NORTH CAROLINA REPORTS

VOLUME 308

SUPREME COURT OF NORTH CAROLINA

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1. Appointed Judge 27 January 1984 to succeed Samuel E. Britt who retired 31 December 1983.
2. Appointed Judge 20 February 1984.
3. Appointed Judge 23 March 1984.
4. Appointed Emergency Judge 1 January 1984.

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1. Appointed Chief Judge 16 January 1984 to replace Robert D. Wheeler who retired 31 December 1983.
2. Appointed Judge 2 March 1984.
3. Appointed Judge 13 December 1983.
4. Appointed Judge 16 January 1984 to replace Joseph E. Dupree who resigned 1 December 1983.
5. Appointed Senior Resident Superior Court Judge 27 January 1984.
6. Appointed Judge 30 December 1983 to replace Walter M. Lampley who retired 30 November 1983.
7. Appointed Judge 8 February 1984 to replace Edward J. Crotty who resigned 31 December 1983.
8. Retired effective 1 April 1984.

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CASES REPORTED

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

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THOMAS DELANO EATMAN, JR. ..... Rocky Mount
REGINALD GREGGORY EDWARDS ..... Fayetteville
GREGORY KEITH ELLER ..... Greensboro
BILLIE RAY ELLERBE ..... Mount Gilead
ALBERT CHARLES ELLIS ..... Jacksonville
HAROLD MARK EMANUEL ..... Charlotte
MARGARET C. ENGLAND ..... Collinsville, Illinois
PAUL GRIEG ENNIS ..... Newport News, Virginia
JOHN ROBERT ERWIN ..... Morganton
RICHARD WILSON EVANS ..... Auburn, Alabama

THOMAS ALVIN FARR ..... Greensboro
TODD H. FENNELL ..... Wilmington
ALAN EARL FERGUSON ..... Charlotte
ROBERT WARNER FERGUSON ..... Monroe
JOSEPH ALECK FERIKES ..... Asheville
SPURGEON FIELDS III ..... Raleigh
NEAL WILLIAM FISHER ..... Roanoke, Virginia
MARY BETH FORSYTH ..... Roxboro
CHARLES RANDALL FOSTER ..... Jamestown
JAMES WILLIAM FOSTER, JR. ..... Hyde Park, New York
NANCY DAIL FOUNTAIN ..... Tarboro
MARTHA ERWIN FOX ..... Catawba
SARAH WESLEY FOX ..... Raleigh
DENNIS JOEL FRANKS ..... Raleigh
GEORGE JOSEPH FRANKS ..... Fayetteville
JEFFREY S. FULK ..... Winston-Salem
ROBERT WALKER FULLER III ..... High Point
NATHAN MORRIS GARREN ..... Raleigh
LESLEY ROBIN GARRETT ..... Winston-Salem
JOHN BALTZLY GARVER III ..... Durham
JOHN JOSEPH GEZELIN ..... Reno, Nevada
RICHARD WAYNE GIBSON, JR. ..... Wilmington
DEBRA KAY GILCHRIST ..... Greenville
MICHAEL A. GILLES ..... Evansville, Indiana
REGINALD B. GILLESPIE, JR. ..... Graham
SALLY T. GILMORE ..... Durham
GEORGE FRANKLIN GIVENS ..... Gaston
BRANT HATTON GODFREY ..... Winston-Salem
LAWRENCE DALE GRAHAM ..... Taylorsville
CHARLES WILLIAM GRANDY ..... Charlotte
BRADLEY KEITH GREENWAY ..... Tryon
CYNDI ANN HADEN ..... Willow Grove, Pennsylvania
KURT LAMONT HAEFELI ..... Fayetteville
ZESELY BRYAN HAISLIP, JR. ..... Winston-Salem
NANCY WENTZ HALE ..... Dudley
HARDIN GRAHAM HALSEY ..... Mouth of Wilson, Virginia
WILLIAM GRADY HAMBY, JR. ..... Laurinburg
KENT LEWIS HAMRICK ..... Winston-Salem
KIMBERLY POWELL HARGETT ..... Steubenville, Ohio
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LARRY CLAYTON HARRIS, JR. ..... Asheville
PATTIE SUE HARRISON ..... Roxboro
JOHN ROBERT HART ..... Winston-Salem
LEE KENION HART ..... Candor
DEBORAH HYLTON HARTZOG ..... Durham
MICHAEL SCOTT HAWLEY ..... Gainesville, Florida
JEFFREY SCOTT HAY ..... Columbia, South Carolina
GREGORY RALPH HAYES ..... Winston-Salem
WILLIAM JAMES HAYNES II ..... Charlotte
EDWARD WATSON HEDRICK ..... Charlotte

NANCY GARLICK HEMRIC ..... Burlington
J. DOUGLAS HENDERSON ..... Greensboro
CHRISTINE JENKS HERLINGER ..... Durham
GEORG NICHOLAS HERMAN ..... Chapel Hill
CHRISTOPHER SCOTT HESTER ..... High Point
RONDI RAUCH HEWITT ..... Durham
STEVEN ENNIS HIGHT ..... Louisburg
ANNE CHARETTE HILL ..... Raleigh
LILLIAN LUCILE HILL ..... Greenville, South Carolina
WILLIAM FRAZIER HILL ..... Salem, Virginia
CHARLES FRANKLIN HILTON ..... Newton
HELEN KELLY HINN ..... Wilmington
GARL EDWARD HINSHAW, JR. ..... Winston-Salem
ROBERT HENRY HOCHULI, JR. ..... Asheboro
RONALD GREGORY HOCK ..... Charlotte
BARBARA D. HOLLINGSWORTH ..... Oak Grove, Louisiana
DORIS JOHNSON HOLTON ..... Thomasville
JAMES P. HUFFINES, JR. ..... Greensboro
FRANK JEFFERSON HUGHES ..... Pompano Beach, Florida
WARREN ASHTON HUTTON ..... Hickory
SANDRA JEAN HYLDBURG ..... Asheville
JOHN RANDOLPH INGRAM II ..... Cary
ANNE ALENE ISAAC ..... Greensboro
CATHERINE DAWN ISRAEL ..... Winston-Salem
ROBERT ANDREWS IZARD, JR. ..... Decatur, Georgia
GEORGE STEVENS JACKSON ..... Elizabeth City
JANE CORNWELL JACKSON ..... Aldie, Virginia
CLYDE HAMILTON JARRETT III ..... Charlotte
LISA CAROL JEFFREY ..... Roxboro
THOMAS PATRICK JENKINS ..... Canton, Pennsylvania
JAMES ALLEN JERNIGAN ..... Raleigh
DEBRA IRENE JOHNSON ..... High Point
MARTHA FOUNTAIN JOHNSON ..... Rocky Mount
CHESTER MARVIN JONES ..... Franklin
EUNICE JONES-OBENG ..... Greensboro
JAMES FREDERICK JORDAN ..... Raleigh
JANA ANN JOUSTRA ..... Pinehurst
DAVID L. KENNEDY ..... Sanford
DAVID SHOPE KENNETT ..... Greensboro
TERENCE H. KENNEY ..... San Rafael, California
KATHY J. KING ..... Statesville
NANCY M. P. KING ..... Durham
PAUL ANDREW KOHUT ..... Winston-Salem
JAMES KARL KUYK ..... Winston-Salem
MARK DIXON LACKEY ..... Shelby
STEVEN W. LAMBERT ..... High Point
ANDREW SAMPSON LASINE ..... High Point
JANET POWELL LAWRENCE ..... Raleigh
ROBYN JILL LAZENBY ..... Statesville
KIMBERLY ELIZABETH LEDFORD ..... Franklin

EDNA ELIZABETH LEFLER ..... Lexington
DEBORAH LYNN LEONARD ..... Raleigh
BRYAN EDWARD LESSLEY ..... Charleston, West Virginia
BLAIR STEVEN LEVIN ..... Northridge, California
STEVEN JAY LEVITAS ..... Charlotte
DONA LEWANDOWSKI ..... Madisonville, Tennessee
KURT ERIC LINDQUIST II ..... Morganton
EUGENE TAYLOR LINKOUS, JR. ..... Sanford
CLIFF GAVIN LINN ..... Philadelphia, Pennsylvania
ANNE RHYS LONG ..... Winston-Salem
VANCE BRADFORD LONG ..... Asheboro
MARK TIMOTHY LOWDER ..... Albemarle
RICHARD PURCELL LUDINGTON ..... Miami, Florida
DEBORAH MOORE LUTZ ..... Jacksonville
ROBIN SINCLAIR LYMBERIS ..... Charlotte
CLEGG WAYNE MABRY, JR. ..... Albemarle
JOHN DALE MADDEN ..... Winston-Salem
MELISSA ANN MAGEE ..... Bonduel, Wisconsin
RICHARD LAYNE MAGEE ..... Pfafftown
GARY S. MAINES ..... Raleigh
ANGELINE M. MALETTO ..... Raleigh
THOMAS LANE MALLONEE, JR. ..... Candler
EDWARD L. MANCHUR ..... Revere, Massachusetts
STEPHEN GRAY MARLER ..... Greensboro
FRANCES KATE MCNAIR MARSH ..... Greensboro
DAVID RAY MARTIN ..... Pinehurst
KENNETH CHARLES MARTIN ..... Pittsfield, Massachusetts
WATT NICHOLAS MARTIN ..... Winston-Salem
JEFFREY NELSON MASON ..... Harlowe
JAMES PRESSLY MATTOX ..... Statesville
GREGORY PEER MAYER ..... Williamsville, New York
ALAN I. MAYNARD ..... Elizabethtown
MALLAM JOHN MAYNARD ..... Greensboro
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EDDIE H. MEACHAM ..... Ellerbe
KIRAN H. MEHTA ..... Charlotte
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SALLY SPAHN MENNEN ..... Greensboro
JEFFREY SCOTT MERRELL ..... Daytona Beach, Florida
ROBERT MARSHALL MERRIMAN, JR. ..... Galax, Virginia
LOUIS B. MEYER ..... Wilson

