and a cut" on her neck the day after the rape. In presenting evidence on rebuttal, after defendant had testified that he had engaged in consensual acts of intercourse with Ms. Namath, the district attorney asked Detective Andrews if he noticed any bruises on Ms. Namath on 4 May. He replied, over defendant's objection, that she had bruises on the right side of her neck.

We are satisfied that the evidence is relevant to the question whether a forcible rape occurred and is admissible.

> Evidence is relevant if it has any logical tendency to prove a fact at issue in a case, . . . and in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. . . . It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact. [Citations omitted.]

State v. Arnold, 284 N.C. 41, 47-8, 199 S.E. 2d 423, 427 (1973).

Furthermore, another detective with the Randolph County Sheriff's Department, Waymon Pugh, testified on rebuttal that he noted red marks on Ms. Namath's neck on the day of the rape, although they were not bruises at that time. This testimony was admitted without objection. Thus, any possible error in admitting Detective Andrews' testimony could not have prejudiced defendant. We conclude this assignment of error is without merit.

All other assignments of error have been expressly abandoned by defendant in his brief.

For the reasons stated we conclude that defendant has had a fair trial free from reversible error.

No error.

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

NORTH CAROLINA NATIONAL BANK v. VIRGINIA CAROLINA BUILDERS

No. 414A82

(Filed 8 February 1983)

1. **Appeal and Error § 2— Court of Appeals—one panel may not overrule decision of another**

One panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case. Thus, where a panel of the Court of Appeals had denied a petition for a writ of certiorari to review an order of the trial court, a second panel of that Court had no authority to exercise its discretion in favor of reviewing the trial court's order.

2. **Judgments § 13; Rules of Civil Procedure § 55— answer filed by out-of-state attorney not admitted to practice—default judgment not proper**

The Court of Appeals erred in holding that plaintiff could obtain a default judgment when there was an answer on file on the ground that the answer was filed by an out-of-state attorney who had not qualified under G.S. 84-4.1 to practice in North Carolina. G.S. 1A-1, Rule 55(a).

Justices COPELAND and FRYE did not participate in the consideration or decision of this case.

ON appeal from a decision of the Court of Appeals, opinion by *Judge Hedrick* with *Judge Arnold* concurring and *Chief Judge Morris* dissenting, 57 N.C. App. 628, 292 S.E. 2d 135 (1982), reversing an order of *Judge James Long* entered on 6 April 1981 following a hearing in ROCKINGHAM Superior Court setting aside a default judgment.

Harrington, Stultz & Maddrey by Thomas S. Harrington, for plaintiff appellee.

Bryant, Drew, Crill & Patterson, P.A., by Victor S. Bryant, Jr., for defendant appellant.

EXUM, Justice.

The first question raised in this case is whether one panel of the Court of Appeals may overrule the decision of another panel on the same question in the same case. We conclude that it may not. On the merits, we conclude the Court of Appeals also erred in holding that plaintiff may obtain a default judgment when there is an answer on file on the ground the answer was filed by an out-of-state attorney not authorized to practice in North Carolina.

On 3 July 1979 plaintiff filed complaint for recovery of $32,650.81 allegedly owed it on a promissory note executed by defendant. Defendant employed John D. Epperly, an attorney licensed to practice in Virginia with offices in Martinsville, Virginia, to represent it in the action. Mr. Epperly filed an answer to the complaint on 25 July 1979, alleging that only $1,000 plus interest on that amount was owed. Mr. Epperly failed, however, to obtain the limited admission to practice in North Carolina afforded out-of-state attorneys under G.S. 84-4.1. Plaintiff filed a reply to defendant's answer on 27 July 1979.

On 19 October 1979 plaintiff filed motion for entry of default under Rule 55 of the North Carolina Rules of Civil Procedure, citing the failure of defendant's attorney to comply with G.S. 84-4.1 as the basis for plaintiff's entitlement to a default judgment. Victor S. Bryant, Jr., a licensed North Carolina attorney, filed notice of appearance on 8 November 1979, and specified that he would be actively defending the case with Mr. Epperly. The Clerk of Rockingham Superior Court filed an entry of default on 2 February 1981, and entered a default judgment on 3 February 1981. Plaintiff was awarded the amount sought, plus interest on the principal owed until payment was made and costs of the action.

Mr. Bryant filed a motion on 16 February 1981, pursuant to Rule 55(d) of the North Carolina Rules of Civil Procedure, to set aside the entry of default.[1] Mr. Epperly filed a separate motion to set aside the default judgment, pursuant to Rule 60(b), on 17 February 1981. He also filed on 16 March 1981 a motion for admission to practice under G.S. 84-4.1 for the purpose of representing defendant in this action.

Judge Long granted Mr. Epperly's motion to practice on 21 April 1981, but provided that the court's order would be applied prospectively only in order not to prejudice any rights already accrued to plaintiff. He also granted the motion to set aside the default judgment. In doing so, he first took judicial notice of a custom among Virginia attorneys practicing in areas near the North Carolina border to appear in North Carolina courts without

1. Mr. Bryant subsequently supplemented this motion with a motion filed on 26 February 1981 to set aside the default judgment.

complying with the provisions of G.S. 84-4.1. He found Mr. Epperly's failure to comply to be "in keeping with such practice and custom." He further found that defendant had alleged a valid defense to the action, and that even if Mr. Epperly had been negligent in failing to comply with G.S. 84-4.1 in a timely fashion, his negligence should not be imputed to defendant. He ordered that the default judgment be set aside.

Plaintiff on 12 June 1981 petitioned the Court of Appeals for a writ of certiorari which was denied on 8 July 1981 by a panel of the Court of Appeals composed of Judges Clark, Webb and Wells. Plaintiff on 3 August 1981 filed a record on appeal in the Court of Appeals, pursuant to a notice of appeal given on 27 April 1981. Defendant filed a motion to dismiss the appeal on 14 August 1981.

The Court of Appeals reversed the decision of the trial court to set aside the judgment without expressly ruling on the motion to dismiss. Judge Hedrick, writing for the majority, recognized that orders setting aside default judgments are ordinarily nonappealable interlocutory orders. He declared, however, that "because the present order contains serious error regarding a matter of great importance we, in our discretion, choose to review it." The majority noted its disapproval of the trial court's taking judicial notice of widespread failure to comply with North Carolina statutory requirements for out-of-state attorneys to practice in this state. It concluded that Mr. Epperly's failure to comply with G.S. 84-4.1 was inexcusable negligence that should be imputed to defendant; therefore, the trial court erred in setting aside the judgment.

Judge Morris dissented on the ground that the appeal was interlocutory and that she "perceive[d] no reason to exercise our discretionary authority to review the matter by treating this purported appeal as a petition for writ of certiorari and allowing the writ," particularly since "[a]nother panel has already denied a petition for a writ of certiorari previously filed here by plaintiff." She also disagreed with the majority's determination on the merits, citing the rule that a default may not be entered by the clerk after an answer has been filed even if that answer is technically deficient. Plaintiff had not challenged the answer with a motion to strike, thus the answer remained of record.

Defendant appealed to this Court as a matter of right under G.S. 7A-30(2).

[1] Under the general rule set forth in *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E. 2d 431, 433-34 (1980), the superior court's order setting aside the default judgment in the instant case is not appealable because it is interlocutory, and there has been no showing that it affects a substantial right and will cause irreparable injury to plaintiff if left uncorrected before appeal from a final judgment. Both panels of the Court of Appeals that considered this case correctly concluded the order was not appealable and could be considered by the Court of Appeals only in the exercise of that court's discretionary power to grant appellate review. The first panel determined in its discretion not to review the case. Later, the second panel determined to exercise its discretion in favor of review. Thus, on the question of reviewability, the second panel of the Court of Appeals in effect overruled the first.

Although we have never considered the question, well-established analogies in our law lead us to conclude that the second panel of the Court of Appeals was without authority to overrule the first on the same question in the same case. Once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case. *Tennessee-Carolina Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 239, 210 S.E. 2d 181, 183 (1974); *Horton v. Redevelopment Commission of High Point*, 266 N.C. 725, 726, 147 S.E. 2d 241, 243 (1966); *Bass v. Mooresville Mills*, 15 N.C. App. 206, 207-08, 189 S.E. 2d 581, 582, *cert. denied*, 281 N.C. 755, 191 S.E. 2d 353 (1972). At the trial level "[t]he well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E. 2d 484, 488 (1972). "The power of one judge of the superior court is equal to and coordinate with that of another, and a judge holding a succeeding term of court has no power to review a judgment rendered at a former term on the ground that the judg-

ment is erroneous." *Michigan National Bank v. Hanner*, 268 N.C. 668, 670, 151 S.E. 2d 579, 580 (1966).

Applying these principles to the question before us, we conclude that once a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case. Further, since the power of one panel of the Court of Appeals is equal to and coordinate with that of another, a succeeding panel of that court has no power to review the decision of another panel on the same question in the same case. Thus the second panel in the instant case had no authority to exercise its discretion in favor of reviewing the trial court's order when a preceding panel had earlier decided to the contrary.

Our decision on this point in no way impinges on the power of this Court or the Court of Appeals to change its ruling upon a motion to rehear, or on the court's own motion, if the court determines that its former ruling was clearly erroneous. In the case of the Court of Appeals, however, such a change must be made, if at all, by the same panel which initially decided the matter. Otherwise, a party against whom a decision was made by one panel of the Court of Appeals could simply continue to press a point in that court hoping that some other panel would eventually decide it favorably, as indeed the plaintiff did in this case; and we would not have that "orderly administration of the law by the courts," *Rutherford College v. Payne*, 209 N.C. 792, 796, 184 S.E. 827, 830 (1936), which litigants have a right to expect.

The second panel of the Court of Appeals from which the appeal to us is taken erred, therefore, in not allowing defendant's motion to dismiss the purported appeal.

[2] Since, however, we also conclude that the Court of Appeals erred in resolving the case on its merits, we have decided, in the exercise of our supervisory power, to address this question. We agree with Judge Morris's analysis of the question whether a default judgment may be entered when an answer has been filed by an attorney not authorized to practice in North Carolina. Rule 55(a) of the North Carolina Rules of Civil Procedure states: "*Entry.*—When a party against whom a judgment for affirmative relief is sought *has failed to plead* . . . and that fact is made to appear by affidavit or otherwise, the clerk shall enter his de-

fault." (Emphasis added.) Thus, default may not be entered if an answer has been filed, even if the answer is deficient in some respect. *Peebles v. Moore*, 302 N.C. 351, 275 S.E. 2d 833 (1981) (no default judgment could be entered by clerk even though answer not timely filed); *Rich v. Norfolk Southern Railway Co.*, 244 N.C. 175, 92 S.E. 2d 768 (1956) (unverified answer precluded entry of default judgment); *Bailey v. Davis*, 231 N.C. 86, 55 S.E. 2d 919 (1949) (no default judgment could be entered by clerk even though answer not timely filed). Concern for an equitable and just result undergirds this rule. As Chief Justice Branch stated in *Peebles v. Moore, supra*, 302 N.C. at 356, 275 S.E. 2d at 836,

> We believe that the better reasoned and more equitable result may be reached by adhering to the principle that a default should not be entered, even though technical default is clear, if justice may be served otherwise. McIntosh, North Carolina Practice and Procedure (1970, Phillips Supp.) § 1670; 3 Barron and Holtzoff, Federal Practice and Procedure (Wright ed., 1961) § 1216.
>
> Here plaintiff does not contend that his right to fairly litigate his action has been impaired because defendant tardily filed his answer. The record shows that defendant was a few days late in filing his answer, and plaintiff delayed until answer was filed and issues joined before seeking entry of default and before filing a reply. Without considering the questions of just cause, excusable neglect or waiver, we conclude that justice will be served by vacating the entry of default and permitting the parties to litigate the joined issues.

We conclude the default judgment in the instant case was improperly entered because defendant's answer, even though filed by an out-of-state attorney, was on the record. Plaintiff's remedy was to move to strike the answer, and then to move for entry of default and default judgment. *Rich v. Norfolk Southern Railway Co., supra*, 244 N.C. at 180, 92 S.E. 2d at 772; *Bailey v. Davis, supra*, 231 N.C. at 89, 55 S.E. 2d at 921.

Because no motion to strike the answer has been made, the question whether a pleading filed by an out-of-state attorney who had not qualified under G.S. 84-4.1 may be stricken for that reason is not before us and we do not reach it. Also not before us

is the question whether defendant's employment of an out-of-state attorney to defend an action brought in North Carolina is excusable neglect. Defendant need not have made this showing because of our conclusion that the clerk was without authority to enter a default judgment while defendant's answer was on record.

The decision of the Court of Appeals is

Reversed.

Justices COPELAND and FRYE did not participate in the consideration or decision of this case.

MIDDLESEX CONSTRUCTION CORPORATION v. THE STATE OF NORTH CAROLINA EX REL. STATE ART MUSEUM BUILDING COMMISSION

No. 575PA82

(Filed 8 February 1983)

State §§ 2.2, 4, 4.4— breach of contract action—failure to follow statutory procedure for settling controversy—denial of defendant's motions to dismiss error

In an action instituted by plaintiff alleging breach of contract in the construction of the North Carolina Museum of Art building, the trial court erred in denying defendant's motions to dismiss which were raised on the defense of sovereign immunity. Plaintiff failed to exhaust its statutory remedies under G.S. § 143-135.3 prior to instituting a civil action in superior court, and although a contractor may ultimately file an action in superior court, the exhaustion of administrative remedies as provided in G.S. § 143-135.3 is a *condition precedent* to such action, and the provisions become *a part of every contract* entered into between the State and the contractor. The holding in *Smith v. State*, 289 N.C. 303 (1976) abolished sovereign immunity in only those cases where an administrative or judicial determination was not available.

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

FROM a decision by *Bailey, J.*, entered 23 July 1982 in Superior Court, WAKE County, denying defendant's Motions to Dismiss pursuant to Rules 12(b)(1), 12(b)(2) and 12(b)(6) of the North Carolina Rules of Civil Procedure, defendant appealed to the Court of Appeals. Pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure and G.S. § 7A-31, plaintiff peti-

tioned this Court for discretionary review prior to determination by the Court of Appeals. We allowed plaintiff's petition on 3 November 1982.

Plaintiff instituted this action against the defendant by filing a complaint in Superior Court, Wake County, alleging breach of contract in the construction of the North Carolina Museum of Art building. The complaint alleged seven claims for breach of contract which, for the most part, are based on failure of architects, acting as agents for the State Art Museum Building Commission, to properly exercise their duties with respect to the general supervision of the construction. More specifically, plaintiff alleged damages resulting from work ordered beyond that contemplated by the contract and required due to defective specifications; unreasonable delays occasioned by failure to provide plaintiff with instructions necessary to accomplish its work; failure to act on requested change orders; and failure to communicate to plaintiff changes in orders or information on the progress of other contractors.

By its Motions to Dismiss, defendant raised the defense of sovereign immunity, its position being that plaintiff had failed to exhaust its statutory remedies under G.S. § 143-135.3 prior to instituting a civil action in Superior Court. Relying on this Court's holding in *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976), which abolished the defense of sovereign immunity in certain contract actions against the State, plaintiff argued that it was no longer bound by the statutory procedure but could elect to pursue a common law breach of contract action in the first instance.

Sanford, Adams, McCullough & Beard, by J. Allen Adams, E. D. Gaskins, Jr., William George Pappas, and Nancy H. Hemphill, attorneys for plaintiff-appellee.

Rufus L. Edmisten, Attorney General, by T. Buie Costen, Special Deputy Attorney General for defendant-appellant.

MEYER, Justice.

At issue is whether the trial court erred in denying defendant's motions to dismiss. The resolution of this issue involves the interpretation of and the interaction between a statutory provision, G.S. § 143-135.3, and the judicial prescript enunciated in *Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412.

In *Smith*, this Court wrote:

> We hold, therefore, that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.

Id. at 320, 222 S.E. 2d at 423-24. In its apparent holding that the defense of sovereign immunity was no longer available to the State in any action for breach of a duly authorized State contract, *Smith* was a landmark decision in the jurisprudence of our State. However, as recognized in *Smith*, the State had, through various legislative enactments prior to that decision, waived its immunity and had expressly consented to be sued on its contracts. *See* G.S. § 136-29(b) (highway construction contracts); G.S. § 115-142(n) (teacher employment contracts) (now repealed). Also referred to in *Smith* as an "important" contractual situation in which the Legislature had already consented to suits against the State is G.S. § 143-135.3, authorizing "*civil actions* on claims arising out of completed contracts for construction or repair work awarded by any state board." *Id.* at 321, 222 S.E. 2d at 424 (emphasis added).

G.S. § 143-135.3, which was amended in 1981, provides as follows:

> § 143-135.3. *Procedure for settling controversies arising from contracts; civil actions on disallowed claims.*
>
> When a claim arises prior to the completion of any contract for construction or repair work awarded by any State board to any contractor under the provisions of this Article, the contractor may submit his claim in writing to the Division of State Construction for decision. Upon completion of any contract for construction or repair work awarded by any State board to any contractor, under the provisions of this Article, should the contractor fail to receive such settlement as he claims to be entitled to under terms of his contract, he may, within 60 days from the time of receiving written notice as to the disposition to be made of his claim, submit to the Secretary of Administration a written and verified claim for such amount as he deems himself entitled to under the terms of said contract, setting forth the facts upon which said claim

is based. In addition, the claimant, either in person or through counsel, may appear before the Secretary of Administration and present any additional facts and arguments in support of his claim. Within 90 days from the receipt of the said written claim, the Secretary of Administration shall make an investigation of the claim and may allow all or any part or may deny said claim and shall have the authority to reach a compromise agreement with the contractor and shall notify the contractor in writing of his decision.

As to such portion of a claim which may be denied by the Secretary of Administration, the contractor may, within six months from receipt of the decision, institute a civil action for such sum as he claims to be entitled to under said contract by the filing of a verified complaint and issuance of summons in the Superior Court of Wake County or in the superior court of any county wherein the work under said contract was performed. The procedure shall be the same as in all civil actions except as herein and as hereinafter set out.

All issues of law and fact and every other issue shall be tried by the judge, without jury; provided that the matter may be referred in the instances and in the manner provided for in Article 20 of Chapter 1 of the General Statutes.

The submission of the claim to the Secretary of Administration within the time set out in this section and the filing of an action in the superior court within the time set out in this section shall be a condition precedent to bringing an action under this section and shall not be a statute of limitations.

The provisions of this section shall be deemed to enter into and form a part of every contract entered into between any board of the State and any contractor, and no provision in said contracts shall be valid that is in conflict herewith.

The word "board" as used in this section shall mean the State of North Carolina or any board, bureau, commission, institution, or other agency of the State, as distinguished from a board or governing body of a subdivision of the State. "A contract for construction or repair work," as used in this section, is defined as any contract for the construction of

> buildings and appurtenances thereto, including, but not by way of limitation, utilities, plumbing, heating, electrical, air conditioning, elevator, excavation, grading, paving, roofing, masonry work, tile work and painting, and repair work as well as any contract for the construction of airport runways, taxiways and parking aprons, sewer and water mains, power lines, docks, wharves, dams, drainage canals, telephone lines, streets, site preparation, parking areas and other types of construction on which the Department of Administration enters into contracts.
>
> "Contractor" as used in this section includes any person, firm, association or corporation which has contracted with a State board for architectural, engineering or other professional services in connection with construction or repair work as well as those persons who have contracted to perform such construction or repair work.

N.C. Gen. Stat. § 143-135.3 (Supp. 1981) (emphasis added).

Apart from the introductory sentence, the present version of the statute is identical to that which was in effect at the time the *Smith* case was decided. Its language could not be clearer: although a contractor may ultimately file an action in Superior Court, the exhaustion of administrative remedies as provided in G.S. § 143-135.3 is *a condition precedent* to such action, and the provisions become *a part of every contract* entered into between the State and the contractor.[1]

The threshold question, then, is whether by its holding, *Smith* was intended to affect or nullify these prior statutory provisions which permit an aggrieved party, after exhausting certain administrative remedies, to institute a civil contract action in Superior Court. *See Stahl-Rider v. State*, 48 N.C. App. 380, 269 S.E. 2d 217 (1980). With respect to this question, one astute

1. We do not agree with plaintiff's position that the administrative claims procedure is elective or permissive (the contractor "may" submit his claim in writing). Certainly the procedure was not elective prior to *Smith*. It was the only means by which an aggrieved contractor could obtain relief on an alleged breach of contract with the State. Because the purpose of G.S. § 143-135.3 was to waive the State's sovereign immunity with respect to certain construction contracts, the language reflects the purpose of its enactment: to *permit* or *allow* a contractor to bring a contract action against the State. In this respect only was it permissive.

writer commenting on *Smith* noted that: "The court failed to indicate what effect the *Smith* decision would have upon the procedural requirements necessary to institute civil actions against the state under the statutes which expressly waive governmental immunity. As it now stands a plaintiff conceivably might bypass administrative procedures set up by the legislature and institute his suit in the proper judicial forum." 12 Wake Forest L. Rev. 1082, 1089 (1976). However, as there was nothing in the opinion to indicate the court's intent, "[i]t would seem that the proper interpretation would be that if the court wished to eliminate the established statutory procedures, it would have expressed such an intent." *Id.* at 1089, n. 45.

We read nothing in *Smith* which would indicate an intention to modify, ameliorate or abrogate the legislative mandate of G.S. § 143-135.3. To the contrary, from our reading of the case, the Court's concern was for those contractors who were completely foreclosed, under the doctrine of sovereign immunity, from obtaining administrative or judicial relief in a contract action against the State. Where relief had been afforded through statutory provisions, as in G.S. § 143-135.3, the language in *Smith* abolishing sovereign immunity as a defense to a contract action must be viewed as superfluous.

Plaintiff challenges the constitutionality of G.S. § 143-135.3, arguing that in light of the *Smith* decision, to hold that the statute establishes mandatory procedures applicable to plaintiff's claim would violate due process and equal protection; that is, G.S. § 143-135.3 limits plaintiff to trial without a jury and purports to limit the effect of contractual provisions in conflict with the statute, limitations not imposed on other litigants not bound by statute.

Our holding that the *Smith* decision was not intended to modify the express language of prior statutory enactments providing limited waiver of sovereign immunity in contract actions against the State determines the constitutional question. To be sure, prior to *Smith* the constitutionality of the statute was never open to question: under its limited terms, *Smith* permitted suits against the State where none could be brought otherwise. The *Smith* Court *abolished* sovereign immunity in only those cases where an administrative or judicial determination was not avail-

able. It did so by finding that the State had *implicitly* consented to be sued by entering into a valid contract. Unaffected by the decision were those contractual situations in which the State had *waived* its immunity by statute, thereby *expressly* consenting to suit. That statutory law, including its constitutionality, remains intact, neither modified nor affected by the *Smith* decision. We hold that with respect to that class of cases for which statutory relief had been provided prior to *Smith*, "[i]t is for the General Assembly to determine when and under what circumstances the State may be sued." *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. 168, 173, 118 S.E. 2d 792, 795 (1961).

It should be noted that prior to *Smith*, this Court had "steadfastly refused judicially to modify governmental immunity. Even though the court ha[d] recognized the harshness and unreasonableness of the concept, until *Smith v. State* the court had delegated the duty of abrogation of the theory to the legislature." 12 Wake Forest Law Rev. at 1086-87. The *Smith* majority was clearly concerned with the constitutionality of its decision, and Justice Lake, in his dissenting opinion, discussed the question in some detail. We believe that this Court reached its constitutional limits in *Smith* when it abrogated the State's sovereign immunity in contract actions for which no remedy had been provided. Any further extension (or limitation) of the State's liability on its contracts must come from the Legislature. Plaintiff is bound by the mandates of G.S. § 143-135.3 until such time as the Legislature acts further in the matter.

We make no comment on the merits of plaintiff's case. Plaintiff's claims must be pursued under the provisions of G.S. § 143-135.3 and thus the Superior Court of Wake County lacked jurisdiction to adjudicate these claims. *Guthrie v. Ports Auth.*, 307 N.C. 522, 299 S.E. 2d 618 (1983). We hold that the trial court erred in denying defendant's motions to dismiss for lack of jurisdiction. The judgment is reversed without prejudice to the plaintiff to file a new claim within one year of the date of the filing of this opinion in compliance with G.S. § 143-135.3.

Reversed.

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

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

BALLINGER v. SECRETARY OF REVENUE

No. 701P82.

Case below: 59 N.C. App. 508.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 28 January 1983.

CARVER v. CARVER

No. 658PA82.

Case below: 55 N.C. App. 716.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals allowed 28 January 1983.

DEPARTMENT OF TRANSPORTATION v. BRAGG

No. 670PA82.

Case below: 59 N.C. App. 344.

Petition by defendants Bragg for discretionary review under G.S. 7A-31 allowed 28 January 1983.

GODWIN SPRAYERS v. UTICA MUTUAL INSURANCE CO.

No. 694P82.

Case below: 59 N.C. App. 497.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 January 1983.

IN RE NUZUM-CROSS CHEVROLET

No. 666P82.

Case below: 59 N.C. App. 332.

Petition by Taxpayer for discretionary review under G.S. 7A-31 denied 28 January 1983.

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

LILES v. CHARLES LEE BYRD LOGGING CO.

No. 673PA82.

Case below: 59 N.C. App. 330.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 28 January 1983.

MEACHAM v. BOARD OF EDUCATION

No. 687P82.

Case below: 59 N.C. App. 381.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 February 1983.

NAYLOR v. INGRAM

No. 684P82.

Case below: 59 N.C. App. 362.

Petition by defendants for discretionary review under G.S. 7A-31 denied 28 January 1983.

PERDUE v. DANIEL INTERNATIONAL

No. 686P82.

Case below: 59 N.C. App. 517.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 January 1983.

PETERS v. ELMORE

No. 692P82.

Case below: 59 N.C. App. 404.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 February 1983.

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

STATE v. ATKINSON

No. 713P82.

Case below: 60 N.C. App. 1.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 February 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 February 1983.

STATE v. BATEMAN

No. 693P82.

Case below: 59 N.C. App. 738.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 January 1983.

STATE v. COOPER

No. 23P83.

Case below: 60 N.C. App. 439.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 January 1983.

STATE v. COX

No. 706P82.

Case below: 59 N.C. App. 239.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 28 January 1983.

STATE v. DARDEN

No. 711P82.

Case below: 59 N.C. App. 738.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 January 1983.

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

STATE v. FREEMAN

No. 8P83.

Case below: 60 N.C. App. 216.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 January 1983.

STATE v. GRAINGER

No. 37P83.

Case below: 60 N.C. App. 188.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 January 1983.

STATE v. HICKS

No. 23P83.

Case below: 60 N.C. App. 116.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 January 1983.

STATE v. JONES

No. 23P83.

Case below: 60 N.C. App. 116.

Petition by defendant for discretionary review under G.S. 7A-31 denied 25 January 1983.

STATE v. JONES

No. 584P82.

Case below: 59 N.C. App. 472.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 February 1983.

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

STATE v. MATHIS

No. 48P83.

Case below: 60 N.C. App. 439.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 January 1983.

STATE v. MELVIN

No. 47P83.

Case below: 60 N.C. App. 439.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 February 1983.

STATE v. OVERTON

No. 713P82.

Case below: 60 N.C. App. 1.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 February 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 February 1983.

STATE v. PARKER & BEST

No. 677P82.

Case below: 59 N.C. App. 362.

Petition by defendants for discretionary review under G.S. 7A-31 denied 8 February 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 February 1983.

STATE v. POLK

No. 683P82.

Case below: 59 N.C. App. 557.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 January 1983.

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

STATE v. POWELL

No. 61P83.

Case below: 60 N.C. App. 440.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 February 1983.

STATE v. RUVIWAT

No. 713P82.

Case below: 60 N.C. App. 1.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 February 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 February 1983.

STATE v. SMEDLEY

No. 713P82.

Case below: 60 N.C. App. 1.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 February 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 February 1983.

STATE v. SMITH

No. 709P82.

Case below: 59 N.C. App. 739.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 January 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 28 January 1983.

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

STATE v. THOMPSON & TUCKER

No. 695P82.

Case below: 59 N.C. App. 425.

Petition by Tucker for discretionary review under G.S. 7A-31 denied 28 January 1983. Motion of Attorney General to dismiss for lack of substantial constitutional question allowed 28 January 1983.

STATE v. VAUGHAN

No. 633P82.

Case below: 59 N.C. App. 318.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 January 1983.

STATE v. WARREN

No. 676PA82.

Case below: 59 N.C. App. 264.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 8 February 1983.

THOMPSON v. BURLINGTON INDUSTRIES

No. 702P82.

Case below: 59 N.C. App. 539.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 28 January 1983.

THREATTE v. THREATTE

No. 665PA82.

Case below: 59 N.C. App. 292.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 28 January 1983.

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

WHITESELL v. WHITESELL

No. 696P82.

Case below: 59 N.C. App. 552.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 February 1983.

WRIGHT v. AMERICAN GENERAL LIFE INS. CO.

No. 19P83.

Case below: 59 N.C. App. 591.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 February 1983.

STATE OF NORTH CAROLINA v. NEAL FRANCIS AHEARN

No. 596A82

(Filed 8 March 1983)

1. **Criminal Law § 138— Fair Sentencing Act—need of trial judge to treat offenses separately**

In every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense. Further, where factors are listed in the disjunctive, trial judges are cautioned to eliminate those portions inapplicable to the particular case.

2. **Criminal Law § 138— felonious child abuse—sentencing hearing—wrongful consideration of "heinous, atrocious or cruel" aggravating factor**

In a felonious child abuse case, an aggravating factor that the offense was especially heinous, atrocious or cruel was not supported by the evidence which tended to show that the child had been struck on at least three occasions, tied to his crib, and placed under a mattress.

3. **Criminal Law § 138— Fair Sentencing Act—error in finding or findings in aggravation—case must be remanded**

In every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing.

4. **Criminal Law § 138; Parent and Child § 2.2— fair sentencing hearing—felonious child abuse—consideration of age of victim as aggravating factor**

In a prosecution for felonious child abuse, the trial court did not err in the sentencing hearing by considering as a factor in aggravation that the victim was very young or mentally or physically infirm. The fact that the victim was very young was not an element necessary to prove felonious child abuse, and was therefore properly considered as an aggravating factor. G.S. 14-318.4.

5. **Criminal Law § 138— Fair Sentencing Act—dangerousness to others—aggravating and mitigating factor—dangerousness to self not proper aggravating factor**

In imposing a sentence for felonious child abuse, the trial court did not err in finding as an aggravating factor that defendant was dangerous to others as a result of his social and emotional problems even though evidence of his social and emotional problems was also considered in mitigation. However, the trial court erred in finding as an aggravating factor that defendant was dangerous to himself since such circumstance bears no relation to the statutory purposes of sentencing or the length of sentence. G.S. 15A-1340.1(a); G.S. 15A-1340.3.

6. **Criminal Law § 146.5— no right to appellate review of guilty plea**

A defendant is not entitled to appellate review, as a matter of right, of the court's acceptance of his guilty plea. G.S. 15A-1444(a) & (e).

7. Parent and Child § 2.2— felonious child abuse—sufficiency of evidence

Evidence that a 24-month-old baby was the victim of battered child syndrome, that there were bruises covering most of the baby's body, and that the child had a neck burn, was sufficient to provide a factual basis for defendant's plea of guilty to felonious child abuse. G.S. 14-318.4(a) and G.S. 15A-1022(c).

8. Criminal Law § 138; Homicide § 31.6— voluntary manslaughter—sentencing phase—consideration of aggravating factors

In a prosecution for voluntary manslaughter, the trial court did not err in finding as aggravating factors that the offense was especially heinous, atrocious or cruel, that the victim was very young, or mentally or physically infirmed, and that defendant was dangerous to others. The trial court did err in finding as a factor in aggravation defendant's dangerousness to himself since this factor bears no relationship to the statutory purposes of sentencing.

9. Criminal Law § 138— sentencing phase—consideration of improper mitigating factor

In a prosecution for felonious child abuse and voluntary manslaughter, the trial court erroneously considered as a mitigating factor for the voluntary manslaughter offense that "[p]rior to arrest or any early stage of the criminal process, the defendant voluntarily acknowledged wrong-doing in connection with the offense to a law enforcement officer," since defendant acknowledged his wrongdoing only with respect to the felonious child abuse offense. Furthermore, defendant's plea of guilty could not be considered as a factor in mitigation.

DEFENDANT appeals from a decision of the Court of Appeals, one judge dissenting, which affirmed judgments entered by *Small, J.*, at the 2 November 1981 Criminal Session of Superior Court, PASQUOTANK County.

Upon his pleas of guilty, and following a hearing pursuant to North Carolina's Fair Sentencing Act, G.S. § 15A-1340.1 to -1340.4, defendant received prison sentences of sixteen years for voluntary manslaughter and five years for felonious child abuse, both sentences exceeding the presumptive terms prescribed by G.S. § 15A-1340.4(f). Pursuant to G.S. § 15A-1444(a1), he appealed as a matter of right to the Court of Appeals. After determining that the trial court improperly relied upon several aggravating factors in sentencing defendant, the Court of Appeals nevertheless held that defendant had "failed to carry his burden of showing grounds for reversal of the sentences imposed by showing he was prejudiced by the court's erroneous findings in aggravation." 59 N.C. App. 44, 50, 295 S.E. 2d 621, 625 (1982).

For the reasons set forth below, we find that the trial court erred in its findings on aggravation to the actual prejudice of the defendant. We hold, therefore, that the decision of the Court of Appeals must be reversed and the case remanded for a new sentencing hearing.

Evidence at defendant's sentencing hearing consisted of testimony from the forensic pathologist who conducted an autopsy on the body of the victim; a psychologist who reported on defendant's mental and emotional condition; and the investigating officer who, in addition to apprising the court of the events connected with the crime, read verbatim into the record a transcript of the interrogation of the defendant. Also before the court were numerous photographs of the victim's body and the crime scene, various medical reports, letters from defendant's family and friends, and notes written by the defendant himself. Taken together, we believe this evidence provided the trial judge with an unusually complete and thorough record upon which to base his assessment of both the crimes and the defendant. Before Judge Small were the following facts:

On 21 July 1981, two year old Daniel Joseph Bright died of a cerebral hemorrhage caused by multiple blows to his head which were inflicted by "some sort of a blunt object." The investigating officer testified that "the little fellow's face had been beaten, both eyes were black, on the side of his head there was a tremendous bulge on the side of that which indicated it was swollen." An autopsy revealed bruises covering much of the baby's body, including his chest, abdomen, arms, legs and back. There were abrasions or skin burns around his neck indicating that something had been pulled or tied around that area. The hematoma and bruises around his head appeared to be recent, while other bruises had been partially discolored indicating wounds inflicted three to seven days before his death. In addition to a skull fracture, x-rays revealed a fracture of the right clavicle or collarbone and a leg fracture. At the time of his death, Daniel Bright wore a cast covering the lower section of his abdomen and his right leg. The upper portion of the cast appeared to be broken off. Excluding the leg fracture which was the result of an accident some weeks earlier and which had been treated, the examining physician concluded that Daniel Bright was the victim of "battered child syndrome" which he described as follows:

> The battered child syndrome has been described as a pattern of injuries, not always the same group of injuries but a group of injuries that go together, including fractures, usually fractures of arms, or legs, or sometimes skull fractures, and bruises that appear to have happened over a period of time, old as well as recent bruises, sometimes internal injuries, lacerations or hemorrhages of internal organs associated with blows to the abdomen, and often subdural hemorrhages under the scalp. . . .

The defendant had moved in with the baby's mother, Gladys (Risa) Bright, five weeks earlier. He had met her at a bar. For two weeks the pair lived together alone while Daniel remained in the hospital under treatment for his broken leg. Although defendant has been deaf since birth, nevertheless Risa Bright took full advantage of him once the baby returned home from the hospital. The defendant cooked, cleaned, washed, fed and cared for the baby while the mother spent her time away from home. Defendant became increasingly dissatisfied with the arrangement, angry and resentful at being left with the responsibilities of home and child, and frustrated by the baby's difficult moods. He expressed his concern to the mother, suggesting that she send the baby to its father.

Defendant admitted slapping the baby on at least three occasions, once on the arm, once on the leg, and once on the side of his neck. He had also tied the baby down in its playpen with a sheet. He admitted blindfolding the baby and placing him face down between the mattress and bedsprings. There is conflicting testimony as to which, if either of these latter abuses, caused the burns discovered around the baby's neck. Risa Bright was aware of each of these incidents but expressed no disapproval.

Defendant further admitted that he and Risa Bright smoked marijuana regularly; that he "just blew some smoke in [Danny's] face one time and Risa laughed, Danny coughed and that was all"; and that he had given the baby "a taste, a sip of beer, that was it. Risa said nothing."

Defendant's version of the events leading up to the baby's death is as follows:

Sometime before 10:00 a.m. defendant bathed the baby. He slapped him "a little hard on the side of the neck" because

"Daniel doesn't like a bath and he was fussing." Risa Bright left home to visit a neighbor at approximately 10:30 a.m. Defendant placed the baby sitting upright on a bed and went outdoors. Sometime later he returned to the house to check on the baby and found him with his head twisted and on the floor, and the cast caught in the bed rail. "His breathing was very weak and he had thrown up on the side of his face." Defendant picked the baby up and broke open the cast "so he could breathe better." Frightened and upset, defendant then ran the four-tenths of a mile to the neighbor's home to find Risa Bright. The baby was still alive when they returned but died shortly after reaching the hospital.

In searching the house, investigating officers found pieces of the baby's cast in a woodstove in the den.

In a letter to a friend which defendant's mother took from a trash can, defendant wrote "I don't mean cause hit by post of bed board because Daniel was layed on the floor so he fell from our bed."

The autopsy report was clearly inconsistent with defendant's account.

However, until the attorneys' closing arguments, one could only speculate as to how and why the fatal injuries were inflicted on Daniel Bright. The record discloses the following statement made by defendant's counsel:

> Sometime between 11 and 12 o'clock that morning Neal went to the kitchen, the child was in the adjacent room, the child was all right, standing at a table, the child falls near a stove, but that is not the problem. Neal comes out, picks up the child and carries him back to the front bedroom and puts him on the bed, and then Neal goes out and there is some debris in the yard from that Saturday party that has been referred to in the evidence. Neal cleans up the debris, and sits down on the front porch and cools off a little while. And then about midday, about 12 o'clock, he goes back to the front bedroom and checked on the child, and the child had fallen off the bed and was on the floor, with his head on the floor, but I know that doesn't kill a child because I have interviewed several doctors and I heard one testify this morning, but the child at that moment is not fatally injured.