VINCENT JAMES MILITA II ..... Raleigh
CAROL VINCENT MILLER ..... Murfreesboro
DAVID SIGSBEE MILLER ..... Millers Creek
H. WILLIAM MILLER, JR. ..... Carrboro
PETER JON MILLER ..... Berkeley Heights, New Jersey
DARRYL MILLS ..... Wilmington
CHARLES GUY MONNETT III ..... Greensboro
LAURA OLIVE MONNETT ..... Charlotte
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MARTHA DENNING MOORE ..... Willow Springs
MYRON L. MOORE III ..... Lenoir
WILLIAM HENRY MOORE, JR. ..... Bennettsville, South Carolina
JAMES BATTLE MORGAN, JR. ..... Smithfield
VICTOR HUGO E. MORGAN, JR. ..... Burgaw
JOHN ARTHUR MORRICE ..... Winston-Salem
WILLIAM CLYDE MORRIS III ..... Asheville
ROBERT POLLOCK MORROW, JR. ..... Winston-Salem
JOHN KINGS MOTSINGER ..... Winston-Salem
HOLLIS ANN MUSILEK ..... Ames, Iowa
JOHN THOMAS NEWMAN VI ..... Albemarle
JOHN JEFFERSON NEWTON ..... Beaufort
STEVEN JAMES O'CONNOR ..... Burlington
PAULA DENNIS OGUAH ..... Fayetteville
NANCY LYNNE OLAH ..... Cleveland, Ohio
TERRYN DOUGLAS OWENS ..... Lumberton
EDMUND SPENCER PARRIS ..... Columbia, South Carolina
IMELDA JEAN PATE ..... Kinston
DONALD NASH PATTEN ..... Lake Junaluska
JANET FRANCES PAUCA ..... Winston-Salem
JOHN MARK PAYNE ..... Raleigh
ALEXIS CHRISTOPHER PEARCE ..... Greensboro
ROBERT BRANTLEY PECK, JR. ..... Roanoke Rapids
GEORGE THADDEUS PERKINS III ..... Brevard
MICHAEL KIAH PERRY ..... Pittsboro
ROBERT T. PERRY ..... Durham
REBECCA F. PERSON ..... Fayetteville
PHYLLIS BEATRICE PICKETT ..... Rocky Point
CYNTHIA MCCLELLAN PITTARD ..... Smithfield
PAMELA RUTH PONDER ..... Charlotte
MICHAEL ROY POTTER ..... Chapel Hill
ALLEN WHITAKER POWELL ..... Ahoskie
MARK EDWIN POWELL ..... Asheville
CATHERINE ANITA POWERS ..... New Bern
RANDALL BROOKS PRIDGEN ..... Rocky Mount
FRANCIS B. PRIOR ..... Yardley, Pennsylvania
JAMES A. PRIVETTE, JR. ..... Kinston
DAVID B. PURYEAR, JR. ..... Carrboro
HENRY HAMILTON RALSTON ..... Winston-Salem
TIMOTHY JETER RAMSEY ..... Murphy
LESLIE RUFFIN CARTER RAWLS ..... Durham

DANIEL F. READ ..... Chapel Hill
GLENN J. REID ..... Freeport, New York
ERNEST WILLIAM REIGEL ..... Charlotte
WILLIAM B. REINGOLD ..... Winston-Salem
EDWARD MARTIN REISNER ..... Tenafly, New Jersey
GIRARD CRAWFORD RIPPY III ..... Anderson, South Carolina
JEFFREY NEIL ROBINSON ..... Shelby
FREDERICK STEPHEN ROGERS ..... Greenville
JULIUS ADDISON ROUSSEAU III ..... Wilkesboro
CLINT DOUGLAS ROUTSON ..... Hopkinsville, Kentucky
THOMAS RUFFIN III ..... Greensboro
DONALD ELLIOT RUMSEY, JR. ..... Greensboro
HILTON LAMAR RUTH III ..... Concord
THOMAS RUBEN SALLENGER ..... Windsor
ROBERT HARRISON SASSER III ..... Franklin, Virginia
MARGARET EMANUEL SCHMID ..... Winston-Salem
RICHARD L. SCHWARTZ ..... Winston-Salem
DEBORAH ANN SHANDLES ..... Raleigh
DEAN ARVESON SHANGLER ..... Durham
BARBARA A. SHAW ..... Carrboro
MARGARET ELIZABETH SHEA ..... Falls Church, Virginia
MARK ELDRIDGE SHELLEY ..... Hamlet
NANCY ELIZABETH SHORT ..... Greensboro
WILLIAM ALBERT SIGMON ..... Hickory
BEN H. SIRMONS, JR. ..... Greensboro
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NELSON BELL SOMERVILLE ..... Montreat
KATHLEEN PEPI SOUTHERN ..... Durham
MARVIN RAY SPARROW ..... Charlotte
MACK SPERLING ..... Woodmere, New York
S. KAY SPETRINO ..... Chapel Hill
MARVIN MITCHEL SPIVEY, JR. ..... Willow Springs
JAMES MICHAEL SPRAGINS ..... Benson
MICHAEL CARROLL STAMEY ..... Shelby
BARRY STEPHEN STANBACK ..... Durham
THOMAS WARWICK STEED III ..... Raleigh
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THOMAS M. STERN ..... West Orange, New Jersey
MARILYN HARMON STOUT ..... Greensboro
ANN GUTTENBERGER SUGG ..... Whiting, New Jersey
TIMOTHY PATRICK SULLIVAN ..... Raleigh
PHILIP SUMMA ..... Buies Creek
GERALDINE SUMTER ..... Columbia, South Carolina
MERINDA LEE SWANSON ..... Hayesville
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GENE BRYSON TARR ..... Elizabeth City
ANN CALLISON TAYLOR ..... Dayton, Ohio
STEPHEN GRAHAM TEAGUE ..... Greensboro
DAVID LEE TERRY ..... Hickory
RICHARD MCALPIN THIGPEN ..... Charlotte

JANET CHARLENE THOMAS ..... Durham
ROBERT STEWART THOMPSON ..... Winston-Salem
WILLIAM DAVID THURMAN ..... Asheville
JERRY REGINALD TILLETT ..... Manteo
BOYD STEPHEN TOBEN ..... Greensboro
BRENT ALBERT TORSTRICK ..... Richmond, Virginia
THATCHER LOVEJOY TOWNSEND III ..... Tobaccoville
FRANCES YOUNGBLOOD TRASK ..... Wilmington
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LYNNETTE HICKS TROUTMAN ..... Mocksville
JOHN A. TURNER ..... Cary
JANE WESLEY VEACH ..... Warsaw
CURTIS BRIAN VENABLE ..... Kernersville
STEPHEN PHILIP VOGEL ..... Durham
JANE ELIZABETH VOLLAND ..... Chapel Hill
RICHARD JAMES VOTTA ..... Belmont
HAMLIN LANDIS WADE, JR. ..... Charlotte
THOMAS WILLIAM WALDREP, JR. ..... Greenfield, Indiana
STEPHEN RICHARD WARD ..... Greenville
RAYMOND ALLAN WARREN ..... Durham
STEVE RAY WARREN ..... Canton
LILA ELIZABETH WASHINGTON ..... Cameron
JAMES ROBERT WEAR ..... Salisbury
WALTER S. WEATHERS ..... Louisburg
JOHN JACKSON WELLS III ..... Rocky Mount
LYNN OLIVER WENIGE ..... Asheville
GARRY BRUCE WHITAKER ..... Murfreesboro
PAUL WESLEY WHITE ..... Tyner
THOMAS WAYNE WHITE ..... Elizabethtown
DEBRA LEE WHITED ..... Winter Park, Florida
DENNIS ALAN WHITLING ..... Knox, Pennsylvania
ALFREDA MAE WILLIAMSON ..... Durham
CHRISTOPHER TODD WILLIFORD ..... Kannapolis
MICHAEL LEIGHTON WILLIFORD ..... Fayetteville
ADRIAN NEWTON WILSON ..... Raleigh
LYDA TYSON WINSTEAD ..... Sanford
RUTH CATHERINE STULLKEN WITMER ..... Buies Creek
DUDLEY AVERY WITT ..... Napoleon, Ohio
EDWIN MOORE WOLTZ ..... Mount Airy
LAURIE HUTCHINS WOLTZ ..... Winston-Salem
CAROLYN CORDELIA WOOD ..... Roxboro
CAROLYN JOHNSON WOODRUFF ..... Durham
NANCY L. WOOTEN ..... Winston-Salem
DAVID CALEP WRIGHT III ..... Charlottesville, Virginia
DEBBIE KAY WRIGHT ..... Garysburg
ISAAC CLARK WRIGHT, JR. ..... Raleigh
R. BENJAMIN WRIGHT ..... Raleigh
DOUGLAS CHARLES YOHE ..... Winston-Salem

ANDREA BETH YOUNG ..... Chapel Hill
SARAH LEE YOUNG ..... Durham
ANITA M. YOVA ..... Warren, Ohio

Given over my hand and Seal of the Board of Law Examiners this the 19th day of October, 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 duly passed the examinations of the Board of Law Examiners as of the 27th day of September, 1983, and said person has been issued a certificate of this Board:

DAVID MICHAEL BISHOP ..... Charlotte

Given over my hand and Seal of the Board of Law Examiners this the 19th day of October, 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 September 22, 1983, the following individuals were admitted:

JANICE MCKENZIE COLE ..... Hertford, applied from the State of New York Second Department
ROXANNE GROSSMAN ..... Winston-Salem, applied from the State of Virginia
BONNIE DURHAM JONES ..... Winston-Salem, applied from the State of Nebraska
WALTER LAUGHN LEWIS ..... Durham, applied from the State of Virginia
THOMAS J. MANLEY ..... Raleigh, applied from the State of Virginia
MICHAEL DENT MCCOY ..... Charlotte, applied from the State of Illinois
ROBERT S. MOSER ..... Wilmington, applied from the State of New York Fourth Department
JOHN HARMON POAG ..... Morehead City, applied from the State of Texas

On September 23, 1983, the following individual was admitted:

THOMAS M. KNIES ..... Concord, applied from the State of Tennessee

Given over my hand and Seal of the Board of Law Examiners this the 19th day of October, 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 October 20, 1983, the following individual was admitted:

VIRGINIA R. DALE ..... Columbus, applied from the State of Pennsylvania

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

BARRY LEWIS MASTER ..... Fairview, applied from the State of Kentucky
FRANK J. MURPHY, JR. ..... Charlotte, applied from the State of New York First Department
RUDOLF A. RENFER, JR. ..... Chapel Hill, applied from the State of Texas
BARBARA JANET SULLIVAN ..... Wilmington, applied from the District of Columbia

I do further certify that the following individuals duly passed the examinations of the Board of Law Examiners and said persons have been issued certificates of this Board dated December 9, 1983:

JUDITH CUTTING FRASER ..... Maggie Valley
GEORGE FRANKLIN GIVENS ..... Gaston

Given over my hand and Seal of the Board of Law Examiners this the 30th day of December, 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 January 26, 1984, the following individuals were admitted:

ROBERT EARL PATTERSON ..... Jacksonville, applied from the State of Ohio
DIANE DIMOND ..... Rocky Mount, applied from the State of New York First Department
MURIEL NORBREY HOPKINS ..... Winston-Salem, applied from the State of Virginia

On February 9, 1984, the following individuals were admitted:

MARK FRANCIS SULLIVAN ..... Durham, applied from the State of Michigan
RICHARD WOODSON RUTHERFORD .. Pinehurst, applied from the State of Connecticut

Given over my hand and Seal of the Board of Law Examiners this the 9th day of March, 1984.

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. MICHAEL VAN McDOUGALL

No. 86A81

(Filed 5 April 1983)

1. Criminal Law § 55— blood analysis—testimony by expert

The trial court properly permitted testimony by an expert who analyzed during trial a blood sample taken from defendant shortly after his arrest some nine months earlier that an initial screening test showed a positive reaction for the presence of cocaine but that a more sophisticated analysis indicated that there were no signs of cocaine or its metabolites in the blood where the blood sample was not willfully concealed in bad faith by the district attorney but was simply overlooked until it was inadvertently discovered during the trial; defendant was permitted to select an expert for the purpose of analyzing the blood sample; and the witness was qualified to perform the tests in question, they were performed in accordance with scientifically approved procedures, and the procedures used were scientifically reliable.

2. Constitutional Law § 58; Criminal Law § 126— right to unanimous jury verdict —felony murder—use of disjunctive for underlying felonies

Defendant was not denied his right to a unanimous verdict in a felony murder prosecution by the trial court's submission of the underlying felonies of kidnapping and attempted rape in the disjunctive where it is obvious, when the charge is read as a whole, that the court conveyed to the jury that its verdict must be unanimous as to each element of the offenses which were submitted to it.

3. Homicide § 21.6— first degree murder—perpetration of rape and kidnapping—sufficiency of evidence

The State's evidence was sufficient to support conviction of defendant of first degree murder on the theory that the murder was committed in the perpetration of a rape and on the theory that it was committed in the perpetration of a kidnapping where it tended to show that defendant removed the victim from her home at knifepoint and dragged her to an automobile in

the driveway; defendant stated that he intended to put the victim and her roommate in the trunk of the car and drive them to some undisclosed place; when the roommate threw the car keys to the ground, defendant threw her to the ground and began stabbing her; defendant prevented the victim from escaping from his control by catching her as she began to run across the yard; after he caught the victim, defendant stabbed her until she bled to death; the victim was found on her back with her legs spread wide, her feet nearly up to her buttocks, knees raised and apart, and her nightgown drawn up to her upper chest, exposing her left breast; many of the wounds were inflicted upon the victim while she was in a supine position; an examination of the victim's nightgown indicated that it had been pulled up before some of the stab wounds were inflicted; and when defendant crawled out of the bushes near the victim's body, he had blood smeared upon his shirt and pants consistent with the blood type of the victim.

4. **Criminal Law § 135.4— first degree murder—sentencing hearing—prior felony as aggravating factor—proof of use of threat or violence**

In order for a felony involving the use or threat of violence to be used as an aggravating factor pursuant to G.S. 15A-2000(e)(3) in imposing a sentence for first degree murder, the use or threat of violence to the person need not be an element of the offense. Furthermore, the involvement of the use of threat or violence to the person in the commission of the prior felony may be proven or rebutted by the testimony of witnesses notwithstanding defendant's stipulation of the record of conviction.

5. **Criminal Law § 135.4— first degree murder—sentencing hearing—failure to include mitigating circumstances on verdict form**

While it would be the better practice for the trial court to include on the verdict form all mitigating circumstances which are to be submitted to the jury, the trial court did not err in listing only the statutory mitigating circumstances on the verdict form and failing to list thereon the additional mitigating circumstances submitted to the jury where defendant failed to request that the mitigating circumstances be listed on the written verdict form.

6. **Criminal Law § 135.4— first degree murder—sentencing hearing—instruction on mitigating circumstances**

The trial court's instruction that "[t]he law in North Carolina specifies the mitigating circumstances which might be considered by you, and only those circumstances created by statute . . . may be considered by you" was not erroneous when the phrase "only those circumstances created by statute" is interpreted to include "any other circumstances arising from the evidence which the jury deems to have mitigating value" pursuant to G.S. 15A-2000(f)(9). Moreover, such instruction was not erroneous when considered with the court's submission of ten mitigating circumstances under G.S. 15A-2000(f)(9) and the court's repeated instructions that the jury could find any mitigating circumstance supported by the evidence.

7. **Criminal Law § 135.4— first degree murder—sentencing hearing—instruction on duty to recommend death penalty**

The trial court did not err in instructing the jury that it had a duty to recommend a sentence of execution if it found (1) one or more aggravating cir-

cumstances existed, (2) that mitigating circumstances found by it were insufficient to outweigh the aggravating circumstances and (3) that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty.

8. **Criminal Law § 135.4— first degree murder—sentencing hearing—form and instructions on fourth issue**

The form of and instructions on the fourth issue submitted to the jury as to whether the jury found beyond a reasonable doubt that the aggravating circumstance or circumstances it found was or were sufficiently substantial to call for the death penalty were not erroneous where the jury was adequately instructed that before recommending the death sentence it must be satisfied that the sentence was justified and appropriate upon considering the totality of the aggravating circumstances with the totality of the mitigating circumstances found by it. G.S. 15A-2000.

9. **Criminal Law § 135.4— first degree murder—sentencing hearing—order and form of issues**

The order and form of the issues to be submitted to the jury in a sentencing hearing in a capital case should be substantially as follows: (1) Do you find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances? (2) Do you find from the evidence the existence of one or more of the following mitigating circumstances? (3) Do you find beyond a reasonable doubt that the mitigating circumstance or circumstances you have found is, or are, insufficient to outweigh the aggravating circumstance or circumstances you have found? (4) Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

10. **Criminal Law § 135.4— death sentence—excessive or disproportionate to penalty in similar cases—pool of cases to be used**

The pool of cases to be used in determining whether a sentence of death is excessive or disproportionate to the penalty imposed in similar cases is to be composed of all capital cases tried after the effective date of our capital punishment statute, 1 June 1977, in which there were convictions of murder in the first degree, regardless of the sentences imposed, and which have been reviewed on appeal by the N.C. Supreme Court.