> Something triggers. Neal picks up the child, you saw a reference to it in that letter he wrote that his mother fished out of the trash can. I know what happened as much as one can determine what happened, from the horse's mouth itself. I spent not hours with him, but days, and he told me what happened. The child was killed by, how many times I don't know, being forced against that bedpost, that's the blunt object the doctor told us about, I want the Court to know it, I want somebody to know it besides myself, and that's where death came.

The defendant's evidence consisted primarily of the results of psychological testing he underwent in preparation for the sentencing hearing. From the psychologist's report, we find that defendant

> was a very sick baby who remained in an incubator for nearly three weeks after birth. During the first year of life Neal continued to be ill and did not develop normally. The family was first told by the doctors at Brook Army Hospital in San Antioni [sic] that Neal might have cerebral palsy. Finally when Neal was approximately one year old, doctors confirmed that he had nerve damage resulting in profound deafness. Mrs. Ahearn reported that Neal's early childhood proved to be very difficult for the family. Neal was an aggressive child who had temper tantrums and frequently broke things including his hearing aids. Mrs. Ahearn felt that Neal did not respond to their limits and discipline. In 1963, at the age of five, Neal was enrolled in Saint John's School for Deaf in Milwaukee, Wisconsin. Neal remained there until 1974 when he was sent home due to his behavior problems and inability to be controlled by the staff. Neal then attended school in Elizabeth City for two years. Again he did poorly, so in 1976 he was sent to the North Carolina School for the Deaf in Morganton. Neal again had difficulty conforming to rules and eventually left the school without graduating. Since Neal returned home from the North Carolina School for the Deaf his behavior has presented increasingly serious problems for his family. Possibly due to his deafness, he has had difficulty in obtaining a job. His mother intervened and obtained several jobs for him. However, due to his personality problems, he has been unable to sustain useful work activity

for any extended period of time. There have also been additional behavior problems. Frequently over the last few years, Neal has left home without giving his parents notice and driven to distant parts of the United States. He has then needed his parents to arrange for his transportation back to Elizabeth City.

Defendant acknowledged excessive use of alcohol and street drugs during the year prior to 21 July 1981.

The results of the Hiskey-Nebraska Test of Learning Aptitude indicated that the defendant functions in the average range of intellectual ability when compared to other deaf persons. He scored above average on the Weschler Adult Intelligence Scale (non-verbal subtest).

The report continues:

The results of both the intellectual and personality tests reveal no evidence of psychosis. However, the results paint a picture of a young man who has serious emotional problems. Neal's self-esteem is poor. He has a limited ability to describe or understand himself and has a marked difficulty viewing himself from the perspective of others. He has difficulty using his imagination or his inner resources to place himself in the future or understand his past. Neal also has great difficulty imagining or perceiving the emotions of others. This leaves him frequently unable to empathize with the needs and feelings of others. Neal tends to see and place his own needs first with little ability to understand why he would place another's needs above his own. In this sense, his relationships are very childlike.

Neal has difficulty with emotional situations. He finds these situations confusing. When presented with these situations he becomes impulsive and loses his capacity for good judgment. In emotional situations Neal has a poor ability to judge what action he should take, and the possible consequences of alternative actions. At times these situations cause Neal to use paranoid defenses. These paranoid defenses in turn cause him to misconstrue situations and the intent of the other parties. In summary, Neal has adequate intellectual abilities to understand social situations. However, when he is

in social situations that arouse strong emotion he is often unable to use his good judgment and may be carried away in the heat of the moment. This may lead to impulsive and poorly planned actions. At these times Neal may not see alternative solutions.

Dr. Catherine McGrogan, the testing psychologist, was asked the following question to which she responded affirmatively:

CROSS EXAMINATION by Mr. Watts:

Q. Dr. McGrogan, considering what you have just told us about Neal becoming very disorganized when confronted with emotional problems, and considering further what you have told us about Neal displaying symptoms of over aggressiveness since childhood, and indeed coupling that with his excessive use of alcohol and street drugs, you would say, wouldn't you Doctor, that he is indeed when he is in one of these episodes and that situation that he is dangerous to himself or to others?

Q. And he was likely involved in such an episode at the time he committed the crimes for which he has been charged and which he has entered pleas of guilty?

Dr. McGrogan clarified her answers by cautioning that in speaking of defendant's aggressiveness, she was referring to "social aggressiveness." "I wouldn't want to imply that person is any coldblooded or calculated, a manipulative kind of aggressive behavior." "I don't want people to confuse that with aggressive as in directed toward hurting others . . . ." Dr. McGrogan was then asked whether defendant "might intend to hit someone but not know how severely he was harming them by striking them," to which the doctor replied "or not knowing who he was intending to hit, just massively striking out at everything."

Letters from defendant's interpreter, teachers and family friends all suggest that while the defendant appears to be a well-groomed, cooperative and friendly young man, he is unable to handle frustrating situations and disappointments, is socially immature, and at times is distrustful due to his limited communication skills.

Defendant has no criminal record.

The trial judge, although imposing sentences beyond the presumptive for both the felonious child abuse offense and the manslaughter offense, completed only one sentencing form, thus treating both offenses alike for purposes of listing the findings in aggravation and mitigation. Based on the evidence, he found three factors in aggravation and five factors in mitigation. In finding that the aggravating factors outweighed the mitigating, the trial judge stated that "[t]he fact that an aggravating, or the fact that aggravating factors may outnumber mitigating factors in no way controls the Judgment. Neither does the fact that the number of mitigating factors controls the Judgment, for one factor may be so dominant that it outweighs all other factors regardless of the number involved. I find this to be a case where the aggravating factors although few in number are substantially more dominant than the mitigating factors."

The Court of Appeals considered each offense separately and found error as illustrated in the following chart:

	TRIAL COURT'S FINDINGS	COURT OF APPEALS' HOLDINGS	
	FELONIOUS CHILD ABUSE & MANSLAUGHTER	FELONIOUS CHILD ABUSE	MANSLAUGHTER
FACTORS IN AGGRAVATION	The offense was especially heinous, atrocious and cruel.	ERROR	ERROR
	The victim was very young or mentally or physically infirm.	ERROR (neither age nor his physical infirmity present)	NO ERROR
	Additional written finding: The defendant fails to control his emotions. He sometimes reacts violently to frustrations he experiences, and the defendant is dangerous to himself and to others and confinement is needed to ensure his safety and the safety of others.	NO ERROR	NO ERROR

FACTORS IN MITIGATION	The defendant has no record of criminal convictions.	NO ERROR	NO ERROR
	The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but reduced his culpability for the offense.	NO ERROR	NO ERROR
	The defendant's immaturity or his limited mental capacity at the time of commission of the offense reduced his culpability for the offense.	NO ERROR	NO ERROR
	Prior to arrest or at any early stage of the criminal process, the defendant voluntarily acknowledged wrong doing in connection with the offense to a law enforcement officer.	NO ERROR	NO ERROR
	The defendant has been a person of good character or has had a good reputation in the community in which he lives.	NO ERROR	NO ERROR

The Court of Appeals held that despite these alleged errors, the trial court "could be well within its discretion in finding that the 'dangerousness' factor in the felonious child abuse case, and the 'dangerousness' and the 'very young victim' factors in the voluntary manslaughter case outweighed the mitigating factors in each case," and, as indicated, held that the defendant had failed to show prejudice.

Rufus L. Edmisten, Attorney General, by Christopher P. Brewer, Assistant Attorney General, for the State.

White, Hall, Mullen, Brumsey & Small, by Gerald F. White, attorney for defendant-appellant.

Adam Stein, Appellate Defender, and James H. Gold, Assistant Appellate Defender, amicus curiae.

MEYER, Justice.

Because this case presents us with our first opportunity to fully discuss the policies, purposes, and implementation of the new "Fair Sentencing Act," we find it appropriate to discuss the issues presented in the context of the historical background of

the Act and to set out pertinent portions of the statute.[1] In response to a perceived need for certainty in sentencing, to a perceived evil of disparate sentencing, and to a perceived problem in affording trial judges and parole authorities unbridled discretion in imposing sentences, Governor James B. Hunt, Jr., urged the adoption of presumptive sentencing legislation in an address to the North Carolina General Assembly in 1977. Originally enacted in 1979 as "An Act to Establish a Fair Sentencing System in North Carolina Criminal Courts," the Fair Sentencing Act underwent technical amendments in 1980 and more substantial amendments in 1981. *See* Comment, Criminal Procedure—The North Carolina Fair Sentencing Act, 60 N.C. L. Rev. 631 (1982). The sentencing procedures in the Act apply only to felonies committed on or after 1 July 1981. N.C. Gen. Stat. § 15A-1340.1(a) (Cum. Supp. 1981).

As set out in the Fair Sentencing Act,

> The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

G.S. § 15A-1340.3.

The Act provides in pertinent part:

> (a) . . . If the judge imposes a prison term, whether or not the term is suspended, and whether or not he sentences the convicted felon as a committed youthful offender, he must impose the presumptive term provided in this section unless, after consideration of aggravating or mitigating factors, or both, he decides to impose a longer or shorter term,

1. Although the principal provisions of the Act are codified in Chapter 15A, Article 81A of the North Carolina General Statutes, the Act resulted in revisions to other portions of the General Statutes. *See e.g.*, Chapter 14, Articles 1, 2, 2A, 33; Chapter 15A, Articles 58, 81A, 82, 83, 85, 85A, 89, 91; Chapter 148, Article 2, and Chapter 162, Article 4. Credit is due to the Office of the Appellate Defender for its excellent research in the preparation of an amicus brief from which this information is taken.

or unless he imposes a prison term pursuant to any plea arrangement as to sentence under Article 58 of this Chapter. In imposing a prison term, the judge, under the procedures provided in G.S. 15A-1334(b), may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing, whether or not such aggravating or mitigating factors are set forth herein, but unless he imposes the term pursuant to a plea arrangement as to sentence under Article 58 of this Chapter, he must consider each of the following aggravating and mitigating factors:

(1) Aggravating factors:

(Here follows a list of the statutory aggravating factors.)

Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to prove more than one factor in aggravation.

The judge may not consider as an aggravating factor the fact that the defendant exercised his right to a jury trial.

(2) Mitigating factors:

(Here follows a list of the statutory mitigating factors.)

(b) If the judge imposes a prison term for a felony that differs from the presumptive term provided in subsection (f), whether or not the term is suspended, and whether or not he sentences the convicted felon as a committed youthful offender, the judge must specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence. If he imposes a prison term that exceeds the presumptive term, he must find that the factors in aggravation outweigh the factors in mitigation, and if he imposes a prison term that is less than the presumptive term, he must find that the factors in mitigation outweigh the factors in aggravation. However, a judge need not make any findings regarding aggravating and mitigating factors if he imposes a prison term pursuant to any plea arrangement

as to sentence under Article 58 of this Chapter, regardless of the length of the term, or if he imposes the presumptive term.

The Fair Sentencing Act is an attempt to strike a balance between the inflexibility of a presumptive sentence which insures that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender. Presumptive sentences established for every felony provide certainty. Furthermore, no convicted felon may be sentenced outside the minimum/maximum statutory limits set out for the particular felony. The sentencing judge's discretion to impose a sentence within the statutory limits, but greater or lesser than the presumptive term, is carefully guarded by the requirement that he make written findings in aggravation and mitigation, which findings must be proved by a preponderance of the evidence; that is, by the greater weight of the evidence. We are guided in our definition of the term preponderance of the evidence by the following statement which, although generally applied in civil cases, is no less appropriate for a sentencing hearing where the judge sits in a dual capacity as judge and jury:

> 'This preponderance does not mean number of witnesses or volume of testimony, but refers to the reasonable impression made upon the minds of the jury by the entire evidence, taking into consideration the character and demeanor of the witnesses, their interest or bias and means of knowledge, and other attending circumstances.' . . . There would seem to be great merit in the suggestion that what is meant by the formula is that the jury should be satisfied of the greater *probability* of the proposition advanced by the party having the burden of persuasion—i.e., that it is more probably true than not.

2 Stansbury's North Carolina Evidence § 212 (Brandis Rev. 1973).

The Fair Sentencing Act was not intended, however, to remove all discretion from our able trial judges. The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony. While he is required to justify a sentence which

deviates from a presumptive term to the extent that he must make findings in aggravation and mitigation properly supported by the evidence and in accordance with the Act, a trial judge need not justify the weight he attaches to any factor. He may properly determine that one factor in aggravation outweighs more than one factor in mitigation and vice versa. In this respect we quote with approval from an opinion written by Judge (now Justice) Martin:

> The fair sentencing act did not remove, nor did it intend to remove, all discretion from the sentencing judge. Judges still have discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within their sound discretion. Thus, upon a finding by the preponderance of the evidence that aggravating factors outweigh mitigating factors, the question of whether to increase the sentence above the presumptive term, and if so, to what extent, remains within the trial judge's discretion.
>
> The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. Although the court is required to consider all statutory factors to some degree, it may very properly emphasize one factor more than another in a particular case. N.C. Gen. Stat. 15A-1340.4(a). The balance struck by the trial judge will not be disturbed if there is support in the record for his determination.

State v. Davis, 58 N.C. App. 330, 333-34, 293 S.E. 2d 658, 661 (1982). *See State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983).

Should the Appellate Court find no error in the trial court's findings in aggravation and mitigation, our standard of review respecting its decision to deviate from a presumptive term remains as it did prior to the effective date of the Act.

> There is a presumption that the judgment of a court is valid and just. The burden is upon appellant to show error amount-

> ing to a denial of some substantial right. . . . A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.

State v. Pope, 257 N.C. 326, 335, 126 S.E. 2d 126, 130 (1962). *See State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981); *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980); *State v. Wilkins*, 297 N.C. 237, 254 S.E. 2d 598 (1979).

Furthermore, our appellate courts will apply the above-quoted standard in determining the propriety of the sentencing judge's decision to quantitatively vary the presumptive term to any substantial degree. Where the sentence ultimately imposed is within the statutory limits prescribed for the offense, we defer to the wisdom of our Legislature the appropriateness of the minimum or maximum punishment. We defer to the wisdom of the trial judge the appropriateness of the severity of punishment imposed on the particular offender.

[1] Turning now to the issues presented, we must first emphasize the inherent difficulties present in this appeal resulting from the trial court's failure to list separately the aggravating and mitigating factors for each of the two offenses. Separate findings as to the aggravating and mitigating factors for each offense will facilitate appellate review. Further, in the interest of judicial economy, separate treatment of offenses, even those consolidated for hearing, will offer our appellate courts the option of affirming judgment for one offense while remanding for resentencing only the offense in which error is found. This option is not available to us in the present case because error found on any aggravating factor applicable to only one offense will result in remand for resentencing on that offense, irrespective of whether the trial judge intended that the particular factor apply to one, the other, or both offenses. We therefore hold that in every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense.

Furthermore, where factors are listed in the disjunctive, as for example, "the victim was very young, or very old, or mentally or physically infirmed," trial judges are cautioned to eliminate those portions inapplicable to the particular case.

For purposes of clarity, therefore, we will discuss defendant's assignments of error as they apply to each offense separately.

FELONIOUS CHILD ABUSE.

[2] Defendant contends that the trial court's finding that this offense was especially heinous, atrocious or cruel is not supported by the evidence. We agree. Excluding the injuries inflicted which resulted in Daniel Bright's death, the evidence discloses that the baby had been struck on at least three occasions, tied to his crib, and placed under a mattress. While this evidence is factually sufficient to support defendant's plea of guilty of felonious child abuse, and depicts shocking behavior on the part of the defendant, it falls short of supporting a finding that the offense was especially heinous, atrocious or cruel.

This Court has had occasion to construe the heinous, atrocious or cruel language as it applies in capital cases, where we find the following to be instructive.

> 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.' . . . 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. Pinch, 306 N.C. 1, 34, 292 S.E. 2d 203, 227-28 (1982). *See State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (1981); *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979).

While we agree with the Court of Appeals that the trial court erred in its finding in aggravation that the offense of felonious child abuse was especially heinous, atrocious or cruel,

we do not agree with the Court of Appeals' reasoning or holding that the error was not prejudicial. We note that the Court of Appeals has, in addition to the present case, adopted similar reasoning and holdings in at least two others cases. *See State v. Goforth*, 59 N.C. App. 504, 297 S.E. 2d 128 (1982); *State v. Abee*, 60 N.C. App. 99, 298 S.E. 2d 184 (1982). Although finding no error, the Court of Appeals suggests similar reasoning in dicta in *State v. Morris*, 59 N.C. App. 157, 296 S.E. 2d 309 (1982), and has remanded a fourth case for resentencing under similar facts. *See State v. Thobourne*, 59 N.C. App. 584, 297 S.E. 2d 774 (1982). To illustrate not only the need for a consistent rule, but also the unsound reasoning inherent in the Court of Appeals' decisions, the following chart summarizes the facts and holdings of these cases.

State v. Ahearn

	MORRIS	AHEARN	GOFORTH	THOBOURNE	ABEE and JONES
FACTS	Defendant found guilty of armed robbery.	Defendant pled guilty to felonious child abuse and voluntary manslaughter.	Defendant found guilty of attempted first degree rape.	Defendants found guilty of possession with intent to sell and deliver marijuana.	Defendants pled guilty to second degree sexual offense.
TRIAL COURT'S FINDINGS	Aggravation — 3 Mitigation — 2	Aggravation — 3 Mitigation — 5	Aggravation — 3 Mitigation — 3	Aggravation — 4 Mitigation — 3	Aggravation — 8 and 7 Mitigation — 9 and 12
SENTENCE	Presumptive (dicta suggests judgment affirmed had the sentence exceeded presumptive).	3 years and 10 years respectively beyond presumptive for child abuse and manslaughter.	Twice the statutory presumptive term.	Maximum term of 5 years.	8 years beyond presumptive. 6 years beyond presumptive.
COURT OF APPEALS' HOLDINGS	Error in at least one aggravating factor.	Error in two aggravating factors in child abuse and Error in one aggravating factor in manslaughter case.	Error in one aggravating factor.	Error in two aggravating factors.	Error in one aggravating factor. No error.
DISPOSITION	AFFIRMED.	AFFIRMED.	AFFIRMED.	REMANDED.	AFFIRMED. AFFIRMED.

[3] What the Court of Appeals' decisions failed to consider and what the dissent in that court's opinion points out, is that any error in a sentencing procedure gives rise to a twofold analysis. Reliance on a factor in aggravation determined to be erroneous may or may not have affected the balancing process which resulted in the decision to deviate from the presumptive sentence. Certainly there will be many cases where, on remand, the trial judge will properly reach the same result absent the erroneous finding. We repeat that the weight to be given any factor is within the sound discretion of the sentencing judge. The judge is not required to engage in a numerical balancing process. By the same token, our appellate courts should not attempt to second guess the sentencing judge with respect to the weight given to any particular factor. Nor should appellate courts engage in numerical balancing in order to determine whether a sufficient number of aggravating factors remain to "tip the scales."

More important, however, it must be assumed that every factor in aggravation measured against every factor in mitigation, with concomitant weight attached to each, contributes to the *severity* of the sentence—the quantitative variation from the norm of the presumptive term. It is only the sentencing judge who is in a position to re-evaluate the severity of the sentence imposed in light of the adjustment. For these reasons, we hold that in every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing.

Because defendant's additional assignments of error raise issues that are likely to recur at resentencing, we will treat each one in detail.

[4] Defendant contends that the trial court erred in its finding in aggravation for the offense of felonious child abuse that the victim was very young or mentally or physically infirm. In support of his argument he cites the language of G.S. § 15A-1340.4(a) that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." He argues that because the age of the victim is an element of the offense of felonious child abuse, the trial judge was precluded from considering the age of the victim as an aggravating factor. We do not agree.

G.S. § 14-318.4 provides that:

> (a) Any parent of a child less than sixteen years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in:
>
> (1) Permanent disfigurement, or
>
> (2) Bone fracture, or
>
> (3) Substantial impairment of physical health, or
>
> (4) Substantial impairment of the function of any organ, limb, or appendage of such child, is guilty of a Class I felony.
>
> (b) The felony of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.

The age of the victim, while an element of the offense, spans sixteen years, from birth to adolescence. The abused child may be vulnerable due to its tender age, and *vulnerability* is clearly the concern addressed by this factor. The fact that Daniel Bright was *very young* (24 months) was not an element necessary to prove felonious child abuse, and was therefore properly considered as an aggravating factor. Furthermore, we disagree with the Court of Appeals' determination that the victim was not physically infirm. Daniel Bright was immobilized by a body cast.

[5] Defendant finally argues that the trial court's finding that he was dangerous to himself and to others as a result of his social and emotional problems was error. It is defendant's contention that because the evidence of his social and emotional problems was considered in mitigation, the trial court erred in considering the same evidence in making a finding in aggravation. He further agues that the evidence does not support the finding. On this issue, the State answers as follows: (1) The Fair Sentencing Act proscribes only the use of the same evidence in proving more than one factor in aggravation. (2) The converse of defendant's argument would be to preclude consideration of evidence in support of a mitigating factor once the trial court applied that evidence in support of an aggravating factor. (3) There are many

examples of aggravating and mitigating factors which interact in such a way as to be susceptible of being proven by the same or similar evidence.

> Proof which establishes that a defendant held a public office or position of confidence at the time an offense related to that office was committed might also be properly considered as showing that defendant to be a person of good character and reputation in the community. The same evidence which establishes that a defendant was on probation or parole at the time an offense was committed, which could be viewed as a factor in aggravation, might also support a finding that defendant's prior performance on parole or probation was good, a factor in mitigation. The fact that a defendant is proven to be a chronic alcoholic or narcotics addict who needs rehabilitative treatment may be considered a factor in aggravation while a showing that the defendant was under the influence of alcohol or drugs at the time the offense was committed may be considered as a mitigating factor providing some explanation for a defendant's unlawful acts in reducing the defendant's culpability for the crime.

(4) The evidence supports the finding of dangerousness which is reasonably related to the purposes of sentencing one of which is "to protect the public by restraining offenders." G.S. § 15A-1340.3.

We find the State's arguments persuasive. The defendant does, in fact, suffer from a physical handicap as well as social and emotional problems. He is apparently unable to handle stress. He acts impulsively and fails to exercise good judgment. He does not foresee the consequences of his actions, nor can he accept responsibility for them. In short, his condition has manifested itself in the form of serious antisocial behavior and criminal acts. The trial court did not err in finding, as an aggravating factor, that defendant was dangerous to others. However, defendant's dangerousness to himself, while a valid consideration in determining whether he should be confined, bears no relation to the statutory purposes of sentencing or the length of his sentence. G.S. § 15A-1340.1(a). As to that portion of the finding, we hold there was error.

With respect to the factors found in mitigation for the offense of felonious child abuse, we find no error.

[6] As an additional assignment of error, defendant contends that there was no factual basis for his plea of guilty of felonious child abuse. The statute in effect at the time of defendant's appeal, G.S. 15A-1444(a), and upon which he relied, as printed in the General Statutes, provided that "[a] defendant who has entered a plea of *guilty* to a criminal charge, and who has been found guilty of a crime is entitled to appeal as a matter of right when final judgment has been entered" (emphasis added). Since that time the statute has been corrected through amendment, and now states that "[a] defendant who has entered a plea of *not guilty* to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered." G.S. 15A-1444(a) (Cum. Supp. 1981) (emphasis added). The statute goes on to provide that

> (e) Except as provided in subsection (a1) of this section and G.S. 15A-979 and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. . . .

Thus, if we are to consider this assignment of error, we must treat it as a petition for writ of certiorari, which we do.

[7] The elements necessary for a conviction of felonious child abuse appear in G.S. § 14-318.4 which was enacted to "fill the gap between misdemeanor and homicide" and, "[w]hen the child's injuries result in death, the statute will provide a basis for a felony murder charge." 58 N.C. L. Rev. 1369, 1371 (1980). By virtue of his plea, defendant was charged with manslaughter rather than murder.

In *State v. Mapp*, 45 N.C. App. 574, 264 S.E. 2d 348 (1980), the Court considered and rejected a defendant's argument that the misdemeanor child abuse offense merged into and became a part of a charge of second degree murder. The Court wrote:

> The General Assembly apparently did not intend child abuse to be a lesser included offense or to merge with any other offense. While the General Assembly cannot, by statute, repeal the double jeopardy provisions of the Con-

stitution, in this situation the double jeopardy clause does not require merger.

Id., at 585, 264 S.E. 2d at 356.

The Court considered only whether the same acts which gave rise to the murder also gave rise to the child abuse offense and found that "[t]here is also ample evidence that there were many separate acts of child abuse or child neglect which by themselves were not the proximate cause of the child's death." *Id. See State v. Walden*, 306 N.C. 466, 293 S.E. 2d 780 (1982).

G.S. § 15A-1022(c) provides that "[t]he judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

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

(2) A written statement of the defendant.

(3) An examination of the presentence report.

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

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

We have held that "[t]hat which [the trial judge] does consider, however, must appear in the record, so that an appellate court can determine whether the plea has been properly accepted." *State v. Sinclair*, 301 N.C. 193, 198, 270 S.E. 2d 418, 421 (1980).

Thus, in determining whether there is a factual basis for defendant's plea of guilty to the charge of felonious child abuse, we are bound by the record, and are foreclosed from considering only evidence of the act which caused Daniel Bright's death. We are left with testimony that the baby was the victim of battered child syndrome, based on the evidence of prior physical injuries. We deem this evidence sufficient to provide a factual basis for defendant's plea of guilty. *See* G.S. § 14-318.4(a)(2).

VOLUNTARY MANSLAUGHTER.

[8] The evidence supports the trial court's findings that this offense was especially heinous, atrocious or cruel. Daniel Bright was beaten to death—struck against a bed post with such force

that it shattered his cast and crushed his skull. We cannot know the extent of the fear, pain, and suffering he endured. His injuries were multiple, and death was not immediate. *See State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203.

Likewise we find no error in the trial court's finding in aggravation that the victim was very young, or mentally or physically infirm.

Further, we find, as we did in the felonious child abuse case, that the trial court properly considered defendant's dangerousness to others as an aggravating factor. Voluntary manslaughter is defined as the *unlawful* killing of a human being *without malice*, premeditation or deliberation. *State v. Holcomb*, 295 N.C. 608, 247 S.E. 2d 888 (1978); *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). It is mitigating factors, the heat of passion or the use of excessive force, that reduce the offense from murder to manslaughter. *Id.* It does not follow that the presence of these mitigating factors compels a negative finding as to dangerousness. The offender who, although sane, cannot control his emotions, who strikes out indiscriminately because of his own inadequacies, and who cannot exercise his human faculties of reason and judgment is as dangerous to society as the offender who targets his victim for a calculated motive.

The trial court erred, however, in finding as a factor in aggravation defendant's dangerousness to himself. As we have previously determined, this factor bears no relationship to the statutory purposes of sentencing. The case must be remanded for resentencing for this as well as for error in one finding in mitigation.[2]

[9] The trial court found as a factor in mitigation on both the felonious child abuse offense and the voluntary manslaughter offense that "[p]rior to arrest or at any early stage of the criminal process, the defendant voluntarily acknowledged wrong-doing in connection with the offense to a law enforcement officer." Defend-

2. G.S. § 15A-1335 provides that "[w]hen a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

ant acknowledged his wrongdoing only with respect to the felonious child abuse offense. The record does not support this finding with respect to the offense of voluntary manslaughter. Defendant expressly denied any wrongdoing connected with the baby's death during his interrogation. The fact that he pled guilty to the charge has no bearing on the policy behind this factor in mitigation, *i.e.* that defendant showed remorse for his actions. As we have held that a defendant's failure to plead guilty to an offense cannot be used as a factor in aggravation, so his plea of guilty may not be considered as a factor in mitigation. *See State v. Boone*, 293 N.C. 702, 239 S.E. 2d 459 (1977).

The decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for further remand to the Superior Court, Pasquotank County, for resentencing on both the offenses of felonious child abuse and voluntary manslaughter, in accordance with our opinion today.

Reversed and remanded.

STATE OF NORTH CAROLINA v. LESTER BARNETT, RICKY BARNETT AND CARL WILDER

No. 23A81

(Filed 8 March 1983)

1. Criminal Law § 76.7— in-custody statements—admissibility—sufficiency of evidence and findings

Although there were conflicts in the evidence presented in a hearing on a motion to suppress defendants' in-custody statements, the trial court properly admitted the in-custody statement of each defendant where the court resolved the evidentiary conflicts in favor of the State and made findings supported by the evidence that each defendant was verbally advised of his constitutional rights before being questioned by the police; each defendant stated he understood his rights and did not wish to have an attorney present; each defendant executed a waiver of rights form; each defendant then gave an oral statement which was reduced to writing and signed by him; at the time of interrogation by law enforcement officers, each defendant was in full control of his mental and physical faculties, was coherent and gave reasonable answers to questions asked; no defendant was given any promise or offer of reward or was threatened by law officers or anyone else to persuade or induce him to make a statement; and each defendant understood and expressly waived his rights to remain silent and have counsel during the periods of interrogation.

2. Searches and Seizures § 16— search of house—consent by third party with common authority

A warrantless search of the house in which defendants were arrested was lawful on the basis of the voluntary consent of a third party who possessed common authority, at least, over the premises, where the evidence showed that the third party leased the house, that she lived there with her daughter and paid all the rent, and that although defendants stayed there on occasion, they paid no rent.

3. Criminal Law § 75.13— incriminating statements made to person other than police officer

Incriminating statements about a robbery-murder made by defendants to the victim's cousin while defendants and the cousin were being "booked" on criminal charges in the magistrate's office were admissible against defendants where there was no evidence that the police requested the cousin to engage in conversation with defendants, an officer in fact instructed the cousin not to talk to defendants and rebuked him for doing so, and it was several days later that police learned from the cousin's relatives what defendants had said to the cousin.

4. Criminal Law § 92.1— consolidation of charges against three defendants

Armed robbery and murder charges against three defendants were properly consolidated for trial where the evidence showed that each defendant participated in the robbery and that decedent was killed with a deadly weapon during commission of the robbery. G.S. 15A-926(b)(2)a.

5. Criminal Law § 74.3— admissibility of confessions of codefendants

In a joint trial of three defendants for a robbery-murder, the confession of each of the three defendants was properly admitted into evidence where all parts of each defendant's confession which referred to or implicated any other defendant were first deleted. G.S. 15A-927(c)(1).

6. Criminal Law § 101.4— jury review of confessions in courtroom—discretion of court

The trial court properly exercised its discretion in permitting the jury to review in the courtroom written confessions which had been admitted into evidence, the consent of defendants being required only when the jury is permitted to take writings or exhibits to the jury room. G.S. 15A-1223(a), (b).

7. Criminal Law § 75— voluntariness of confession—no issue for jury

The law in North Carolina does not require that the issue of voluntariness of a confession be submitted to the jury.

8. Criminal Law § 113.7— robbery-murder—instructions on common purpose to commit murder—supporting evidence

In a prosecution of three defendants for murder committed in the perpetration of an armed robbery, the trial court did not err in instructing the jury on the "common purpose" of two or more persons to commit the crime of murder on the ground that the evidence showed only a common purpose to

commit armed robbery, since the jury could have inferred from the facts of this case and from the nature of the crime of armed robbery that all three defendants had a common purpose to murder if murder became necessary during the course of the robbery to overcome the victim's resistance, to eliminate the victim or others as potential witnesses, or to aid in their escape.

9. **Criminal Law § 113.7— instructions on acting in concert**

The trial court's instruction that the jury should convict defendant if he acted in concert with both codefendants rather than with either of the codefendants imposed a greater burden on the State than it was required to meet and was not prejudicial to defendant.

10. **Criminal Law §§ 66.9, 66.16— pretrial photographic identification—in-court identification—admissibility in evidence**

The trial court properly concluded that a witness's pretrial photographic identification of one defendant as a participant in a robbery-murder was not unnecessarily suggestive, that her in-court identification of defendant was of independent origin and not tainted by the pretrial identification, and that both the pretrial and the in-court identifications were admissible in evidence where the court found upon supporting voir dire testimony that the witness was told that some people had been arrested in connection with the robbery and shooting; she was shown several sets of photographs but was not told photographs of any of the persons who had been arrested were in the group she received; although the group contained photographs of all three defendants, she identified only a photograph of one defendant; when she was at the crime scene, the witness saw such defendant face to face at a distance of only several feet and had a better opportunity to observe such defendant than she did the other defendants; the witness had previously described the smallest of the robbers as being 5 feet 6 or 7; the defendant identified by the witness was approximately that height, while the other defendants were more than 5 feet 10 inches tall; and the witness testifed that her in-court identification of one defendant was based solely upon what she saw at the crime scene and not on any photographs which she had seen of him.

Justices MITCHELL, MARTIN and FRYE did not participate in the consideration or decision of this case.

BEFORE *Judge Lacy H. Thornburg,* presiding at the 1 December 1980 Criminal Session of MECKLENBURG Superior Court, and a jury, defendants were found guilty of armed robbery and murder in the first degree. A sentencing hearing pursuant to G.S. 15A-2000 was conducted for defendants Barnett and the jury recommended that they receive life sentences. No sentencing hearing was conducted for defendant Wilder because the state had no aggravating circumstances to submit in his case. Each defendant was sentenced to life imprisonment on the murder

charge.[1] All defendants appealed to this Court pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Ralf F. Haskell, Assistant Attorney General, for the state.

David B. Sentelle for defendant appellant Lester Barnett.

Lawrence Hewitt and Henry H. Wilson, III for defendant appellant Ricky Barnett.

Paul J. Williams for defendant appellant Carl Wilder.

EXUM, Justice.

In this appeal defendants' numerous assignments of error relate primarily to the joinder of their cases for trial, the failure to suppress certain testimony, the admission of testimony, instructions to the jury, and denial of their motions to set the verdicts aside and for new trials. We find no merit in any of the assignments and affirm the judgments.

The state's evidence tends to show:

Early in the morning of 13 August 1980 Chalmers H. (Butch) Wallace was working on the third shift as a clerk at a Fast Fare store on Nations Ford Road in Charlotte. Shortly after 2 a.m. Cheryl Little entered the store to make some purchases. After selecting the items, she carried them to the cash register where Wallace was working as cashier. As she paid for her purchases, two young black males entered the store.

She then went out the front door of the store and entered her car which was parked near the door. Just before entering the car she heard a loud noise. She looked in the store and saw one of the men who had entered the store "go down on top of the cashier"; the other man had a gun and was looking at her. As she sped away from the store, a man was standing on the outside and shot at her. After arriving at her home she telephoned the police and reported what she had seen. She identified defendant Ricky Barnett as one of the men she saw in the store.

1. Since the first degree murder verdicts were based on the felony-murder rule, no judgments were entered on the armed robbery verdicts.

About 2:15 a.m. on 13 August 1980, Officer Dinkins of the Charlotte Police Department was dispatched to the Fast Fare store in question. When he arrived there he found no one in the store except the clerk who was lying on his back on the floor. Both cash registers were "rifled open and had been shuffled through." Blood was on the right side of the clerk's shirt. Dinkins radioed for assistance, including medical aid, but upon their arrival the medical team determined that the clerk, Wallace, was dead.

On 14 August 1980 police arrested defendants Barnett at a residence at 323 Katonah Avenue in Charlotte. They arrested defendant Wilder on the same day. The three defendants were taken to police headquarters, advised of their rights and questioned. Each of the defendants admitted participation in the robbery, and Lester Barnett admitted shooting the store clerk. Their written, signed statements, with references to their codefendants deleted, were admitted into evidence. Weapons matching the description of those that defendants said they used were found in the house where defendants Barnett were arrested.

Defendants Ricky Barnett and Carl Wilder presented evidence but it is not set out in the record on appeal. Defendant Lester Barnett offered no evidence.

I.

ERRORS ASSIGNED BY ALL DEFENDANTS.

[1] All defendants assign as error the denial of their motions to suppress the in-custody statements made by them. We find no merit in these assignments.

Before trial each defendant moved to suppress all statements allegedly made by him to police officers following his arrest. Judge Johnson conducted a hearing on the motions and heard extensive evidence presented by the state and defendants. Following the hearing Judge Johnson found the pertinent facts that: Before being questioned by the police each defendant was verbally advised of his constitutional rights as required by *Miranda*,[2] each defendant stated he understood his rights and did not wish

2. *Miranda v. Arizona*, 384 U.S. 436 (1966).

to have an attorney present; each defendant executed a "Waiver of Right to Remain Silent and Right to Counsel During Interview" form; each defendant then gave an oral statement which was reduced to writing and signed by him; at the time of interrogation by law enforcement officers, each defendant was in full control of his mental and physical faculties, was coherent and gave reasonable answers to questions asked; no defendant was given any promise or offer of reward or was threatened by law enforcement officers or anyone else to persuade or induce him to make a statement; each defendant was fully and properly advised of his constitutional rights; and each defendant understood and expressly waived his rights to remain silent and have counsel during the periods of interrogation.

Upon his findings of fact, Judge Johnson made these conclusions of law: None of the constitutional rights of any defendant were violated by his arrest or interrogation; the statement of each defendant was made freely, voluntarily and understandingly; each defendant fully understood his constitutional right to remain silent and his right to counsel; and each defendant freely, knowingly, intelligently and voluntarily waived his rights and made the incriminating statements in question. The court denied the motions to suppress.

In *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E. 2d 540, 548 (1982), this Court said:

> Following a hearing on a motion to suppress, it is incumbent on the trial court to make findings of fact and conclusions of law. *State v. Jackson*, 292 N.C. 203, 232 S.E. 2d 407, *cert. denied*, 434 U.S. 850 (1977). The court's findings, if supported by competent evidence, are conclusive on appeal. *State v. Herndon*, 292 N.C. 424, 233 S.E. 2d 557 (1977). If there is a conflict between the state's evidence and defendant's evidence on material facts, it is the duty of the trial court to resolve the conflict and such resolution will not be disturbed on appeal. *Id.* If *all* the evidence tends to show that investigators made promises or threats to a suspect whose confession is the product of hope or fear generated by such promises or threats, the confession will be ruled involuntary as a matter of law. *State v. Pruitt*, 286 N.C. 442, 455-58, 212 S.E. 2d 92, 100-02 (1975), and cases there cited.

In the case *sub judice*, the findings of fact made by Judge Johnson are fully supported by the evidence and the findings support the conclusions of law. While there were conflicts between some of the evidence presented by the state and evidence presented by defendants, it was incumbent on the trial judge to resolve the conflicts after hearing the evidence and observing the demeanor of the witnesses. *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970). The trial court has resolved the evidentiary conflicts in favor of the state; we are bound by this resolution. *State v. Herndon*, 292 N.C. 424, 233 S.E. 2d 557 (1977).

The assignments of error are overruled.

II.

ERRORS ASSIGNED BY DEFENDANTS BARNETT.

A.

[2] Defendants Barnett assign as error the denial of their motions to suppress as evidence items seized as a result of a search of the premises of Margaret Ware. These assignments have no merit.