11. **Criminal Law § 135.4— death penalty not disproportionate**

A sentence of death imposed upon defendant for a first degree murder committed in the perpetration of a rape and kidnapping was not disproportionate when compared with the pool of similar cases.

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

Justice EXUM dissenting as to sentence.

State v. McDougall

APPEAL by defendant from judgments entered by *Ferrell, J.*, at the 9 June 1980 Session of Superior Court, MECKLENBURG County.

Defendant was convicted by a jury of assault with a deadly weapon with intent to kill inflicting serious injury, kidnapping, and murder in the first degree. For his conviction of murder in the first degree, defendant was sentenced to death. He was also sentenced to consecutive prison terms of twenty years on the conviction of assault with a deadly weapon with intent to kill inflicting serious injury and life imprisonment on the charge of kidnapping. Defendant appeals to this Court as a matter of right from judgments entered with respect to his convictions of murder in the first degree and kidnapping. Defendant's motion to bypass the Court of Appeals for review of the judgment entered with respect to his conviction of assault with a deadly weapon with intent to kill inflicting serious injury was allowed by this Court 5 March 1982.

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

Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, by James C. Fuller, Jr., for defendant.

MARTIN, Justice.

I.

Evidence for the state tended to show that at approximately 2:30 a.m. on the morning of 21 August 1979, Officer W. K. Crisler saw a flatbed truck at the intersection of Fairview Road and Sardis Road in the city of Charlotte. The flatbed truck was stopped at a traffic light and was headed away from Charlotte. The police car also was stopped at the intersection, headed in the opposite direction. Because in the mind of the officer it was unusual for such a truck to be driven at that time of night, he observed the truck closely. It was being operated in a normal manner. As the two vehicles passed each other, the officer had ample opportunity to observe the driver of the truck and later identified him as the defendant, Michael McDougall.

The intersection where Officer Crisler observed McDougall was located some one and one-half to two miles from 1420 Blue-

berry Lane in the city of Charlotte. Vicki Dunno and Diane Parker lived together in a house at 1420 Blueberry Lane. Approximately fifteen minutes after Officer Crisler had observed the flatbed truck, Vicki and Diane were wakened by the ringing of their front doorbell. They went to the front door and heard a male begging to be admitted into the house. This person stated that his wife had cut her leg "real bad," that he needed alcohol and bandages for her, and that he needed to call a doctor. He continued to beg for help. Diane went to the bathroom and got alcohol and bandages which she put outside the back door. She then came back to the front of the house. When the person began calling Diane by name, saying that he needed to talk to her, that he needed help, that his wife was hurt, Diane answered for the first time. He said that he was her neighbor Mike, that his wife was hurt "real badly," and that he needed help. After he continued pleading and begging to get into the house, Diane Parker finally opened the door and let him in. The person was Michael McDougall.

The three persons went into the kitchen where Vicki Dunno got the telephone directory off the refrigerator for the purpose of calling a doctor. While Vicki was looking up a number, the defendant walked from the kitchen into the den and began to "check out the house." Diane then took the telephone book from Vicki and started to dial for help. McDougall came back from the den into the kitchen, walked over behind Diane to the corner where there was a cutting board, and picked up a butcher knife. Vicki told Diane to look out, that McDougall had a knife. Defendant grabbed Diane by the arm, put the knife up in front of her face, and told her to put down the phone. Diane tried to get away from him and in the struggle the two knocked over one of the kitchen stools and the phone was knocked out of Diane's hand. They fell to the floor. Diane told Vicki to go next door and get help. Vicki ran out the front door. When she got to the grass, it was wet and she slipped, fell to her hands and knees, and her glasses flew off. She was searching in the grass for her glasses when the defendant came running out of the house, grabbed her by the arm, and told her that she wasn't going anywhere. Diane then came out of the house and was standing in the driveway. She had a knife in her hand and told McDougall that if he hurt Vicki she would kill him. McDougall realized that Diane had a knife. He let go of Vicki,

then went over and started struggling with Diane and got her down in the grassy area beside the bushes. Vicki screamed and pleaded with Diane not to fight because she knew that McDougall had a knife. Vicki heard one of the knives thrown down the driveway. Diane then stopped struggling and McDougall grabbed her and Vicki by the back of the hair and dragged both of them back into the house. When the three got back into the house, Diane was bleeding from her forehead and nose. McDougall was a big man, weighing about two hundred and twenty pounds and standing six feet two inches tall. Vicki was twenty-five years old, five feet ten inches tall, and weighed one hundred and thirty pounds. Diane was twenty-seven years old, five feet two inches tall, and weighed one hundred and twenty-five pounds.

McDougall demanded that Vicki get her car keys. They went to her bedroom; Vicki got the keys and gave them to him. He was still holding Diane and took the two women back outside to the car. He gave the keys to Vicki and asked her which key was the trunk key. He said that he was going to put the women into the trunk until he got where he was going and he would then let them out. Diane told Vicki not to give him the keys, and Vicki threw them away. McDougall was very angry and threw Vicki to the ground and started stabbing her. She screamed to Diane, and Diane ran in the direction of a neighbor's house. McDougall left Vicki and ran after Diane and caught her. Vicki, in the meantime, got up and went into the house where she closed and locked the front door and went into the kitchen to call for help on the telephone. She dialed the emergency number, 911, and reported the incidents. Lynda McDougall, the wife of the defendant, then telephoned and asked Vicki what was happening. Vicki told her that she had been stabbed and that her roommate was outside with the assailant.

When the police arrived they found Diane Parker's body sprawled in front of 1400 Blueberry Lane, Michael McDougall's home. Vicki Dunno gave a description of the defendant to the officers and told them what had happened. An ambulance arrived and Vicki Dunno was taken to the hospital, where she remained in intensive care for some time. Her condition required surgery, and she has been left with permanent scarring as a result of being stabbed some nine times.

Diane Parker's body was clothed only with a nightgown, which had been pulled up to her chest, exposing her pubic area and one breast. Her knees were pulled up and her legs parted wide. Her genitalia appeared to have some liquid upon it. Diane had been stabbed some twenty-two times. She also had other contusions about her body. Any one of several of the stab wounds could have caused her death. At least two of the stab wounds entered her heart. Most of the wounds had been inflicted while she was in a prone position. She had cuts across the palm of her hand which a doctor who testified characterized as defensive type wounds. She had lost approximately half of the volume of her blood. Several of the wounds were from four to six inches deep. The medical examiner testified that in his opinion the butcher knife which was found at the scene of the crime and which was offered into evidence could have caused the wounds to Diane Parker.

The officers brought in searchlights to aid in the investigation, and once these lights were operating the defendant came out from behind some bushes, saying "I give up. Okay, I give up." There was blood smeared on his person, shirt, and pants. A blood analysis later showed that the blood on McDougall matched Diane Parker's blood type.

For two weeks during trial the defendant put on extensive evidence indicating that he suffered from a cocaine induced psychosis, as well as underlying depression and organic brain damage. This evidence showed that he had suffered severe and traumatic experiences as a child. For example, his grandfather committed suicide in his presence. Defendant's evidence indicated that he had injected nearly five grams of cocaine before he came to the Dunno residence. On the night of the arrest a sample of defendant's blood was taken; however, this blood was not analyzed until some nine or ten months after it had been obtained. Evidently the blood sample had become misplaced or overlooked and no one knew of its existence until some envelopes were being opened during the process of the trial. On defendant's motion the blood was sent to an expert selected by the defendant for the purpose of analysis, and upon an initial basic screening test, the analysis showed that the blood contained a residue of cocaine. However, upon a more sophisticated analysis of the blood the

results indicated that there were no signs of cocaine or its metabolites in the blood.

Defendant for some time suffered from amnesia concerning the events in question but eventually was able to provide his psychiatrist with sufficient information for the psychiatrist to testify that at the time defendant was stabbing Vicki Dunno and Diane Parker, he thought that he was fighting and stabbing his mother who was beating him with an automobile antenna. The defendant did not testify at trial.

Other evidence relevant to the decision will be discussed below.

II. Guilt or Innocence Phase

The first issue in defendant's brief refers to the alleged denial of his constitutional rights by the trial judge's denial of his motion to continue the trial. Defendant's counsel at oral argument before this Court expressly waived this issue, stating that the issue was not one of substance and therefore was being waived.

A.