Judge Johnson found as facts that: On 13 August 1980 Officer Guerette received information indicating that defendants Barnett had participated in the robbery in question; upon checking the warrant desk at the Charlotte Police Department, he discovered outstanding arrest warrants charging defendants Barnett with rape; on the morning of 14 August he and several other officers went to three addresses on Katonah Avenue looking for defendants Barnett in order to serve the rape warrants on them; upon arriving at 323 Katonah Avenue, the officers knocked and announced their presence; defendant Lester Barnett came to the door, looked out the window, and then retreated to a rear bedroom; shortly thereafter they were admitted into the living room by Margaret Ware; the officers asked for defendants Barnett; defendant Ricky Barnett was seated on a sofa in the living room but denied that he was Ricky Barnett; one of the officers knew the person on the sofa as Ricky Barnett and arrested him pursuant to the rape warrant; defendant Ricky Barnett was also informed that he was a suspect in the robbery-murder at the Nations Ford Road convenience store; the officers were then told that defendant Lester Barnett was in the rear bedroom; Officer

Frye went to the bedroom, arrested defendant Lester Barnett pursuant to the rape warrant and informed him that he was a suspect in the robbery-murder; defendant Lester Barnett was moved to the living room; the officers inquired about the ownership of the house; Margaret Ware stated she was renting the house from David Willis, she lived there with her daughter and although the Barnetts stayed there on occasion, they paid no rent: Ms. Ware then consented, both verbally and in writing, for the officers to search the premises; the officers found a .32 caliber pistol under the bed in the room in which defendant Lester Barnett was arrested and a .22 caliber pistol and a sawed-off shotgun under the cushion of a chair in the living room; they also found the other items sought to be suppressed; and the search of the premises did not disclose any clothing or personal effects belonging to either defendant.

Pursuant to these findings, Judge Johnson concluded defendants Barnett had no standing to contest the search of Margaret Ware's house, to which she had consented; and in any event the search and seizure were incident to a lawful arrest of these defendants.

The findings of fact above summarized are fully supported by the evidence presented at the voir dire hearing on defendants' motions to suppress, particularly the testimony of Officers Guerette and Frye and Margaret Ware. Thus, the findings are binding on this Court. *State v. Herndon, supra*, 292 N.C. 424, 233 S.E. 2d 557. The question remaining is whether Judge Johnson's findings support his conclusion that the evidence was admissible. We hold they do.

Assuming *arguendo* that defendants Barnett have standing to protest the search of the residence at 323 Katonah Avenue, a point we do not decide, the question becomes whether the search was permissible on either the ground that Ms. Ware had consented to it or that it was incident to a lawful arrest. In *United States v. Matlock*, 415 U.S. 164 (1974), the United States Supreme Court reaffirmed the principle "that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient

relationship to the premises or effects sought to be inspected." *Id.* at 171-72 (footnote omitted). In *Matlock* the defendant was arrested in the yard of a home in which he lived. The home was leased by a Mr. and Mrs. Marshall. It was occupied by Mrs. Marshall, several of her children including the defendant's girlfriend, Mrs. Gayle Graff, the defendant, and Gayle's three-year-old son. After arresting the defendant, several officers went to the house and requested permission to search the house for money and a gun. Mrs. Graff voluntarily consented to the search of the house, including the bedroom she shared with the defendant. The money sought was found in a diaper bag in the only closet in the bedroom.

The significant question in *Matlock* was whether there was sufficient evidence of Mrs. Graff's common authority over the bedroom to render permissible the search based on her consent. The Court concluded, *id.* at 177-78:

> It appears to us, given the admissibility of Mrs. Graff's and [defendant's] out-of-court statements, that the Government sustained its burden of proving by the preponderance of the evidence that Mrs. Graff's voluntary consent to search the east bedroom was legally sufficient to warrant admitting into evidence the $4,995 found in the diaper bag. But we prefer that the District Court first reconsider the sufficiency of the evidence in the light of this decision and opinion.

(Footnote omitted.)

In the instant case the trial court found as a fact that before searching the house the officers asked who owned the house. In response:

> Margaret Ware stated that she was renting it from David Willis. That although the Barnetts stayed there on occasion, they didn't contribute to the rent. That she lived there with her daughter and she (Margaret) paid all the rent. Margaret Ware then consented verbally and in writing for the officer to search the premises.

The trial court also found as follows:

> Although Margaret Ware stated that the Barnetts stayed there occasionally and sometimes slept in the living

room and the front and back bedrooms, a search of the premises did not reveal any clothing or personal effects of either defendant. The only articles of clothing and personal effects discovered were those of a female.

These facts are more than sufficient to support the trial court's conclusion of law that the search could be sustained on the basis of Ms. Ware's voluntary consent because she possessed common authority, at least, over the premises. Because the search is sustainable on this ground, we do not consider the question whether it also could be justified on the ground it was incident to a lawful arrest.

B.

[3] Defendants Barnett assign as error the denial of their motions to suppress the testimony of Albert Frazier relating to statements allegedly made to him by them while in custody. There is no merit in these assignments.

The record reveals that while defendants Barnett were in a magistrate's office being "booked" and committed, Albert Frazier, a cousin of the victim, Wallace, was also in the office being "booked" on a charge of carrying a concealed weapon. Defendants Barnett were standing by the wall on the opposite side of the room from the magistrate. Police Officer Smith told Frazier to stand by the wall but not to talk with the Barnetts. As Frazier was standing there, he engaged defendants Barnett in conversation. In the conversation defendants Barnett made incriminating statements relating to the robbery and murder of Wallace. Judge Johnson denied the Barnett defendants' motion to suppress Frazier's testimony and he testified at trial as a witness for the state.

While defendants Barnett concede that there is no direct evidence that Frazier was a paid police informant, or agent, at the time, they argue that he was placed beside them in the magistrate's office in order to obtain evidence against them. Relying on *Massiah v. United States*, 377 U.S. 201 (1964), defendants argue that Frazier's presence constituted a "custodial interrogation" in violation of their constitutional rights.

In *Massiah*, the defendant was indicted for violating the federal narcotics laws. He retained a lawyer, pled not guilty, and

was released on bail. Thereafter, a man named Colson was indicted for offenses related to the same matter for which Massiah was indicted. Colson was also released on bail. Several days later, and without Massiah's knowledge, Colson decided to cooperate with the government agents investigating the narcotics activities in which Massiah, Colson and others allegedly had been engaged. Colson permitted a government agent to install a radio transmitter in his automobile. Thereafter, Colson and Massiah engaged him in conversation while in Massiah's car about the matters with which they were charged. Massiah made some incriminating statements that were heard over the radio by a government agent. The agent related the statements as evidence against Massiah at his trial.

Massiah was convicted and the United States Court of Appeals for the Second Circuit affirmed. The United States Supreme Court granted certiorari and awarded Massiah a new trial. The Court held that under the Sixth Amendment's guarantee of the defendant's right to assistance of counsel, his incriminating statements, elicited by government agents after he had been indicted and in the absence of counsel, were not admissible at trial.

The case at hand is clearly distinguishable from *Massiah.* In that case Colson was without doubt a *government agent* and the decision of the Court emphasizes that fact. In the case at hand there was no evidence that the police requested Frazier to engage in conversation with defendants Barnett; in fact, Officer Smith instructed Frazier *not* to talk to the Barnetts and rebuked him when he saw Frazier was talking with them. It was several days later that police learned from Frazier's relatives what defendants Barnett had said to Frazier.

The assignments of error are overruled.

III.

ERRORS ASSIGNED BY DEFENDANTS LESTER BARNETT AND CARL WILDER.

A.

[4] These defendants assign as error the joinder of the charges against all defendants for trial. These assignments have no merit.

Upon written motion of the prosecutor charges against two or more defendants may be joined for trial "[w]hen each of the defendants is charged with accountability for each offense." G.S. 15A-926(b)(2)a. *See also State v. Smith*, 301 N.C. 695, 272 S.E. 2d 852 (1981); *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). Ordinarily, motions to consolidate cases for trial are within the sound discretion of the trial court, *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death penalty vacated*, 429 U.S. 809 (1976), and absent a showing that a joint trial has deprived an accused of a fair trial, the exercise of the court's discretion will not be disturbed on appeal. *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968).

Each of the defendants was charged on 12 August 1980 with the robbery and the murder of Chalmers H. Wallace. The evidence showed that each defendant participated in the robbery and that Wallace was killed with a deadly weapon during the commission of the robbery. That being true, each defendant was "charged with accountability" for the felony-murder of Wallace and was subject to conviction for first degree murder. G.S. 14-17; *State v. Shrader*, 290 N.C. 253, 225 S.E. 2d 522 (1976).

We hold the court did not abuse its discretion in consolidating the cases for trial. The question of defendants' alleged deprivation of a fair trial is hereinafter discussed.

B.

[5] Lester Barnett and Wilder each assigns as error the admission into evidence of the "sanitized" statement of his codefendants. There is no merit in this assignment.

These defendants argue that inasmuch as the trial court, over their objections, allowed the state's motion for joinder of their trials, the admission into evidence of the confessions of all defendants violated their constitutional rights under *Bruton v. United States*, 391 U.S. 123 (1968).

In *Bruton*, there was a joint trial of Evans and Bruton for armed postal robbery. Evans did not testify and a postal inspector testified with respect to Evans' oral confession that Evans and Bruton had committed the robbery. The trial judge instructed the jury that the confession evidence was not admissible against Bruton and the jury could not consider it in determining Bruton's

guilt or innocence. Both defendants were convicted. The United States Court of Appeals for the Eighth Circuit set aside Evans' conviction on the ground that his admissions to the postal inspector were tainted by his prior unconstitutional confession, but the Court affirmed Bruton's conviction because of the trial court's limiting instructions. *Id.* at 124-25.

The United States Supreme Court allowed Bruton's petition for certiorari and reversed the lower court. The Supreme Court held that since Evans did not testify, the introduction of his confession added substantial weight to the government's case in a form not subject to cross-examination, thereby violating Bruton's Sixth Amendment Right of Confrontation. The Court also concluded that this encroachment on Bruton's Right of Confrontation could not be avoided by instructing the jury to disregard the confession in Bruton's case.

In *State v. Fox, supra,* 274 N.C. at 291, 163 S.E. 2d at 502, this Court, after recognizing the *Bruton* principle, said:

> The result is that in joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant. If such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately.

See also State v. Davis and State v. Fish, 284 N.C. 701, 202 S.E. 2d 770, *cert. denied,* 419 U.S. 857 (1974); G.S. 15A-927(c).

In the case at hand, the record clearly discloses that the trial court admitted the confessions into evidence only after modifying them as mandated by *Fox* and in compliance with G.S. 15A-927(c)(1).[3] All parts of each defendant's confession that referred to or implicated any other defendant were deleted.

3. This section reads:

(c) Objection to Joinder of Charges against Multiple Defendants for Trial; Severance.—

(1) When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a co-defendant makes reference to him but is not admissible against him,

The assignment of error is overruled.

C.

[6] Defendants Lester Barnett and Wilder assign as error the trial court's permitting the jury to examine and read their "sanitized" written confessions. These assignments have no merit.

After the jury had gone to the jury room and began their deliberations, they returned to the courtroom with some questions and a request that they be allowed to review defendants' written confessions which had been admitted into evidence. The court would not allow the jury to take these statements to the jury room but did allow the jury to review the statements in the courtroom.

The action of the trial judge is clearly authorized by G.S. 15A-1233(a), which provides in pertinent part:

> The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury *and may permit the jury to reexamine in open court the requested materials admitted into evidence.* [Emphasis added.]

Defendants do not contend that they did not have notice as provided by the quoted statute. They argue that the judge should not have allowed the jury to reexamine the statements without their consent. Consent is required, however, only when the jury is allowed to take writings or exhibits *to the jury room.* G.S. 15A-1233(b).[4]

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the court must require the prosecutor to select one of the following courses:

a. A joint trial at which the statement is not admitted into evidence; or

b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or

c. A separate trial of the objecting defendant.

4. This statute provides, in part: "(b) Upon request by the jury and with the consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence."

We hold that the trial judge properly exercised his discretion and the assignments of error are overruled.

D.

[7] Defendants Lester Barnett and Wilder assign as error the failure of the trial court to submit to the jury the issue of the voluntariness of defendants' confessions. There is no merit in these assignments.

Defendants concede that under current law as restated in *State v. Miley*, 291 N.C. 431, 230 S.E. 2d 537 (1976), the trial judge is not required to submit to the jury the issue of voluntariness, but they ask us to reconsider *Miley* in light of the decision in *United States v. Inman*, 352 F. 2d 954 (4th Cir. 1965).

In *State v. Miley, supra*, 291 N.C. at 434-35, 230 S.E. 2d at 539-40, this Court said:

> In connection with the issue of defendant's statement to the police, defendant contends that the trial court should have submitted the question of voluntariness to the jury. Counsel for defendant, citing *State v. Hill*, 276 N.C. 1, 170 S.E. 2d 885 (1969), concedes that the present law in North Carolina does not require the issue of voluntariness of the confession to be submitted to the jury, but requests that this Court reconsider its position on this question. In *State v. Hill, supra*, at 14-15, 170 S.E. 2d at 894, Justice Higgins, speaking for the Court, said:
>
> > 'Defense counsel also argue that the voluntariness of the confession should have been one of the issues submitted to the trial jury. Under North Carolina procedure, voluntariness is a preliminary question to be passed on by the trial judge in the absence of the jury. *State v. Vickers*, 274 N.C. 311, 163 S.E. 2d 481; *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1; *State v. Barnes*, 264 N.C. 517, 142 S.E. 2d 344. This procedure, we think, is approved by the Supreme Court of the United States. In *Jackson v. Denno*, 378 U.S. 368 (Footnote 19), the Court uses this language: ". . . [T]he states are free to allocate functions between the judge and the jury as they see fit." '
>
> We see no reason to change this well established rule and refrain from doing so in this case.

In *Inman*, the United States Court of Appeals for the Fourth Circuit not only held that the trial judge must pass upon the voluntariness of a confession, but further held that in federal prosecutions within the Fourth Circuit final appraisal of the voluntariness of a confession should be left to the jury. With respect to the question of voluntariness being determined solely by the trial judge, the Court said: "There is, concededly, authority at least implying that this procedure in State prosecutions is not Constitutionally impermissible." 352 F. 2d at 955-56 (citing *Jackson v. Denno*, 378 U.S. 368 (1964)).

We adhere to our decision in *Miley;* therefore, the assignments of error are overruled.

E.

[8] Defendants Lester Barnett and Wilder assign as error the trial court's instructions to the jury on the question of "common purpose." There is no merit in these assignments.

The trial court's charge to the jury included the following instruction:

> Again, in determining guilt or innocence as to this crime [murder], the court instructs you that for a person to be guilty of a crime, it is not necessary that he, himself, do all the acts necessary to constitute the crime.
>
> *If two or more persons in the presence of each other act together with a common purpose to commit the crime of murder,* each of them is held responsible for the acts of the others done in the commission of the crime. Each is responsible for all the acts committed by the others in the execution of the common purpose which are the natural or probable consequence of the unlawful combination of the undertaking. [Emphasis added.]

Defendants except to that part of the instruction in italics. They argue that there was no evidence tending to show that there was a common purpose on the part of two or more of the defendants to commit the crime of murder; that, at most, the evidence tended to show a common purpose to commit the offense of armed robbery.

We disagree. An essential element of armed robbery, indeed the heart of the offense, is that a firearm or other dangerous weapon be used "whereby the life of a person is endangered or threatened." G.S. 14-87. This act is by its nature inherently dangerous to human life; and if this danger against which the statute is aimed occurs and the robber kills, the act is ordinarily murder under the felony-murder rule. Here *all three* defendants were armed with firearms—the Barnetts with pistols and Wilder with a shotgun. There was evidence that *both* of the Barnetts shot Wallace[5] and Wilder shot at the escaping witness, Cheryl Little. Because of these facts and because of the nature of the crime of armed robbery, we think the jury could infer, although it would not have been compelled to do so, that all three defendants had a common purpose to murder if murder became necessary during the course of the robbery to overcome the victim's resistance, to eliminate the victim or others as potential witnesses, or to aid in their escape. We find no error, therefore, in the instruction.

The assignments are overruled.

F.

Defendants Lester Barnett and Wilder assign as errors the denial of their motions to set aside the verdicts as to them and to grant them new trials. These assignments have no merit.

As the grounds for these assignments, defendants depend on the soundness of their contentions hereinabove discussed. Having rejected all of these contentions, we conclude that defendants have shown no support for the assignments; hence they are overruled.

IV.

ERRORS ASSIGNED ONLY BY DEFENDANT WILDER.

A.

In his argument on his fifth assignment of error, defendant Wilder contends "it was prejudicial error for the court in its in-

5. Ballistics evidence tended to show that some projectiles found in Wallace's body came from the pistol used by Lester Barnett and other projectiles found in Wallace's body came from the pistol used by Ricky Barnett.

structions to the jury to refer to Wilder as 'the other' in possession of a pistol when there was no evidence to support such instruction." This assignment has no merit.

With respect to this assignment, the court charged the jury as follows:

> That sometime in the early morning hours, three Black males came to the store; one remained outside with a sawed-off shotgun; two went into the store. The one remaining outside was Carl Anthony Wilder. That the two who went into the store were Lester and Ricky Barnett.
>
> The two going into the store each had pistols. And, that the—That Chalmers Wallace was shot five times. That four of the bullets were recovered. One was attributed to a .32 caliber pistol in the possession of the Barnett brothers. (That three of the bullets were attributed to a .22 pistol in the possession of the other.)

Defendant Wilder takes exception to the last sentence of the challenged instruction, arguing that "the other" must have referred to him as the one in possession of the .22 pistol. We reject this argument. We think it is clear that the court was referring to "the other" Barnett. In the first paragraph quoted above the court clearly referred to defendant Wilder as the one who remained outside of the store with a shotgun. The second paragraph clearly relates to defendants Barnett, one of whom had a .32 pistol while the other had a .22 pistol.

The assignment is overruled.

B.

[9] In his seventh assignment of error, defendant Wilder contends that the trial court erred in its jury instructions relating to acting in concert. This assignment has no merit.

With respect to defendant Wilder, the trial court charged the jury as follows:

> (If you find from the evidence, and beyond a reasonable doubt, as to the defendant, Carl Anthony Wilder, that on or about the 12th day of August, 1980, the defendant, Carl Wilder, acting together with Lester Barnett and Ricky Bar-

nett, for the purpose of aiding them in the commission of a robbery,)

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knowingly stood outside the Fast Fare Store with a sawed-off shotgun, at the time that Ricky Barnett and Lester Barnett had in their possession firearms, and took and carried away money from the person or presence of Chalmers H. Wallace, without his voluntary consent, by endangering or threatening Chalmers H. Wallace's life, with the use or threatened use of pistols, the defendants Ricky Barnett and Lester Barnett knowing that they were not entitled to take the money and intending at that time to deprive Chalmers H. Wallace of the use of that property permanently, that money permanently, then it would be your duty to return, as to the defendant Carl Anthony Wilder, a verdict of guilty of robbery with a firearm.

Defendant Wilder points out that the court earlier charged it would be the jury's duty to convict Lester Barnett if he acted together with Ricky Barnett, and Ricky if he acted together with Lester, but then charged that they should convict Wilder if he acted together with Lester *and* Ricky. He argues that the instructions were conflicting "as the jury was told to convict Wilder if he was found to have acted with Lester *and* Ricky, but the jury was only told to convict Ricky if he acted with Lester and to convict Lester if he only acted with Ricky. Wilder was left out of the instructions regarding Ricky and Lester, thus creating a conflict in the jurors' minds as to the issue of acting in concert."

We are not impressed with this argument. The court could have instructed the jury that if defendant Wilder were acting in concert with either of defendants Barnett he would be guilty. The requirement that the jury find that Wilder was acting in concert with both defendants Barnett imposed a greater burden on the state than it was required to meet and was beneficial to Wilder. He is not, therefore, in position to complain.

V.

ERROR ASSIGNED ONLY BY DEFENDANT RICKY BARNETT.

[10] Defendant Ricky Barnett assigns as error the admission of testimony by Cheryl H. Little identifying him as one of the par-

ticipants in the robbery, and her testimony concerning her out-of-court identification of him through a photographic display. We find no merit in this assignment.

It is well established that "[i]dentification evidence must be excluded as violating a defendant's rights to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. White*, 307 N.C. 42, 45-46, 296 S.E. 2d 267, 269 (1982) (citing *Simmons v. United States*, 390 U.S. 377 (1968); *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982); *State v. Thompson*, 303 N.C. 169, 277 S.E. 2d 431 (1981); and *State v. Wilson*, 296 N.C. 298, 250 S.E. 2d 621 (1979)).

In the case at hand, the evidence presented on voir dire showed that Cheryl Little was requested by Officer Van Hoy to come to the police department. She was told that some people had been arrested in connection with the robbery and shooting. She was shown several sets of photographs but was not told photographs of any of the persons who had been arrested were in the group she received. Although the group contained photographs of all three defendants, she identified only a photograph of defendant Ricky Barnett. When she was at the Fast Fare she had a better opportunity to observe Ricky Barnett than she did the other defendants; she saw him face to face at a distance of only several feet. In selecting Ricky's photograph she stated that he was "the little one with the hat." She had previously described the smallest of the robbers as being about 5 feet 6 or 7. Ricky Barnett was approximately that height, while the other defendants were more than 5 feet 10 inches tall. Cheryl Little further testified that her in-court identification of defendant Ricky Barnett was based solely upon what she saw at the Fast Fare store and not on any photographs which she had seen of him.

Judge Johnson, after finding the above recited facts, concluded that Cheryl Little's identification of defendant Ricky Barnett was of independent origin and was "not tainted by any pretrial identification procedure so unnecessarily suggestive and conducive to irreparable mistaken identification as to constitute a denial of due process of law." He also concluded: "The pretrial photographic identification procedure involving the defendants was not so unnecessarily suggestive and conducive to irreparable

mistaken identification as to violate the defendants' rights to due process of law."

The findings of Judge Johnson are supported by the evidence and his conclusions are supported by his findings. This assignment of error is overruled.

Having considered all of the assignments of error argued by each defendant and finding no merit in any of them, we conclude that defendants received fair trials, free from prejudicial error.

No error.

Justices MITCHELL, MARTIN and FRYE did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. CHARLES ALLEN GRIER

No. 258A82

(Filed 8 March 1983)

1. **Criminal Law §§ 42.6, 55 — blood sample — chain of custody sufficient**

The chain of custody of a blood sample taken from the victim in a prosecution for first degree rape was sufficiently established where a doctor testified that she examined the victim shortly after the rape and that, although she did not actually see the blood drawn from the victim, she signed a blood sample that was supposedly taken from the victim by a laboratory technician either immediately before or after the examination.

2. **Criminal Law § 62 — stipulation concerning lie detector test — inconclusive results improperly excluded**

Where the defense and prosecution stipulated that an inconclusive result of a polygraph examination should not be admitted into evidence, and where the defendant took a polygraph examination and the result was inconclusive, and where the defendant took a second polygraph examination and the result indicated he was being deceptive, the trial court erred in refusing to allow defendant to cross-examine the examiner concerning the prior inconclusive polygraph result. The reasons justifying exclusion of an inconclusive result do not apply when conclusive results are achieved on a second test pursuant to the same stipulation and the prior inconclusive results are offered only to impeach the examiner's testimony as to the conclusive results.

3. Criminal Law § 62— polygraph evidence not admissible in any trial

In North Carolina, polygraph evidence is no longer admissible in any trial even if the parties stipulate to its admissibility.

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

APPEAL by defendant from *Ferrell, Judge,* at the 15 February 1982 Criminal Session of MECKLENBURG County Superior Court.

Defendant was charged in indictments, proper in form, with the offenses of first-degree rape and first-degree burglary. He entered a plea of not guilty to each of the offenses charged.

The State offered evidence tending to show that at about 12:30 a.m. on 22 September 1981, James Lee was watching television in the living room of his duplex apartment at 2026 Thomas Avenue, Charlotte, North Carolina, when a tall black man broke open a locked storm door, entered the living room and placed a gun to Lee's head. Lee's wife had been asleep in her bedroom. She wakened and came down the hallway toward the living room. The black intruder, later identified as defendant, forced Mr. and Mrs. Lee to accompany him into the bedroom where he took Mr. Lee's money and forced the couple to lie down on the bed. While aiming the gun at her husband's head, defendant forced Mrs. Lee to have sexual intercourse with him.

Defendant then left the bedroom to search the house for other valuables. Meanwhile, James Lee obtained his shotgun and confronted defendant as he was preparing to leave carrying the Lees' television set. Lee fired at defendant but missed. As defendant fled from the apartment, he turned and shot at Lee two or three times. Lee again fired at defendant from the porch but defendant escaped without injury.

Both Mr. and Mrs. Lee testified that when they came out of the bedroom after the rape, a second black man was in the living room rummaging through Mrs. Lee's purse and gathering other items. This second intruder demanded and received some money and Mr. Lee's ring before fleeing.

Neither of the Lees was able to identify defendant from a photographic lineup conducted eight days after the incident. Mrs. Lee did, however, select defendant from a physical lineup held on

2 October 1981 and also identified defendant in court as the man who first entered the house. Mr. Lee could not identify defendant at the physical lineup, nor could he make a positive identification at trial.

Mr. and Mrs. Lee testified that immediately after the crime was committed, they described the first intruder as having a full beard, an afro and wearing white clothes trimmed with red. Their descriptions of the man's height varied significantly, from Mr. Lee's estimate of six feet, eight inches, to Mrs. Lee's statement that the intruder was six feet tall. The officer who conducted the lineup testified that defendant is five feet, nine inches tall.

On 1 October 1981, Officer Cobb searched defendant's residence in an effort to locate the clothes described by the Lees and the items taken from their home. The only item found was a pair of white trousers.

The State presented testimony of Ronnie Easterling. Easterling had been arrested for an unrelated armed robbery and was under suspicion as resembling the composite picture of the second man who entered the Lees' apartment. Easterling testified that he overheard defendant telling someone that he had been involved in a "lick," a stealing, on Thomas Avenue. He further testified that he heard defendant say the incident had been reported on television, that the old man had shot at him, and that buckshot brushed across his head.

Officer J. A. Welborne testified that he went to the Lee apartment on 22 September 1981 and collected, *inter alia*, a hair pick containing several hairs and the sheet from Mrs. Lee's bed. Dr. Louis Portis of the microanalysis section of the Charlotte-Mecklenburg crime laboratory compared the hairs taken from the pick with hairs removed from defendant. It was his opinion that the two hair specimens were consistent.

Jane Burton, a criminalist with the Charlotte-Mecklenburg crime laboratory, determined that stains on the sheet and on Mrs. Lee's dress revealed the presence of human semen. She testified that the semen stains were consistent with defendant's blood type and inconsistent with Mrs. Lee's.

The State presented testimony of W. O. Holmberg, an expert in polygraph examination and chart interpretation. Holmberg had

earlier administered two polygraph examinations to defendant, the first on 22 January and the second on 27 January 1982. Holmberg deemed the results of the first examination inconclusive. It was his opinion, however, that the results of the second examination indicated that defendant's answers were deceptive.

Prior to Holmberg's testimony, defense counsel moved to exclude it unless the court would permit defendant to cross-examine Holmberg concerning the inconclusive results obtained from the first examination. The trial court ruled that defendant would not be allowed to cross-examine Holmberg regarding the 22 January 1982 examination because a stipulation entered into between the State and defendant provided that inconclusive results would not be admissible for any purpose. Holmberg's testimony, then, was confined to his interpretation of the results obtained from the examination conducted on 27 January.

Defendant presented evidence in the nature of an alibi. He testified that on the night in question, he was at home drinking beer and watching television with his girl friend, his brother and his brother's date. He recalled that his sister came by that evening and told him she was getting married. Defendant's brother and sister also testified that defendant could not have perpetrated the crime because he was with them throughout the evening of 21 September 1981. Defendant's sister said that she remained at defendant's apartment until 1:30 or 2:30 the following morning and that defendant did not leave his residence at any time during the night or early morning. She also stated that she had never known her brother to have a full beard.

On 17 February 1982, the jury returned verdicts of guilty on both the charge of first-degree rape and the charge of first-degree burglary. Defendant was sentenced to life imprisonment on each charge. Defendant appealed directly to this Court as a matter of right pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Robert L. Hillman, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Marc D. Towler, Assistant Appellate Defender, for defendant-appellant.

BRANCH, Chief Justice.

I.

[1] Defendant assigns as error the trial court's admission into evidence of a blood sample purportedly taken from the victim and the admission of testimony concerning the results of blood typing tests performed on the sample.

The State presented evidence of the victim's blood type in an effort to show that semen stains found on the dress Mrs. Lee was wearing on the night of the rape and on the sheets removed from her bed were consistent with defendant's blood type and inconsistent with Mrs. Lee's. Criminalist Jane Burton's testimony tended to show that the blood characteristics of the stains did not match Mrs. Lee's. The stains were, however, totally consistent with defendant's blood groupings. In fact, Burton testified that defendant's blood characteristics, an A reaction in the ABO grouping and a 2-1 reaction in the PGM grouping, were shared by only 11% of the population.

Defendant maintains that the evidence regarding the inconsistency of the victim's blood type should have been excluded because there was no evidence establishing that the blood tested was actually taken from the victim.

Dr. Rita Kay Williams examined the victim shortly after the rape on 22 September 1981. She testified that although she did not actually see the blood drawn from Mrs. Lee, she signed a blood sample that was supposedly taken from the victim by a laboratory technician either immediately before or after the examination. The technician who drew the blood did not testify.

Defendant, relying on *Robinson v. Life and Casualty Ins. Co.*, 255 N.C. 669, 122 S.E. 2d 801 (1961), argues that the chain of custody was insufficient to permit submission of evidence concerning the blood test. His position is that the person who actually draws the blood specimen must testify in order to lay a proper foundation for the admission of this evidence.

We do not interpret *Robinson* to hold that the person who draws the blood must testify in every case in order to establish a proper foundation for the admission of this evidence.

In *Robinson*, the issue was whether the deceased insured had been drinking at the time of an accident. Defendant attempted to offer a coroner's report indicating that the deceased was intoxicated when the collision occurred. This Court upheld the trial court's ruling excluding that report because there was no evidence as to who took the sample or when the sample was taken. The lack of such evidence was crucial in *Robinson* because it was necessary to determine whether the sample had been taken before or after the deceased had been injected with embalming fluid. There was, then, good reason to require specificity as to who drew the blood and when the blood was drawn since the injection of embalming fluid would obviously taint any findings as to the presence of alcohol in the bloodstream.

Robinson is easily distinguished from the case before us. Here no foreign matter had been injected into the bloodstream of the victim. The uncontested evidence shows that a sample of Mrs. Lee's blood was taken in accordance with normal hospital procedure. The laboratory technician took the sample concomitantly with Dr. Williams' examination of the victim. The vial purportedly containing Mrs. Lee's blood was signed by Dr. Williams immediately upon its presentation to her by the technician. We, therefore, find defendant's reliance upon *Robinson* misplaced. Rather, we are of the opinion that the question before us is controlled by *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979). There, defendant argued that a chain of custody was insufficient because it was not shown which laboratory employee picked up the deceased's specimens at the post office and because several people had supervision over the bench where the specimens were first placed. We held in *Detter* that the chain of custody of the deceased's specimens was sufficiently established because "the possibility that the specimens were interchanged with those from another body [was] too remote to have required ruling this evidence inadmissible." *Id.* at 634, 260 S.E. 2d at 588.

Here, as in *Detter*, the possibility that Mrs. Lee's blood sample was confused with someone else's is simply too remote to require exclusion of this evidence. Any weakness in the chain of custody relates only to the weight of the evidence and not to its admissibility. *Id.* This assignment of error is overruled.

II.

[2] Defendant next assigns as error the trial court's denial of his motion to exclude testimony regarding conclusive results of a polygraph examination since defense counsel was not permitted to cross-examine the polygraphist regarding an earlier test, the results of which were deemed inconclusive.

The trial court permitted polygraph examiner W. O. Holmberg to testify to the results of a polygraph test he administered to defendant on 27 January 1982. Holmberg's opinion was that defendant's answers denying involvement in the burglary at the Lee home were deceptive. The court refused, however, to permit defendant to cross-examine Holmberg regarding the earlier test administered on 22 January 1982. In determining that the results of the first examination were inadmissible, the trial judge relied on the following provision of a stipulation entered into between the parties:

> 5. That the results of the polygraphic examination so taken or offered shall be admissible into evidence in the trial of the above styled case(s) irrespective of the results, except that if the results of such examination are deemed inconclusive by the operator, then such inconclusive results will not be admissible for any purpose by either side, and that the undersigned hereby agree to waive any and all objections to the testimony of the results as to the competency, weight, relevancy, remoteness, or admissibility of such testimony based upon public, legal, judicial, social policy, due process of law, and/or such rules of evidence as might otherwise govern.

The trial court ruled that the language prohibiting inconclusive results was absolute and that no evidence regarding inconclusive results was permissible under any circumstances.

We do not agree. It is our conclusion that the language forbidding the introduction of inconclusive results was intended to cover the situation where the *only* results obtained were inconclusive. In our opinion, the parties simply did not contemplate the exclusion of inconclusive results when a series of examinations were conducted and the examiner interpreted the results of these examinations inconsistently.

There are sound reasons for excluding an inconclusive result when no other results are obtained. An inconclusive result, standing alone, is meaningless. It does not tend to show the defendant's propensity to tell the truth, nor does it lead to the conclusion that he is deceptive. It is simply irrelevant for purposes of weighing the defendant's credibility.

These reasons justifying exclusion do not apply, however, when conclusive results are achieved on a second test pursuant to the same stipulation and the prior inconclusive results are offered only to impeach the examiner's testimony as to the conclusive results. An inconclusive result takes on an added significance when other conclusive results are introduced. Where, as here, the same examiner administers two polygraph tests to defendant within five days and he interprets the results inconsistently, this calls into serious question the inherent reliability of the polygraph as an accurate detector of the subject's truthfulness or deception. Furthermore, this inconsistency tends to cast doubt on the expert's capability to reach a definitive conclusion regarding the test results. If defendant had been permitted to introduce this evidence that the examiner had earlier been unable to determine whether or not defendant was deceptive, this would have diminished the impact of the State's evidence that defendant had "failed" a lie detector test.

We, therefore, conclude that the trial judge erred in construing the stipulation so as to preclude defendant from cross-examining the polygraphist regarding the inconclusive results obtained from the first polygraph examination.

The nature of any scientific testimony requires the fullest possible exploration at trial. The right to a full and thorough cross-examination is especially important, however, when evidence regarding the procedure, theory and results of a polygraph examination is presented. Even a cursory examination of the cases and journals discussing this subject reveals a significant division of opinion regarding the effectiveness of the polygraph as a means of detecting deception. *See, e.g.*, J. Reid and F. Inbau, *Truth and Deception* (2d ed. 1977); Abbell, *Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials*, 15 Am. Crim. L. Rev. 29 (1977); Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 Yale L.J. 694

(1961); Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System*, 26 Hastings L.J. 917 (1975); Comment, *The Polygraph: Perceiving or Deceiving Us?*, 13 N.C. Cent. L.J. 84 (1981); Case Comment, *Commonwealth v. Vitello: The Role of the Polygraph in Criminal Trials Under Massachusetts Law and the Federal Rules of Evidence*, 15 New Eng. L. Rev. 837 (1980); Note, *Polygraph: Short Circuit to Truth?*, 29 U. Fla. L. Rev. 286 (1977).

Even if the accuracy of the machine as a measuring device and the operative theory of the polygraph is accepted, this is not the end of the inquiry regarding the validity of the polygraphic process. All courts and commentators concede that the most important factor to be considered when evaluating the reliability and utility of the polygraph is the role of the examiner. "The examiner's training, competence, experience, integrity and conduct during the test is as critically important to the reliability of the polygraph as the machine and the examinee." *State v. Dean*, 103 Wis. 2d 228, 236, 307 N.W. 2d 628, 632 (1981).

The examiner must first acquaint himself with the facts of the crime and become familiar with the examinee's background. He or she must determine whether the examinee is psychologically and biologically suitable for testing. The examiner conducts a pre-test interview, prepares the test questions and asks them during the examination, supervises the examinee's behavior during the examination, conducts a post-test interview and, finally, interprets the test results. J. Reid and F. Inbau, *Truth and Deception* (2d ed. 1977). The recordings of the machine do not, in and of themselves, indicate whether the examinee has been truthful or deceptive. Rather, the ultimate conclusion is totally dependent upon the examiner's *interpretation* and *analysis* of the physiological changes measured by the polygraph. The entire process, then, is a combination of scientific measurement and human evaluation. Because human judgment in the role of the examiner is intrinsic to the method, human error is, perhaps, equally intrinsic. As such, considerable latitude should be permitted in the defendant's cross-examination of the examiner to insure that the reliability of the procedure is fully probed and to disabuse the jury of any mistaken impression that the polygraph is scientifically precise.

Under the factual circumstances of this case, we hold that the erroneous exclusion of this evidence relating to the earlier polygraph examination constitutes prejudicial error entitling defendant to a new trial. Considering defendant's corroborated alibi, Mr. Lee's failure to identify defendant and the varying descriptions relating to defendant's height and appearance, we conclude that there is a reasonable possibility that, had this error not been committed, a different result would have been reached.

We are aware that the examiner's testimony concerned a polygraph examination in which the questions related only to the burglary charge. We are of the opinion, however, that the admission of the results without proper opportunity for cross-examination requires that defendant receive a new trial on both charges. Defendant's defense rested upon an alibi, corroborated by the testimony of his brother and sister. Each testified that defendant could not have committed either offense because he did not leave his residence throughout the evening of 22 September 1981. The examiner's testimony that defendant was deceitful as to the burglary tended to lessen the credibility of defendant's claim that he was not involved in either offense. Defendant must, therefore, receive a new trial on both the rape and burglary charges.

III.

[3] The circumstances presented in instant case prompt us to re-examine our rule permitting the trial judge, in the exercise of his discretion, to admit the results of a polygraph examination into evidence when the defendant, defense counsel and the prosecution have entered into a stipulation as to admissibility prior to trial.

Our discussion begins with a review of the development of North Carolina law relating to the admissibility of polygraph evidence in criminal trials.

Prior to 1975, the law in North Carolina was clear that evidence relating to polygraph examinations was inadmissible at trial. *State v. Jackson*, 287 N.C. 470, 215 S.E. 2d 123 (1975); *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). This rule was unaffected by a stipulation. Polygraph evidence was simply not admissible for any purpose.