[1] Defendant contends next that the trial court erred in denying his motion to suppress the evidence of the expert who analyzed defendant's blood for the purpose of determining whether it contained a residue of cocaine. This blood sample had been taken from the defendant shortly after he was arrested; however, it was not analyzed until during the trial, some nine to ten months after it had been obtained. There is no evidence to indicate, and indeed no contention is made by defendant, that the evidence was willfully concealed in bad faith by the district attorney. All of the evidence indicates that the blood sample was simply overlooked until it was inadvertently discovered during the trial upon the opening of some of the evidence envelopes. On defendant's motion he was allowed to select an expert for the purpose of analyzing the blood sample to determine if cocaine or a residue of cocaine was in the sample. This examination was done by an expert in Salt Lake City who was flown to Charlotte for the purpose of testifying at the trial. A voir dire was held on defendant's motion to suppress the testimony of the witness. Afterwards the court denied defendant's motion to suppress all of the testimony. The defendant did not object to this ruling, nor did he ask that he be

allowed a continuing objection to the questions asked in the presence of the jury. Rather, the defendant made individual objections to the testimony of the witness Peat during his examination. Defendant's counsel lodged some twelve objections during the direct examination of the witness Peat. The court passed upon the various objections as they were made in the presence of the jury. The following questions were asked in the presence of the jury of the witness Michael Peat, the examiner who was qualified as an expert in the field of chemistry and toxicology for the purpose of testifying in this case:

> Q: Now you said the mass spectrometer would determine or show if there were cocaine or its metabolites in the sample that you tested. Is that correct?
>
> A: That is correct.
>
> Q: And in this particular instance of testing this blood sample, what results did you get on the mass spectrometer?
>
> A: We did not detect cocaine or its metabolites in this blood sample.

The defendant did not object to this crucial testimony.

Generally, a defendant's failure to enter an appropriate and timely motion or objection results in a waiver of his right to assert the alleged error upon appeal. *E.g.*, N.C. Gen. Stat. § 15A-1446(b) (1978); *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978); *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976). However, in *State v. Mems*, 281 N.C. 658, 190 S.E. 2d 164 (1972), this Court held that where a voir dire was held by the court and thereafter the court ruled that the evidence sought to be excluded was admissible and the defendant excepted to the ruling, it was not necessary for the defendant to renew his objection upon the presentation of the testimony before the jury, although that would have been the better practice. Here, this principle is inapplicable because the defendant did not lodge an exception to the adverse ruling of the court upon his motion to suppress at the conclusion of the voir dire hearing. Nevertheless, in our discretion we have reviewed the testimony challenged by the defendant and find that it was competent and that the court did not commit error in admitting it.

Michael Peat, the witness, was qualified as an expert in the field of chemistry and toxicology for the purpose of testifying in this trial. He conducted two tests upon the defendant's blood sample which involved the use of accepted scientific procedures—radioimmunoassay, gas chromatography, and mass spectrometry. The witness was qualified to perform the tests in question, they were performed in accordance with scientifically approved procedures, and the procedures used were scientifically reliable. Therefore, the test results were properly admissible into evidence. *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974), *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1207 (1976). Moreover, the initial screening test which was testified to before the jury showed a positive reaction for the presence of cocaine, which was favorable to the defendant. The second test failed to reveal the presence of cocaine or its metabolites in the blood sample. Mr. Peat also testified that once ingested, cocaine and its metabolites are quickly broken down and excreted from the human system. There was also before the jury the testimony of Dr. Peter Jatlow of the Yale University School of Medicine, who was a clinical pathologist. He was qualified as an expert in the analysis of blood and urine samples for the presence of various chemicals and has specialized in the study of such drugs as cocaine. He has also done extensive research on the breakdown of cocaine in the bloodstream. Dr. Jatlow's testimony corroborated the defendant's contention that defendant had ingested cocaine at the time in question. We find no prejudicial error in the court's admitting the testimony of the witness Michael Peat.

B.

[2] Defendant next contends that there was not sufficient evidence to support the finding of a felony upon which the jury could base its determination of guilt of felony murder in the first degree. Defendant also contends that the underlying felonies relied upon by the state are kidnapping and attempted rape and that because they were presented to the jury in the disjunctive, this raises a question of the unanimity of the verdict. The underlying felonies on the felony murder instructions were submitted in the disjunctive; however, a reading of the entire charge shows that Judge Ferrell clearly instructed the jury that its verdict must be unanimous as to every essential element of the of-

fenses charged. Early in its instructions the court charged the jury that "your answers must be unanimous as to each issue and sub-part thereof which you shall come to consider." Later in his instructions, after his final mandate, Judge Ferrell charged:

> Again, I remind you that each of these charges and any lesser-included offense about which I have instructed you is a separate charge and you should consider them at all times as separate in your deliberations.
>
> Finally, as to any verdict which you reach in each charge, your verdict, to be a verdict, must be unanimous.

There can be no question but that the jury fully understood that its verdict must be unanimous as to each element of the offenses which were submitted to it.

We conclude that the law as stated by Justice Carlton in *State v. Jordan*, 305 N.C. 274, 279, 287 S.E. 2d 827, 830-31 (1982), is equally applicable to the facts of this case:

> Defendant also alleges error in the trial court's instructions on first degree burglary. He contends that by instructing the jury that defendant must have intended "to commit rape and/or first degree sexual offense" at the time of the breaking and entering, the trial court denied defendant his constitutional right to a unanimous jury verdict.
>
> The North Carolina Constitution guarantees a criminal defendant the right to a unanimous verdict. N.C. Const. art. I, § 24; *accord, State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975). To convict a defendant, the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged. *See In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970). Defendant contends that the use of the disjunctive in describing the requisite intent for burglary created the possibility that less than all the jurors could agree which felony the defendant intended to commit although they might all agree that defendant did have the intent to commit one of the felonies and convict him of burglary.
>
> While defendant's argument is not unreasonable, we are not persuaded. The trial court repeatedly instructed the jury

> that its verdict must be unanimous. When the charge is read as a whole, as it must be, it is obvious that the trial court conveyed to the jury that the verdicts must be unanimous as to every essential element and that the instruction containing the disjunctive was a shorthand statement that the jurors must all find that defendant had the intent to commit rape or that they must all agree that defendant had the intent to commit a first degree sexual offense. While defendant is correct as to the technical meaning of the instruction, this Court must neither forget nor discount the common sense and understanding of the trial court and the jurors. From our examination of the charge we are satisfied that defendant was not deprived of his constitutional right to a unanimous jury verdict.

We find no prejudicial error in the court's instructions to the jury.

[3] Turning now to defendant's contention as to the insufficiency of the evidence, we find plenary evidence in the record to sustain both the charge of kidnapping Diane Parker and the charge of attempting to commit rape upon Diane Parker. Diane Parker was found on her back with her legs spread wide, her feet nearly up to her buttocks, knees raised and apart, and her nightgown drawn up to her upper chest, exposing her left breast. Many of the wounds were inflicted upon Diane Parker while she was in a prone position. An examination of Diane's nightgown indicated that it had been pulled up before some of the stab wounds were inflicted. When defendant crawled out of the bushes near Diane Parker's body, he had blood smeared upon his shirt and pants consistent with the blood type of Diane Parker. These facts support a reasonable inference that McDougall caught Diane Parker in the yard, knocked or threw her to the ground on her back, pulled her nightgown up over her chest, and parted her legs in an effort to rape her. She resisted and fought back, and McDougall stabbed her to death. The evidence is sufficient to survive a motion for nonsuit on the theory of murder during an attempted rape. *State v. Knight*, 248 N.C. 384, 103 S.E. 2d 452 (1958); *State v. Norman*, 14 N.C. App. 394, 188 S.E. 2d 667 (1972).

Moreover, the evidence is amply sufficient to find the defendant guilty of kidnapping Diane Parker and thus to support a ver-

dict of guilty of murder in the first degree upon that felony. N.C.G.S. 14-39(a)(3) states that:

> (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, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

The evidence is clear that there was a removal and restraint of Diane Parker which was more than an inherent inevitable part of the commission of the murder. *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981). The evidence shows that once McDougall grabbed the butcher knife in Diane and Vicki's kitchen, he continuously confined, removed, or restrained the two women until he crawled into the bushes after stabbing Diane to death. Clearly defendant removed Diane from her home at knife point and dragged her to an automobile in the driveway. There defendant stated that he intended to put her and Vicki in the trunk of the car and drive them to some undisclosed place. This removal was not inherent in the felony of murder or attempted rape. It was more than a technical asportation inherent in the commission of another felony. *State v. Fulcher*, 34 N.C. App. 233, 237 S.E. 2d 909 (1977), *aff'd*, 294 N.C. 503, 243 S.E. 2d 338 (1978). When Vicki threw the car keys to the ground, defendant threw her to the ground and began stabbing her. The two women were terrorized. Defendant prevented Diane from escaping from his control by catching her as she began to run across the yard. Whereas Vicki managed to lock herself in her house and call for help, Diane never escaped from her kidnapper. After he caught Diane, defendant stabbed her until she bled to death. The evidence thus supports a jury's finding that defendant was guilty of the felony of kidnapping Diane and that he murdered her in the perpetration of this felony.

While it is true that the jury found McDougall not guilty of the offense of kidnapping Vicki Dunno, this does not invalidate the finding that McDougall was guilty of kidnapping Diane Parker. Consistency of verdicts is not a necessity. A verdict of guilty on one count and not guilty on the other when the same act results in both offenses will not be disturbed. *State v. Davis*, 214 N.C. 787, 1 S.E. 2d 104 (1938); *State v. Rosser*, 54 N.C. App. 660, 284 S.E. 2d 130 (1981); 4 Strong's N.C. Index 3d Criminal Law § 124.5 (1976). The verdict of kidnapping Diane Parker was fully supported by the evidence and supports the verdict of guilty with respect to felony murder. We find no prejudicial error in the determination of the guilt of defendant of murder in the first degree.