In *State v. Foye, supra*, this Court enumerated four reasons which justified adherence to the well-established rule excluding evidence relating to polygraph examinations. The Court cited the following obstacles to the admissibility of polygraph evidence: (1) lack of general scientific recognition, (2) tendency to distract the jury, (3) the defendant's ability to have extrajudicial tests made without the necessity of submitting to similar tests by the prosecution, and (4) inability to cross-examine the polygraph machine. 254 N.C. at 708, 120 S.E. 2d at 172. These reasons for exclusion were reaffirmed in *State v. Brunson*, 287 N.C. 436, 445, 215 S.E. 2d 94, 100 (1975), when the Court again refused to change the rule relating to the inadmissibility of polygraph evidence.

The Court of Appeals in *State v. Steele*, 27 N.C. App. 496, 219 S.E. 2d 540 (1975), first considered the question of whether polygraph evidence should be admitted upon the basis of a pretrial stipulation between the parties. Following the lead of the Arizona Supreme Court in *State v. Valdez*, 91 Ariz. 274, 371 P. 2d 894 (1962), the court decided that if the parties stipulated to admissibility, and if other conditions were met, the results of polygraph evidence could be admitted. The other qualifications were as follows:

> (1) That the county attorney, defendant and his counsel all sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.
>
> (2) That notwithstanding the stipulation the admissibility of the test results is subject to the discretion of the trial judge, i.e. if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.
>
> (3) That if the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:
>
> a. the examiner's qualifications and training;
>
> b. the conditions under which the test was administered;
>
> c. the limitations of and possibilities for error in the technique of polygraphic interrogation; and

d. at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.

(4) That if such evidence is admitted the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged but at most tends only to indicate that at the time of the examination defendant was not telling the truth. Further, the jury members should be instructed that it is for them to determine what corroborative weight and effect such testimony should be given.

27 N.C. App. at 500, 219 S.E. 2d at 543.

This Court did not consider the advisability of this approach until 1979. In *State v. Milano*, 297 N.C. 485, 256 S.E. 2d 154 (1979), we adopted the admissibility by stipulation rule without discussion.

It became clear in *Milano*, however, that this Court would require strict compliance with the provisions of the stipulation governing admissibility. In *Milano*, the trial court admitted into evidence unfavorable polygraph results obtained pursuant to stipulation. The defendant was not, however, permitted to offer the favorable results of a psychological stress evaluation because the stipulation did not explicitly permit evidence relative to the latter test. This Court affirmed the rulings of the trial judge. 297 N.C. at 500, 256 S.E. 2d at 162-63.

The most recent North Carolina case relating to the admissibility of polygraph results pursuant to stipulation is *State v. Meadows*, 306 N.C. 683, 295 S.E. 2d 394 (1982). In that case, the defendant received a new trial because the results of a polygraph test were admitted into evidence against him even though the stipulation authorizing the examination was not complied with. One of the conditions of admissibility was that the prosecutrix would submit to a "similar polygraph examination under the same terms, conditions and stipulations" governing the defendant's examination and that the results of her examination would also be admitted into evidence. *Id.* at 685, 295 S.E. 2d at 396. Both the defendant and the prosecutrix were scheduled to be examined on the same morning. They encountered each other in the polygraphist's office. According to the polygraphist, the confron-

tation so upset the prosecutrix that she became an unsuitable subject for examination. The results of the test administered to her that morning were inconclusive and the polygraphist administered another test to her at a later date. The defendant was also examined that first morning. The polygraphist testified that the defendant was not affected by the encounter and that the results obtained revealing deception were valid.

We held that by according the prosecutrix, but not the defendant, a second opportunity to take the polygraph, the polygraphist violated the provision of the stipulation which required that both the defendant and the prosecutrix take "a similar polygraph examination under the same terms [and] conditions." *Id.* at 686, 295 S.E. 2d at 396.

We hasten to note that in these cases permitting polygraph evidence upon stipulation of the parties, we have not implicitly recognized the reliability of the polygraph technique. Admissibility of this evidence has not been based on the validity and accuracy of the lie detector, but rather that by consenting to the evidence pursuant to stipulation, the parties have waived any objections to the inherent unreliability of the test. The stipulation itself and the other conditions set forth in *Steele* were to operate as a compromise between total rejection and complete acceptance of polygraph evidence.

The admission by stipulation approach has been widely criticized by courts and commentators. Many reject the stipulation approach as mechanistic and accomplishing little toward resolving the inherent defects in the polygraph technique and procedure. *See, e.g. People v. Anderson*, --- Colo. ---, 637 P. 2d 354, 361-62 (1981); *State v. Frazier*, 252 S.E. 2d 39, 45-46 (W.Va. 1979). Because the stipulation does not cure the unreliability of the evidence, commentators have labeled the practice paradoxical. "By what logic should stipulated polygraphic evidence be admissible when the same evidence without stipulation is barred?" Note, *The Polygraphic Technique: A Selective Analysis*, 20 Drake L. Rev. 330, 341 (1971). A similar view was expressed by the Maryland Court of Special Appeals in *Akonom v. State*, 40 Md. App. 676, 394 A. 2d 1213 (1978).

We find these cases unpersuasive and would venture to suggest that they are guilty of putting the cart before the

> well-known horse. As we see it, the crucial issue is whether, as a matter of law, this type of evidence is sufficiently reliable or trustworthy. It cannot logically be argued that a stipulation enhances in any significant way the inherent reliability of evidence produced by a so-called scientific process or art.

Id. at 680, 394 A. 2d at 1216. *See also People v. Monigan*, 72 Ill. App. 3d 87, 88-89, 390 N.E. 2d 562, 562-63 (1979); *Pulakis v. State*, 476 P. 2d 474, 479 (Alaska 1970); Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System*, 26 Hastings L.J. 917, 953-56 (1975).

Two appellate courts, accepting these criticisms as well-taken, have reversed their position on this issue and no longer permit polygraph evidence pursuant to pretrial stipulation.[1]

Oklahoma was the first jurisdiction to abandon the rule admitting polygraph evidence upon stipulation. In *Fulton v. State*, 541 P. 2d 871 (Okla. Crim. App. 1975) [overruling *Castleberry v. State*, 522 P. 2d 257 (Okla. Crim. App. 1974) and *Jones v. State*, 527 P. 2d 169 (Okla. Crim. App. 1974)], that Court held that the potential unreliability of the polygraph test dictated its total exclusion.

In 1981, the Supreme Court of Wisconsin, in an exceptionally well-researched and scholarly opinion, held that polygraph evidence would no longer be admitted pursuant to stipulation. *State v. Dean*, 103 Wis. 2d 228, 307 N.W. 2d 628 (1981) [overruling *State v. Stanislawski*, 62 Wis. 2d 730, 216 N.W. 2d 8 (1974)]. In *Stanislawski*, the Court had earlier held that polygraph evidence

1. We note that a number of jurisdictions continue to refuse to admit polygraph evidence and have never experimented with the admission by stipulation approach. *Pulakis v. State*, 476 P. 2d 474 (Alaska 1970); *People v. Anderson*, --- Colo. ---, 637 P. 2d 354 (1981); *State v. Antone*, 62 Hawaii 346, 615 P. 2d 101 (1980); *People v. Monigan*, 72 Ill. App. 3d 87, 390 N.E. 2d 562 (1979); *Penn v. Commonwealth*, 417 S.W. 2d 258 (Ky. 1967); *State v. Catanese*, 368 So. 2d 975 (La. 1979); *State v. Gagne*, 343 A. 2d 186 (Me. 1975); *Akonom v. State*, 40 Md. App. 676, 394 A. 2d 1213 (1978); *People v. Rocha*, 110 Mich. App. 1, 312 N.W. 2d 657 (1981); *Jordon v. State*, 365 So. 2d 1198 (Miss. 1978); *State v. Biddle*, 599 S.W. 2d 182 (Mo. 1980) (en banc); *State v. Beachman*, --- Mont. ---, 616 P. 2d 337 (1980); *State v. Steinmark*, 195 Neb. 545, 239 N.W. 2d 495 (1976); *State v. French*, 119 N.H. 500, 403 A. 2d 424 (1979); *Commonwealth v. Pfender*, 280 Pa. Super. 417, 421 A. 2d 791 (1980); *State v. Watson*, 248 N.W. 2d 398 (S.D. 1976); *Jones v. Commonwealth*, 214 Va. 723, 204 S.E. 2d 247 (1974); and *State v. Frazier*, 252 S.E. 2d 39 (W.Va. 1979).

would be admissible subject to the same conditions that our Court of Appeals adopted in *State v. Steele, supra.* The Court in *Dean* concluded, however, that the *Stanislawski* rule was not functioning in a manner which enhanced the reliability of polygraph evidence and did not protect the integrity of the trial to the degree necessary to justify its continuance. 103 Wis. 2d at 229, 307 N.W. 2d at 629.

We are also persuaded by the criticisms directed to the admission by stipulation approach. As alluded to earlier in this opinion, we have never retreated from our basic position that polygraph evidence is inherently unreliable. Thus, we must determine whether the conditions placed upon the admissibility of polygraph evidence in *State v. Steele*, 27 N.C. App. 496, 500, 219 S.E. 2d 540, 543 (1975), and adopted by this Court in *State v. Milano*, 297 N.C. 485, 499, 256 S.E. 2d 154, 162 (1979), are sufficient to guard against the prejudicial factors inherent in polygraph evidence.

First, we are forced to conclude that the stipulation accomplishes little toward enhancing the reliability of the polygraph. By entering into a stipulation, the parties have merely agreed to the admissibility of the polygraph evidence, thereby waiving any objections to the basic theory of polygraphy. The stipulation is, then, based on principles of consent and waiver and does not even purport to deal with the difficult questions respecting the reliability of the polygraph as an accurate means to detect deception. It simply cannot logically be argued that any foundation as to accuracy is achieved by stipulation.

Our misgivings regarding the effectiveness of the stipulation to guarantee a reliable examination are tempered somewhat by our rule that, notwithstanding the stipulation, the admissibility of the test results is subject to the discretion of the trial judge. *State v. Meadows*, 306 N.C. 683, 686, 295 S.E. 2d 394, 396 (1982); *State v. Milano*, 297 N.C. 485, 499, 256 S.E. 2d 154, 162 (1979); *State v. Steele*, 27 N.C. App. 496, 500, 219 S.E. 2d 540, 543 (1975). If the presiding judge is not satisfied that the examiner is qualified or that the test was conducted under proper conditions, he may refuse to accept the polygraph evidence.

We are not convinced that this discretionary power is a sufficient safeguard to ensure reliability of the polygraph test results

in a particular case. In making this determination, we intend no criticism of the trial judges who have attempted to deal with the issues surrounding the admissibility of polygraph evidence. Rather, we are forced to conclude that the administration of justice simply cannot, and should not, tolerate the incredible burdens involved in the process of ensuring that a polygraph examination has been properly administered. If a trial court were to adequately police the reliability of stipulated results, the time required to explore the innumerable factors which could affect the accuracy of a particular test would be incalculable. *See* Note, *Polygraph Evidence Held Inadmissible in Criminal Trials in Wisconsin, State v. Dean*, 65 Marq. L. Rev. 697, 705 (1982).

Recognizing that a litigant could legitimately challenge the proffered results of a test on the basis of the motivation of the subject, the subject's physical and mental condition, the competence and attitude of the examiner, the wording of the relevant questions, and the interpretation of the test results, we are acutely aware of the possibility that the criminal proceeding may degenerate into a trial of the polygraph machine. *See United States v. Wilson*, 361 F. Supp. 510, 513 (D. Md. 1973); Abbell, *Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials*, 15 Am. Crim. L. Rev. 29, 50-52 (1977). The introduction and rebuttal of polygraph evidence, if all the possibilities for error in the polygraphic process were deeply explored, could divert the jury's attention from the question of the defendant's guilt or innocence to a judgment of the validity and limitations of the polygraph. It is our view that the *Steele* conditions do not satisfactorily deal with this problem. They provide no safeguards to protect against the spectre of trial by polygraph. In fact, we question whether it would even be appropriate to limit the manner in which the admitted polygraph results could be challenged in view of the recognized unreliability of the test.

We are also disturbed by the possibility that the jury may be unduly persuaded by the polygraph evidence. The Eighth Circuit Court of Appeals expressed their concern in this way:

> When polygraph evidence is offered in evidence at trial, it is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi. During the course of laying the evidentiary foundation at trial, the polygraphist will

> present his own assessment of the test's reliability which will generally be well in excess of 90 percent. He will also present physical evidence, in the form of the polygram, to enable him to advert the jury's attention to various recorded physiological responses which tend to support his conclusions. Based upon the presentment of this particular form of scientific evidence, present-day jurors, despite their sophistication and increased educational levels and intellectual capacities, are still likely to give significant, if not conclusive, weight to a polygraphist's opinion as to whether the defendant is being truthful or deceitful in his response to a question bearing on a dispositive issue in a criminal case. To the extent that the polygraph results are accepted as unimpeachable or conclusive by jurors, despite cautionary instructions by the trial judge, the jurors' traditional responsibility to collectively ascertain the facts and adjudge guilt or innocence is preempted.

United States v. Alexander, 526 F. 2d 161, 168 (8th Cir. 1975).

It may be argued that cautionary instructions are sufficient to overcome this objection. One of the *Steele* conditions is that the jury be instructed to consider evidence of the polygraph results only as they relate to whether the defendant was telling the truth at the time of the examination. The jury must be told that the examiner's testimony is not intended to prove or disprove any element of the crime with which the defendant is charged.

Again, we turn to the Eighth Circuit for appropriate language revealing the potential decisiveness of polygraph testimony despite cautionary instructions.

> If the expert testimony is believed by the jury, a guilty verdict is usually mandated. The polygraphist's testimony often is not limited to mere identification or any other limited aspect of defendant's possible participation in the criminal act. Through the testimony of the polygraph expert relating to whether the defendant was being truthful in his responses concerning participation in the crime, the expert is thus proffering his opinion based on scientific evidence bearing upon the sole issue reserved for the jury—is the defendant innocent or guilty?

United States v. Alexander, 526 F. 2d at 169.

We conclude from this discussion that the admission by stipulation approach does not resolve some of the more perplexing problems attendant to the use of polygraph evidence. The validity of the polygraphic process is dependent upon such a large number of variable factors, many of which are extremely difficult, if not impossible, to assess, that we feel the stipulation simply cannot adequately deal with all situations which might arise affecting the accuracy of any particular test.

We therefore hold that in North Carolina, polygraph evidence is no longer admissible in any trial. This is so even though the parties stipulate to its admissibility. The rule herein announced shall be effective in all trials, civil and criminal, commencing on or after the certification date of this opinion, including the retrial of this case. *State v. Steele*, *supra*, *State v. Milano*, *supra*, and *State v. Meadows*, *supra*, are expressly overruled to the extent that they are in conflict with this decision. We wish to make it abundantly clear, however, that this rule does not affect the use of the polygraph for investigatory purposes.

For the reasons earlier stated regarding the exclusion of evidence relating to the first polygraph examination administered to defendant, there must be a

New trial.

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

STATE OF NORTH CAROLINA v. LORAN RICHARD CHRISTOPHER, JR.

No. 595PA82

(Filed 8 March 1983)

Indictment and Warrant § 17.2— fatal variance as to time of conspiracy

A variance between an indictment charging that defendant conspired "on or about the 12th day of December, 1980" to commit felonious larceny of hams and evidence tending to show that defendant and a co-conspirator had conversations concerning the hams and their value sometime in October or November

and in December of 1980 and that the hams were stolen after Christmas was prejudicial to defendant in light of defendant's evidence that he was elsewhere on the date charged in the indictment, 12 December 1980, since defendant was forced to defend his actions over a period of time much greater than the time specified in the indictment.

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

Justice MITCHELL concurring.

Justice MEYER joins in this concurring opinion.

ON defendant's petition for discretionary review of the decision of the Court of Appeals, 58 N.C. App. 788, 295 S.E. 2d 487 (1982) (opinion by *Judge Hill* with *Judge* (now Justice) *Harry C. Martin* and *Judge Becton* concurring), finding no error in the judgment entered by *Cornelius, J.*, on 13 August 1981 in Superior Court, CATAWBA County.

The Court of Appeals vacated defendant's conviction of receiving stolen goods but found no error in defendant's conviction of conspiring to commit felonious larceny. Defendant seeks to vacate the conspiracy conviction on the basis, *inter alia*, that there is a fatal variance between the date of the offense alleged in the indictment and the date presented at trial.

At trial the State's evidence tended to show that Johnny McCracken was employed as a truck driver for Mom and Pop's Smokehouse, Inc. from August 1980 until February 1981. The evidence also showed that Johnny McCracken was acquainted with the defendant and had known defendant for at least seven years. Sometime in October or November of 1980 the defendant mentioned to McCracken that he was "sitting on a gold mine." At some point in December 1980 defendant told McCracken that "he could get rid of some ham if I (McCracken) could get it."

Johnny McCracken admitted to stealing the ham from Mom and Pop's Smokehouse, Inc. sometime in late December, 1980 by having an unauthorized pallet of ham loaded onto his delivery truck. McCracken then took the ham to his house where defendant was supposed to pick it up and in fact did so.

The State's evidence also included the testimony of Tom McCall who stated that defendant delivered to McCall's store several cases of Mom and Pop's Smokehouse, Inc. hams in December 1980 or January 1981. McCall testified that defendant charged him

substantially less than the list price of the hams and the delivery was made through the use of defendant's car. Although the State's evidence failed to show that there was ever any agreement as to how the ham was to be taken, when the ham was to be taken, or how McCracken asked to be paid for his part in the theft, McCracken did testify that sometime after 1 January 1981 he was paid fifty dollars and given a 1972 Chevrolet automobile by defendant.

Defendant's evidence tended to show that on the weekend of 12 December 1980 he was in Kingsport, Tennessee with his girlfriend, Beverly Cole. Ms. Cole testifed that she was also with the defendant on the 19th and 20th of December 1980. Defendant's evidence further showed that the Chevrolet automobile which Johnny McCracken took possession of, was the property of defendant's sister-in-law, Darlene Christopher and had been sold by her to Johnny McCracken for the sum of $350.00.

Defendant testified that he had known Johnny McCracken for at least seven years and that he had on occasion seen McCracken during November and December of 1980. Defendant further testified that his discussions with McCracken were casual and no mention was ever made concerning McCracken "sitting on a gold mine" or concerning defendant's ability to get rid of any hams McCracken might obtain. Defendant further testifed that he never took possession of any hams belonging to Mom and Pop's Smokehouse, Inc., and he never sold any hams to Tom McCall.

At the end of all the evidence the trial judge instructed the jury that they could find defendant guilty of the conspiracy charge if they found that on or about 14 December 1980 or the latter part of 1980 the defendant conspired to commit felonious larceny. The jury found defendant guilty of conspiring to commit felonious larceny. Judge Cornelius imposed a three-year sentence but ordered defendant to serve only 90 days, with the remaining thirty-three months suspended.

Defendant appealed to the Court of Appeals which upheld the conviction of conspiring to commit larceny. From the decision of the Court of Appeals defendant sought discretionary review by this Court pursuant to G.S. 7A-31 which was granted 8 December 1982.

Sigmon, Clark and Mackie by Jeffrey T. Mackie and Barbara H. Kern, for defendant-appellant.

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

COPELAND, Justice.

Under the second question presented for review by the defendant he contends there exists a fatal variance between the date of the conspiracy alleged in the indictment, 12 December 1980, and the date of the conspiracy as shown by the State's evidence at trial. Such a variance, the defendant argues, in light of defendant's alibi defense, is prejudicial. We agree that the variance between the date alleged in the indictment and the date shown by the evidence at trial prejudiced defendant's ability to present a defense to the charge of conspiring to commit larceny.

The bill of indictment alleges that "on or about the 12th day of December, 1980, in Catawba County Loran Richard Christopher, Jr. unlawfully and wilfully did feloniously agree, plan, combine, conspire and confederate with Johnny McCracken . . ." to commit felonious larceny from Mom and Pop's Smokehouse, Inc. The indictment was undoubtedly based primarily on the statements of Johnny McCracken who admitted to stealing the ham from Mom and Pop's Smokehouse, Inc. In a statement to the police Johnny McCracken stated that on or about 14 December 1980 he stole the hams.

As a result of the indictment and Johnny McCracken's statement the defendant prepared his defense for trial in a manner designed to explain via an alibi the impossibility of his involvement in a conspiracy on 12 December 1980 and a theft two days later on 14 December 1980. However, at trial the State did not offer evidence that any criminal activity took place on or about 12 December 1980. Instead the State's chief witness, McCracken, testified that the hams were taken from Mom and Pop's Smokehouse, Inc. sometime after Christmas. As for his testimony concerning the conspiracy McCracken could be no more specific than to say he had conversations with the defendant sometime in October or November and in December. McCracken failed to pinpoint even one specific date on which the planned larceny was discussed or carried out. As a result, the defendant came to trial

prepared to defend his innocence of a crime alleged to have happened around 12 December 1980 and was forced to defend his innocence of a crime which might have occurred over a three months period from October 1980 to January 1981.

In *State v. Trippe*, 222 N.C. 600, 24 S.E. 2d 340 (1943), this Court held that when the date alleged in the indictment is not of the essence of the offense charged a "variance between allegation and proof as to time is not material where no statute of limitations is involved." 222 N.C. at 601, 24 S.E. 2d at 341; *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961). In *State v. Trippe*, 222 N.C. 600, 24 S.E. 2d 340, the defendant was charged with carnal knowledge of a female under sixteen years of age. For such a crime the date of the act was not essential so long as it was proven that the victim was under the age of sixteen and had no prior sexual behavior.

Much like the crime in *State v. Trippe*, 222 N.C. 600, 24 S.E. 2d 340, the date of the crime of conspiracy to commit larceny is "not of the essence of the offense charged." *State v. Trippe*, 222 N.C. 600, 601, 24 S.E. 2d 340, 341. The crime of conspiracy is complete when there is a meeting of the minds and no overt act is necessary. *State v. Gallimore*, 272 N.C. 528, 158 S.E. 2d at 505 (1968). Although the crime of conspiracy is to be completed upon a meeting of the minds, it may be a continuing crime which extends over a period of years. *State v. Brewer*, 258 N.C. 533, 129 S.E. 2d 262 (1962).

Even though the date in the indictment for crimes like conspiracy is not ordinarily material, to have a rule that allows the State to prove a different date at trial, "cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense." *State v. Whittemore*, 255 N.C. 583, 592, 122 S.E. 2d 396, 403 (1961).

In *State v. Whittemore, supra*, the State presented evidence during its case in chief that the crime was committed on the date alleged in the indictment. Defendant then presented an alibi defense for the date alleged in the indictment. After defendant rested his case the State presented rebuttal evidence tending to show the crime occurred on a date different from the date alleged in the indictment or shown by the State during its case in chief. In *Whittemore* the defendant was clearly disadvantaged because

he was misled by the indictment and the State's evidence as to the dates of the alleged crime. The result being that the State was able to present alternative dates for the crime without allowing defendant an opportunity to defend his innocence as to those dates.

Although the defendant in the case *sub judice* has not been prejudiced in the same manner as the defendant in *Whittemore*, to-wit, not being allowed to explain the alternative dates, the defendant before us was nonetheless prejudiced. The wide ranging discrepancies between the indictment and the State's evidence at trial forced this defendant to explain conversations and actions with a long time acquaintance which in some instances were more than a month from the date alleged in the indictment. The result is a trial by ambush.

We are not unmindful that conspiracy offenses are ongoing crimes which may encompass many months. However, conspiracy crimes may be of very short duration covering less than one day. The indictment suggests the conspiracy occurred on 12 December 1980 and the defense was prepared in the light of this date. However, at trial the State ignored the indictment date and offered vague evidence that the conspiracy occurred over a three months period. The vague testimony of Johnny McCracken left the jury with the impression that this conspiracy began sometime in October or November of 1980 but no specific day, week or even month could be recalled.

As a result of the State's "bait and switch" routine the defendant was forced to defend his actions over a period of time much greater than the time specified in the indictment. Such a disparity in the dates alleged and the dates supported by the evidence at trial, considering the weak testimony offered by the State, leads to prejudicial error. We therefore grant defendant a new trial on his conviction of conspiring to commit larceny.

The defendant's other assignments of error will not likely recur at retrial and will not be discussed.

The decision of the Court of Appeals is reversed and this case remanded to that Court for remand to the Superior Court, Catawba County for a new trial on the charge of conspiring to commit larceny.

Reversed and remanded.

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

Justice MITCHELL concurring.

I concur in the result reached by the majority and in the principles of law which I understand the majority to rely upon in reaching its holding. As I understand the majority opinion, the vice in the State's case here is that the State chose in drafting its indictment to tie itself to the one specific date of 12 December 1980 and to allege that the defendant "did feloniously agree, plan, combine, conspire and confederate" on that date. I further understand the majority opinion to interpret the use of the verbs "agree," "plan," "combine," "conspire" and "confederate" to have caused the defendant reasonably to believe that the State contended that he *entered* into the alleged conspiracy on that date. The defendant then justifiably relied upon the misperception induced by the indictment and prepared his defense in the belief that the State would seek to prove his involvement in a conspiracy on that date and no other.

At trial the State's evidence tended to show that the defendant entered into the conspiracy to commit felonious larceny well prior to the specific date alleged in the bill of indictment and remained a party to the conspiracy until a time well after the date alleged in the bill. As I read the majority opinion, the majority views this simply as a case in which the form of the bill of indictment allowed the defendant the reasonable belief that the State was contending that he conspired only on the date alleged in the bill. After the defendant offered evidence in the nature of alibi evidence for the date charged, the State did not attempt to prove that he *entered* into the conspiracy on that date. In other words, the majority treats this as a case in which the failure of the State's proof to match its allegations substantially impaired the defendant's ability to prepare a defense. I agree.

I am concerned, however, that portions of the majority opinion could be misconstrued as changing long established principles of law regarding the somewhat unique offense of criminal conspiracy. I do not believe that the majority opinion is intended to

have or has that effect. In particular, I am concerned that the majority opinion not be misread as indicating that in the present case the evidence was insufficient to show that the defendant entered into a criminal conspiracy to commit larceny prior to 12 December 1980 and continued as a conspirator until the conspiracy was consummated by the actual larceny. The fault is in the bill of indictment, not the evidence presented. The evidence clearly was sufficient in this regard to support a conviction for conspiracy upon a proper bill of indictment giving adequate notice to the defendant which would enable him to adequately prepare a defense.

Conspiracies are continuing offenses which generally occur over a period of time of more than a day. Even though the offense of conspiracy is complete upon the formation of the illegal agreement, the offense continues until the conspiracy is either consummated or abandoned. *State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39 (1969). A distinction must be made here between the larceny and the criminal conspiracy to commit larceny. In the first, the *corpus delicti* is the act itself; in the latter, it is the meeting of the minds in an agreement to do the act. *See, State v. Whiteside*, 204 N.C. 710, 169 S.E. 711 (1933). As conspiracies are continuing offenses, the better practice in drawing bills of indictment would be to state the dates of the criminal conspiracy as the entire period during which the State contends the defendant was a party to the continuing conspiracy. This may be done by simply stating that the defendant agreed, planned, combined and conspired "from on or about" a particular date "until on or about" a particular date.

Had the bill of indictment in this case been drawn as indicated above, a result different from the one reached by the majority would have been required. The defendant would have known that the State contended that the conspiracy began sometime in October or November of 1980 and continued until at least the end of December of that year. Providing such information in the bill of indictment would assure that the defendant was aware of the necessity of filing a bill of particulars if he desired further and more specific information.

We have previously indicated that, in conspiracy cases, we will encourage our trial courts to allow motions for bills of particulars directing prosecutors to reveal information required to

enable defendants to meet the charges against them, to the extent such information is known to the prosecutors. *State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39 (1969). The State will frequently not have direct evidence available to it to show the precise date upon which the conspirators entered into the conspiracy. The State can be required, however, to provide the defendant with such information as it has on the issue. *See, id.* The conspiracy need not be proved by direct evidence and may be proved by circumstantial evidence. "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*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933); *quoted with approval in State v. LeDuc*, 306 N.C. 62, 76, 291 S.E. 2d 607, 616 (1982). Therefore, in such cases, the State often will not be able to give the defendant a precise date upon which it contends the conspiracy was formed but will be able to place the defendant in as good a position as the State finds itself. The ultimate issues of whether and on what date a conspiracy has been entered into by the defendant will remain a question for the jury, with the State and the defendant going to trial with equal knowledge.

Even if the defendant did not seek a bill of particulars, a bill of indictment as suggested herein would have informed the defendant that the State contended that the conspiracy charged was a continuing offense occurring over a considerable period of time. He would then have understood that the evidence he actually offered during the trial here, concerning his whereabouts on the weekend of 12 December 1980 and on the 19th and 20th of December, 1980, did not tend to establish an "alibi" in the true sense of that term. In order to establish an alibi, a defendant must offer evidence showing that he was elsewhere at the time of the crime in question and, therefore, could not have committed the crime charged.

The majority holds, and I agree, that under the bill of indictment and the evidence relied upon in this case, the defendant's offer of evidence that he was elsewhere on the *only date* charged in the bill was in the nature of alibi evidence and made the time of the offense material and of the essence. *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961). Under a bill of indictment that alleged the entire time during which the State contended the con-

spiracy existed, however, time clearly would not have been made of the essence or material by the defendant's "alibi" evidence. Unlike the crimes charged in *Whittemore*, the continuing offense of criminal conspiracy may and often does occur on more than one date. Thus, evidence that the defendant could not have *entered* into the conspiracy on four or five days during the several months the State sought to prove he was engaged in a continuing criminal conspiracy would not have amounted to true "alibi" evidence, as it would not have tended to show that the defendant was elsewhere during the entire time the crime was committed and, therefore, could not possibly have committed the crime. A bill of indictment worded as I have suggested, would have caused the defendant to know that the evidence he intended to and did offer during his trial clearly did not tend to negate the possibility that he was already a party to a criminal conspiracy on the dates for which he prepared his defense. He would have known that, instead, his evidence, at most, had some tendency to show that he did not *enter* into a conspiracy on those dates. Had the bill of indictment given proper notice to the defendant, the defendant simply would have been able to prepare his defense in light of the facts the State sought to prove.

The circumstantial evidence offered by the State was substantial evidence tending to show that the defendant and his alleged co-conspirator had a meeting of the minds sometime between October and the date on which the hams were actually stolen. The State's evidence tended to show that they had conversations concerning the hams and their value as early as October. They had other conversations in the ensuing months. The State's evidence also tended to show that the defendant's alleged co-conspirator stole the hams and delivered them to the defendant who sold them for substantially less than their market value and gave some of the proceeds to the alleged co-conspirator. The crime of conspiracy has been committed when there is a union of wills for the unlawful purpose. "Furthermore, the agreement may be 'a mutual, implied understanding' rather than an express understanding." *State v. LeDuc*, 306 N.C. 62, 75, 291 S.E. 2d 607, 615 (1982). Such an implied understanding need not be proved by direct evidence of acts which precede the completion of the conspiracy. *State v. Locklear*, 8 N.C. App. 535, 174 S.E. 2d 641 (1970). As pointed out by Chief Justice Stacy for this Court:

> If four men should meet upon a desert, all coming from different points of the compass, and each carrying upon his shoulder a plank, which exactly fitted and dovetailed with the others so as to form a perfect square, it would be difficult to believe they had not previously been together. At least it would be some evidence tending to support the inference.

State v. Lea, 203 N.C. 13, 31, 164 S.E. 737, 747, *petition for reconsideration denied*, 203 N.C. 35, 164 S.E. 749, *cert. denied sub nom. State v. Davis*, 287 U.S. 649, 77 L.Ed. 561, 53 S.Ct. 95 (1932). The evidence introduced by the State constituted substantial circumstantial evidence that the defendant entered into a criminal conspiracy to commit larceny at some point between October and the day the hams were stolen in December. It would be appropriate upon this evidence, therefore, to submit the issue of the defendant's guilt of criminal conspiracy to the jury based upon a proper bill of indictment. Such a bill would be proper if it gave the defendant sufficient notice of the charges against him to enable him to prepare his defense. A proper bill would not permit the defendant to reasonably but erroneously prepare his defense in the belief that the State would offer proof of criminal conduct occurring only on the day for which he offered alibi evidence.

Based upon my understanding of the holding of the Court, as explained herein, I concur.

Justice MEYER joins in this concurring opinion.

STATE OF NORTH CAROLINA v. DAVID AMBROSE ODOM A/K/A DAWUD AL-AMIN SHABAZZ

No. 551A82

(Filed 8 March 1983)

Criminal Law §§ 115.1, 163 – failure to object to instructions – adoption of "plain error" rule – no "plain error" in failure to charge on simple assault

Rule of Appellate Procedure 10(b)(2) barred defendant from assigning as error the court's failure to instruct on the possible verdict of guilty of simple assault where defendant made no objection to the instructions at trial. However, the "plain error" rule as used by the federal courts pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure is adopted by the court to apply to the "exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " There

was, however, no "plain error" mandating a new trial for the defendant who was convicted of attempted robbery with a firearm where the evidence, when considered as a whole, did not justify an instruction on the offense of simple assault.

BEFORE *Ferrell, Judge*, at the 3 May 1982 Criminal Session of Superior Court, MECKLENBURG County, the defendant, David Ambrose Odom, aka Dawud Al-Amin Shabazz, was convicted of attempted robbery with a firearm and sentenced to life imprisonment. The defendant appeals to the Supreme Court as a matter of right pursuant to G.S. 7A-27(a).

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

Adam Stein, Appellate Defender, by James H. Gold, Assistant Appellate Defender for defendant-appellant.

MITCHELL, Justice.

The defendant contends that he should be granted a new trial due to the failure of the trial court to instruct the jury on the offense of simple assault. The defendant admits that he did not object to the instructions at trial and therefore waived his right to appeal on that ground. N.C.R. App. P. 10(b)(2). We agree with the defendant that the adoption of the "plain error" rule is appropriate in light of Rule 10(b)(2). While we adopt the "plain error" rule, when applying it to the defendant's case we find no "plain error" that would mandate a new trial.

The charges against the defendant arose out of an incident at the Galaxy Discount Beverage Store in Charlotte. William H. Streater testified that he owns the store and that he was operating it by himself between 10:00 and 10:30 a.m. on 25 April 1981. At that time Streater was also a patrol officer with the Charlotte Police Department. On the morning of 25 April 1981, Streater was in civilian clothes and was counting money when a man, later identified as the defendant, entered the store and purchased some beer. The defendant left, but immediately returned and purchased another item and left the store again. A moment later, the defendant returned and claimed that the drink machine outside of the store had taken his nickel. He asked for a nickel in exchange for five pennies. When Streater opened the register to

get the change, the defendant produced a gun and told Streater to "move back." The defendant then ordered Streater to get down on his knees and, when he was on one knee, the defendant put the gun to Streater's neck and pulled the trigger, but the gun did not fire.

At this point, Streater grabbed at the gun and pushed the defendant. When the defendant fell back, Streater saw him raise his gun. Streater drew his own gun and fired at the defendant who was on the other side of the counter. The two men exchanged gunfire and finally Streater heard the footsteps of a person running out the door. Streater thought that he had hit the defendant with one of his shots, but he was not positive. A small amount of blood was found in the front of the store where the defendant was during the gunfire exchange.

Darryl Bernard, age fourteen, helped Streater work around the store. He was riding his bicycle to the store on 25 April 1981 when he heard someone hollering. He looked in the back door of the store and saw the defendant running out of the front door to a green car which appeared to be waiting. Bernard saw a gun in the defendant's hand. When Bernard entered the store he saw Streater who also had a gun in his hand.

Estella Blackwell was in the beauty salon adjacent to the Galaxy Discount Beverage Store on 25 April 1981. She heard two loud noises and then two or three shots from the beverage store. She and the other patrons got down on the floor and she saw someone get into a green Chevrolet and drive off. She called out the number from the license plate on the car to someone else in the store who recorded the number. She later identified the car that the defendant had rented and the police had impounded as the same car that she saw leaving the store after the shootout.

The police officers investigating the shooting found five bullets at the scene. Two of the bullets were taken from the wall of the building, including the wall adjoining the beauty salon. Later that evening, Streater discovered another bullet that had not been found in the initial search. The police examined Streater's gun and determined that it contained four spent cartridges and two live rounds. Investigating officers also discovered some blood on the floor near the ice cream cooler. The green car was searched and a bloody washcloth was found inside.

The State also presented evidence that a nearby Handy Pantry Food Store was robbed on 12 April 1981 by a man identified as the defendant.

The defendant testified on his own behalf. On the morning of 25 April 1981 he had an argument with his wife. He was driving a rented car because he was having problems with his own car. He decided to stop at the Galaxy Discount Beverage Store to buy a soft drink from the machine outside the store. When he put some coins in the machine, he did not get a drink or change. Frustrated, he pushed the machine against the wall. The man in the store, Streater, yelled, "Nigger, don't tear that box up." The defendant continued to push the machine and Streater came out of the store. Streater jerked the defendant around and the defendant hit him. The two men exchanged blows and Streater produced a gun from his pocket and fired at the defendant who took cover. Streater then told the defendant to come out because he was a police officer. Streater fired a few more shots and the defendant ran to his car, which he had left running, and drove off.

The defendant testified that he did not own a gun and that he did not have a weapon with him when he was at the store on 25 April 1981. He was not hit by any of the bullets and he testified that he felt that both he and Streater had overreacted. Following the encounter at the store, the defendant parked his car and went to play basketball. The defendant noticed police cars around his car and walked to his mother's house and borrowed her car. He drove to the bus station and called his wife who told him not to come home because "[t]hey say they are going to kill you." Following his conversation with his wife, the defendant got on a bus and left for New York.

The defendant admitted that he had been convicted of armed robbery about twenty years ago when he was in his early twenties. He had also been convicted of possession of heroin, disorderly conduct, assault on a police officer, breaking and entering, theft by taking and larceny. He had been convicted of common law robbery about one month before his trial. He was also convicted of the felony of possession of a firearm while he was in New York.

The defendant presented no other witnesses.

The defendant's only assignment of error is the failure of the trial court to instruct the jury on the misdemeanor of simple

assault as well as the felony of attempted robbery with a firearm. The defendant did not submit a request for an instruction on simple assault nor did he object to the instructions as given. Assuming, without deciding, that simple assault is a lesser included offense of attempted robbery with a firearm,[1] we nevertheless find no error in the case *sub judice* that would require a new trial. We have held that "[w]hen there is conflicting evidence of the essential elements of the greater crime and evidence of a lesser included offense, the trial judge must instruct on the lesser included offense even where there is no specific request for such instruction." *State v. Brown*, 300 N.C. 41, 50, 265 S.E. 2d 191, 197 (1980). However, that rule was recently altered by an amendment to the North Carolina Rules of Appellate Procedure. Rule 10(b)(2) now provides:

> No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

The defendant admits that no objection to the instructions was made at trial and therefore Rule 10(b)(2) bars his assigning as error the court's failure to instruct on the possible verdict of guilty of simple assault. The defendant, however, urges this Court to adopt the "plain error" rule to allow for review of some assignments of error normally barred by waiver rules such as Rule 10(b)(2).

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1. Whether a criminal offense is a lesser included offense of a greater crime is determined definitionally, not factually. "If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense." *State v. Weaver*, 306 N.C. 629, 635, 295 S.E. 2d 375, 379 (1982). While this Court has held that the crime of robbery with a firearm includes assault, *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954), there is a question as to whether the definition of *attempted* robbery with a firearm includes all of the essential elements of simple assault. *Compare, State v. Moore*, 279 N.C. 455, 183 S.E. 2d 546 (1971) (fear not an element of attempted robbery); *and State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971) (definition of attempt); *with, State v. Allen*, 245 N.C. 185, 95 S.E. 2d 526 (1956) (definition of assault).

Rule 30 of the Federal Rules of Criminal Procedure is virtually the same as North Carolina's Rule 10(b)(2). The "plain error" rule is used by the federal courts pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure which states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The rule, as interpreted by several federal courts, is defined as follows:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *"fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

United States v. McCaskill, 676 F. 2d 995, 1002 (4th Cir. 1982) (footnotes omitted) (emphasis in original); *see also* 3A Wright, Federal Practice and Procedure: Criminal 2d § 856 (1982). Acknowledging the potential harshness of Rule 10(b)(2), we adopt the "plain error" rule as quoted above. We note that the term "plain error" does not simply mean obvious or apparent error, but rather has the meaning given it by the court in *McCaskill.*

The adoption of the "plain error" rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial. To hold so would negate Rule 10(b)(2) which is not the intent or purpose of the "plain error" rule. *See United States v. Ostendorff,* 371 F. 2d 729 (4th Cir.), *cert. denied,* 386 U.S. 982, 18 L.Ed. 2d 229, 87 S.Ct. 1286 (1967). The purpose of Rule 10(b)(2) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. Indeed, even when the "plain error" rule is ap-

plied,"[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L.Ed. 2d 203, 212, 97 S.Ct. 1730, 1736 (1977).

In deciding whether a defect in the jury instruction constitutes "plain error," the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt. *United States v. Jackson*, 569 F. 2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907, 57 L.Ed. 2d 1137, 98 S.Ct. 3096 (1978). In the present case, a review of the whole record reveals no "plain error" mandating a new trial for the defendant. The State presented evidence of the victim of the robbery who testified that the defendant demanded money, put a gun to the victim's throat and pulled the trigger and exchanged gunfire with the victim before fleeing. This testimony was corroborated by another witness who saw both the defendant and the victim with guns in their hands, a witness who heard several gunshots and investigative police officers who found fragments of five bullets and who determined that the victim's gun had been fired four times.

The defendant's evidence consisted solely of his own uncorroborated testimony. He did not deny being present at the store and fighting with the victim. He testifed, however, that he had never owned a firearm and that he did not have a gun and did not shoot at the victim on 25 April 1981. His testimony was not only contradicted by the witnesses for the State, he was also impeached by his considerable past criminal record, which included convictions for armed robbery, common law robbery and possession of a firearm. The defendant's flight from North Carolina to New York following the incident was also admissible as evidence of the defendant's guilt. *State v. Self*, 280 N.C. 665, 187 S.E. 2d 93 (1972). Moreover, the circumstances of the incident and the defendant's action following the shootout, according to the defendant's testimony, do not lend credibility to his version of the encounter. The State's evidence indicated that the defendant had been wounded during the exchange of gunfire at the store. There was blood in the store and a bloody washcloth was found a short time later in the defendant's car. According to the defendant's own testimony he had been shot at several times by the storeowner. Yet, following this encounter, according to the defendant

he simply went to play basketball, then borrowed his mother's car and drove to the bus station when he saw the police around his car. He then boarded a bus for New York when his wife told him "they" were going to kill him.

Prior to the trial court's charge to the jury, the defendant submitted twelve "Proposed Additional Jury Instructions," none of which contained a request for an instruction on simple assault. Finally, following the charge to the jury, the defendant answered in the negative when asked by the court if he had any further requests.

Upon the record as a whole, we find no "plain error" in the defendant's trial.

No error.

STATE OF NORTH CAROLINA v. RONALD HAMMOND

No. 278A82

(Filed 8 March 1983)

1. **Escape § 6— felonious escape—evidence of commitments for felony and misdemeanor**

In a prosecution of defendant under G.S. 148-45(b) for felonious escape while on work release, it was not error for the trial court to admit evidence that defendant was incarcerated for both a felony and a misdemeanor at the time he escaped, although the crime of felonious escape required proof that defendant was incarcerated for the commission of a felony, not a misdemeanor, since defendant could have been found guilty of the lesser included offense of misdemeanor escape under G.S. 148-45(a) if the felony commitment was determined to be invalid and the misdemeanor to be valid.

2. **Criminal Law § 66.18— in-court identification—appellate review—necessity for objection**

Defendant waived his right to have the admission of an in-court identification considered on appellate review by failing to object at trial to the in-court identification. G.S. 15A-1446(b).

3. **Criminal Law § 66.16— photographic show-up—independent origin of in-court identification**

Even if the pretrial display of an I.D. card with defendant's photograph on it to a rape victim was impermissibly suggestive, the victim's in-court identification of defendant was admissible as being of independent origin from the

photographic show-up where the trial court found upon supporting voir dire testimony that the assailant was in the presence of the victim for nearly three hours; although defendant wore a pair of pantyhose over his head, the pantyhose did not distort defendant's features and the victim could see his face through the hose; the victim gave an accurate description of defendant and the clothing he was wearing to a police officer; and the victim identified defendant without hesitation at trial and testified that her identification of him was based on her observation of him during the three hours she was in his presence at the time of the crime.

ON appeal by defendant from judgments entered by *Winberry, J.*, at the 22 March 1982 Criminal Session of Superior Court, NEW HANOVER County.

Defendant was charged in indictments proper in form with rape in the first degree, breaking or entering and larceny, armed robbery, larceny of an automobile, and escape from prison while on work release. Defendant was convicted of each charge.

Evidence presented by the state tended to show that on 20 July 1981 defendant was an inmate at the New Hanover County unit of the state prison system, serving sentences for assault with a deadly weapon on a police officer and assault on a female. As part of his sentence defendant participated in a work release program in which on some days he was checked out of the prison in the morning, worked under supervision in the community during the day, and then returned to prison after work for incarceration during the night. On 20 July 1981 defendant checked out of the prison at 7:00 a.m. and was supposed to return by 4:30 p.m. By 5:00 p.m. he had not arrived.

The state's evidence further tended to show that defendant reported for work the morning of 20 July 1981 but left at 12:30 p.m. Sometime between 12:30 p.m. and 3:15 p.m. defendant broke into and entered the home of Mrs. Brenda O'Connor. When Mrs. O'Connor and her six-year-old daughter walked into the house about 3:15, defendant grabbed Mrs. O'Connor from behind and threw her up against the wall. Defendant had a pantyhose loosely over his head and was armed with a knife. Donald O'Connor entered the house shortly thereafter and defendant wrestled him to the floor. Defendant forced the three victims into a bedroom, where he tied Mrs. O'Connor to her daughter and tied up Mr. O'Connor separately. Defendant cut Mr. and Mrs. O'Connor's clothes off and then began kissing Mrs. O'Connor on various parts

of her body. Defendant allowed Mrs. O'Connor and her daughter to get up so the daughter could go to the bathroom. Mother and daughter hobbled down the hall, hands and feet still tied. After some scuffling Mrs. O'Connor managed to hit defendant with a garden spade. Defendant then raped Mrs. O'Connor at knife point. Before leaving, defendant took money from Mr. O'Connor's wallet, one of Mrs. O'Connor's rings and some jewelry. He then took the keys to Mrs. O'Connor's car and drove away. He had been in the presence of the victims for about three hours.

Several hours after Mrs. O'Connor reported the assaults to the sheriff's department her car was observed parked in front of a house in Pender County. A deputy sheriff and an employee of the North Carolina Department of Correction who arrived at the house saw defendant inside. Defendant came out of the house, jumped off the end of the porch, and ran in a direction away from the officers. After giving proper warning, the officers fired shots at defendant and eventually took him into custody. Defendant was wearing green khaki pants and a green khaki jacket. Mrs. O'Connor's driver's license and the keys to her car were in defendant's pockets. A pair of crumpled pantyhose was found in the car.

At trial defendant presented no evidence.

Rufus L. Edmisten, Attorney General, by Wilson Hayman, Assistant Attorney General, for the state.

Adam Stein, Appellate Defender, by James H. Gold, Assistant Appellate Defender, for defendant.

MARTIN, Justice.

In this appeal defendant argues that he is entitled to a new trial because of two errors committed by the superior court. After careful review of defendant's claims, we have determined that defendant received a fair trial, free of prejudicial error. Accordingly, we affirm the judgments entered by the trial court.

[1] Defendant first argues that the court committed prejudicial error when it allowed the superintendent of the prison from which defendant escaped to testify that at the time defendant escaped he was serving a sentence imposed for misdemeanor assault on a female. In the instant case defendant was charged with felonious escape under N.C.G.S. 148-45 while on work

release. Before a defendant can be convicted of this offense, the state must prove beyond a reasonable doubt that at the time of his escape defendant was serving a sentence of incarceration imposed for the conviction of a felony. *State v. Johnson*, 21 N.C. App. 85, 203 S.E. 2d 424 (1974). In the case at bar the state was permitted to elicit testimony that at the time of his escape defendant was imprisoned by virtue of sentences imposed for a felony and for a misdemeanor. Defendant claims that the testimony that defendant was serving a prison sentence for a misdemeanor was irrelevant because the crime of felonious escape requires proof that defendant was incarcerated for the commission of a felony, not a misdemeanor. Defendant contends that the erroneous admission of the testimony concerning his incarceration for misdemeanor assault on a female highly prejudiced his case because this testimony made it more likely that the jury would believe that defendant was guilty of raping Mrs. O'Connor.

We hold that when a defendant is charged with escape from the state prison system under N.C.G.S. 148-45 the state is entitled to introduce evidence of any and all convictions for which defendant was in custody at the time of escape. When a defendant is charged with escape under this statute, the state has the burden of proving that defendant was in the legal custody of the Department of Correction at the time of the escape. Testimony concerning the kind of crimes for which defendant was sentenced to prison is relevant and competent evidence which the state may introduce in order to meet its burden of proof on this issue. If, in the present case, the felony commitment had been determined defective, then defendant would not have been guilty of felony escape under N.C.G.S. 148-45(b); however, if his imprisonment for a misdemeanor were valid, then defendant would have been guilty of the lesser included offense of misdemeanor escape under N.C.G.S. 148-45(a). *See State v. Ledford*, 9 N.C. App. 245, 175 S.E. 2d 605 (1970). In either situation the state would have been required to prove that defendant was in custody at the time of escape, and evidence that he was serving sentences for various crimes would be relevant for this purpose. Therefore, in the instant case it was not error for the trial court to admit evidence that defendant was incarcerated for both a felony and a misde-

meanor at the time he escaped from the lawful custody of the Department of Correction.[1]

[2] Defendant next contends that he is entitled to a new trial because the trial judge erred in overruling his objection to Mrs. O'Connor's in-court identification of him as her assailant. We observe at the outset that defendant failed to object at trial to Mrs. O'Connor's in-court identification of him, and thus defendant has waived his right to have this considered on appellate review. N.C. Gen. Stat. § 15A-1446(b) (1978). The record shows that when the state asked Mrs. O'Connor during direct examination "[d]o you see your assailant here in the courtroom?" defendant objected and a voir dire was held. After voir dire and in the presence of the jury, the state again asked Mrs. O'Connor whether she could see her assailant in the courtroom. Defendant objected and the trial judge properly overruled this objection. Mrs. O'Connor answered the question by replying that she did observe her assailant in the courtroom. To this point, the witness had not identified defendant as her assailant. Then the following questioning occurred without any objection by defendant:

PROSECUTOR: Would you [Mrs. O'Connor] point out your assailant?

MRS. O'CONNOR: (Pointing to the defendant.) He is sitting next to his attorney in the brown suit.

PROSECUTOR: Your Honor, I would like the record to show that she is pointing to Ronald Hammond, the defendant.

THE COURT: Let the record so show.

Because defendant failed to object to Mrs. O'Connor's identification of him during trial, defendant has waived his right to have the propriety of the in-court identification considered during this appeal. As this Court held in *State v. Foddrell*, 291 N.C. 546, 557, 231 S.E. 2d 618, 626 (1977):

1. If defendant was concerned that testimony of his prior conviction for misdemeanor assault on a female might prejudice his defense to the rape charge, he could have moved for severance of the escape and rape charges for trial. N.C. Gen. Stat. § 15A-927(a)(1) (1978).

> The rule is as quoted in *State v. Jones*, 280 N.C. 322, 339-340, 185 S.E. 2d 858, 869 (1972): "It is elementary that, 'nothing else appearing, the admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered.' . . . An assertion in this Court by the appellant that evidence, to the introduction of which he interposed no objection, was obtained in violation of his rights under the Constitution of the United States, or under the Constitution of this State, does not prevent the operation of this rule." *See State v. Lowery*, 286 N.C. 698, 213 S.E. 2d 255 (1975); *State v. Gurley*, 283 N.C. 541, 196 S.E. 2d 725 (1973); 4 Strong's North Carolina Index 3d *Criminal Law* § 162 (1976).

Nevertheless, in our discretion we have examined the record carefully and have found that even if defendant had properly objected, the admission of the evidence would not have been error.

[3] In the present case, one-half hour after defendant left Mrs. O'Connor's residence Sergeant Long of the New Hanover Sheriff's Department arrived at Mrs. O'Connor's house. He asked Mrs. O'Connor whether she could identify her assailant and she answered "definitely. Yes." She then described the assailant's height, weight and facial features to Sergeant Long. Shortly thereafter Superintendent Stallings of the New Hanover prison unit arrived at Mrs. O'Connor's house. He produced an I.D. card with a photograph on it, showed it to Mrs. O'Connor, and asked her whether the man in the photograph might be her assailant. She answered that he was. The photograph was of the defendant. Defendant claims that this pretrial photographic observation was so unnecessarily suggestive that it gave rise to a substantial likelihood of misidentification of Mrs. O'Connor's assailant. Defendant contends that Mrs. O'Connor's identification of him as her assailant resulted from her view of the I.D. photo and that therefore her in-court identification of him should not have been allowed.

Identification evidence must be excluded as violating a defendant's rights to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247 (1968); *State*

v. White, 307 N.C. 42, 296 S.E. 2d 267 (1982); *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982); *State v. Thompson*, 303 N.C. 169, 277 S.E. 2d 431 (1981).

In the instant case, assuming arguendo that the pretrial photographic display was impermissibly suggestive, we find more than adequate evidence in the record to determine that Mrs. O'Connor's in-court identification was admissible as being of independent origin. It is well settled that

> an in-court identification is competent evidence, even if the witness took part in an illegal pretrial confrontation or photographic identification, where it is first determined by the trial judge on clear and convincing evidence that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967); *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963); *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), *death sentence vacated*, 428 U.S. 902 (1976); 1 Stansbury's North Carolina Evidence § 57 (Brandis Rev. 1973).

State v. Weimer, 300 N.C. 642, 648, 268 S.E. 2d 216, 220 (1980).

As stated in *State v. Thompson, supra*, 303 N.C. 169, 172, 277 S.E. 2d 431, 434:

> The factors to be considered in determining whether the in-court identification of defendant is of independent origin include the opportunity of the witness to view the accused at the time of the crime, the witness' degree of attention at the time, the accuracy of his prior description of the accused, the witness' level of certainty in identifying the accused at the time of the confrontation, and the time between the crime and the confrontation.

In the present case the trial court found the following facts on voir dire: The assailant had been in the presence of the three victims for nearly three hours. Although he wore a stocking over his head, Mrs. O'Connor testified that "[i]t was a pair of pantyhose, and the top portion, the waist portion was used over the face." She further testified that the pantyhose did not distort

defendant's features and that she could see his face through the hose. When she described her assailant to Sergeant Long, Mrs. O'Connor stated with certainty that he was about six feet two inches tall, weighed about one hundred and sixty-five pounds, was wearing green pants and a green shirt, had a mustache and goatee, very high cheekbones and a sharp nose. She identified defendant without hesitation at trial and testified that her identification of him was based on her observation of him during the three hours she had been in his presence on 20 July 1981.

The facts found by the trial court are supported by clear, competent and convincing evidence and are conclusive upon this Court. *State v. Gibbs*, 297 N.C. 410, 255 S.E. 2d 168 (1979). At the conclusion of the voir dire held to determine whether Mrs. O'Connor's identification of defendant as her assailant was the result of unconstitutionally suggestive procedures, the trial judge concluded 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 alleged assault, and is not tainted by any pre-trial identification procedure so unnecessarily suggestive and conducive to irreparable mistaken identification as to constitute a denial of due process.

Considering Mrs. O'Connor's identification of Hammond in light of the totality of the circumstances, we hold that it was of origin independent of the photographic show-up. Therefore Mrs. O'Connor's identification would properly have been held admissible had defendant objected to it at trial.

Defendant's final contention is that he is entitled to a new sentencing hearing because the felony judgment and commitment form erroneously listed the crime of robbery with a deadly weapon as a Class C felony, whereas in fact it is a Class D felony. This clerical error has been corrected by the trial court and the record on appeal has been amended to include the corrected judgment. *York v. York*, 271 N.C. 416, 156 S.E. 2d 673 (1967); *State v. Cannon*, 244 N.C. 399, 94 S.E. 2d 339 (1956). The issue is moot.

We find that defendant received a fair trial, free of prejudicial error.

No error.

RUFUS L. EDMISTEN, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA v. ALEXANDER P. SANDS, III, EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF ROYAL WARE SANDS, DECEASED, MRS. ESTELLE S. TATEM, MRS. HUGH S. WHITE, MRS. EDNA S. JARMAN, AND WILLIAM C. STOKES, CHAIRMAN OF THE BOARD OF TRUSTEES OF THE MAIN STREET UNITED METHODIST CHURCH, REIDSVILLE, NORTH CAROLINA, AND LILLIAN P. BALSLEY, LEWIS VUN CANNON, J. EARL CONNOLLY, CLARK M. HOLT, STANFORD KALLAM, LARRY G. SOMERS, JERRY W. TURPIN, J. THOMAS WILLIAMS, AND DEAN CRADDOCK, MEMBERS OF THE BOARD OF TRUSTEES OF THE MAIN STREET UNITED METHODIST CHURCH, REIDSVILLE, NORTH CAROLINA

No. 439PA82

(Filed 8 March 1983)

1. **Trusts § 4.2— construction of charitable trust—statute inapplicable**

Since G.S. 36A-53(b) applies only to wills and trusts created prior to 31 December 1978, that statute cannot be the basis for ordering construction of a will executed on 23 August 1979 as requiring a charitable remainder unitrust created therein to be administered in accordance with IRS Regulations.

2. **Trusts § 4.2— charitable remainder unitrust—impracticable of fulfillment**

A charitable remainder unitrust created by a will was "impracticable of fulfillment" within the meaning of G.S. 36A-53(a) and (d) where the will failed to include a prohibition against self-dealing by the trustee and failed to include other administrative provisions required by IRS Regulations so that the trust will qualify for the federal estate tax charitable deduction and the federal income tax exemption.

3. **Trusts § 4.2— charitable remainder unitrust impracticable of fulfillment—appropriate remedy**

Where a charitable remainder unitrust created by a will was "impracticable of fulfillment" because the will did not contain provisions requiring administration of the trust in accordance with IRS Regulations so that the trust would qualify for the federal estate tax charitable deduction and federal income tax exemption, the appropriate remedy under G.S. 36A-53 to assure "as nearly as possible" the fulfillment of the testator's intent was a mere construction of the instrument to require administration of the trust in compliance with the applicable IRS Regulations, and the trial court erred in also reform-

ing the will to include the omitted administrative provisions required by the IRS Regulations.

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

ON discretionary review prior to determination in the Court of Appeals pursuant to G.S. 7A-31, from an order construing and reforming the will of Royal Ware Sands, entered 26 February 1982 in Superior Court, ROCKINGHAM County, by *Morgan, J.*

The testator, Royal Ware Sands, died on 28 February 1980 and his will, dated 23 August 1979, was duly admitted to probate in the office of the Clerk of Superior Court of Rockingham County, North Carolina. Alexander P. Sands, III, was appointed executor of the estate.

Under the provisions of the will, after the payment of expenses, debts and specific bequests, the remainder of the estate is to be transferred to a charitable remainder unitrust. Alexander P. Sands, III, the trustee of said charitable trust, is directed to distribute annually an amount equal to the lesser of five percent of the net fair market value of the trust assets, as determined annually, or the trust income, to the decedent's three sisters for life. Upon the death of the survivor of the sisters, the trust assets are to be transferred outright to the trustees of the Main Street United Methodist Church of Reidsville, North Carolina. The trustees are instructed to invest and reinvest the corpus and to use the income and, in their discretion, the principal, to provide scholarships for the children of Methodist families in the Reidsville area to attend summer camps and institutions of higher learning in North Carolina.

The executor maintains that this trust qualifies as a charitable remainder unitrust under Section 664 of the Internal Revenue Code and that therefore the value of the remainder interest passing irrevocably to the charitable beneficiary, the trustees of the Main Street United Methodist Church, qualifies for a charitable deduction under federal estate tax law. He further takes the position that the income of the trust is exempt from federal income tax under applicable Code provisions. On 26 November 1980, the executor filed a federal estate tax return claiming the charitable deduction above described.

The Internal Revenue Service (IRS) has issued a revenue agent's report denying the charitable deduction and proposing an adjustment that would increase the estate tax liability by more than $300,000. The IRS maintains that the trust does not qualify for either the federal estate tax charitable deduction or the federal income tax exemption because certain technical administrative provisions required by the Regulations to be included in all instruments creating a charitable remainder unitrust were not expressly included in the will. These Regulations have been promulgated by the IRS in interpreting and implementing Section 2055 and Section 664 of the Internal Revenue Code. The specific required provisions which were omitted from the will of Royal Sands will be discussed later in this opinion.

On 31 December 1981, the Attorney General of North Carolina, acting in the public interest, filed a complaint pursuant to G.S. 36A-52 seeking a judgment construing the will to provide that the trust must be administered in accordance with the requirements of the IRS Regulations pertaining to charitable remainder unitrusts. Alternatively, the Attorney General sought reformation of the trust, effective as of the date of death of the decedent, so as to include all necessary technical administrative provisions. The complaint was served on all defendants named in this action, the IRS and the United States Attorney for the Middle District of North Carolina. The IRS and the United States Attorney, however, chose not to intervene below to oppose the relief sought by the Attorney General.

A hearing on the merits was held before the Honorable Melzer A. Morgan, Jr. On 26 February 1982, Judge Morgan entered a judgment granting the relief sought in its entirety. He ordered that the will be construed from its inception as requiring administration of the trust in accordance with Section 664 of the Internal Revenue Code and all Regulations promulgated thereunder. Additionally, he ordered that the trust be reformed *nunc pro tunc* so as to include all necessary provisions respecting administration of charitable remainder unitrusts.

The appellants, the Board of Trustees of the Main Street United Methodist Church and the individual members thereof, filed a timely notice of appeal from the judgment entered by Judge Morgan. We allowed defendant's petition for discretionary review prior to determination by the Court of Appeals on 3 August 1982.

On 6 August 1982, the United States Department of Justice, on behalf of the IRS, requested a 60-day extension of time in which to determine whether it wished to file a brief *amicus curiae* on this appeal. We granted this requested extension on 9 August 1982. The Department of Justice notified this Court by letter dated 6 October 1982 that, upon review of the facts and circumstances of this case, it had decided not to participate as *amicus curiae*. Thus, the IRS has not opposed the relief sought by the Attorney General at any stage of this proceeding.

Womble, Carlyle, Sandridge & Rice, by Linwood L. Davis and Gregory L. Smith, for defendant-appellants.

Rufus L. Edmisten, Attorney General, by George W. Boylan, Assistant Attorney General and Marilyn R. Rich, Assistant Attorney General, for plaintiff-appellee.

Tuggle, Duggins, Meschan, Thornton & Elrod, by Thomas W. Sinks and J. Reed Johnston, Jr., for defendant-appellee Alexander P. Sands, III, Executor and Trustee under the Last Will and Testament of Royal Ware Sands, Deceased.

Holt & Watt, by Clark M. Holt, for defendant-appellees Mrs. Hugh S. White and Larry W. Jarman, Executor of the Estate of Edna S. Jarman, Deceased.

Day, Summs & Epps, by E. Kenneth Day, for defendant-appellee Mrs. Estelle S. Tatem.

BRANCH, Chief Justice.

The sole question presented for review concerns the propriety of the trial court's judgment construing and reforming the will of Royal Ware Sands so as to require administration of the trust in accordance with technical administrative provisions set forth in Internal Revenue Service Regulations governing charitable remainder unitrusts.

In ordering the relief requested by the Attorney General in this proceeding, the trial court concluded as a matter of law that to the extent the federal estate and income tax liability would be increased by a failure of the trust to qualify as a charitable remainder unitrust, this would constitute a partial failure of the trust within the contemplation of G.S. 36A-53(a) and (b). He also

concluded that the omission of the required administrative provisions would affect a partial voiding of the trust in violation of the public policy of this State as expressed in G.S. 36A-52.

This Court unquestionably concurs with the trial court's finding that the public policy of North Carolina is to preserve, to the fullest extent possible, the manifested intention of a testator or donor to bestow a gift for charitable purposes. The policy of protecting charitable trusts is repeatedly declared throughout the statutory provisions of Chapter 36A.

We must disagree, however, with the statutory analysis employed by the trial court in reaching the result in instant case.

[1] First, we note that G.S. 36A-53(b) has no application to this trust and cannot therefore be the basis for ordering a construction of the instrument to comply with applicable IRS Regulations. G.S. 36A-53(b) applies only to wills and trusts created prior to 31 December 1978. The will before us was executed on 23 August 1979.

[2] We are of the opinion that the situation here presented falls squarely within the terms of G.S. 36A-53(a) and (d). G.S. 36A-53(a) provides, in pertinent part:

> If a trust for charity is or becomes illegal, or impossible or impracticable of fulfillment or if a devise or bequest for charity, at the time it was intended to become effective is illegal, or impossible or impracticable of fulfillment, and if the settlor, or testator, manifested a general intention to devote the property to charity, any judge of the superior court may, on application of any trustee, executor, administrator or any interested party, or the Attorney General, order an administration of the trust, devise or bequest as nearly as possible to fulfill the manifested general charitable intention of the settlor or testator. . . . This section shall not be applicable if the settlor or testator has provided, either directly or indirectly, for an alternative plan in the event the charitable trust, devise or bequest is or becomes illegal, impossible or impracticable of fulfillment. However, if the alternative plan is also a charitable trust or devise or bequest for charity and such trust, devise or bequest for charity fails, the intention shown in the original plan shall prevail in the application of this section.

Under this statute, all that need be shown to enable a superior court judge to order an administration of the trust is that: (1) the trust is a charitable trust, *i.e.*, that the "settlor, or testator, manifested a general intention to devote the property to charity"; (2) the trust "is or becomes illegal, or impossible or impracticable of fulfillment"; and (3) no alternative disposition is made of the corpus in the event the charitable trust fails.[1]

This record reflects, without question, that Royal Ware Sands intended for the trust assets to be devoted to a charitable purpose. In his will, he lamented that he was unable to experience the joys of summer camp and that he was not presented with the opportunity to attend college. So that others might enjoy these opportunities, he entrusted the bulk of his estate to the trustees of the Main Street United Methodist Church, confident in the belief that they would carry out his wishes to provide scholarships for Methodist children desiring to attend camps and institutions of higher learning in North Carolina. Mr. Sands' intent in this endeavor could hardly be more manifestly expressed.

The record reveals that the third requirement of G.S. 36A-53(a) is also met in this case in that the will does not provide for an alternate disposition of the corpus in the event the trust fails as a charitable trust. Thus, we focus our inquiry on the meaning of the words "illegal, or impossible or impracticable of fulfillment" as they are used in the statute to determine whether G.S. 36A-53(a) is appropriately applied in this case.

The phrase "impracticable of fulfillment" is defined in G.S. 36A-53(d). That statute provides as follows:

> The words "impracticable of fulfillment," as used in this section shall include, but shall not be limited to, the failure of any trust for charity, testamentary or inter vivos, (including, without limitation, trusts described in section 509 of the Internal Revenue Code of 1954 or corresponding provisions of

1. We note that the statutory scheme of G.S. 36A-53(a), and the strong public policy embodied therein, is merely reflective of the well-established principle that courts, in the exercise of their equitable powers, may modify the terms of a trust instrument, consistent with the settlor's intentions, in order to preserve the trust. *Penick v. Bank of Wadesboro*, 218 N.C. 686, 12 S.E. 2d 253 (1940); *Wachovia Bank & Trust Co. v. Laws*, 217 N.C. 171, 7 S.E. 2d 470 (1940); *Reynolds v. Reynolds*, 208 N.C. 578, 182 S.E. 341 (1935).

any subsequent federal tax laws and charitable remainder trusts described in section 664 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws) to include, if required to do so by section 508(e) or section 4947(a) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws, the provisions relating to governing instruments set forth in section 508(e) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws.

In sum, this statute provides that the term "impracticable of fulfillment" includes, but is not limited to, the failure of any charitable remainder unitrust to expressly include a provision prohibiting the trustee from engaging in any act of self-dealing. *See* 26 USC § 508(e)(1)(B). The legislature's obvious purpose in enacting G.S. 36A-53(d) was to make clear that the imposition of additional federal tax liability as a result of a failure to include the "boilerplate" required by IRS Regulations would constitute impracticability of fulfillment so as to invoke the application of G.S. 36A-53(a).

The legislature has also clearly indicated that the prohibition against self-dealing is not the only administrative requirement the omission of which will invoke the application of the statute. G.S. 36A-53(d) specifically mentions the prohibition against self-dealing and then refers to "corresponding provisions of any subsequent federal tax laws." In addition to the prohibition against self-dealing by the trustee, the instrument at issue here failed to provide for a number of other administrative procedures and contingencies. Each of the omitted provisions is required by the Regulations promulgated by the IRS in construing section 664 and section 2055 of the Code.[2] Each of them are detailed ad-

2. In addition to the prohibition against self-dealing, the trust instrument at issue here failed to explicitly set forth the following provisions: (1) a provision setting forth valuation dates [Treas. Reg. §§ 1.664-3(a)(1)(v)(a)(3) and (b)(1)(iii)]; (2) a provision setting forth the remedy in the event of an incorrect determination of the net fair market value of the trust assets [Treas. Reg. § 1.664-3(a)(1)(iii)]; (3) a provision governing amounts to be paid for a year in which the noncharitable interests terminate [Treas. Reg. § 1.664-3(a)(1)(v)(b)]; (4) a provision governing additional contributions to the charitable remainder unitrust [Treas. Reg. § 1.664-3(b)]; (5) a provision providing for the transfer of trust assets to a qualified organization in the event the named organization does not qualify under § 170(c) of the Internal Revenue Code [Treas. Reg. § 1.664-3(a)(6)(iv)]; and a provision governing amounts to be paid for a period of less than twelve months [Treas. Reg. § 1.664-3(a)(1)(v)(a)].

ministrative requirements which relate to charitable remainder unitrusts and which, if not included, would result in the imposition of additional federal tax liability. We therefore conclude that the failure to include the prohibition against self-dealing and the failure to include the other required administrative provisions renders this trust "impracticable of fulfillment" under G.S. 36A-53.

[3] Having determined that G.S. 36A-53(a) governs the disposition of this case, we must determine the appropriate nature of relief to be granted. G.S. 36A-53 expressly directs the court to "order an administration of the trust, devise or bequest as nearly as possible to fulfill the manifested general charitable intention of the settlor or testator."

The trial court fashioned a remedy whereby the instrument was construed so as to require administration of the trust in compliance with all the necessary technical provisions. The trial judge also ordered reformation of the trust to include the omitted administrative provisions required by the Regulations.

We are not convinced that by construing *and* reforming the will, the trial judge assured, "as nearly as possible," the fulfillment of the testator's intent. Obviously, the manifested intent of Royal Sands included the intent to give to the charitable beneficiary all monetary benefits of the charitable deduction and exemption provisions of the Code, for this would permit more money to be devoted to the charitable purpose of educating and enriching the lives of young people by sending them to summer camp. We find that the remedy most likely to fulfill Sands' charitable purpose is a mere *construction* of the instrument to require administration in compliance with the applicable Code provisions and Regulations. We reject reformation as an appropriate remedy in this case because the Internal Revenue Service takes the position that a governing instrument speaks as of the date it becomes effective, in this case, the date of death of Royal Sands. Under this view, the tax consequences would become fixed at that time. Arguably, an order *reforming* the trust would only speak from the date of the entry of the order and would not assure the favorable tax treatment with respect to the charitable deduction. Conversely, an order *construing* the will to require from its creation administration in compliance with the Regulations would assure that the estate will be entitled to the charitable deduction.

In *Estate of Bird*, 69 Misc. 2d 1015, 332 N.Y.S. 2d 85 (Sur. Ct. N.Y. 1972), the trust at issue lacked many of the provisions required by the IRS Regulations in order to qualify as a charitable remainder unitrust. The New York Court, in a situation almost identical to the case at bar, held that construction, rather than reformation, was the proper remedy to assure that the trust was administered in a manner consistent with the dictates of the Regulations.

This remedy of construction is completely consistent with the statutory command to administer the trust "consistent with the intent of the settlor or testator." This is not to say that G.S. 36-53(a) requires construction in every case or that reformation is never consistent with the policy expressed by the statute. The appropriate remedy to be ordered in any given case must be determined on an *ad hoc* basis and may depend on any number of factors affecting the tax consequences of a particular transaction.

We hold, however, that in this case, the trust created by the will of Royal Ware Sands should be construed so as to include the administrative provisions required by the Internal Revenue Service Regulations to be included in governing instruments of charitable remainder unitrusts. We therefore direct that the Sands trust be administered in full compliance with applicable Regulations and Code provisions.

We vacate that portion of the trial judge's order reforming the will to include such provisions since this measure will not assure, "as nearly as possible," the fulfillment of the testator's intent.

The judgment entered by Judge Morgan on 26 February 1982, except as herein partially vacated and modified, is affirmed.

Vacated in part, modified and affirmed.

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

State v. Tysor

STATE OF NORTH CAROLINA v. JOHN RANDOLPH TYSOR

No. 301A82

(Filed 8 March 1983)

1. **Homicide § 21.7— murder in the second degree—sufficiency of evidence**

Where the defendant admitted that he pointed a gun at the deceased and fired the weapon with the intent to shoot him in the left arm, there was substantial evidence of each element of murder in the second degree and that the defendant was the perpetrator.

2. **Homicide § 21.5— murder in the first degree—sufficiency of the evidence**

The evidence of murder in the first degree was sufficient to go to the jury where it showed that deceased had argued with the defendant but no blows were exchanged during the initial argument; that the argument ended and the deceased moved to the bar; that everything quieted down for a few seconds; that approximately five minutes elapsed between the time he and the deceased began to argue and the time the shooting occurred; that he had "thought about many things" from the time the argument began until he shot the deceased; that the defendant had put a loaded, cocked pistol in his pocket that morning; that he had been shot before and that he did not want to be shot again; that no one had hit the defendant when he approached the deceased at the bar; that he used two hands to release the safety of his gun; that he shot the deceased three times, once in the back; and that the deceased was unarmed and had not threatened the defendant.

3. **Criminal Law § 162— objection to evidence—later admitted without objection—waiver of earlier objection**

Where defendant objected to the admission of certain evidence, but the same or like evidence was later admitted without objection, defendant waived the objection to the earlier evidence.

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

BEFORE *Lee, Judge,* presiding at the 30 November 1981 Criminal Session of Superior Court, CHATHAM County, the defendant was convicted of first degree murder and given a life sentence. The defendant appealed directly to the Supreme Court as a matter of right pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by J. Michael Carpenter, Assistant Attorney General, for the State.

Gregory Davis and William T. Wilson, Jr., for defendant-appellant.

MITCHELL, Justice.

Through several assignments of error the defendant contends that the trial court erred in permitting the case to go to the jury and ruling that there was sufficient evidence to support the first degree and second degree murder charges. The defendant also assigns as error the admission of the testimony by one of the State's witnesses that she had previously seen the defendant with a gun. We find no reversible error.

The State produced evidence which tended to show that Wendell Palmer was shot and killed on 17 May 1981 in Chatham County. Jimmy Ray Goldston testified that he and the deceased hosted a private party that night at a social club called the "Greasy Spoon." The defendant, John Randolph Tysor, and his girl friend, Carolyn Frazier, were among the guests. Tysor and Frazier began to argue and, according to some witnesses, Tysor struck Frazier. The deceased, Wendell Palmer, approached Tysor and told him not to hit the deceased's cousin, Frazier. Tysor and Palmer began to argue and push and shove each other, although no blows were exchanged. Several of the guests who were outside began to come back into the club and Jimmy Ray Goldston fired a gun in the air to restore order.

After Jimmy Ray Goldston fired his gun, the defendant and the deceased stopped arguing and the deceased walked to the bar and stood there with his hands in his pocket. It was quiet for a few seconds and then Tysor walked up to Palmer and shot him at point blank range. Palmer was shot three times, once in the middle of the chest, once in the left shoulder and once in the back. The deceased was unarmed and the earlier argument between the defendant and the deceased appeared to be over at the time of the shooting. No one had struck or threatened the defendant prior to the shooting. When Palmer was shot he fell forward onto Tysor and both men fell on Jimmy Ray Goldston. Jimmy Ray Goldston gave his gun to Roy Earl Goldston who proceeded to use it to beat the defendant. Jimmy Ray Goldston told the defendant to wait until the police arrived and tell them what happened, but the defendant left before the police arrived.

The defendant testified and presented witnesses. Two of the defendant's witnesses testified that Palmer did not hit the defendant before the shooting. One witness testified that Palmer hit

Tysor during their argument before the shooting. Toby Siler testified for the defendant that Palmer was about to strike the defendant when Tysor shot him. Siler had attempted to persuade the defendant to leave the club after the initial argument with Palmer, but Tysor refused to do so. All of the witnesses for the defendant testified that they did not see the deceased with any weapon.