III. SENTENCING HEARING

During the sentencing hearing the state proposed to offer evidence of a previous conviction of defendant for a felony involving the use or threat of violence. N.C. Gen. Stat. § 15A-2000(e)(3) (Cum. Supp. 1981). The prior conviction was on a charge of rape in the state of Georgia in 1974. Defendant opposed the use of the 1974 rape conviction and first argued that it was not a final conviction because defendant had filed a petition for writ of habeas corpus moving that the conviction be set aside. This petition was filed during the current trial. It was only after this motion to suppress the use of the Georgia rape conviction was denied that defendant stipulated the certified record of the conviction could be introduced. Defendant, however, never stipulated that the Georgia rape conviction involved the use or threatened use of violence to the person.

The state further offered the testimony of Mary Huff, the victim in the Georgia rape case, for the purpose of showing that the crime involved the use or threat of violence. After extensive argument, the court allowed this witness to testify. Mary Huff testified that in 1973 she lived next door to defendant's sister and that prior to her rape she had seen defendant but had never talked to him. About 4:00 a.m. on 21 November 1973, she wakened, turned on her light, and saw defendant standing in her bedroom doorway. She ordered defendant to leave and began to telephone the police when he refused. Defendant pulled out a butcher knife, held it to her face, and threatened to kill her and

her child unless she removed her nightgown. She complied, and defendant raped her upon her bed. Defendant threatened to kill her if she told his sister about the rape. After defendant left, Ms. Huff called the police. This testimony occupies seven pages of the transcript. Defendant cross-examined Mary Huff extensively, for eighteen pages of the transcript. Defendant attacked the credibility of the witness Huff and established that he was eighteen years of age at the time of the rape and had entered a plea of guilty to the charge.

During the sentencing hearing defendant also produced evidence from several expert witnesses concerning his emotional, mental, and psychological condition. McDougall testified in his own behalf, relating many experiences he had as a child, particularly those concerning his being beaten by his mother with pots, pans, golf clubs, and a car antenna. His grandfather committed suicide in McDougall's presence by shooting himself with a shotgun. McDougall's father was killed as the victim of an armed robbery.

McDougall testified that between dusk and midnight or one o'clock in the morning on the night of the crimes, he and a friend injected six grams of cocaine. He said his vision was fuzzy and he couldn't focus well as he drove home in the early morning hours. He parked outside his home in Blueberry Lane, but he didn't want to go inside because his arms were bleeding from the needle marks and he feared an argument with his wife. He decided to ask his neighbors for alcohol to clean his arms.

McDougall knocked on the door of the victims' house, said that he was "Lynda's husband from next door," and asked for alcohol. When Diane Parker asked if he wanted her to call a doctor, he said he didn't know why but he said yes. Someone opened the door and he went inside, where Diane Parker picked up the phone to call. At that point McDougall said he "lost everything," "could no longer think," and was "very, very scared." He picked up a knife he saw, grabbed the phone, and asked for car keys. He said the next thing he knew he was outside, and when he looked at Diane Parker, he saw his mother, who was hitting him with a car antenna. He said something happened inside him like an explosion in his chest, and he jumped at her and stabbed her. He saw her running, chased her, pulled her down, and started stab-

bing her again. He did that for a long time until he felt "the thing that had been inside" of him leaving. He stopped, sat on his knees, and couldn't hear or focus. He wanted to get away, but his legs wouldn't work, so he crawled under some nearby bushes. The next thing he knew there were many people around, including policemen. He thought they were after him for drugs so he came out and said, "I give up." The police questioned him about a woman who was dead, but he didn't remember what had happened and didn't believe them.

The jury found the following aggravating circumstances:

1. The defendant had previously been convicted of a felony involving the use of violence to the person. N.C. Gen. Stat. § 15A-2000(e)(3) (Cum. Supp. 1981).

2. The murder was especially heinous, atrocious, or cruel. N.C. Gen. Stat. § 15A-2000(e)(9).

3. The murder was part of a course of conduct by the defendant which included the commission by defendant of another crime of violence against another person. N.C. Gen. Stat. § 15A-2000(e)(11).

The jury found the following mitigating circumstances:

1. The murder was committed while defendant was under the influence of mental or emotional disturbance. N.C. Gen. Stat. § 15A-2000(f)(2).

2. Defendant's capacity to appreciate the criminality of his conduct or his capacity to conform his conduct to the requirements of the law was impaired. N.C. Gen. Stat. § 15A-2000(f)(6).

3. There are other circumstances arising from the evidence that have mitigating value. N.C. Gen. Stat. § 15A-2000(f)(9).

The jury then answered the following issues:

3. Do you find, beyond a reasonable doubt, that the mitigating circumstance or circumstances you have found is or are insufficient to outweigh the aggravating circumstance or circumstances you have found?

ANSWER: Yes.

4. Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances you have found is or are sufficiently substantial to call for the imposition of the death penalty?

ANSWER: Yes.

Whereupon the jury recommended that defendant be sentenced to death, which sentence the court imposed.

A.

[4] Defendant first argues that by allowing Mary Huff to testify during the sentencing hearing the trial court committed prejudicial error. During the hearing the state sought to elicit testimony from Ms. Huff relevant to the following aggravating circumstance:

> The defendant had been previously convicted of a felony involving the use or threat of violence to the person. N.C. Gen. Stat. § 15A-2000(e)(3) (Cum. Supp. 1981).

Defendant had been previously convicted of feloniously raping Ms. Huff and feloniously burglarizing her home. Before Ms. Huff took the stand, the state contended at the bench that the facts of these prior convictions showed that each was a felony involving the use or threat of violence to the person. Defendant responded by arguing that under N.C.G.S. 15A-2000(e)(3) the phrase "felony involving the use or threat of violence to the person" must be limited to a felony in which the use or threat of violence to the person was an element of the offense. Defendant contended that a prior felony conviction cannot be used as an aggravating circumstance unless the use or threat of violence to the person is an element of the offense, even though the facts show that the commission of the offense did involve the use or threat of violence to the person. Because the use or threat of violence to the person was not an element of the offense of burglary, the defendant argued that burglary is not a felony within the meaning of N.C.G.S. 15A-2000(e)(3). Therefore, defendant argued, evidence of the burglary was not admissible during the sentencing hearing for the purpose of establishing the aggravating circumstance listed in N.C.G.S. 15A-2000(e)(3).

The trial court resolved this question in favor of defendant. Although the state did not except to this ruling, we have exam-

ined the issue in our discretion because it is likely to arise again. We find the trial court's ruling to have been erroneous. The statute does not state that the jury may only consider as an aggravating circumstance those felonies in which the use or threat of violence to the person is an element of the offense. The statute contains the word "involving," which indicates an interpretation much more expansive than one restricting the jury to consider only felonies having the use or threat of violence to the person as an element. Crimes that do not have violence as an element may be committed by the use or threat of violence. By using "involving" instead of language delimiting consideration to the narrow class of felonies in which violence is an element of the offense, we find the legislature intended the prior felony in N.C.G.S. 15A-2000 (e)(3) to include any felony whose commission involved the use or threat of violence to the person. Thus we hold that for purposes of N.C.G.S. 15A-2000(e)(3), a prior felony can be either one which has as an element the involvement of the use or threat of violence to the person, such as rape or armed robbery, *State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (1981), or a felony which does not have the use or threat of violence to the person as an element, but the use or threat of violence to the person was involved in its commission.[1]

Defendant's objection before this Court concerns Mary Huff's testimony regarding defendant's prior conviction for raping her. We note that rape is a felony which has as an element the "use or threat of violence to the person." N.C.G.S. 14-27.2 reads in part as follows:

1. For example, a defendant could commit armed robbery, yet, for reasons satisfactory to the district attorney, only be charged with felonious larceny. A conviction of the larceny charge could be an aggravating circumstance if the state at the sentencing hearing proved that its commission involved the use or threatened use of violence to the person. The testimony of witnesses would be proper to prove or rebut the involvement of violence. Likewise, a defendant could be convicted of rape in the second degree by engaging in vaginal intercourse with a victim who is mentally defective. N.C. Gen. Stat. § 14-27.3(a)(2) (1981). Violence is not an element of the offense. If the use or threat of violence to the person was involved, this could be shown by witnesses to establish the conviction as an aggravating circumstance. Forgery, N.C.G.S. 14-119 (1981), a nonviolent crime, may be committed by a defendant who forces another at gunpoint to forge a signature on a check.

§ 14-27.2. First degree rape.

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

. . . .

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon . . . .

Defendant was convicted of raping Ms. Huff in Georgia, where the same general principle applies: "A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will . . . ." Ga. Code Ann. § 16-6-1(a) (1982).