The defendant testified that after he was arguing with Frazier, Palmer came up to him and began to argue with him, used profanity and told him to leave Frazier alone. The defendant turned his back on Palmer and he was hit in the head from behind. Palmer had a "brass something" and hit the defendant again. Some other men surrounded the defendant, and Palmer said something to the effect that he was going to kill Tysor. The defendant tried to leave but the other men blocked his path. Tysor saw blood on his clothing and decided to shoot the deceased in the left arm. At that time, he heard a "boom" and thought that he had been shot. He pulled out his gun and as he fired someone grabbed his hand. Tysor testified that he had been shot once before and that he was afraid of being killed when he pulled out his gun. The defendant never saw the deceased with a gun, but saw him reach into his pocket and there was a bulge which the defendant thought was a gun. Tysor had put his gun in his own pocket that morning and it was loaded and cocked and he needed two hands to release the safety. He also testified that he was dazed from being hit by Palmer when the shooting occurred.

The defendant's first three assignments of error all question the sufficiency of the evidence to support his conviction of first degree murder. The first assignment concerns the failure of the trial court to grant his motion to dismiss the first degree murder charge at the conclusion of the State's evidence. Since the defendant chose to present evidence after the denial of his motion, this assignment of error was waived. G.S. 15-173; *State v. Jones*, 296 N.C. 75, 248 S.E. 2d 858 (1978); *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975).

The defendant's next two assignments of error are directed to the failure of the trial court to grant the defendant's motion to dismiss the first degree murder and second degree murder charges at the end of all the evidence and the denial of the de-

fendant's motion to set aside the jury's verdict because the evidence was insufficient to support a conviction of first degree murder. These two assignments are basically the same and, except where noted later, will be considered together.

Before a defendant's motion to dismiss can be denied, the court must find substantial evidence of each essential element of the offense charged and of the defendant as the perpetrator of the crime. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Substantial evidence must be existing and real, but it does not have to exclude every reasonable hypothesis of innocence. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). "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 . . . ." *State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980).

[1] Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Jenkins*, 300 N.C. 578, 268 S.E. 2d 458 (1980). The defendant admitted that he pointed a gun at the deceased and fired the weapon with the intent to shoot him in the left arm. The intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980). Thus, there was substantial evidence of each element of murder in the second degree and that the defendant was the perpetrator.

[2] Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17; *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979). Premeditation is defined as thought beforehand for some length of time, however short. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980). Deliberation means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982); *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769, *cert. denied*, 368 U.S. 851, 7 L.Ed. 2d 49, 82 S.Ct. 85 (1961). The

term "cool state of blood" does not mean that the defendant must be calm or tranquil or display the absence of emotion; rather, the defendant's anger or emotion must not have been such as to disturb the defendant's faculties and reason. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980); *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974).

The defendant testified and tended by his testimony to directly deny the existence of the elements of premeditation and deliberation. Nevertheless the evidence, taken in the light most favorable to the State, was sufficient to allow the case to go to the jury on the charge of murder in the first degree. The deceased had argued with the defendant, but it was in response to the deceased's cousin being slapped by the defendant. Although the defendant and the deceased pushed each other, no blows were exchanged during the initial argument. The argument ended and the deceased moved to the bar. Everything quieted down for a few seconds. The defendant testified that approximately five minutes elapsed between the time he and the deceased began to argue and the time the shooting occurred. He stated that he had done a lot of thinking and that he "thought about many things" from the time the argument began until he shot the deceased. The defendant had put a loaded, cocked pistol in his pocket that morning. He had been shot before and he did not want to be shot again. No one had hit the defendant when he approached the deceased at the bar and, using two hands to release the safety of his gun, shot the deceased three times, once in the back. The deceased was unarmed and had not threatened the defendant. Given this evidence, there was substantial evidence of each essential element of murder in the first degree. The trial court's denial of the defendant's motion to dismiss at the end of all the evidence was proper.

The motion to set aside the verdict for insufficiency of the evidence to support the verdict was addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal absent a showing of an abuse of that discretion. *State v. Horton*, 299 N.C. 690, 263 S.E. 2d 745 (1980); *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335, *cert. dismissed*, 423 U.S. 918, 46 L.Ed. 2d 367, 96 S.Ct. 228 (1975). For the reasons previously discussed herein, the trial court in the present case did not abuse its discretion.

[3] The defendant's final assignment of error concerns the testimony of one of the State's witnesses, Diane McKinney. McKinney testified, over objection, that she had seen the defendant on a previous occasion with a gun. This evidence was presented during the State's case-in-chief. Later, the defendant testified that he had been shot about one year ago and that he had carried a gun ever since. It is a well established rule that if a party objects to the admission of certain evidence and the same or like evidence is later admitted without objection, the party has waived the objection to the earlier evidence. 1 Brandis on N.C. Evidence, § 30 (1982); *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972). The defendant's testimony here operated as a waiver of his objection to this portion of McKinney's testimony.

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

No error.

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

ARLENE R. HARRIS v. HAROLD R. HARRIS

No. 424PA82

(Filed 8 March 1983)

1. Divorce and Alimony § 19.5; Rules of Civil Procedure § 60; Specific Performance § 1 — modification of prior specific performance order — reduction of support payments — court's powers in equity

Where an earlier judgment had ordered that defendant specifically perform support provisions of a separation agreement requiring defendant to pay plaintiff each month an amount equivalent to 50% of his United States Army retirement pay, the trial court in the exercise of its powers in equity under G.S. 1A-1, Rule 60(b)(5) could modify the prior judgment to change the amount to be paid to plaintiff under the specific performance order from 50% of defendant's military retirement pay to 20% thereof. However, this modification of the specific performance order did not affect the parties' rights at law under the separation agreement.

2. Appeal and Error § 2; Divorce and Alimony § 21.6— authority to order assignment of military retirement pay—question not before appellate court

The issue of the trial court's authority to order an assignment of defendant's United States Army retirement pay under the federal definition of "alimony" was not before the Court of Appeals where the question of whether provisions of a separation agreement between the parties constituted "alimony" as defined by federal statutes was not litigated by the parties below and was not briefed or argued on appeal; defendant admitted in his brief that he executed the assignment and has made no objection to the order of assignment; and plaintiff has no standing to object to the assignment and does not in fact object thereto.

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

APPEAL by the plaintiff from the decision of the Court of Appeals reported at 58 N.C. App. 175, 292 S.E. 2d 775 (1982). The plaintiff appealed to the Court of Appeals from an order by *Hair, Judge*, District Court, CUMBERLAND County, modifying an earlier judgment which ordered specific performance and required the defendant to pay the plaintiff an amount equivalent to fifty percent of his United States Army retirement pay in conformity with a separation agreement. The Court of Appeals held that the District Court improperly modified the separation agreement and that the District Court had no authority to order an assignment of the defendant's retirement pay. The plaintiff appealed from the part of the Court of Appeals' opinion vacating the District Court's order of assignment. The plaintiff's petition for discretionary review was allowed on 21 September 1982.

William J. Townsend, attorney for plaintiff-appellant.

No Counsel Contra.

MITCHELL, Justice.

There are two main issues in the present case. The first issue is whether the District Court properly modified a prior judgment by reducing the amount of the defendant's obligation to make support payments to the plaintiff that the court had ordered the defendant to specifically perform. The second issue is whether the District Court lacked the authority to order an assignment of the defendant's United States Army retirement pay. We hold that the court in the exercise of its powers in equity could modify the prior judgment ordering specific performance of the separation

agreement of the parties but that this modification did not affect the parties' rights at law under the agreement. We further hold that the issue of the court's authority to order assignment of military retirement pay was not before the court and that the Court of Appeals should not have reached or decided that issue.

The plaintiff and the defendant were married in 1951 and entered into a separation agreement on 27 September 1974. The agreement provided, *inter alia*, that the defendant pay as support to the plaintiff "a sum equivalent to fifty percent (50%) of his United States Army retirement pay each month for his lifetime." The parties were subsequently divorced in June 1975 and the separation agreement was not incorporated into the divorce decree.

In 1977 the defendant stopped making payments and the plaintiff brought an action to enforce the separation agreement. On 9 November 1979 the jury returned a verdict in favor of the plaintiff and judgment was filed on 12 February 1980 ordering that the defendant specifically perform the support provisions of the separation agreement. That judgment was affirmed by the Court of Appeals. *Harris v. Harris*, 50 N.C. App. 305, 274 S.E. 2d 489, *disc. rev. denied*, 302 N.C. 397, 279 S.E. 2d 351 (1981). Following a motion by the plaintiff and a hearing on the motion, on 9 June 1981 the District Court found the defendant in contempt and ordered that he be imprisoned until he paid arrearages owed to the plaintiff. The next relevant occurrence was the 20 July 1981 order of the District Court that is the subject of this appeal. That order allowed the defendant to purge himself of the contempt by assigning ten percent of his monthly military retirement pay to satisfy arrearages owed the plaintiff in the amount of $15,390.00. The order further required the defendant to assign twenty percent of his monthly military retirement benefits to the plaintiff "for the purpose of securing future monthly alimony payments." Finally, the District Court modified the judgment on 12 February 1980 to change the amount of support to be paid to the plaintiff under the specific performance order from fifty percent of his retirement benefits to twenty percent of the benefits. The defendant executed the assignment of his retirement wages pursuant to the 20 July 1981 order of the District Court. The plaintiff appealed the 20 July 1981 order to the Court of Appeals. The Court of Appeals vacated the District Court's order. The Court of Ap-

peals held that the portion of the order modifying the amount of support that the defendant must pay the plaintiff was improper because the court had no authority to modify the separation agreement. The Court of Appeals also held that under federal law the payments to the plaintiff were not "alimony" and therefore the District Court could not order the assignment of the defendant's United States Army retirement pay.

[1] The plaintiff argued and the Court of Appeals held that the District Court lacked authority to modify the terms of the separation agreement by reducing the percentage of the defendant's military retirement pay to which the plaintiff was entitled. Had the District Court modified the separation agreement, we would affirm the Court of Appeals' opinion vacating that order. However, the District Court did not modify the separation agreement. Instead, the court only modified the previous judgment ordering specific performance.

The defendant made a Rule 60 motion to amend or vacate the 12 February 1980 judgment of the court which required the defendant to specifically perform the support terms of the separation agreement. Pursuant to that motion, the court ordered that "the Judgment of February 12, 1980 in this action, be, and the same is, hereby modified, and amended, in part . . . ." The court did not order a modification of the separation agreement.

A motion under Rule 60(b) is addressed to the sound discretion of the trial court and the court's ruling will not be disturbed without a showing that the court abused its discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). G.S. 1A-1, Rule 60(b)(5) states that a court may relieve a party from a final judgment or order when "it is no longer equitable that the judgment should have prospective application." We have held that, since the federal rule is nearly identical to the North Carolina rule, the application of the federal rule can be helpful in interpreting the North Carolina statute. *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E. 2d 879 (1971). An order directing specific performance may be modified if it is for specific performance in the future at various times, such as an order to perform pursuant to the terms of a contract with a long period to run. 7 Moore's Federal Practice, § 60.26[4] at n. 43. Furthermore, a court may hold a party in contempt for past violations of an order and at the same time relieve

the party of the prospective applicability of that order. *Id.* at n. 27. The District Court did just that.

The court ordered the defendant to pay arrearages, albeit at a rate of ten percent of his retirement pay per month, and then ordered the defendant to assign twenty percent of his monthly retirement pay rather than the amount "equivalent to fifty percent" agreed upon in the separation agreement. The plaintiff brought the original action seeking the equitable relief of specific performance and also brought the later action for contempt. The District Court initially ordered specific performance of the entire amount of the support provision of the separation agreement. The later decision to change the amount that would be subject to specific performance was not a modification of the separation agreement, but rather was an act within the court's equitable discretion when reviewing the previous specific performance order pursuant to the defendant's Rule 60 motion. See In Re Marriage of Sandy, 113 Cal. App. 3d 724, 169 Cal. Rptr. 747 (1980).

A court can properly order specific performance of only part of a contract if it deems another portion unworkable. *Munchak Corp. v. Caldwell*, 46 N.C. App. 414, 265 S.E. 2d 654 (1980), *modified on other grounds*, 301 N.C. 689, 273 S.E. 2d 281 (1981). The separation agreement here is a contract between the parties not subject to modification by the court. The 12 February 1980 judgment ordering specific performance was an exercise of the court's equitable powers and did not modify the separation agreement. In the exercise of its equitable powers, the court could order specific performance of all or only part of the contract and could modify its orders from time to time as equity required. The District Court in entering its order of 20 July 1981 found as a fact that the defendant was unable to comply with the support requirements of the 12 February 1980 judgment. Thus, the court determined that equity required a modification of the judgment. The District Court's exercise of its *powers in equity* in the present case did not affect the rights and obligations of the parties under the separation agreement. The plaintiff still has open to her the full range of remedies available *at law* for the enforcement of any remaining obligations under the separation agreement.

While the District Court couched the order in terms of modifying and amending the 12 February 1980 judgment the effect

and design of the court's action was to relieve the defendant of part of the prospective application of that judgment. This action was within the court's equitable power under Rule 60(b)(5). *But cf. Coleman v. Arnette*, 48 N.C. App. 733, 269 S.E. 2d 755 (1980) (Under a Rule 60(b)(6) motion the District Court attempted only to modify and make additions to a previous order). The separation agreement between the plaintiff and the defendant was not and is not modified by the order of 20 July 1981. Only the previous judgment of 12 February 1980 is affected, and the District Court properly exercised its equitable power to specifically enforce the separation agreement by ordering specific performance only to the extent of twenty percent of the defendant's military retirement pay.

[2] The plaintiff takes exception to the holding by the Court of Appeals that the District Court had no authority to order an assignment of the defendant's United States Army retirement pay. Although the Court of Appeals based its decision on the definition of "alimony" as applied in *McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed. 2d 589, 101 S.Ct. 2728 (1981), we hold that the Court of Appeals incorrectly reached the issue of whether the District Court's order of assignment was proper.

Only the plaintiff appealed from the District Court's order of 20 July 1981 and the resulting opinion of the Court of Appeals. Although the plaintiff assigns as a question both before this Court and before the Court of Appeals the assignability of the retirement income, she has not raised the issue of whether the provisions of the separation agreement constitute "alimony" under the federal statute. It is apparent from the brief that the plaintiff is in actuality asserting another attack on the District Court's power to reduce the assignment to *only* twenty percent and ten percent of the military retirement pay, not on the court's power to assign *any* of the retirement pay. The defendant specifically declined to raise any issue relating to the power of the court to enter the order of assignment. Obviously, it is to the plaintiff's benefit to have at least a portion of the retirement pay assigned. In fact, even if the plaintiff had actually attacked the order of assignment, she would have been without standing to do so. The plaintiff had no right of assignment under the separation agreement because it provided only for "a sum equivalent to fifty percent" of the defendant's military retirement pay. Therefore,

the assignment could only be ordered by the court exercising its discretionary equitable powers. Since the plaintiff had no right to an assignment and a partial assignment was ordered, the plaintiff was not harmed by the order, absent a showing of abuse of discretion, and therefore cannot appeal. Only a party aggrieved may appeal. G.S. 1-271; *Rubber Co. v. Tire Co.*, 270 N.C. 50, 153 S.E. 2d 737 (1967); *Coburn v. Timber Corp.*, 260 N.C. 173, 132 S.E. 2d 340 (1963); *Langley v. Gore*, 242 N.C. 302, 87 S.E. 2d 519 (1955). The scope of review by an appellate court is usually limited to a consideration of the assignments of error in the record on appeal and it is well established that if the appealing party has no right to appeal the appellate court should dismiss the appeal *ex mero motu*. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E. 2d 431 (1980); see also Rules of Appellate Procedure, Rule 10(a). When a party fails to raise an appealable issue, the appellate court will generally not raise it for that party. *Henderson v. Matthews*, 290 N.C. 87, 224 S.E. 2d 612 (1976). Since the parties have failed to cite authorities or bring forward an argument on the issue of the assignment of United States Army retirement pay under the federal definition of "alimony," the question is not properly before the Appellate Division.

An appellate court, of course, has the duty to declare a nullity any order made without authority by a trial court. This is true when there is no possible ground for the authority, even though the issue was not raised by either party. This is not, however, the situation that confronted the Court of Appeals in the present case. 42 U.S.C. § 659(a) makes armed service pay specifically subject to legal process for the enforcement of an individual's legal obligation to make alimony payments. 42 U.S.C. § 662(c) defines alimony to include "periodic payments of funds for the support and maintenance of the spouse (or former spouse)" and to exclude "any payment or transfer of property . . . in compliance with any . . . other division of property between spouses or former spouses." The Supreme Court in *McCarty v. McCarty*, 453 U.S. 210, 69 L.Ed. 2d 589, 101 S.Ct. 2728 (1981), applied this statute to preclude assignment to satisfy a property settlement incident to the dissolution of a marriage. This interpretation does not necessarily preclude all provisions in a separation agreement from falling within the "alimony" definition of 42 U.S.C. §§ 659(a) and 662(c). *See, e.g.*, 10 U.S.C. § 1408 (effective 1 February, 1983).

The question of whether the provisions of the separation agreement in the case *sub judice* constituted "alimony" as defined by the federal statutes was not litigated by the parties below and was not briefed or argued on appeal. Since the provisions in this separation agreement may be "alimony" within the federal definition, the District Court's order of assignment may be completely enforceable under the federal statute. In light of the fact that the defendant specifically states in his brief to the Court of Appeals that he executed the assignment and does not and did not object to the order and the fact that the plaintiff has no standing and does not in fact object, we hold that there was no justiciable issue of assignment before the Court of Appeals. Therefore, the Court of Appeals erred in deciding the case on the assignment issue.

The remaining issues decided by the Court of Appeals were not brought forward or argued before this Court and are included in the plaintiff's brief "for purposes of clarification" only. They are not part of the appeal to this Court, and we do not reach or decide them.

Based on the foregoing, we hold that the District Court properly modified the previous judgment ordering specific performance. We also hold that the Court of Appeals improperly vacated the 20 July 1981 order of the District Court. Therefore, the opinion of the Court of Appeals is reversed and the case is remanded for the entry of an order reinstating the District Court's order of 20 July 1981.

Reversed and remanded.

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

STATE OF NORTH CAROLINA v. ROSE RICHARDSON

No. 553PA82

(Filed 8 March 1983)

Prostitution § 2— crime of prostitution not including the sexual act of masturbation for hire

The Court of Appeals misconstrued the definition of prostitution, as found in G.S. 14-203 and prohibited by G.S. 14-204, by including within that definition the sexual act of masturbation for hire.

ON defendant's petition for discretionary review of the decision of the Court of Appeals, 58 N.C. App. 822, 295 S.E. 2d 263 (1982) (opinion by *Hill, J.*, with *Vaughn, J.* (now Chief Judge) and *Johnson, J.*, concurring), finding no error in the judgment of *Lane, S.J.*, entered 20 October 1981 in Superior Court, ONSLOW County.

The State presented evidence at trial that an undercover agent for the Jacksonville Police Department, Michael Stock Groalman, entered the "Sultan's Harem Movie Mates" establishment at 7:40 p.m. on 2 March 1981. Upon payment of thirty dollars ($30.00) Mr. Groalman was escorted to a dimly lighted room by a woman he later identified as the defendant. Once in the room, which was furnished with a bed and nightstand, Mr. Groalman was instructed to disrobe by the defendant who then turned on a movie containing explicit sexual material. After Mr. Groalman disrobed the defendant offered the undercover agent a "hand job" (masturbation) for an additional fee of twenty dollars ($20.00). Upon payment of the twenty dollars ($20.00) Mr. Groalman was masturbated by defendant. After approximately twenty minutes Mr. Groalman left the Sultan's Harem and made an immediate report to the police.

On 10 March 1981, eight days after the alleged offense, the defendant was arrested and charged with prostitution in violation of G.S. 14-204.

The defendant presented no evidence at trial.

On 19 August 1981 in the District Court of Onslow County defendant was convicted of engaging in prostitution. Defendant appealed that conviction to the Superior Court, Onslow County, where a jury convicted defendant of engaging in prostitution.

Judge Lane imposed a nine months sentence which he suspended upon the condition that defendant pay a fine of one hundred dollars and the costs.

From the judgment of the Superior Court the defendant appealed to the Court of Appeals. That Court found no error in defendant's trial in the Superior Court. On 5 October 1982 we allowed defendant's petition for discretionary review.

Jeffrey S. Miller, for defendant-appellant.

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

COPELAND, Justice.

Defendant contends that the Court of Appeals misconstrued the definition of prostitution, as found in G.S. 14-203 and prohibited by G.S. 14-204, by including within that definition the sexual act of masturbation for hire. We agree with the defendant's contention that the warrant charging defendant with prostitution should have been dismissed by the trial court for failure to state an offense under G.S. 14-204.

The definition of prostitution as found in G.S. 14-203 provides in part:

> The term "prostitution" shall be construed to include the offering or receiving of the body for *sexual intercourse* for hire, and shall also be construed to include the offering or receiving of the body for indiscriminate *sexual intercourse* without hire. (Emphasis added.)

The statute, G.S. 14-203, unequivocally defines prostitution as an act of *sexual intercourse*, and nothing else. Sexual intercourse is defined as, "The actual contact of the sexual organs of a man and a woman, and an actual penetration into the body of the latter." Ballentine's Law Dictionary 1170 (3d ed. 1969). This definition is in accord with our holding in *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), where Justice Huskins, in defining *"sexual intercourse"* for purposes of a rape case, stated, "It necessarily follows that the term 'sexual intercourse' encompasses *actual penetration.*" *State v. Vinson*, 287 at 342, 215 at 71 (emphasis added). If the legislature wishes to include within G.S. 14-204 other sexual

acts, such as cunnilingus, fellatio, masturbation, buggery or sodomy, it should do so with specificity since G.S. 14-204 is a criminal statute.

In its opinion the Court of Appeals relied on *Gilchrist v. Hurley*, 48 N.C. App. 433, 269 S.E. 2d 646 (1980), *disc. rev. denied*, 301 N.C. 720, 274 S.E. 2d 233 (1981) for the proposition that prostitution includes numerous forms of sexual activity for hire. Such reliance on *Gilchrist* is misplaced since *Gilchrist* concerned the construction of G.S. 19-1.2, a nuisance statute, and not a criminal statute. When the Court is asked to construe a criminal statute such as the one in the case *sub judice*, the law must be construed strictly in favor of the defendant. In re *Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978); *State v. Ross*, 272 N.C. 67, 157 S.E. 2d 712 (1967); *State v. Brown*, 264 N.C. 191, 141 S.E. 2d 311 (1965).

As a result we are unable to construe G.S. 14-204 broadly enough so as to encompass the alleged acts of the defendant within the definition of prostitution. We therefore order that this case be remanded to the Court of Appeals for remand to Superior Court, Onslow County, for dismissal of the prostitution charge.

Reversed and remanded.

LOUISE PHILLIPS v. HARRIE PARTON

No. 652A82

(Filed 8 March 1983)

APPEAL by defendant pursuant to N.C.G.S. 7A-30(2) from the decision of the Court of Appeals (*Judges Hill* and *Hedrick* concurring, *Judge* (now Chief Judge) *Vaughn* dissenting), reported in 59 N.C. App. 179, 296 S.E. 2d 317 (1982), which affirmed the judgment entered by *Sitton, Judge*, at the 15 June 1981 Session of JACKSON Superior Court.

Holt, Haire & Bridgers, by Ben Oshel Bridgers, for plaintiff appellee.

Herbert L. Hyde and G. Edison Hill for defendant appellant.

PER CURIAM.

Affirmed.

GUSTER McCOLLUM v. GROVE MANUFACTURING COMPANY

No. 505PA82

(Filed 8 March 1983)

WE granted plaintiff's petition for discretionary review under G.S. 7A-31 (1981) on 5 October 1982 to review the decision of the Court of Appeals. That decision, written by *Judge Becton* with *Judges Hedrick* and *Hill* concurring, held the trial court did not err in granting defendant's motion for directed verdict and in denying plaintiff's motion for a new trial. 58 N.C. App. 283, 293 S.E. 2d 632 (1982). In so doing, the court affirmed the judgment of *Collier, Judge,* entered 16 March 1981 in Superior Court, GUILFORD County.

Alexander, Ralston, Pell & Speckhard, by Stanley E. Speckhard, for plaintiff appellant.

Bateman, Wishart, Norris, Henninger & Pittman, P.A., by Robert J. Wishart, for defendant appellee.

PER CURIAM.

The decision of the Court of Appeals is affirmed.

Affirmed.

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

BOWEN v. CRA-MAC CABLE SERVICES

No. 77P83.

Case below: 60 N.C. App. 241.

Petition by defendants for writ of certiorari to North Carolina Court of Appeals denied 8 March 1983.

BOWLING v. COMBS

No. 73P83.

Case below: 60 N.C. App. 234.

Petition by defendants for discretionary review under G.S. 7A-31 denied 8 March 1983.

BROWN v. BROWN

No. 703P82.

Case below: 59 N.C. App. 719.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 March 1983.

DOWDY v. FIELDCREST MILLS

No. 21PA83.

Case below: 59 N.C. App. 696.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 8 March 1983.

HOOPER v. HOOPER

No. 675P82.

Case below: 59 N.C. App. 309.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 March 1983.

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

IN RE COHOON

No. 68P83.

Case below: 60 N.C. App. 226.

Petition by Ziman for discretionary review under G.S. 7A-31 denied 8 March 1983.

IN RE WARREN

No. 15P83.

Case below: 59 N.C. App. 738.

Petition by respondents Warren for discretionary review under G.S. 7A-31 denied 8 March 1983.

LEONARD v. JOHNS-MANVILLE SALES CORP.

No. 697PA82.

Case below: 59 N.C. App. 454.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 8 March 1983.

MANHATTAN LIFE INS. CO. v. MILLER MACHINE CO.

No. 43P83.

Case below: 60 N.C. App. 155.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 March 1983.

MESSER v. TOWN OF CHAPEL HILL

No. 69P83.

Case below: 59 N.C. App. 692.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 March 1983. Motion by defendants to dismiss appeal for lack of significant public interest allowed 8 March 1983.

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

OHIO CASUALTY INS. CO. v. ANDERSON

No. 26P83.

Case below: 59 N.C. App. 621.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 8 March 1983.

RDC, INC. v. BROOKLEIGH BUILDERS

No. 64PA83.

Case below: 60 N.C. App. 375.

Petition by defendant Foster & Hailey, Inc. for discretionary review under G.S. 7A-31 allowed 8 March 1983.

STATE v. BALDWIN

No. 50P83.

Case below: 59 N.C. App. 430.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 8 March 1983.

STATE v. BOONE

No. 29PA83.

Case below: 59 N.C. App. 730.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 8 March 1983.

STATE v. CREWS

No. 58P83.

Case below: 60 N.C. App. 216.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 8 March 1983.

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

STATE v. FERGUSON

No. 24P83.

Case below: 59 N.C. App. 738.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 March 1983.

STATE v. FISHER

No. 79P83.

Case below: 60 N.C. App. 439.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 March 1983.

STATE v. FUNDERBURK

No. 115P83.

Case below: 60 N.C. App. 777.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 March 1983.

STATE v. GLENN

No. 669P82.

Case below: 59 N.C. App. 362.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 March 1983.

STATE v. GOFORTH

No. 699P82.

Case below: 59 N.C. App. 504.

Petition by defendant for discretionary review under G.S. 7A-31 allowed for the purpose of reversing and remanding for resentencing 8 March 1983.

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

STATE v. HARGROVE

No. 57P83.

Case below: 60 N.C. App. 174.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 8 March 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 March 1983.

STATE v. HORNE

No. 32P83.

Case below: 60 N.C. App. 439.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 March 1983.

STATE v. JOHNSON

No. 688P82.

Case below: 59 N.C. App. 362.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 8 March 1983.

STATE v. KIDD

No. 27P83.

Case below: 60 N.C. App. 140.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 March 1983.

STATE v. MOSLEY

No. 707P82.

Case below: 59 N.C. App. 238.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 8 March 1983.

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

STATE v. PASCHAL

No. 610P82.

Case below: 59 N.C. App. 239.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 March 1983.

STATE v. SCHNEIDER

No. 41P83.

Case below: 60 N.C. App. 185.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 March 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 March 1983.

STATE v. SEAY

No. 22P83.

Case below: 59 N.C. App. 667.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 March 1983. Motion for Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 March 1983.

STATE v. SIMMONS

No. 13P83.

Case below: 60 N.C. App. 440.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 8 March 1983.

STATE v. THOMAS

No. 685P82.

Case below: 59 N.C. App. 739.

Petition by defendant for discretionary review under G.S. 7A-31 allowed for order remanding defendant's motion for appropriate relief for hearing to the Superior Court 8 March 1983.

STATE v. TREANTS

No. 34P83.

Case below: 60 N.C. App. 203.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 March 1983.

STATE v. WILHELM

No. 668P82.

Case below: 59 N.C. App. 298.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 March 1983.

STATE v. WILLIAMS

No. 698P82.

Case below: 59 N.C. App. 549.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 8 March 1983.

STATE v. WOODRUP

No. 51P83.

Case below: 60 N.C. App. 205.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 8 March 1983.

SUSAN B. v. PLANAVSKY

No. 52P83.

Case below: 60 N.C. App. 77.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 8 March 1983.

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

WELLMAN v. THE HIDEAWAY

No. 71P83.

Case below: 59 N.C. App. 739.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 March 1983.

PETITIONS TO REHEAR

NCNB v. VIRGINIA CAROLINA BUILDERS

No. 372PA82.

Case below: 307 N.C. 563.

Petition by plaintiff to rehear denied 8 March 1983.

WALTERS v. WALTERS

No. 30PA82.

Case below: 307 N.C. 381.

Petition by plaintiff to rehear denied 8 March 1983.

WILLIAMS v. BETHANY FIRE DEPT.

No. 327PA82.

Case below: 307 N.C. 430.

Petition by plaintiffs to rehear denied 8 March 1983.

APPENDIXES

AMENDMENTS TO RULES GOVERNING
ADMISSION TO PRACTICE OF LAW

AMENDMENTS TO CODE OF
PROFESSIONAL RESPONSIBILITY

AMENDMENTS TO RULES RELATING TO
DISCIPLINE AND DISBARMENT OF ATTORNEYS

AMENDMENT TO STATE BAR RULES
RELATING TO LEGAL SPECIALIZATION

AMENDMENTS TO STATE BAR RULES
RELATING TO OFFICERS OF
THE NORTH CAROLINA STATE BAR

AMENDMENT OF ORDER CONCERNING
ELECTRONIC MEDIA AND STILL PHOTOGRAPHY
COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

AMENDMENTS TO RULES GOVERNING ADMISSION TO PRACTICE OF LAW

The following amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted at the regular quarterly meeting of the Council of the North Carolina State Bar on April 16, 1982.

BE IT RESOLVED that Rule .0404(1), (2), (3) and (4) of the Rules Governing Admission to the Practice of Law in the State of North Carolina as appear in 289 N.C. 742 and as amended in 295 N.C. 747 be amended as follows:

§ .0404 FEES

(1) By deleting the figure of $170.00 and substituting in its place the figure $200.00.

(2) By deleting the figure $300.00 and substituting in its place the figure $345.00.

(3) By deleting the figure $170.00 and substituting in its place the figure $200.00.

(4) By deleting the figure $300.00 and substituting in its place the figure $345.00.

BE IT FURTHER RESOLVED that Rule .0502(2) of the Rules Governing Admission to the Practice of Law in the State of North Carolina as appears in 289 N.C. 744 and as amended in 295 N.C. 747 be amended as follows:

§ .0502 REQUIREMENTS FOR COMITY APPLICANTS

(2) By deleting the figure $575.00 and substituting in its place the figure $625.00.

NORTH CAROLINA
WAKE COUNTY

I, B. E. JAMES, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina have been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at regular quarterly meeting, unanimously adopt said amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of April, 1982.

B. E. JAMES, *Secretary-Treasurer*
The North Carolina State Bar

After examining the foregoing amendments to the Rules Governing Admission to the Practice of Law of the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 4th day of May, 1982.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules Governing Admission to the Practice of Law of the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 4th day of May, 1982.

MITCHELL, J.
For the Court

The following amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted by the Council of the North Carolina State Bar at its regular quarterly meeting on April 8, 1983.

BE IT RESOLVED that Rule .0501 of the Rules Governing Admission to the Practice of Law in the State of North Carolina as appear in 289 N.C. 742 and 743 and as amended in 293 N.C. 759, 295 N.C. 747, and 296 N.C. 746 be amended by adding a new paragraph to be designated (8) and to read as follows:

§ .0501 REQUIREMENTS FOR GENERAL APPLICANTS

(8) Have stood and passed the Multistate Professional Responsibility Examination approved by the Board within the twenty-four (24) month period next preceding the beginning day of the written bar examination prescribed by Section .0900 of this Chapter which the applicant passes, or shall take and pass the Multistate Professional Responsibility Examination within the twelve (12) month period thereafter. (This subsection shall apply only to applicants who apply to take the July 1984 and subsequent examinations.)

BE IT FURTHER RESOLVED that Rule .0502(4)(e) of the Rules Governing Admission to the Practice of Law in the State of North Carolina as appears in 289 N.C. 743 and as amended in 291 N.C. 724 be amended by rewriting Section (4)(e) and adding a new paragraph to be designated (10) to read as follows:

§ .0502 REQUIREMENTS FOR COMITY APPLICANTS

(4)(e) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States, whether or not such service is in the jurisdiction in which applicant is duly licensed; or

(10) Have stood and passed the Multistate Professional Responsibility Examination approved by the Board.

BE IT FURTHER RESOLVED that Rule .1203(2) of the Rules Governing Admission to the Practice of Law in the State of North Carolina as appears in 289 N.C. 756 be amended by rewriting Section (2) to read as follows:

§ .1203 WHO SHALL CONDUCT HEARINGS

(2) The Panel will make a determination as to the applicant's eligibility to stand the written bar examination or to be licensed by comity. The Panel may grant the application,

deny the application, or refer it to the full Board for a de novo hearing. The applicant will be notified in writing of the Panel's determination. In the event of an adverse determination by the Panel, the applicant may request a hearing de novo before the full Board by giving written notice to the secretary at the offices of the Board within ten (10) days following receipt of the Panel's determination. Failure to file such notice in the manner and within the time stated shall operate as a waiver of the right of the applicant to request a hearing de novo before the full Board and shall result in the determination of the Panel becoming final.

NORTH CAROLINA
WAKE COUNTY

I, B. E. JAMES, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina have been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at regular quarterly meeting, unanimously adopt said amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of May, 1983.

B. E. JAMES, *Secretary*

After examining the foregoing amendments to the Rules Governing Admission to the Practice of Law of the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of June, 1983.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules Governing Admission to the Practice of Law of the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 8th day of June, 1983.

FRYE, J.
For the Court

AMENDMENTS TO THE CODE OF PROFESSIONAL RESPONSIBILITY

The following amendments to the Code of Professional Responsibility of the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 1982.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article X, Canon 2 of the Canons of Ethics and Rules of Professional Responsibility of the Certificate of Organization of the North Carolina State Bar as appear in 205 N.C. 865 and as amended in 283 N.C. 798, 293 N.C. 777, 299 N.C. 747 and 301 N.C. 735 be amended by deleting the current DR 2-101; DR 2-102; DR 2-103; DR 2-104; and DR 2-105 and rewriting the same to read as follows:

CANON 2

A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available

DR 2-101 **Publicity and Advertising**

(A) A lawyer shall not, on behalf of himself or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading or deceptive statement or claim.

(B) A public communication for which a lawyer has given value must be identified as such unless it is apparent from the context that it is such a communication. If such communication is disseminated to the public by use of electronic media, it shall be prerecorded, and the prerecorded communication shall be approved in advance by the lawyer before it is broadcast. A recording of the actual transmission shall be retained by the lawyer for a period of one year following the last broadcast date.

DR 2-102 **Firm Names and Letterheads**

(A) A lawyer shall not use a firm name, letterhead or other professional designation that violates DR 2-101. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise false or misleading. The North Carolina State Bar may require that every trade name used by a law firm shall be registered, and upon a determination by the Council that such name is false or potentially misleading, may require

with its use a remedial disclaimer or an appropriate identification of the firm's composition or connection. For purposes of this section the use of the names of deceased former members of the firm shall not render the firm name a trade name.

(B) A law firm practicing in more than one jurisdiction may use the same name in each jurisdiction, but identification of the members and associates in an office of the firm shall indicate the jurisdictional limitations of those not licensed to practice in the jurisdiction where the office is located.

(C) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(D) A lawyer shall not hold himself out as practicing in a law firm unless the association is in fact a firm.

(E) No lawyer may maintain a permanent professional relationship with any lawyer not licensed to practice law in North Carolina unless a certificate of registration authorizing said professional relationship is first obtained from the Secretary of the North Carolina State Bar. (A new section adopted by the Council on July 16, 1982 and certified to the Supreme Court on July 26, 1982 as DR 2-102 (D).)

DR 2-103 **Recommendation or Solicitation of Professional Employment**

(A) A lawyer shall not, by personal communication, solicit employment for himself or any other lawyer affiliated with him or his firm from a non-lawyer who has not sought his advice regarding employment of a lawyer if

(1) The communication is false, fraudulent, misleading or deceptive, or

(2) The communication has a substantial potential for, or involves the use of, coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching or vexatious or harassing conduct, taking into account the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made.

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his em-

ployment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay for public communications not prohibited by DR 2-101 and the usual and reasonable fees or dues charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communication of the service or plan does not violate DR 2-101.

(C) A lawyer shall not accept employment when he knows or reasonably should know that the person who seeks his services does so as a result of any conduct prohibited by DR 2-101 or DR 2-103.

DR 2-104 **Specialization**

Unless a lawyer is certified as a specialist by a body authorized to do so by the North Carolina State Bar, he may represent himself as a specialist in a public communication only if such communication is not misleading or deceptive and includes the following disclaimer or language which is substantively similar:

"REPRESENTATIONS OF SPECIALTY DO NOT INDICATE STATE CERTIFICATION OF EXPERTISE."

BE IT FURTHER RESOLVED that DR 2-106 be renumbered DR 2-105; DR 2-107 be renumbered DR 2-106; DR 2-108 be renumbered DR 2-107; DR 2-109 be renumbered DR 2-108 and DR 2-110 be renumbered DR 2-109.

NORTH CAROLINA
WAKE COUNTY

I, B. E. JAMES, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar have been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendment to the Rules and Regulations of the North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of November, 1982.

B. E. JAMES, *Secretary*
The North Carolina State Bar

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 8th day of December, 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 8th day of December, 1982.

MARTIN, J.
For the Court

The following amendments to the Rules, Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 14, 1983.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article X, Canon 9, EC 9-6, of the Canons of Ethics and Rules of Professional Conduct of the Certificate of Organization of the North Carolina State Bar, as appears in 205 N.C. 868 and as amended in 283 N.C. 845 is hereby amended by renumbering it EC 9-7 and rewriting EC 9-6 to read as follows:

EC 9-6 There is now available to the members of the legal profession the opportunity to participate in a program for the advancement of our legal system. It is now possible for an attorney to elect to invest in an interest bearing account advances of clients that are nominal in amount or to be held for a short period of time with the income derived to be used for purposes beneficial to the public through a program established by the North Carolina State Bar and approved by the North Carolina Supreme Court. Lawyers are encouraged to participate in this endeavor for the general public. This is an excellent example of how the individual attorney can aid in making needed changes and improvements.

BE IT FURTHER RESOLVED by the Council of the North Carolina State Bar that Canon 9, DR 9-102 as appears in 283 N.C. 847 is amended as follows by adding a subsection to be designated DR 9-102(A)(3); by rewriting DR 9-102(B)(4); and by adding a new section to be designated DR 9-102(C) to read as follows:

DR 9-102 **Preserving Identity of Funds and Property of a Client**

(A)(3) Except as may be authorized by DR 9-102(C), interest earned on bank accounts in which the funds of clients are deposited (less any deduction for bank service charges, fees of the depository institution, and intangible taxes collected with respect to the deposited funds) shall belong to the clients whose funds have been deposited; and the lawyer or law firm shall have no right or claim to such interest.

(B)(4) Promptly pay or deliver to the client or promptly pay or deliver as directed by the client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(C)(1) Pursuant to a plan promulgated by the North Carolina State Bar and approved by the North Carolina Supreme Court, a lawyer may elect to create or maintain an interest bearing trust account for those funds of clients which, in his good faith judgment, are nominal in amount or are expected to be held for a short period of time. A lawyer may be compelled to invest on behalf of a client, in accordance with DR 9-102(A)(3), only those funds not nominal in amount or not expected to be held for a short period of time. Funds deposited in a permitted interest bearing trust account under the plan must be available for withdrawal upon request and without delay. The account shall be maintained in a depository institution authorized by state or federal law to do business in North Carolina and insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the North Carolina Guaranty Corporation. A lawyer participating in the plan shall deliver to all clients from whom or for whose benefit such funds are received a notice reading substantially as follows and comply with its provisions:

Important Notice to Clients.
This Office Participates in the North Carolina Plan Regarding the Generation of Interest on Attorney's Trust Accounts.

Under this plan, funds deposited on behalf of a client that are nominal in amount or are expected to be held for a short period of time will be deposited in an interest bearing trust account and the interest generated will be remitted to the North Carolina State Bar to fund programs for the public's benefit. The costs of maintaining an interest bearing account on an individual client's funds which are nominal in amount or held for a short period of time exceed the amount of interest that may be earned on such funds. Therefore, such client funds are placed in one trust account from which distribution is made at the client's direction and, until recent changes in banking laws, the trust account could not earn interest. Under current law, a trust account is permitted to earn interest under certain circumstances. It is only when all client funds are deposited into the single account with the interest going to a public purpose that such an account can be established. Under no conditions, including any request that the funds not be placed in such an account, can the client benefit individually from the interest earned. The attorney will not receive any of the interest generated under the plan.

(C)(2) Lawyers or law firms electing to deposit client funds in a trust account shall direct the depository institution:

(A) to remit interest or dividends, as the case may be (less any deduction for bank service charges, fees of the depository institution, and intangible taxes collected with respect to the deposited funds) at least quarterly to the North Carolina State Bar;

(B) to transmit with each remittance to the North Carolina State Bar a statement showing the name of the lawyer or law firm maintaining the account with respect to which the remittance is sent and the rate of interest applied in computing the remittance;

(C) to transmit to the depositing lawyer or law firm at the same time a report showing the amount remitted to the North Carolina State Bar and the rate of interest applied in computing the remittance;

(C)(3) Certificates of Deposit may be obtained by a lawyer or law firm on some or all of any deposited funds of clients, so long as there is no impairment of the right to withdraw or transfer principal immediately.

BE IT FURTHER RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, Standing Committees of the Council, as appear in 221 N.C. 587 and as amended in 268 N.C. 734, 274 N.C. 608, 277 N.C. 742 and 302 N.C. 637 be and the same is hereby amended by adding a new subsection j as follows:

§ 5. STANDING COMMITTEES OF THE COUNCIL.—

j. There is created a standing committee for the disposition of funds received by the North Carolina State Bar from interest on trust accounts. This Committee shall carry out the provisions of the Plan for Disposition of Funds Received by the North Carolina State Bar from Interest on Trust Accounts. The Plan is:

I. Any funds remitted to the North Carolina State Bar from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to DR 9-102(C) shall be deposited by the North Carolina State Bar in a special account or accounts which shall be segregated from other funds of whatever nature received by the State Bar.

II. The funds received, and any interest, dividends, or other proceeds received thereafter with respect to these funds shall be used for programs concerned with improvement of the administration of justice, under the supervision and direction of the Board of Trustees established under this plan to administer the funds.

III. The programs for which the funds may be utilized shall consist of: (a) providing legal services to indigents; (b) establishment and maintenance of lawyer referral systems in order to assure that persons in need of legal services can obtain such services from a qualified attorney; (c) enhancement and improvement of grievance and disciplinary procedures to protect the public more fully from incompetent or unethical attorneys; (d) development of a client security fund to protect the public from loss due to dishonest or fraudulent practices on the part of lawyers; (e) development and maintenance of a fund for student loans to enable meritorious persons to obtain a legal education when otherwise they would not have adequate funds for this purpose; and (f) such other programs designed to improve the administration of justice as may from time to time be proposed by the Board of Trustees and approved by the Supreme Court of North Carolina.

IV. The Board of Trustees shall consist of nine members appointed by the Council of the North Carolina State Bar on an annual basis. Members shall serve until their successor is appointed.

V. The Board of Trustees may grant, lend, or invest the funds received by the State Bar pursuant to DR 9-102(C) and funds may be employed to pay such administrative expenses as may be reasonably incurred in connection with the activities of the Board of Trustees. Grants or loans may be made by the Board of Trustees to such persons or entities as the Board of Trustees may consider appropriate in connection with implementing the programs being supported.

VI. If any provision of this plan or the application thereof is held invalid, the invalidity does not affect other provisions or application of the plan which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

NORTH CAROLINA
WAKE COUNTY

I, B. E. JAMES, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments were duly adopted by the Council of the North Carolina State Bar at its meeting on Friday, April 8, 1983.

Given over my hand and the Seal of the North Carolina State Bar, this the 3rd day of May, 1983.

B. E. JAMES, *Secretary*

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 23rd day of June, 1983.

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 23rd day of June, 1983.

FRYE, J.
For the Court

AMENDMENTS TO RULES RELATING TO DISCIPLINE AND DISBARMENT OF ATTORNEYS

The following amendments to the Rules and Regulations and Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 16, 1982.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IX, Sections 14(13) and 14(20) as appear in 288 N.C. 758, 759, as amended in 300 N.C. 754 and 755, be and the same are hereby amended by adding a new section (13.1) and by rewriting the first sentence in (20) to read as follows:

§ 14 FORMAL HEARING.

(13.1) All papers presented to the Disciplinary Hearing Commission for filing shall be on letter size paper (8½ x 11 inches) with the exception of exhibits. The Secretary shall require a party to refile any paper that does not conform to this size. This rule shall become effective on July 1, 1982. Prior to that date either letter or legal size papers will be accepted.

(20) All reports and orders of the Hearing Committee shall be signed by the members of the Committee or by the Chairman of the Hearing Committee on behalf of the Hearing Committee and shall be filed with the Secretary. The copy to the Defendant shall be served by registered or certified mail, return receipt requested. If the Defendant's copy mailed by registered or certified mail is returned as unclaimed, or undeliverable, then service shall be as provided in Rule 4 of the Rules of Civil Procedure.

NORTH CAROLINA
WAKE COUNTY

I, B. E. JAMES, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar have been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at regular quarterly meeting, unanimously adopt said amendments to the Rules and Regulations of the North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of April, 1982.

B. E. JAMES, *Secretary-Treasurer*
The North Carolina State Bar

After examining the foregoing amendments to the Disciplinary Rules 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 4th day of May, 1982.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Disciplinary Rules 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 4th day of May, 1982.

MITCHELL, J.
For the Court

The following amendment to the Rules and Regulations and Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 15, 1983.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IX, Section 12(3) as appears in 205 N.C. 861 and as amended in 288 N.C. 753 be and the same is hereby amended by rewriting section 12(3) to read as follows:

§ 12 INVESTIGATIONS; INITIAL DETERMINATION.

(3) If a Letter of Notice is sent to the accused attorney, it shall be by registered or certified mail and shall direct that a response be made within fifteen days of receipt of the Letter of Notice. Such response shall be in a full and fair disclosure of all the facts and circumstances pertaining to the alleged misconduct.

NORTH CAROLINA
WAKE COUNTY

I, B. E. JAMES, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar have been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at regular quarterly meeting, unanimously adopt said amendment to the Rules and Regulations of the North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of August, 1983.

B. E. JAMES, *Secretary-Treasurer*
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 7th day of September, 1983.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 7th day of September, 1983.

FRYE, J.
For the Court

AMENDMENT TO STATE BAR RULES RELATING TO LEGAL SPECIALIZATION

The following amendment to the Rules and Regulations of the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 21, 1982.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, Standing Committees of the Council, as appears in 221 N.C. 587 and as amended in 268 N.C. 734, 274 N.C. 608, 277 N.C. 742 and 302 N.C. 637 be and the same is hereby amended by adding the following Committee:

Sec. 5. STANDING COMMITTEES OF THE COUNCIL.

J. A board of legal specialization to be composed of nine members appointed by the Council of the North Carolina State Bar. The plan of specialization shall be a voluntary endeavor and not mandatory and not be funded by membership fees of the North Carolina State Bar.

1. Purpose

The purpose of this plan of certified legal specialization is to assist in the delivery of legal services to the public by identifying to the public those lawyers who have demonstrated special knowledge, skill, and proficiency in a specific field, allowing the public to more closely match their needs with available services; and to improve the competency of the bar by establishing an additional incentive for lawyers to participate in continuing legal education and meet the other requirements of specialization.

2. Establishment of Board of Legal Specialization

The Council of the North Carolina State Bar with the approval of the Supreme Court hereby establishes a Board of Legal Specialization ("Board"), which Board shall be the authority having jurisdiction under state law over the subject of specialization of lawyers. The Board shall be composed of nine members appointed by the Council of the North Carolina State Bar, three of whom shall be non-lawyers and the remainder shall be lawyers currently licensed and in good standing to practice law in North Carolina. The lawyer members of the Board shall be representative of the legal profession and shall include lawyers who are in general practice as well as those who specialize. One of the lawyer

members shall be designated annually by the Council of the North Carolina State Bar as Chairperson of the Board. The members shall be appointed by the Council of the North Carolina State Bar to staggered terms of office and the initial appointees shall serve as follows: three (two lawyers and one non-lawyer) shall serve for one year after appointment; three (two lawyers and one non-lawyer) shall serve for two years after appointment and three (two lawyers and one non-lawyer) shall serve for three years after appointment. Appointment to a vacancy among the members shall be made by the Council of the North Carolina State Bar for the remaining term of that member leaving the Board. Any member shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term.

Meetings of the Board shall be held at regular intervals at such times and places and upon such notice as the Board may from time to time prescribe.

3. Powers and Duties of the Board

Subject to the general jurisdiction of the Council and the North Carolina Supreme Court, the Board shall have jurisdiction of all matters pertaining to regulation of certification of specialists in the practice of law and shall have the power and duty:

3.1 To administer the Plan;

3.2 Subject to the approval of the Council and the Supreme Court, to designate areas in which certificates of specialty may be granted and define the scope and limits of such specialties and to provide procedures for the achievement of these purposes;

3.3 To appoint, supervise, act on the recommendations of and consult with Specialty Committees as hereinafter identified;

3.4 To make and publish standards for the certification of specialists, upon the Board's own initiative or upon consideration of recommendations made by the Specialty Committees, such standards to be designed to produce a uniform level of competence among the various specialties in accordance with the nature of the specialties;

3.5 To certify specialists or deny, suspend or revoke the certification of specialists upon the Board's own initia-

tive, upon recommendations made by the Specialty Committees or upon requests for review of recommendations made by the Specialty Committees;

3.6 To establish and publish procedures, rules, regulations and bylaws to implement this Plan;

3.7 To propose, and request the Council to make amendments to this Plan whenever appropriate;

3.8 To cooperate with other boards or agencies in enforcing standards of professional conduct and to report apparent violations of the Code of Professional Responsibility of this state to the appropriate disciplinary authority;

3.9 To evaluate and approve, or disapprove, any and all continuing legal education courses, or educational alternatives, for the purpose of meeting the continuing legal education requirements established by the Board for the certification of specialists and in connection therewith to determine the specialties for which credit shall be given and the number of hours of credit to be given in cooperation with the providers of continuing legal education; to determine whether and what credit is to be allowed for educational alternatives, including other methods of legal education, teaching, writing and the like; to issue rules and regulations for obtaining approval of continuing legal education courses and educational alternatives; to publish or cooperate with others in publishing current lists of approved continuing legal education courses and educational alternatives; and to encourage and assist law schools, organizations providing continuing legal education, local bar associations and other groups engaged in continuing legal education to offer and maintain programs of continuing legal education designed to develop, enhance and maintain the skill and competence of legal specialists; and

3.10 To cooperate with other organizations, boards and agencies engaged in the recognition of legal specialists or concerned with the topic of legal specialization.

4. Retained Jurisdiction of the Council

The Council retains jurisdiction with respect to the following matters:

4.1 Upon recommendation of the Board, establishing areas in which certificates of specialty may be granted;

4.2 Amending this Plan;

4.3 Hearing appeals taken from actions of the Board;

4.4 Establishing or approving fees to be charged in connection with the Plan; and

4.5 Regulating attorney advertisements of specialization under the North Carolina Code of Professional Responsibility.

5. Privileges Conferred and Limitations Imposed

The Board in the implementation of this Plan shall not alter the following privileges and responsibilities of certified specialists and other lawyers:

5.1 No standard shall be approved which shall in any way limit the right of a certified specialist to practice in all fields of law. Subject to Canon 6 of the North Carolina Code of Professional Responsibility, any lawyer, alone or in association with any other lawyer, shall have the right to practice in all fields of law, even though he or she is certified as a specialist, in a particular field of law;

5.2 No lawyer shall be required to be certified as a specialist in order to practice in the field of law covered by that specialty. Subject to Canon 6 of the North Carolina Code of Professional Responsibility, any lawyer, alone or in association with any other lawyer, shall have the right to practice in any field of law, or advertise his availability to practice in any field of law consistent with Canon 2 of the Code of Professional Responsibility, even though he or she is not certified as a specialist in that field;

5.3 All requirements for and all benefits to be derived from certification as a specialist are individual and may not be fulfilled by nor attributed to the law firm of which the specialist may be a member;

5.4 Participation in the program shall be on a completely voluntary basis;

5.5 A lawyer may be certified as a specialist in no more than two fields of law;

5.6 When a client is referred by another lawyer to a lawyer who is a recognized specialist under this Plan on a matter within the specialist's field of law, such specialist shall not take advantage of the referral to enlarge the scope

of his or her representation and, consonant with any requirements of the Code of Professional Responsibility of this state, such specialist shall not enlarge the scope of representation of a referred client outside the area of the specialty field; and

5.7 Any lawyer certified as a specialist under this Plan shall be entitled to advertise that he or she is a "Board Certified Specialist" in his or her specialty to the extent permitted by the Code of Professional Responsibility of this state.

6. Specialty Committees

The Board shall establish a separate Specialty Committee for each specialty in which specialists are to be certified. Each Specialty Committee shall be composed of seven members appointed by the Board, one of whom shall be designated annually by the Chairperson of the Board as Chairperson of the Specialty Committee. Members of each Specialty Committee shall be lawyers licensed and currently in good standing to practice law in this state who, in the judgment of the Board, are competent in the fields of law to be covered by the specialty. Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated. Members shall be appointed by the Board to staggered terms of office and the initial appointees shall serve as follows: two shall serve for one year after appointment; two shall serve for two years after appointment; and three shall serve for three years after appointment. Appointment by the Board to a vacancy shall be for the remaining term of the member leaving the Specialty Committee. All members shall be eligible for reappointment to not more than one additional three-year term after having served one full three-year term. Meetings of the Specialty Committee shall be held at regular intervals, at such times, places and upon such notices as the Specialty Committee may from time to time prescribe or upon direction of the Board.

Each Specialty Committee shall advise and assist the Board in carrying out the Board's objectives and in the implementation and regulation of this Plan in that specialty. Each Specialty Committee shall advise and make recommendations to the Board as to standards for the specialty and the certification of individual specialists in that specialty. Each Specialty Committee shall be charged with actively administering the Plan in its specialty and with respect to that specialty shall:

6.1 After public hearing on due notice, recommend to the Board reasonable and nondiscriminatory standards applicable to that specialty;

6.2 Make recommendations to the Board for certification, continued certification, denial, suspension or revocation of certification of specialists and for procedures with respect thereto;

6.3 Administer procedures established by the Board for applications for certification and continued certification as a specialist and for denial, suspension or revocation of such certification;

6.4 Administer examinations and other testing procedures, if applicable, investigate references of applicants; and, if deemed advisable, seek additional information regarding applicants for certification or continued certification as specialists;

6.5 Make recommendations to the Board concerning the approval of and credit to be allowed for continuing legal education courses, or educational alternatives, in the specialty; and

6.6 Perform such other duties and make such other recommendations as may be requested of or delegated to the Specialty Committee by the Board.

7. Minimum Standards for Certification of Specialists

To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the Board for the particular area of specialty:

7.1 The applicant must be licensed and currently in good standing to practice law in this state;

7.2 The applicant must make a satisfactory showing, as determined by the Board after advice from the appropriate Specialty Committee, of substantial involvement in the specialty during the five years immediately preceding his or her application according to objective and verifiable standards. Such substantial involvement shall be defined as to each specialty from a consideration of its nature, complexity and differences from other fields and from consideration of the kind and extent of effort and experience necessary to demonstrate competence in that specialty. It is a measure-

ment of actual experience within the particular specialty according to any of several standards. It may be measured by the time spent on legal work within the area of the specialty, the number or type of matters handled within a certain period of time or any combination of these or other appropriate factors. However, within each specialty, experience requirements should be measured by objective standards. In no event should they be either so restrictive as to unduly limit certification of lawyers as specialists or so lax as to make the requirement of substantial involvement meaningless as a criterion of competence. Substantial involvement may vary from specialty to specialty, but, if measured on a time-spent basis, in no event shall the time spent in practice in the specialty be less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice. Reasonable and uniform practice equivalents may be established including, but not limited to, successful pursuit of an advanced educational degree, teaching, judicial, government or corporate legal experience;

7.3 The applicant must make a satisfactory showing, as determined by the Board after advice from the appropriate Specialty Committee, of continuing legal education in the specialty accredited by the Board for the specialty, the minimum being an average of twelve hours of credit for continuing legal education, or its equivalent, for each of the three years immediately preceding application. Upon establishment of a new specialty, this standard may be satisfied in such manner as the Board, upon advice from the appropriate Specialty Committee, may prescribe or may be waived if, and to the extent, accreditable continuing legal education courses have not been available during the three years immediately preceding establishment of the specialty; and

7.4 The applicant must make a satisfactory showing, as determined by the Board after advice from the appropriate Specialty Committee, of qualification in the specialty through peer review by providing, as references, the names of at least five lawyers, all of whom are licensed and currently in good standing to practice law in this state, or in any state, or judges who are familiar with the competence and qualification of the applicant as a specialist. None of the references may be persons related to the applicant, or at the time of application, a partner of or otherwise associated with the applicant in the practice of law. The applicant by his or her

application consents to confidential inquiry by the Board, or appropriate disciplinary body and other persons regarding the applicant's competence and qualifications to be certified as a specialist.

7.5 The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability in the specialty for which certification is applied. The examination must be applied uniformly to all applicants within each specialty area. The Board shall assure that the contents and grading of the examination are designed to produce a uniform level of competence among the various specialties.

8. Minimum Standards for Continued Certification of Specialists

The period of certification as a specialist shall be five years. During such period the Board or appropriate Specialty Committee may require evidence from the specialist of his or her continued qualification for certification as a specialist and the specialist must consent to inquiry by the Board, or appropriate Specialty Committee, of lawyers and judges, the appropriate disciplinary body or others in the community regarding the specialist's continued competence and qualification to be certified as a specialist. Application for and approval of continued certification as a specialist shall be required prior to the end of each five-year period. To qualify for continued certification as a specialist, a lawyer applicant must pay any required fee, must demonstrate to the Board with respect to the specialty both continued knowledge of the law of this state and continued competence and must comply with the following minimum standards:

8.1 The specialist must make a satisfactory showing, as determined by the Board after advice from the appropriate Specialty Committee, of substantial involvement (which shall be determined in accordance with the principles set forth in Section 7.2) in the specialty during the entire period of certification as a specialist;

8.2 The specialist must make a satisfactory showing, as determined by the Board after advice from the appropriate Specialty Committee, of continuing legal education accredited by the Board for the specialty during the period of certification as a specialist, the minimum being an average of twelve hours of credit for continuing legal education, or its equiva-

lent, for each year during the entire period of certification as a specialist; and

8.3 The specialist must comply with the requirements set forth in Sections 7.1 and 7.4 above.

9. Establishment of Additional Standards

The Board may establish, on its own initiative or upon the Specialty Committee's recommendation, additional or more stringent standards for certification than those provided in Section 7 and 8. Additional standards or requirements established under this section need not be the same for initial certification and continued certification as a specialist. It is the intent of the plan that all requirements for certification or recertification in any area of specialty shall be no more nor less stringent than the requirements in any other area of specialty.

10. Suspension or Revocation of Certification as a Specialist

The Board may revoke its certification of a lawyer as a specialist if the specialization program in the specialty is terminated or may suspend or revoke such certification if it is determined, upon the Board's own initiative or upon recommendation of the appropriate Specialty Committee and after hearing before the Board on appropriate notice, that:

10.1 The certification of the lawyer as a specialist was made contrary to the rules and regulations of the Board;

10.2 The lawyer certified as a specialist made a false representation, omission or misstatement of material fact to the Board or appropriate Specialty Committee;

10.3 The lawyer certified as a specialist has failed to abide by all rules and regulations promulgated by the Board;

10.4 The lawyer certified as a specialist has failed to pay the fees required;

10.5 The lawyer certified as a specialist no longer meets the standards established by the Board for the certification of specialists; or

10.6 The lawyer certified as a specialist has been disciplined, disbarred or suspended from practice by the Supreme Court of any other state or federal court or agency.

The lawyer certified as a specialist has a duty to inform the Board promptly of any fact or circumstance described in Sections 10.1 through 10.6, above.

If the Board revokes its certification of a lawyer as a specialist, the lawyer cannot again be certified as a specialist unless he or she so qualifies upon application made as if for initial certification as a specialist, and upon such other conditions as the Board may prescribe. If the Board suspends certification of a lawyer as a specialist, such certification cannot be reinstated except upon the lawyer's application therefor and compliance with such conditions and requirements as the Board may prescribe.

11. Right to Hearing and Appeal to Council

A lawyer who is denied certification or continued certification as a specialist or whose certification is suspended or revoked shall have the right to a hearing before the Board and, thereafter, the right to appeal the ruling made thereon by the Board to the Council under such rules and regulations as the Board and Council may prescribe.

12. Financing the Plan

The financing of the Plan shall be derived solely from applicants and participants in the Plan. If fees are not established by the Council, the Board shall establish reasonable fees in each specialty field in such amounts as may be necessary to defray the expense of administering the Plan, which fees may be adjusted from time to time. If established or adjusted by the Board, however, the fees must be approved by the Council as provided in Section 4.4 above.

NORTH CAROLINA
WAKE COUNTY

I, B. E. JAMES, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar have been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendments to the Rules and Regulations of the North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of November, 1982.

B. E. JAMES, *Secretary*
The North Carolina State Bar

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 8th day of December, 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 8th day of December, 1982.

MARTIN, J.
For the Court

AMENDMENTS TO STATE BAR RULES RELATING TO OFFICERS OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations of the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 8, 1983.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article III and Article IV as appear in 205 N.C. 856 and as amended in 221 N.C. 583, 274 N.C. 606 and 298 N.C. 829-832 be and the same are hereby amended by rewriting said Articles to read as follows:

ARTICLE III

ELECTION AND SUCCESSION OF OFFICERS

§ 1. OFFICERS.

a. The Officers of the North Carolina State Bar and the Council shall consist of a President, a President-Elect, a Vice-President, and an Immediate Past President. These Officers shall be deemed Members of the Council in all respects.

b. There shall be a Secretary-Treasurer who shall also have the title of Executive Director. The Secretary-Treasurer shall not be a Member of the Council.

§ 2. ELIGIBILITY FOR OFFICE.

The President, President-Elect, and Vice-President need not be Members of the Council at the time of their election.

§ 3. TERM OF OFFICE.

The term of each Office shall be one year beginning at the conclusion of the Annual Meeting. Each Officer will hold office until a successor is elected and qualified.

The President shall assume the Office of Immediate Past President at the conclusion of the Term as President. The President-Elect shall assume the Office of President at the conclusion of the Annual Meeting following the term as President-Elect.

§ 4. ELECTIONS.

a. A President-Elect, Vice-President and Secretary-Treasurer shall be elected annually by the Council at an elec-

tion to take place at the Council meeting held during the Annual Meeting of the North Carolina State Bar. All elections will be conducted by secret ballot.

b. If there are more than two candidates for an office, then any candidate receiving a majority of the votes shall be elected. If no candidate receives a majority, then a run-off shall be held between the two candidates receiving the highest number of votes.

§ 5. NOMINATING COMMITTEE.

a. There shall be a Committee appointed to nominate one or more candidates for each of the offices which will meet prior to the Council meeting at which the election will be held. The Nominating Committee shall be composed of the Immediate Past President and the five most recent, living Past Presidents. The Nominating Committee shall submit its nominations by report to the Secretary 45 days prior to the election and the Secretary shall transmit the report by mail to the Council at least 30 days prior to the election.

b. The floor shall be open for additional nominations for each office at the time of the election.

§ 6. VACANCIES AND SUCCESSION.

a. If the Office of President becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, the President-Elect shall become President for the unexpired Term and the next Term. If the Office of the President-Elect becomes vacant because the President-Elect must assume the Presidency under the foregoing provision of this Section, then the Vice-President shall become the President-Elect for the unexpired Term and at the end of the unexpired Term to which the Vice-President ascended the office will become vacant and an election held in accordance with Section 4.a. of this Article; if the Office of President-Elect becomes vacant for any other reason, the Vice-President shall become the President-Elect for the unexpired Term following which said Officer shall assume the Presidency as if elected President-Elect. If the Office of Vice-President or Secretary-Treasurer becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, or if the Office of President or President-Elect becomes vacant without an available successor under these provisions then the office will be filled by election by the

Council at a special meeting of the Council with such notice as required by Article VI, § 2 or at the next regularly scheduled meeting of the Council.

b. If the President is absent or unable to preside at any meeting of the North Carolina State Bar or the Council, the President-Elect shall preside, or if the President-Elect is unavailable, then the Vice-President shall preside. If none are available, then the Council shall elect a member to preside during the meeting.

c. If the President is absent from the State or for any reason is temporarily unable to perform the duties of Office, the President-Elect shall assume those duties until the President returns or becomes able to resume the duties. If the President-Elect is unable to perform the duties, then the Council may select one of its members to assume the duties for the period of inability.

§ 7. Removal From Office.

The Council may, upon giving due notice and an opportunity to be heard, remove from Office any Officer found by the Council to have engaged in misconduct or to have a disability, including misconduct not related to the Office but so infamous as to render the offender unfit for the Office, misconduct amounting to noncriminal misconduct in Office and misconduct which is both criminal and misconduct in Office.

ARTICLE IV

Duties of Officers

§ 1. Compensation of Officers.

The Secretary-Treasurer shall receive a salary fixed by the Council. All other Officers shall serve without compensation except the per diem allowances fixed by statute for Members of the Council.

§ 2. President.

The President shall preside over meetings of the North Carolina State Bar and the Council. The President shall sign all resolutions and orders of the Council in the capacity of President. The President shall execute, along with the Secretary-Treasurer, all contracts ordered by the Council. The President will perform all other duties prescribed for the Office by the Council.

§ 3. PRESIDENT-ELECT, VICE-PRESIDENT, AND IMMEDIATE PAST PRESIDENT.

The President-Elect, Vice-President, and Immediate Past President will perform all duties prescribed for the Office by the Council.

§ 4. SECRETARY-TREASURER.

The Secretary-Treasurer shall attend all meetings of the Council and of the North Carolina State Bar, and shall record the proceedings of all such meetings. He shall, with the President, President-Elect or Vice-President, execute all contracts ordered by the Council. He shall have custody of the seal of the North Carolina State Bar, and shall affix it to all documents executed on behalf of the Council or certified as emanating from the Council. He shall take charge of all funds paid into the North Carolina State Bar and deposit them in some bank selected by the Council; he shall cause books of accounts to be kept, which shall be the property of the North Carolina State Bar and which shall be open to the inspection of any officer, committee or member of the North Carolina State Bar during usual business hours. At each January meeting of the Council, the Secretary-Treasurer shall make a full report of receipts and disbursements since the previous annual report, together with a list of all outstanding obligations of the North Carolina State Bar. The books of accounts shall be audited as of December 31st of each year and the Secretary shall publish same in the annual reports as referred to above. He shall perform such other duties as may be imposed upon him, and shall give bond for the faithful performance of his duties in an amount to be fixed by the Council with surety to be approved by the Council.

NORTH CAROLINA
WAKE COUNTY

I, B. E. JAMES, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments were duly adopted by the Council of the North Carolina State Bar at its meeting on Friday, April 8, 1983.

Given over my hand and the Seal of the North Carolina State Bar, this the 19th day of April, 1983.

B. E. JAMES, *Secretary*

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 8th day of June, 1983.

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 8th day of June, 1983.

FRYE, J.
For the Court

AMENDMENT OF ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

The ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS, adopted by this Court 21 September 1982, is hereby amended as follows:

Add the following subsection to paragraph 3:

(f) The Chief Justice of the Supreme Court, and the Chief Judge of the Court of Appeals, may waive the requirements of rule 3(a) and (b) with respect to judicial proceedings in the Supreme Court and in the Court of Appeals, respectively.

Add the words "or courtroom" after the word "area" in 3(d).

Delete the words "trial judge" from 3(e)(iii) and insert in lieu thereof, "presiding justice or judge."

Paragraph 2(a) is amended by deleting the word "judge" and inserting in lieu thereof the words "justice or judge."

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 10th day of November, 1982.

MARTIN, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ANIMALS

§ 8. Municipal Ordinances Relating to Animals

A town ordinance prohibited defendant from keeping goats and ponies within the town limits. *Town of Atlantic Beach v. Young*, 422.

APPEAL AND ERROR

§ 2. Review of Decision of Lower Court and Matters Necessary to Determination of Appeal

The issue of the trial court's authority to order an assignment of defendant's military retirement pay under the federal definition of "alimony" was not properly before the Court of Appeals. *Harris v. Harris*, 684.

One panel of the Court of Appeals may not overrule the decision of another panel on the same question in the same case. *N.C.N.B. v. Virginia Carolina Builders*, 563.

The Court of Appeals should not have addressed the question whether upon a verdict in her favor at retrial plaintiff would be entitled to treble damages for a violation of a provision of the Retail Installment Sales Act. *Simmons v. C. W. Myers Trading Post*, 122.

§ 9. Moot and Academic Questions

The Court of Appeals erred in holding that a rate of return on common equity question was mooted by virtue of later rate increases. *State ex rel. Utilities Comm. v. Southern Bell*, 541.

§ 46. Presumptions Arising from Lower Court Proceedings

Where one member of the Supreme Court did not participate in a case and the remaining six Justices are equally divided, the decision of the Court of Appeals is affirmed and stands without precedential value. *Flack v. Garriss*, 458.

§ 64. Affirmance or Reversal

Where one member of the Supreme Court did not participate in a case and the remaining six Justices are equally divided, the decision of the Court of Appeals is affirmed without becoming a precedent. *Beck v. Carolina Power & Light Co.*, 267.

Where one member of the Supreme Court did not participate in the decision of a case and the remaining six Justices are equally divided, the opinion of the Court of Appeals is affirmed without precedential value. *Felton v. Hospital Guild*, 121.

ASSAULT AND BATTERY

§ 14.5. Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury: Where Weapon is a Knife or Similar Weapon

The State's evidence was sufficient to support defendant's conviction of assault with a deadly weapon with intent to kill inflicting serious bodily injury. *S. v. White*, 42.

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions Available

The State was not required to disclose to defendant the names of the State's witnesses, statements of persons interviewed during the investigation, its investigative files relating to defendant's case, the names of all agents who participated in the investigation, or the criminal records of its witnesses. *S. v. Alston*, 321.

CONSTITUTIONAL LAW—Continued

§ 30. Discovery; Access to Evidence and Other Fruits of Investigation

The State was not required to disclose to defendant the names of the State's witnesses, statements of persons interviewed during the investigation, its investigative files relating to defendant's case, the names of all agents who participated in the investigation, or the criminal records of its witnesses. *S. v. Alston*, 321.

The trial court properly found that the State was not required to divulge to the defendant before trial the existence of a State's witness, a copy of the plea agreement pursuant to which the witness testified, or the substance of the witness's expected testimony. *S. v. Mills*, 504.

The trial court did not err in the denial of defendant's motion at trial that the State be required to produce a written statement taken from the prosecutrix by the sheriff for use by defense counsel in impeaching the prosecutrix. *S. v. Boone*, 198.

Defendant was not entitled under G.S. 15A-904(a) to the pretrial discovery of written statements of witnesses and the names and addresses of witnesses to be called by the State. *S. v. Corbett and S. v. Rhone*, 169.

The record did not support defendant's claim that her lawyer was not provided with information about various concessions the prosecutor made to the State's chief witness in exchange for his testimony. *S. v. Woods*, 213.

§ 31. Affording the Accused the Basic Essentials for Defense

The trial court did not err in the denial of an indigent defendant's motion for funds with which to retain an expert in fingerprint analysis. *S. v. Corbett and S. v. Rhone*, 169.

§ 32. Right to Fair and Public Trial; Publicity

The Court of Appeals erred in finding no error in the trial judge's denial of defendant's motion to set aside the verdict of manslaughter which was based upon alleged misconduct of a sheriff in driving three jurors to a restaurant for an evening meal during a break in the jury deliberations. *S. v. Bailey*, 110.

§ 40. Right to Counsel

When a court activates a suspended prison sentence, defendant may, upon appeal of such activation, raise the claim that he was unconstitutionally denied counsel at his original trial. *S. v. Neeley*, 247.

Where the record is completely silent as to whether the defendant was indigent, whether he knew he had a right to counsel or whether he made a knowing waiver of his right to counsel, the trial judge should not have imposed an active prison sentence upon the defendant. *Ibid.*

CONSUMER CREDIT

§ 1. Generally

The Court of Appeals should not have addressed the question whether upon a verdict in her favor at retrial plaintiff would be entitled to treble damages for a violation of a provision of the Retail Installment Sales Act. *Simmons v. C. W. Myers Trading Post*, 122.

CONTEMPT OF COURT

§ 6.3. Hearings on Orders to Show Cause; Findings and Judgment

A provision for periodic payments to the wife in a court-ordered consent judgment is enforceable by attachment for civil contempt for the husband's willful failure to pay without regard to whether those provisions are modifiable or unmodifiable. *Henderson v. Henderson*, 401.

COSTS

§ 3. Taxing of Costs in Discretion of Court

An offer of judgment for $5,001.00, together with all the costs accrued "except any attorneys' fees," complied with the requirements for a valid offer under Rule 68, and where plaintiff's recovery at trial was only $3,500.00, plaintiff had to bear the costs incurred after the offer of judgment was made, including expert witness fees and attorney's fees incurred after the offer of judgment. *Purdy v. Brown*, 93.

CRIMINAL LAW

§ 4. Distinction Between Crimes, Misdemeanors and Penalties

An attempt to receive stolen goods is punishable only as a misdemeanor. *S. v. Hageman*, 1.

Defendant could be convicted of an attempt to receive stolen property although the property had been recovered by the police and had lost its status as stolen property before it was delivered to defendant. *Ibid.*

§ 5.2. Mental Capacity as Affected by Unconsciousness

The trial court in a prosecution for attempted first degree rape and first degree sexual offense correctly refused to instruct the jury on the defense of unconsciousness or automatism where all the evidence tended to show that defendant's mental state was caused by his voluntary smoking of the drug called "angel dust." *S. v. Boone*, 198.

§ 6. Mental Capacity as Affected by Intoxicating Liquor or Drugs

Intoxication is not a defense to the crime of sexual offense but may be a valid defense to the crime of attempted rape. *S. v. Boone*, 198.

§ 7. Entrapment

Defendant has the burden to prove the defense of entrapment to the satisfaction of the jury, and once defendant has presented evidence of entrapment, the burden does not then shift to the prosecution to prove predisposition beyond a reasonable doubt. *S. v. Hageman*, 1.

The evidence in a prosecution for attempted receipt of stolen property did not disclose that the actions of police officers and their agent amounted to entrapment as a matter of law but permitted an inference by the jury that defendant was ready and willing to enter the illegal transactions when merely afforded the opportunity to do so by the agent. *Ibid.*

§ 7.5. Compulsion and Governmental Authorization

The burden of proving the affirmative defense of duress to the satisfaction of the jury is upon the defendant; however, the State is required to prove beyond a reasonable doubt all the elements of the offense in the face of any defenses raised and proved to the satisfaction of the jury. *S. v. Strickland*, 274.

CRIMINAL LAW—Continued

§ 10.2. Accessories Before the Fact; Sufficiency of Evidence

There was substantial evidence of each of the three elements of accessory before the fact of murder, and defendant's life sentence was proper. *S. v. Woods*, 213.

§ 11. Accessories After the Fact

In a prosecution for accessory after the fact of voluntary manslaughter, the trial court properly denied defendant's motions to dismiss. *S. v. Earnhardt*, 62.

In a prosecution for accessory after the fact of voluntary manslaughter, the trial court erred in stating that if defendant knew two people *could* have committed the crime of voluntary manslaughter and assisted them in escaping detection, then he should be found guilty since one item of proof of the crime of accessory after the fact is that the accused *knew* that a felony had been committed by the persons assisted. *Ibid.*

§ 15.1. Venue; Prejudice, Pretrial Publicity or Inability to Receive Fair Trial

Evidence that four newspaper articles traced the investigation of the crimes in question and reported on the apprehension of defendants did not show prejudice sufficient to preclude a fair and impartial trial in the county so as to require a change of venue, and testimony that the victim came from a respected family in the county and that people in the community were upset over the crimes did not show local prejudice sufficient to require a change of venue. *S. v. Corbett and S. v. Rhone*, 169.