Defendant stipulated to the admissibility of the certified record of his prior conviction of the felony of rape. When the state sought to introduce testimony of Ms. Huff concerning the rape, defendant objected on grounds that his stipulation foreclosed the state from offering testimony to establish the prior conviction and the fact that it involved the use or threat of violence to the person.[2] The trial court ruled that Ms. Huff could testify during the sentencing hearing concerning the prior rape. When she took the stand, she stated that McDougall had raped her at knife point, threatening to kill her and her young daughter.

Defendant states that as a result of allowing the testimony of Mary Huff concerning the prior rape conviction, the sentencing hearing turned into a "mini-trial" of the prior offense.[3] He relies upon *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). At the outset we note that this case was tried at the 9 June 1980 session of superior court in Mecklenburg County and that *Silhan* was not decided until 4 March 1981. Therefore Judge Ferrell did not

2. Although defendant argued that the felony of rape in Georgia involved the use or threat of violence as a matter of law, he did not so stipulate with respect to this prior conviction.

3. If this aspect of the hearing did become a "raucous mini-trial," it was due largely to the efforts of defendant's counsel, Jerry Paul, during his free-swinging, wide-ranging cross-examination of Ms. Huff. Defendant cannot be heard now to complain about the results of his own overzealous actions.

have the benefit of *Silhan*. Moreover we do not find that *Silhan* supports defendant's argument. In *Silhan* we find:

> We note in this regard that the most appropriate way to show the "prior felony" aggravating circumstance would be to offer duly authenticated court records. Testimony of the victims themselves should not ordinarily be offered *unless such testimony is necessary to show that the crime for which defendant was convicted involved the use or threat of violence to the person.* There should be no "mini-Trial" at the sentencing hearing on the questions of whether the prior felony occurred, the circumstances and details surrounding it, and who was the perpetrator. Whether a defendant has, in fact, been convicted of a prior felony involving the use or threat of violence to a person would seem to be a fact which ordinarily is beyond dispute. It should be a matter of public record. If, of course, defendant denies that he was the defendant shown on the conviction record, the occurrence of the conviction, or that the crime involved the use or threat of violence to the person, then the state should be permitted to offer such evidence as it has to overcome defendant's denials.

302 N.C. at 272, 275 S.E. 2d at 484 (emphasis added).

The above statement by this Court in *Silhan* may properly be referred to as obiter dictum. In *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981) (decided eight months after *Silhan*), this Court was faced directly with the question whether the state could introduce evidence concerning a prior murder when the defendant had stipulated that he had been found guilty of the charge. This Court found no error in allowing such testimony.

> The objection made by defendant is that, as he had stipulated the fact of his prior conviction, the State should not have been allowed to introduce testimony concerning the murder. The State argues that when proving as an aggravating circumstance that defendant was previously convicted of a capital felony or of a felony involving the use or threat of violence to the person (G.S. 15A-2000(e)(2) and (3)), the State should not be limited to admission of the court record of conviction.
>
> We think the better rule here is to allow both sides to introduce evidence in support of aggravating and mitigating

circumstances which have been admitted into evidence by stipulation. If the capital felony of which defendant has previously been convicted was a particularly shocking or heinous crime, the jury should be so informed. Conversely, it could be to defendant's advantage that he be allowed to offer additional evidence in support of possible mitigating circumstances, instead of being bound by the State's stipulation.

In *Elledge v. State*, 346 So. 2d 998 (Fla. 1977), the Supreme Court of Florida addressed the same question. There, as here, appellant's counsel stipulated to the admissibility of a prior conviction of defendant for murder. At the sentencing hearing, the widow of the victim was nonetheless allowed to testify in detail about events surrounding the crime. In deeming the testimony properly admitted, the court said:

> This is so because we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. It is matter that can contribute to decisions as to sentence which will lead to uniform treatment and help eliminate 'total arbitrariness and capriciousness in [the] imposition' of the death penalty. (Citation omitted.)

Id. at 1001.

304 N.C. at 279-80, 283 S.E. 2d at 780-81.[4]

In *Taylor* the prior felony, murder, involved violence as an element of the offense. The holding in *Taylor* is in accord with the general rule that every circumstance calculated to throw light upon the alleged crime is admissible. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968); *State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506 (1965), *cert. denied*, 384 U.S. 1020 (1966).

4. Although Justice Exum, the author of *Silhan*, dissented in part in *Taylor*, he did not dissent from this holding of the Court.

The trial judge has ample authority to control the state's presentation of evidence in proving that the prior felony involved the use or threat of violence to the person. It is the duty of the trial judge to supervise and control the trial to prevent injustice to either party. *Greer v. Whittington*, 251 N.C. 630, 111 S.E. 2d 912 (1960). The court has the power and duty to control the examination and cross-examination of the witnesses. *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); *Greer, supra*. The trial judge may ban unduly repetitious and argumentative questions as well as inquiry into matters of tenuous relevance. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874 (1973). The extent of cross-examination with respect to collateral matters is largely within the discretion of the trial judge. *State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978); *Ingle v. Transfer Corp.*, 271 N.C. 276, 156 S.E. 2d 265 (1967). The proper exercise of this authority will prevent the determination of this aggravating circumstance from becoming a "mini-trial" of the previous charge.

Defendant here argues that the state should be limited to introducing the authenticated record of the conviction to prove a prior felony involving the use or threat of violence to the person. Only if defendant then challenges the involvement of the use or threat of violence to the person with respect to the offense would the state be allowed to rebut this contention by the use of witnesses. This argument overlooks the state's duty to prove each aggravating circumstance beyond a reasonable doubt. N.C. Gen. Stat. § 15A-2000(c)(1) (Cum. Supp. 1981). Although the introduction of the record of the prior conviction establishes a prima facie case where the prior felony has the use or threat of violence as an element and could support a peremptory instruction, it is not conclusive upon the jury. Where violence is not an element of the felonious offense, the introduction of the record of conviction would not create a prima facie case. In either event, the state cannot be deprived of an opportunity to carry its burden of proof by the use of competent, relevant evidence.

We find the rule in *Taylor* to be dispositive with respect to this question, and we hold that the involvement of the use or threat of violence to the person in the commission of the prior felony may be proven or rebutted by the testimony of witnesses and that the state may initiate the introduction of this evidence

notwithstanding defendant's stipulation of the record of conviction.

This ruling is consistent with the opinions of the United States Supreme Court. In *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973 (1978), we find:

> And where sentencing discretion is granted, it generally has been agreed that the sentencing judge's "possession of the fullest information possible concerning the defendant's life and characteristics" is "[h]ighly relevant—*if not essential*—[to the] selection of an appropriate sentence . . . ." *Williams v. New York*, supra [337 U.S.], at 247 [93 L.Ed. 1337, 69 S.Ct. 1079] (emphasis added).

Id. at 602-03, 57 L.Ed. 2d at 988-89.

> The plurality concluded, in the course of invalidating North Carolina's mandatory death penalty statute, that the sentencing process must permit consideration of the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S., at 304 [49 L.Ed. 2d 944, 96 S.Ct. 2978] in order to ensure the reliability, under Eighth Amendment standards, of the determination that "death is the appropriate punishment in a specific case."

Id. at 601, 57 L.Ed. 2d at 988 (citations omitted).

> "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

Id. at 604, 57 L.Ed. 2d at 989 (quoting *Woodson v. North Carolina*, 428 U.S. at 304, 49 L.Ed. 2d at 961).

While *Lockett* dealt with an Ohio statute that limited the mitigating circumstances available to a defendant, its reasoning applies equally to the prosecution. In order to prevent an arbitrary or erratic imposition of the death penalty, the state must be allowed to present, by competent relevant evidence, any

aspect of a defendant's character or record and any of the circumstances of the offense that will substantially support the imposition of the death penalty. N.C. Gen. Stat. § 15A-2000(b)(3) (Cum. Supp. 1981).

The assignment of error is without merit.

B.

[5] Defendant next argues that the trial court erred in failing to submit to the jury in writing all possible mitigating circumstances on the verdict sheet. We reject this argument and find no prejudicial error in this regard.

This Court in *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 622 (1982), outlined the instructive guidelines established by this Court for the trial judges of our state to follow in the submission of mitigating circumstances. We commend them to the bench and bar. Defendant's assignment of error is governed by the rules in *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979). There it was held that if "a defendant makes a timely request for a listing *in writing* of possible mitigating circumstances . . . the trial judge must put such circumstances on the written list." *Id.* at 72, 257 S.E. 2d at 617 (emphasis added). Absent a request to include possible mitigating circumstances on the written verdict form, the failure of the trial judge to so do is not error. *Id.*

Here defendant moved that the court submit to the jury three statutory mitigating circumstances, N.C.G.S. 15A-2000(f), and twelve additional mitigating circumstances, N.C.G.S. 15A-2000(f)(9). The court placed the three statutory circumstances on the verdict sheet. The additional circumstances were not placed on the verdict sheet. However, the following question was submitted to the jury on the verdict sheet: "Is there any other circumstance or circumstances arising from the evidence which you deem to have mitigating value?" The judge charged the jury on ten of the twelve mitigating circumstances requested under N.C.G.S. 15A-2000(f)(9). The jury answered this issue "yes."