§ 42.6. Chain of Custody or Possession

The chain of custody of a blood sample taken from a rape victim was sufficiently established. *S. v. Grier*, 628.

§ 48. Silence of Defendant as Implied Admission; Silence Competent

A statement made by a co-perpetrator in defendant's presence that "they" had just robbed a store was competent as an implied admission by defendant. *S. v. Cabey*, 496.

§ 57. Evidence in Regard to Firearms

In a homicide case in which an expert testified concerning similar rifling characteristics on bullets fired by defendant's gun and bullets taken from the deceased and another man, it was not error to permit the expert to state that he found nothing in his examination to be inconsistent with the bullets taken from deceased and the other man having been fired from defendant's gun. *S. v. Reynolds*, 184.

§ 60.3. Evidence in Regard to Fingerprints; Qualification and Testimony of Expert

By admitting fingerprint testimony by three officers, the trial court presumably found the officers to be expert witnesses. *S. v. Corbett and S. v. Rhone*, 169.

§ 62. Lie Detector Tests

Where the defense and the prosecution stipulated that an inconclusive result of a polygraph examination should not be admitted into evidence, defendant took a polygraph examination and the result was inconclusive, and defendant took a second polygraph examination and the result indicated he was being deceptive, the trial court erred in refusing to permit defendant to cross-examine the polygraph operator concerning the prior inconclusive polygraph results. *S. v. Grier*, 628.

CRIMINAL LAW—Continued

Polygraph evidence is no longer admissible in any trial even if the parties stipulate to its admissibility. *Ibid.*

§ 63. Evidence as to Sanity of Defendant; Expert Witness

The trial court committed prejudicial error in excluding a psychiatrist's testimony concerning the substance of his conversation with defendant which provided the basis for his opinion that defendant did not know the difference between right and wrong at the time of the offenses. *S. v. Allison*, 411.

§ 66. Evidence of Identity by Sight

The identification of a photograph of a man not on trial as depicting the shorter of two robbers was relevant and not impermissibly prejudicial to defendant in this armed robbery trial. *S. v. Cabey*, 496.

§ 66.9. Identification from Photographs; Suggestiveness of Procedure

The trial court properly concluded that a witness's pretrial photographic identification of one defendant was not unnecessarily suggestive and that her in-court identification of defendant was of independent origin and not tainted by the pretrial identification. *S. v. Barnett*, 608.

Two photographic lineups were not impermissibly suggestive because the victim had described his assailant as wearing a white T-shirt and defendant was the only person in the lineups wearing a white T-shirt. *S. v. White*, 42.

§ 66.12. Identification; Confrontation in Courtroom

The victim's identification of defendants was of independent origin based upon her viewing of them at the time of the crimes and did not result from her viewing of them at the preliminary hearing. *S. v. Corbett and S. v. Rhone*, 169.

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

Even if the pretrial display of an I.D. card with defendant's photograph on it to a rape victim was impermissibly suggestive, the victim's in-court identification of defendant was admissible as being of independent origin from the photographic show-up. *S. v. Hammond*, 662.

Even if pretrial photographic procedures were impermissibly suggestive, the evidence supported the court's determination that the victim's in-court identification of defendant was of independent origin and was therefore admissible. *S. v. White*, 42.

§ 66.18. Voir Dire to Determine Competency and Admissibility of In-Court Identification Generally; When Voir Dire Required

Defendant waived his right to have the admission of an in-court identification considered on appellate review by failing to object at trial to the in-court identification. *S. v. Hammond*, 662.

§ 73. Hearsay Testimony in General

A sheriff's testimony that a murder victim told the sheriff two days before the murders that he and the defendant had engaged in a serious argument because he had told defendant to stop selling drugs in the parking lot of his store and that he was afraid he would have serious trouble with defendant was admissible under an exception to the hearsay rule and was relevant. *S. v. Alston*, 321.

CRIMINAL LAW—Continued

§ 73.2. Statements Not Within Hearsay Rule

In a prosecution for offenses which arose from defendant's alleged delivery of drugs at a garage, testimony by defendant as to what the garage owner said to her should have been admitted by the trial court to show why defendant left the garage so quickly, but the exclusion of such testimony was harmless error. *S. v. Tate*, 242.

§ 74.3. When Confession is Competent

The confession of each of the three defendants was properly admitted into evidence where all parts of each defendant's confession which referred to or implicated any other defendant were first deleted. *S. v. Barnett*, 608.

§ 75. Admissibility of Confession; Tests of Voluntariness

The issue of voluntariness of a confession should not be submitted to the jury. *S. v. Barnett*, 608.

§ 75.1. Voluntariness of Confession; Effect of Fact that Defendant is in Custody or Under Arrest; Delay in Arraignment

Defendant was seized without probable cause within the meaning of the Fourth Amendment prior to making his confession where a deputy sheriff told defendant he had come to "pick him up," and the State failed to show that the effect of the unlawful seizure had been sufficiently attenuated at the time defendant confessed so as to render the confession admissible. *S. v. Freeman*, 357.

§ 75.2. Voluntariness of Confession; Effect of Promises, Threats or Other Statements of Officers

Even if an officer told defendant that he knew defendant killed the deceased but that defendant may not have intended to do so, the connection between the officer's statement and defendant's subsequent confession was so attenuated that the statement itself could not render the confession involuntary. *S. v. Chamberlain*, 130.

§ 75.3. Voluntariness of Confession; Effect of Confronting Defendant with Statements of Others or with Evidence

An officer's statement to defendant that deceased had identified defendant as the person who hit him in the head with a brick did not render defendant's subsequent confession involuntary. *S. v. Chamberlain*, 130.

§ 75.13. Confessions Made to Persons Other than Police Officers

Incriminating statements about a robbery-murder made by defendants to the victim's cousin while defendants and the cousin were being booked on criminal charges in the magistrate's office were admissible against defendants. *S. v. Barnett*, 608.

§ 76. Confession; Determination of Admissibility; Presumptions and Burden of Proof

The defendant was not prejudiced in a voir dire hearing to determine the admissibility of a confession by the error of the trial court in placing the burden of production on him. *S. v. Cheek*, 552.

§ 76.3. Confession; Voir Dire Hearing; Waiver of Hearing or Determination; Failure to Object to Admission of Confession or to Request Hearing

The trial court did not err in failing to hold a voir dire hearing prior to admitting defendant's statement for impeachment purposes where defendant did not

challenge its admissibility, prior to introduction, on the ground that it was coerced. *S. v. Strickland*, 274.

§ 76.7. Confession; Voir Dire Hearing; Evidence Sufficient to Support Findings

The trial court properly admitted the in-custody statement of each defendant where the court resolved evidentiary conflicts in favor of the State. *S. v. Barnett*, 608.

§ 85.1. Character Evidence; What Questions and Evidence are Admissible; Defendant's Evidence

The trial court did not err in refusing to permit the jury to consider acts of good conduct to negative motive, intent, knowledge and criminal plan. *S. v. Hageman*, 1.

§ 86.5. Credibility; Particular Questions and Evidence as to Specific Acts

In a prosecution for a first degree sexual offense, the prosecutor erred in asking defendant: "Now isn't it a fact, Mr. Sparks, that during the period of time that you were incarcerated that you became acquainted with the use of anal intercourse as a manner of sexual release for men in prison?" *S. v. Sparks*, 71.

§ 86.6. Impeachment; Particular Statements of Defendant

Cross-examination of defendant as to whether he had told a named person that he considered it a thrill to kill people and whether he had told two other persons that he was going to kill deceased if he didn't quit taking his marijuana was proper for impeachment purposes. *S. v. Corn*, 79.

§ 87.1. Leading Questions

The trial court did not abuse its discretion in permitting the State to ask leading questions of a witness concerning the chain of custody of items from which fingerprints were lifted. *S. v. Corbett and S. v. Rhone*, 169.

§ 87.2. Leading Questions; Illustrative Cases

In a prosecution for second degree rape, the trial court did not err in allowing the prosecutor, over objection, to ask the prlfecuting witness, an elderly woman seventy-eight or seventy-nine years of age, leading questions. *S. v. Smith*, 516.

§ 87.3. Use of Writings to Refresh Recollection; Past Recollection Recorded

Selected passages of an autopsy report could be read to the jury by the pathologist who prepared the report as past recollection recorded. *S. v. Corn*, 79.

§ 88. Cross-examination; Generally

Defendant failed to show that the verdict was improperly influenced by the trial court's limiting of defendant's cross-examination of the State's chief witness. *S. v. Woods*, 213.

§ 89.2. Corroboration

The trial court's instructions concerning corroboration given immediately before and after the testimony of various witnesses did not permit the jury to use the evidence to corroborate any previous witness rather than only the testimony of the witness who made the statement. *S. v. Alston*, 321.

Testimony by a doctor, a teacher and a social worker concerning prior statements made to them by two children was admissible to corroborate testimony of the children indicating a continuing course of sexual abuse of both of them by

CRIMINAL LAW—Continued

defendant, although the prior statements did not tend to prove the precise narrow facts brought out in the children's testimony during the trial. *S. v. Burns*, 224.

The trial court did not err in excluding testimony corroborating a witness on a collateral matter. *S. v. White*, 42.

§ 89.6. Impeachment

A receipt issued by the clerk of court's office indicating a payment toward the costs and fine imposed against defendant in another criminal case was irrelevant and not admissible to impeach defendant's testimony that he was employed on the date of two murders and that the only money he had was $10.00 a week which his mother gave him. *S. v. Alston*, 321.

§ 90.2. When Cross-examination of Own Witness May be Permitted

It was prejudicial error for the trial court to deny defendant's motions for a voir dire to determine whether a defense witness was a hostile witness whom defense counsel could ask leading questions. *S. v. Tate*, 242.

§ 91. Speedy Trial

When superseding indictments are appropriate and obtained in good faith, the 120-day speedy trial period begins from the day the new indictments are returned. *S. v. Mills*, 504.

§ 92. Consolidation and Severance of Counts; Multiple Defendants

The trial court erred in consolidating two different defendants' trials for murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury where there was no doubt that the position of one defendant was antagonistic toward the position of the other. *S. v. Boykin*, 87.

§ 92.1. Consolidation of Charges Against Multiple Defendants Held Proper; Same Offenses

Armed robbery and murder charges against three defendants were properly consolidated for trial. *S. v. Barnett*, 608.

Charges against two defendants for armed robbery, kidnapping and rape were properly consolidated for trial. *S. v. Corbett and S. v. Rhone*, 169.

§ 93. Order of Proof

The defendant was not prejudiced in a voir dire hearing to determine the admissibility of a confession by the error of the trial court in placing the burden of production on him. *S. v. Cheek*, 552.

§ 96. Withdrawal of Evidence

The trial court cured testimony which was erroneously admitted when it sustained defendant's objection and motion to strike and it instructed the jury to disregard the witness's statement. *S. v. Reynolds*, 184.

§ 98.2. Sequestration of Witnesses

Defendant made no showing that the trial court abused its discretion in denying her motion to sequester the witnesses, and the court perceived none. *S. v. Woods*, 213.

§ 99.2. Questions, Remarks, and Other Conduct of Court During Trial

Defendant was not prejudiced by the trial judge's remark during an officer's testimony at a voir dire hearing on the admissibility of defendant's confession that he was "not going to pay attention to anything he said." *S. v. Chamberlain*, 130.

CRIMINAL LAW—Continued

§ 101.4. Jury; Conduct or Misconduct Affecting or During, Deliberation; Custody of Jury

The Court of Appeals erred in finding no error in the trial judge's denial of defendant's motion to set aside the verdict of manslaughter which was based upon alleged misconduct of a sheriff in driving three jurors to a restaurant for an evening meal during a break in the jury deliberations. *S. v. Bailey*, 110.

The trial court properly permitted the jury to review in the courtroom, without the consent of defendants, written confessions which had been admitted into evidence. *S. v. Barnett*, 608.

§ 102.3. Arguments, Objection and Cure of Impropriety

Defendant waived objection to the prosecutor's jury argument by failing to object thereto at the trial. *S. v. White*, 42.

Where defense counsel objected to each of two improper arguments to the jury, and in both instances, the trial court sustained defense counsel's objections and immediately instructed the jury to disregard the improper portion of the State's closing argument, the improprieties were cured and possible prejudice to the defendant was avoided. *S. v. Woods*, 213.

§ 102.8. Arguments; Comment on Failure to Testify

The trial court properly refused to permit defense counsel to explain to the jury the reason defendant did not testify. *S. v. Boone*, 198.

§ 112.4. Charge on Degree of Proof Required of Circumstantial Evidence

When there is direct evidence of other elements of the crime, it is not necessary to given an instruction on circumstantial evidence when it relates to intent. *S. v. Hageman*, 1.

§ 113.1. Recapitulation or Summary of Evidence

The trial judge did not place undue emphasis upon the State's evidence but fairly summarized the evidence by the State and defendant. *S. v. Boone*, 198.

§ 113.7. Charge as to "Acting in Concert" or "Aiding and Abetting"

In a prosecution of three defendants for murder committed in the perpetration of an armed robbery, the trial court did not err in instructing the jury on the "common purpose" of two or more persons to commit the crime of murder on the ground that the evidence showed only a common purpose to commit armed robbery. *S. v. Barnett*, 608.

The court's instruction that the jury should convict defendant if he acted in concert with both codefendants rather than with either of the codefendants was not prejudicial to defendant. *Ibid.*

§ 114.2. Charge to Jury; Particular Cases; No Expression of Opinion in Statement of Evidence or Contentions

The trial court did not express an opinion in stating that defendant had said to the prosecutrix that he intended to have sexual intercourse with her where the evidence showed that defendant had used a vulgar word which conveyed the same meaning as sexual intercourse. *S. v. Boone*, 198.

§ 117.1. Charge on Credibility of Witness

The trial court's instructions on corroborating evidence did not constitute an expression of opinion that witnesses gave testimony at trial which was consistent with their earlier statements. *S. v. Alston*, 321.

CRIMINAL LAW—Continued

The trial court did not commit prejudicial error in failing to give a requested instruction concerning the effect on credibility of prior inconsistent statements made by a State's witness. *S. v. Cabey*, 496.

§ 117.4. Charge on State's Witnesses; Accomplices, Accessories, and Codefendants

Evidence that a witness was an accessory after the fact did not require the trial court to give a requested instruction on the duty to examine accomplice testimony carefully, and the trial court's instruction that the jury should consider "any interest, bias or prejudice the witness may have" was a sufficient instruction on the duty to scrutinize the testimony of an interested witness. *S. v. Cabey*, 496.

§ 120.1. Instructions on Consequences of Verdict and Punishment in Capital Cases

It was not necessary to decide whether the trial court should have instructed the jury during the selection process that defendant's eligibility for parole if he were sentenced to life imprisonment and the probability that defendant would in fact be executed if he were sentenced to death were not proper matters for their consideration where the jury returned a verdict of guilty of second degree murder. *S. v. Chamberlain*, 130.

§ 121. Instructions on Defense of Entrapment

The trial court's instruction on entrapment was sufficient without use of the word "predisposed." *S. v. Hageman*, 1.

§ 122.1. Jury's Request for Additional Instructions

Where the trial court asked both the district attorney and the defense counsel if they had any objection to his giving the highlights of the prosecuting witness's testimony and in repeating the defendant's confession upon a request by the jury and defendant did not object, defendant waived his right to have an objection to the charge considered on appeal. *S. v. Cheek*, 552.

§ 138. Severity of Sentence and Determination Thereof

In every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately and separately supported by findings applicable only to that offense. *S. v. Ahearn*, 584.

In a prosecution for voluntary manslaughter, the trial court did not err in finding as aggravating factors that the offense was especially heinous, atrocious or cruel, that the victim was very young or mentally or physically infirmed, and that defendant was dangerous to others. *Ibid.*

In every case in which it is found that the court erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing. *Ibid.*

In imposing a sentence for felonious child abuse, the trial court did not err in finding as an aggravating factor that defendant was dangerous to others as a result of his social and emotional problems, but the court erred in finding as an aggravating factor that defendant was dangerous to himself. *Ibid.*

The trial court erroneously considered as a mitigating factor for a voluntary manslaughter offense that prior to arrest or an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense

CRIMINAL LAW – Continued

to a law enforcement officer, since defendant acknowledged his wrongdoing only with respect to a felonious child abuse offense. *Ibid.*

The trial court's finding as an aggravating factor in a felonious child abuse case that the offense was especially heinous, atrocious or cruel was not supported by the evidence. *Ibid.*

As used in the statute providing that evidence necessary to prove an element of "the offense" may not be used to prove any factor in aggravation, the phrase "the offense" refers to the criminal charge for which defendant is convicted rather than to the crime charged in the indictment. *S. v. Melton*, 370.

Where a defendant charged with first degree murder pled guilty to second degree murder, a determination in the sentencing phase that defendant premeditated and deliberated the killing could be considered as an aggravating factor in determining an appropriate sentence for defendant. *Ibid.*

Under G.S. 14-1.1(b) the trial court erred in giving defendant a ten-year prison sentence for conspiracy to commit murder since the maximum sentence which can be imposed is 3 years imprisonment. *S. v. Woods*, 213.

§ 143.1. Time for, and Notice or Other Manner of Commencement of Revocation Proceedings

Where defendant was given notice of a probation revocation hearing, the court at the hearing could properly modify the conditions of defendant's probation without notice to defendant of the court's intent to modify the conditions. *S. v. Coltrane*, 511.

Defendant received sufficient notice of a 28 September hearing to revoke her probation where the trial judge stated in open court at defendant's 10 September probation revocation hearing that the case would automatically be returned to the court at the next session without further orders of the court if defendant had not found gainful employment within two weeks. *Ibid.*

§ 143.4. Right to Counsel at Probation Revocation Hearing

The trial court erred in revoking defendant's probation where defendant's counsel was not present at her probation revocation hearing and defendant did not waive her right to counsel. *S. v. Coltrane*, 511.

§ 143.5. Probation Revocation; Admissibility, Competency, and Sufficiency of Evidence and Burden of Proof

Defendant's statutory rights were violated where defendant was not effectively allowed to speak on her own behalf at her probation revocation hearing and was not permitted to present information relevant to the charge that she had violated a condition of probation. *S. v. Coltrane*, 511.

§ 146.4. Constitutional Questions

Because defendant failed to ask the trial court to pass upon the constitutionality of G.S. 15A-66, the Supreme Court declined to review the constitutionality of the statute on appeal. *S. v. Woods*, 213.

§ 146.5. Appeal from Sentence Imposed on Guilty Plea

A defendant is not entitled to appellate review as a matter of right of the court's acceptance of his guilty plea. *S. v. Ahearn*, 584.

§ 150. Right of Defendant to Appeal

Where misdemeanor and felony charges were consolidated on appeal, the Court of Appeals rendered a unanimous decision in the misdemeanor case, and

CRIMINAL LAW—Continued

there was a dissent in the felony case, defendant was not entitled to appeal the misdemeanor case to the Supreme Court as a matter of right. *S. v. Hageman*, 1.

§ 162. Necessity for Objections; Waiver and Renewal of Objection

Where defendant failed to object to a line of questioning asked defendant during the voir dire hearing on defendant's motion to suppress his confession, he could not complain on appeal about the interchange. *S. v. Cheek*, 552.

§ 163. Exceptions and Assignments of Error to Charge; Necessity of and Time for Making

Where defendant did not object to the instructions as given in his trial for a first degree sexual offense, and where defendant did not request a recorded conference, in the absence of error so fundamental that the Court would invoke Rule 2 power, the Court would not review defendant's assignments of error. *S. v. Fennell*, 258.

Defendant may not assign the trial court's failure to instruct the jury on the defense of abandonment of the criminal enterprise as error where defendant failed to object thereto before the jury retired. *S. v. Woods*, 213.

The Supreme Court adopted the "plain error" rule to permit review of some assignments of error to the charge normally barred under Appellate Rule 10(b)(2) by defendant's failure to object at trial. Failure of the trial court in a prosecution for attempted robbery with a firearm to instruct on the possible verdict of guilty of simple assault did not constitute such "plain error." *S. v. Odom*, 655.

§ 169.6. Harmless and Prejudicial Error in Exclusion of Evidence

The Court could not determine whether an alleged error was prejudicial where defendant failed to include in the record what his answer would have been. *S. v. Cheek*, 552.

§ 177. Determination and Disposition of Cause; Defendant Entitled to New Trial

Where one member of the Supreme Court did not participate in the consideration or decision of a case and the remaining six Justices were equally divided, the opinion of the Court of Appeals was affirmed without precedential value. *S. v. Woodruff*, 264.

§ 181. Post-Conviction Hearing

The procedures and standards to be employed with regard to collateral attacks upon criminal convictions are no longer controlled by our former Post-Conviction Hearing Act but are now controlled by the statutes comprising Art. 89 of G.S. Ch. 15A, G.S. 15A-1411 through G.S. 15A-1422. *S. v. Bush*, 152.

§ 181.1. Motion for Appropriate Relief; Time for Filing

Even though the defendant made his Motion for Appropriate Relief more than 10 days after the entry of judgment, the motion was not subject to summary denial on that basis since the defendant asserted that his conviction was obtained unconstitutionally. *S. v. Bush*, 152.

§ 181.2. Motion for Appropriate Relief; Burden of Proof

Once defendant stated with specificity in his Motion for Appropriate Relief the manner in which he asserted that his conviction was obtained in violation of the Constitution of the United States, he was entitled to a hearing on questions of law or fact arising from the motion, and he had the burden of showing the existence of the asserted ground for relief and also to show "prejudice." *S. v. Bush*, 152.

DIVORCE AND ALIMONY

§ 19.5. Effect of Separation Agreements and Consent Decrees

Where an earlier judgment had ordered that defendant specifically perform support provisions of a separation agreement requiring defendant to pay plaintiff an amount equal to 50% of his military retirement pay, the trial court in the exercise of its powers in equity under Rule 60(b)(5) could modify the judgment to change the amount to be paid to plaintiff under the specific performance order from 50% of defendant's military retirement pay to 20% thereof. *Harris v. Harris*, 684.

Instead of following the dual consent judgment approach in family law, the Court established a rule tht whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. *Walters v. Walters*, 381.

§ 21.5. Punishment for Contempt

A provision for periodic payments to the wife in a court-ordered consent judgment is enforceable by attachment for civil contempt for the husband's willful failure to pay without regard to whether those provisions are modifiable or unmodifiable. *Henderson v. Henderson*, 401.

§ 21.6. Enforcement of Alimony; Effect of Separation of Agreements

The issue of the trial court's authority to order an assignment of defendant's military retirement pay under the federal definition of "alimony" was not properly before the Court of Appeals. *Harris v. Harris*, 684.

ESCAPE

§ 6. Prosecution for Offense and for Aiding and Assisting Escape; Evidence

In a prosecution of defendant under G.S. 148-45(b) for felonious escape while on work release, it was not error for the trial court to admit evidence that defendant was incarcerated for both a felony and a misdemeanor at the time he escaped, although the crime of felonious escape required proof that defendant was incarcerated for the commission of a felony, not a misdemeanor. *S. v. Hammond*, 662.

EVIDENCE

§ 18. Experimental Evidence

Rules governing the admissibility of experiments were not applicable in determining whether the trial court acted properly in permitting the jury to view a fire truck and to hear its siren. *Williams v. Bethany Fire Dept.*, 430.

§ 45. Evidence as to Value

In an action to recover for breach of an express warranty to repair plaintiff's house trailer, the trial court erred in excluding plaintiff's testimony on the value of her trailer without the promised repairs. *Simmons v. C. W. Myers Trading Post*, 122.

GAS

§ 1. Regulation

The Utilities Commission erred in ordering natural gas utilities to pass to their current customers refunds received from their supplier representing overpayments for gas made from 1958 to 1971 since G.S. 62-136(c) required distribution of the refunds to the actual customers who paid rates including the overcharges, and such

HOMICIDE—Continued

§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder

The State's evidence was sufficient for the jury on the issue of defendant's guilt of second degree murder. *S. v. Tysor*, 679.

§ 24.1. Presumptions Arising from Use of Deadly Weapon

The trial court did not err in instructing the jury on the presumptions of unlawfulness and malice. *S. v. Chamberlain*, 130.

An instruction to the jury that the law implies malice and unlawfulness from the intentional use of a deadly weapon proximately resulting in death was not a conclusive, irrebuttable presumption. *S. v. Reynolds*, 184.

§ 24.2. Defendant's Burden of Meeting or Overcoming Presumption of Malice

A trial court did not err in failing to require the jury to find malice, an essential element in murder in the first degree. *S. v. Strickland*, 274.

The defense of duress is not available to a defendant charged with first degree murder and therefore is not evidence of lack of malice. *Ibid.*

§ 25. First Degree Murder

G.S. § 14-17 separates first degree murder into four distinct classes as determined by proof. *S. v. Strickland*, 274.

§ 25.2. Premeditation and Deliberation

In a prosecution for murder in the first degree, any error in the jury instructions placing the burden of persuasion on the defendant to show absence of malice was cured by the jury's verdict of murder in the first degree. *S. v. Bush*, 152.

§ 26. Second Degree Murder

The trial court's erroneous instruction that the jury could find defendant guilty of second degree murder on a felony murder theory was not prejudicial where the jury returned a verdict of guilty of second degree murder both on the basis of malice without premeditation and deliberation and under the "second degree felony rule." *S. v. Chamberlain*, 130.

§ 28. Self-Defense

In a prosecution for first degree murder, the trial court erred in giving the jury any instructions relative to self-defense; however, this error was favorable to the defendant and clearly harmless to him beyond a reasonable doubt. *S. v. Bush*, 152.

The trial court's instructions in a homicide case adequately stated in substance that a show of force was not necessary in order to find that defendant acted in self-defense. *S. v. Corn*, 79.

§ 30. Submission of Question of Guilt of Lesser Degrees of Crime

When a murder is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the law conclusively presumes that the murder was committed with premeditation and deliberation, and if the evidence produced at trial supports a finding that the murder was so perpetrated, there is no justification for submitting to the jury a charge of one of the lower grades of murder. *S. v. Strickland*, 274.

Where the evidence in a prosecution for first degree murder showed the defendant acted with premeditation and deliberation, the trial judge properly excluded from jury consideration the possibility of a conviction of second degree murder. *Ibid.*

HOMICIDE—Continued

Where a murder is committed in the perpetration or attempted perpetration of certain enumerated felonies or the murder is committed in the perpetration or attempted perpetration of any other felony committed or attempted with the use of a deadly weapon, the State is not required to prove premeditation and deliberation and neither is the court required to submit to the jury second degree murder or manslaughter unless there is evidence to support it. *Ibid.*

Where a murder is perpetrated by means of any other kind of willful, deliberate and premeditated killing, a defendant can properly be convicted of murder in the first degree, and a trial judge is required to give an instruction on second degree murder only if the evidence, reasonably construed, tends to show lack of premeditation and deliberation or would permit a jury to rationally find defendant guilty of the lesser offense and acquit him of the greater. *Ibid.*

§ 30.2. Submission of Charge of Manslaughter; Generally

The trial court in a homicide prosecution did not err in refusing to submit voluntary manslaughter as an alternative verdict. *S. v. Chamberlain*, 130.

INDICTMENT AND WARRANT

§ 13.1. Discretionary Denial of Motion for Bill of Particulars

The trial court properly denied defendant's motion for a bill of particulars requesting "all events and circumstances surrounding the alleged homicide of [two named victims] and the defendant's alleged participation therein." *S. v. Alston*, 321.

§ 17.2. Variance Between Averment and Proof; Time

A variance between an indictment charging that defendant conspired "on or about the 12th day of December, 1980" to commit felonious larceny of ham and evidence tending to show that defendant and a co-conspirator had conversations concerning the hams during a three-month period and that the hams were stolen after Christmas was prejudicial to defendant in light of defendant's evidence that he was elsewhere on the date charged in the indictment. *S. v. Christopher*, 645.

INSURANCE

§ 105. Actions Against Insurer

An insurer has no legal obligation to defend a criminal proceeding brought against an insured arising out of the operation of an automobile causing injury or damages, and an insurance company is under no legal obligation to its insured to pay restitution assessed as the result of a criminal judgment. *Shew v. Southern Fire & Casualty Co.*, 438.

JUDGMENTS

§ 13. Judgments by Default; Grounds

The Court of Appeals erred in holding that plaintiff could obtain a default judgment when there was an answer on file on the ground that the answer was filed by an out-of-state attorney who had not qualified under G.S. 84-4.1 to practice in North Carolina. *N.C.N.B. v. Virginia Carolina Builders*, 563.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

The State's evidence was sufficient to support conviction of defendants for kidnapping a victim whom defendants accosted in a grocery store parking lot. *S. v. Corbett and S. v. Rhone*, 169.

The State's evidence in a first degree kidnapping case was sufficient to support a finding by the jury that defendant forced the victim into an alley for the purpose of committing a first degree sexual offense as alleged in the indictment rather than merely to interrogate him as to the whereabouts of a third person. *S. v. White*, 42.

§ 1.3. Instructions

Where the trial court's instruction to the jury on the defense of duress was such that the Court was unable to determine with certainty whether the jury's rejection of defendant's defense of duress was based upon a disbelief of his evidence or its failure to understand that duress was a complete defense to the kidnapping charge, defendant was entitled to a new trial on that charge. *S. v. Strickland*, 274.

MASTER AND SERVANT

§ 68. Occupational Diseases

G.S. 97-29.1 increased only the weekly benefits of claimants who were totally and permanently disabled prior to 1 July 1973 but did not increase the $12,000.00 maximum compensation provided for in G.S. 97-29. *Taylor v. J. P. Stevens Co.*, 392.

§ 77.1. Modification and Review of Award

In a workers' compensation proceeding, the evidence in the record supported the Industrial Commission's findings of fact and its conclusion of law that plaintiff suffered a change in condition within the meaning of N.C.G.S. 97-47. *McLean v. Roadway Express*, 99.

§ 99. Costs and Attorney's Fees

The Industrial Commission has the discretion to award attorney fees for work rendered in connection with an appeal before an appellate court. *Taylor v. J. P. Stevens Co.*, 392.

MUNICIPAL CORPORATIONS

§ 8.2. Violation and Enforcement of Ordinance

A town ordinance prohibited defendant from keeping goats and ponies within the town limits. *Town of Atlantic Beach v. Young*, 422.

§ 30.3. Validity of Zoning Ordinances Generally

A zoning ordinance which prohibited defendant from maintaining two goats and a small pony at her residence was not unconstitutionally vague, was not arbitrary and unreasonable, and did not violate equal protection. *Town of Atlantic Beach v. Young*, 422.

NARCOTICS

§ 4. Cases Where Evidence Sufficient

The State's evidence was sufficient to permit, but not require, the jury to reasonably infer that defendant possessed 2.7 grams of heroin with intent to sell or deliver. *S. v. Williams*, 452.

§ 4.3. Cases Where Evidence of Constructive Possession Sufficient

In a prosecution for felonious possession of a controlled substance with intent to sell or deliver in violation of G.S. 90-95(a)(1), the State offered ample, substantial

RAPE AND ALLIED OFFENSES – Continued

§ 5. Sufficiency of Evidence

Proof of the element of infliction of "serious personal injury" in a prosecution for first degree rape or first degree sexual offense may be met by the showing of mental injury as well as bodily injury. *S. v. Boone*, 198.

The State's evidence was insufficient to support a jury finding that the victim of an attempted rape and a sexual offense suffered such mental or emotional injuries as a result of defendant's acts which would constitute "serious personal injury" so as to raise the degree of crimes from second degree to first degree. *Ibid.*

The State's evidence was sufficient to support conviction of two defendants for the first degree rape of a victim whom defendants accosted in a grocery store parking lot. *S. v. Corbett and S. v. Rhone*, 169.

The State's evidence was insufficient to be submitted to the jury on the issue of defendant's guilt of a first degree sexual offense with an eight-year-old boy. *S. v. Clark*, 120.

§ 6. Instructions

Under the circumstances of this case, the trial court erred in failing to instruct the jury that in order to convict defendant of second degree rape, it must find beyond a reasonable doubt that defendant penetrated the sex organ of the prosecutrix with his sex organ. *S. v. Barnes*, 104.

Intoxication is not a defense to the crime of sexual offense but may be a valid defense to the crime of attempted rape. *S. v. Boone*, 198.

RECEIVING STOLEN GOODS

§ 1.1. Property Actually Stolen

When the police recovered stolen silverware prior to its delivery to defendant, it lost its status as stolen property, and defendant could not be convicted of receiving stolen goods in connection with the silverware. *S. v. Hageman*, 1.

§ 1.2. Attempt to Commit the Offense

An attempt to receive stolen goods is punishable only as a misdemeanor. *S. v. Hageman*, 1.

Defendant could be convicted of an attempt to receive stolen property although the property had been recovered by the police and had lost its status as stolen property before it was delivered to defendant. *Ibid.*

§ 5.1. Cases Where Evidence Sufficient

The State's evidence was sufficient to support defendant's conviction of an attempt to receive a stolen ring and stolen silverware. *S. v. Hageman*, 1.

REGISTRATION

§ 4. Priorities

Where plaintiff recorded her deed to a piece of property on 5 November 1979, and defendant recorded its options to renew a lease on the property on 26 November 1980, plaintiff did not take the deed subject to the lease. *Simmons v. Quick Stop Food Mart*, 33.

ROBBERY

§ 5.4. Instructions on Lesser Included Offenses and Degrees

The trial court did not err in failing to submit assault as a lesser included offense of attempted common law robbery. *S. v. Whitaker*, 115.

RULES OF CIVIL PROCEDURE

§ 52.1. Findings by Court

In an action tried without a jury where the trial court was to determine whether the parties intended to create a condition precedent to defendants' liability under a guaranty agreement, the trial court failed to make specific findings of the ultimate facts necessary to support its conclusions of law that no condition precedent existed to defendants' liability under the guaranty agreement. *Farmers Bank v. Brown Distributors*, 342.

§ 55. Default

The Court of Appeals erred in holding that plaintiff could obtain a default judgment when there was an answer on file on the ground that the answer was filed by an out-of-state attorney who had not qualified under G.S. 84-4.1 to practice in North Carolina. *N.C.N.B. v. Virginia Carolina Builders*, 563.

§ 60. Relief from Judgment or Order

Where an earlier judgment had ordered that defendant specifically perform support provisions of a separation agreement requiring defendant to pay plaintiff an amount equal to 50% of his military retirement pay, the trial court in the exercise of its powers in equity under Rule 60(b)(5) could modify the judgment to change the amount to be paid to plaintiff under the specific performance order from 50% of defendant's military retirement pay to 20% thereof. *Harris v. Harris*, 684.

§ 68. Offer of Judgment and Disclaimer

An offer of judgment for $5,001.00, together with all the costs accrued "except any attorneys' fees," complied with the requirements for a valid offer under Rule 68, and where plaintiff's recovery at trial was only $3,500.00, plaintiff had to bear the costs incurred after the offer of judgment was made, including expert witness fees and attorney's fees incurred after the offer of judgment. *Purdy v. Brown*, 93.

SEARCHES AND SEIZURES

§ 16. Consent Given by Members of Household

A warrantless search of the house in which defendants were arrested was lawful on the basis of the voluntary consent of a third party who possessed common authority over the premises. *S. v. Barnett*, 608.

SPECIFIC PERFORMANCE

§ 1. Principles and Equitable Considerations Governing Granting Relief

Where an earlier judgment had ordered that defendant specifically perform support provisions of a separation agreement requiring defendant to pay plaintiff an amount equal to 50% of his military retirement pay, the trial court in the exercise of its powers in equity under Rule 60(b)(5) could modify the judgment to change the amount to be paid to plaintiff under the specific performance order from 50% of defendant's military retirement pay to 20% thereof. *Harris v. Harris*, 684.

STATE

§ 4. Actions Against State; Sovereign Immunity

The State Ports Authority is an agency of the State and, as such, is entitled to claim the defense of sovereign immunity. *Guthrie v. State Ports Authority*, 522.

The State has absolute immunity in tort actions without regard to whether it is performing a governmental or proprietary function except insofar as it has consented to be sued or otherwise expressly waived its immunity. *Ibid.*

In an action instituted by plaintiff alleging breach of contract in the construction of the North Carolina Museum of Art Building, the trial court erred in denying defendant's motions to dismiss which were raised on the defense of sovereign immunity in that plaintiff failed to exhaust its statutory remedies under G.S. § 143-135.3 prior to instituting a civil action in superior court. *Middlesex Construction Corp. v. State ex rel. Art Museum Bldg. Comm.*, 569.

§ 5. Nature and Construction of Tort Claims Act

The State Tort Claims Act and G.S. 143-454(1), which vests the State Ports Authority with authority to sue or be sued, when read together, evidence a legislative intent that all tort actions against the Ports Authority for money damages will be pursued in the Industrial Commission under the State Tort Claims Act. *Guthrie v. State Ports Authority*, 522.

STATUTES

§ 2.6. Constitutional Prohibition Against Enactment of Local or Special Acts Relating to Designated Subjects

The 1979 amendment to the North Carolina Housing Finance Agency Act, which provided for issuance of bonds to finance single and multi-family housing for persons of moderate income, was enacted for a public purpose, and is, therefore, a valid exercise of the State's power to tax. *In re Housing Bonds*, 52.

TAXATION

§ 7.2. Particular Purposes as Public

The 1979 amendment to the North Carolina Housing Finance Agency Act, which provided for issuance of bonds to finance single and multi-family housing for persons of moderate income, was enacted for a public purpose, and is, therefore, a valid exercise of the State's power to tax. *In re Housing Bonds*, 52.

§ 27. Inheritance, Estate and Gift Taxes

Plaintiffs' decision to borrow funds with which to pay federal estate and state inheritance taxes due on the decedent's estate was authorized under G.S. §§ 28A-13-2 & -3, and interest expenses incurred as the result of borrowing funds may be properly deductible as a cost of administration pursuant to G.S. 105-9(8). *Holt v. Lynch*, 234.

The interest paid on the actual liabilities for federal estate and state inheritance taxes is properly deductible as a cost of administration. *Ibid.*

TELECOMMUNICATIONS

§ 1.2. Determination of Rate Charged by Public Utility

The Utilities Commission has the authority to include, in a telephone company's operating statistics for the purpose of ratemaking, the investments, the

TELECOMMUNICATIONS – Continued

TRIAL

TRUSTS

UTILITIES COMMISSION

WILLS

WITNESSES

§ 4. Rule that a Party May Not Impeach His Own Witness

It was prejudicial error for the trial court to deny defendant's motions for a voir dire to determine whether a defense witness was a hostile witness whom defense counsel could ask leading questions. *S. v. Tate*, 242.

WORD AND PHRASE INDEX

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