Defendant failed to request, as required by *Johnson*, that the mitigating circumstances be listed on the written verdict form. The fact that the trial judge in his discretion listed the statutory mitigating circumstances on the verdict form does not make it er-

ror for him to fail to list the additional circumstances. *See also State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L.Ed. 2d 155 (1982) (there are no statutory or constitutional requirements of specific findings on the mitigating circumstances submitted to the jury).

We again repeat that it would be the better practice to include on the verdict form all mitigating circumstances that are to be submitted to the jury. *Id.* In so doing, however, the trial court must also submit the question of whether there exists "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value." N.C. Gen. Stat. § 15A-2000(f)(9) (Cum. Supp. 1981). Otherwise, jurors may feel they are prohibited from considering additional mitigating circumstances not listed on the verdict sheet. Failure to submit this question could violate the constitutional principles enunciated in *Lockett v. Ohio, supra*, 438 U.S. 586, 57 L.Ed. 2d 973 (1978).

[6] In addressing this assignment of error, defendant urges that the trial court erred in the following instruction: "The law of North Carolina specifies the mitigating circumstances which might be considered by you, and only those circumstances created by statute, about which I shall instruct you, may be considered by you."

Standing alone this instruction is arguably erroneous unless the phrase "only those circumstances created by statute" is interpreted to include mitigating circumstances arising under N.C.G.S. 15A-2000(f)(9). Certainly this is a logical interpretation of the phrase, and we adopt it. Moreover, when we examine the court's charge in its entirety, as we are required to do, no error appears. *State v. Silhan, supra*, 302 N.C. 223, 275 S.E. 2d 450 (1981); *State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901 (1970); *State v. Hall*, 267 N.C. 90, 147 S.E. 2d 548 (1966). The court, after giving the quoted instruction, specifically charged the jury as to each mitigating circumstance relied upon by defendant. This included three mitigating circumstances specifically listed in the statute and ten circumstances under N.C.G.S. 15A-2000(f)(9). In this respect the court charged:

> [Y]ou may consider any circumstance from the evidence which you are satisfied lessens the seriousness of the murder or suggests a lesser penalty than otherwise may be required,

such as the defendant's character, education, environment, habits, mentality, propensities and record, and any other circumstances arising from the evidence which you deem to have mitigating value. . . . [The judge listed ten mitigating circumstances.]

So then, if you find from the evidence any one or more of the mitigating circumstances specifically enumerated in the preceding paragraph or any other mitigating circumstance arising from the evidence which you deem to have mitigating value, then it would be your duty to answer this sub-part (d) "Yes." Otherwise, "No."

So then, Members of the Jury, as to this second issue I instruct you that if you find one or more of the mitigating circumstances from the evidence, it would be your duty to answer the issue "Yes," . . . .

The trial court repeatedly instructed that the jury could find *any* mitigating circumstance supported by the evidence. We find no prejudicial error in the challenged instruction.

C.

[7] Defendant argues that the trial court erred in charging that if the jury found that: (1) one or more aggravating circumstances existed, and (2) that mitigating circumstances found by it were insufficient to outweigh the aggravating circumstances, and (3) the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty, it had a *duty* to recommend a sentence of execution. Defendant contends that even though the jury answers the issues in the manner required in order to impose the death sentence, it could still exercise its discretion and recommend a sentence of life imprisonment. This question has been resolved by this Court contrary to defendant's contention in *State v. Pinch, supra*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 622 (1982); *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 622 (1982); and *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 622 (1982). Defendant requests us to reconsider these holdings. We decline to do so and reaffirm these decisions with respect to this issue. This assignment of error is meritless.

D.

[8] Defendant argues that the form of and instructions on the fourth issue submitted to the jury were erroneous. The issue reads:

> 4. Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances you have found is or are sufficiently substantial to call for the imposition of the death penalty?
>
> ANSWER: Yes.

This issue involves the requirement that in making the ultimate decision between life and death, the jury must consider any aggravating circumstances found along with any mitigating circumstances. The totality of the mitigating and aggravating circumstances must be considered by the jury in arriving at this decision. We review the court's instructions in their entirety in addressing this issue.

The court instructed the jury *inter alia*:

> It is now your duty to recommend to the Court whether the defendant will be sentenced to death or life imprisonment. Your recommendation will be binding upon the Court. If you unanimously recommend that the defendant be sentenced to death, the Court will be required to impose a sentence of death.
>
> . . . . .
>
> A mitigating circumstance is that circumstance arising from the evidence which does not constitute a justification or excuse for a killing, or which reduces it to a lesser degree of crime than first-degree murder, but which nevertheless may be considered as extenuating or reducing the moral culpability of the killing, or which makes it less deserving of extreme punishment than other first-degree murders. . . .
>
> The defendant has the burden of persuading you of the existence of any mitigating circumstance. The defendant must satisfy you from the evidence taken as a whole, not beyond a reasonable doubt, but merely to your satisfaction, of the existence of any mitigating circumstance.

. . . . .

[Y]ou may consider any circumstance from the evidence which you are satisfied lessens the seriousness of the murder or suggests a lesser penalty than otherwise may be required, such as the defendant's character, education, environment, habits, mentality, propensities and record, and any other circumstances arising from the evidence which you deem to have mitigating value. . . .

. . . . .

So then, if you find from the evidence any one or more of the mitigating circumstances specifically enumerated in the preceding paragraph or any other mitigating circumstance arising from the evidence which you deem to have mitigating value, then it would be your duty to answer this sub-part (d) "Yes." Otherwise, "No."

So then, Members of the Jury, as to this second issue I instruct you that if you find one or more of the mitigating circumstances from the evidence, it would be your duty to answer the issue "Yes". . . .

. . . . .

The third issue for your consideration reads as follows:

3. Do you find, beyond a reasonable doubt, that the mitigating circumstance or circumstances you have found is or are insufficient to outweigh the aggravating circumstance or circumstances you have found?

On this issue the burden is upon the State to prove to you from the evidence beyond a reasonable doubt that the mitigating circumstances you find are insufficient to outweigh any aggravating circumstances you may have found.

If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. In so doing, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. Your weighing should not consist of merely adding up

the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance, and then weigh the aggravating circumstances, so valued, against the mitigating circumstances, so valued, and finally determine whether the aggravating circumstances outweigh the mitigating circumstances.

So then, Members of the Jury, if the State has proven to you from the evidence beyond a reasonable doubt that the mitigating circumstances you find are insufficient to—that is, do not—outweigh the aggravating circumstances you find, it would then be your duty to answer this third issue "Yes." However, if you do not so find, or if you have a reasonable doubt, then it would be your duty to answer this issue "No."

. . . . .

On this [Fourth] issue the burden is on the State to prove to you from the evidence beyond a reasonable doubt that the aggravating circumstances found, if any, are sufficiently substantial to call for the imposition of the death penalty.

Substantial means having substance or weight, important, significant or momentous. Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence beyond a reasonable doubt the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty, and before you may answer "Yes," you must agree unanimously that they are.

If you unanimously find beyond a reasonable doubt that any aggravating circumstance or circumstances found by you are sufficiently substantial to call for the death penalty, you would answer this issue "Yes." If you do not so find, or have a reasonable doubt, then you would answer this issue "No."

If you answer this issue "No," it would be your duty to recommend that the defendant be imprisoned for life.

So then, Members of the Jury, finally I instruct you for you to recommend that the defendant be sentenced to death, the State must prove three things beyond a reasonable doubt, as I have defined that term, from the evidence:

FIRST, that one or more statutory aggravating circumstances existed; and,

SECOND, that the mitigating circumstances found by you are insufficient to outweigh the aggravating circumstances, if any, found by you; and,

THIRD, that the aggravating circumstances, if any, found by you are sufficiently substantial to call for the imposition of the death penalty.

. . . .

. . . If the State has proven these three things to you beyond a reasonable doubt, and you unanimously so find, it would be your duty to recommend that the defendant be sentenced to death. If you do not so find, or if you have a reasonable doubt to one or more of these things, it would be your duty to recommend that the defendant be sentenced to life imprisonment.

Defendant contends that the form of the issue and the jury instructions allowed the jury to answer the issue "yes" without any consideration of the mitigating circumstances found by the jury.

The issues submitted are based upon the following portions of the statute:

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

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

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

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

. . . .

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

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

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

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

N.C. Gen. Stat. § 15A-2000(b), (c) (Cum. Supp. 1981).

The fourth issue is not an isolated, independent question that may be answered without reference to the other issues and circumstances of the case. This is manifested by the language of the General Assembly—"[b]ased on these considerations" should the defendant be sentenced to death or life imprisonment. N.C. Gen. Stat. § 15A-2000(b)(3) (Cum. Supp. 1981). In deciding the fourth issue, the jury must consider the aggravating circumstances found, the mitigating circumstances found, and the degree to which the aggravating circumstances outweigh the mitigating circumstances. The jury must compare the totality of the aggravating circumstances with the totality of the mitigating circumstances and be satisfied beyond a reasonable doubt that the statutory aggravating circumstances found are sufficiently substantial to call for the imposition of the death penalty and that the death penalty is justified and appropriate.

When the charge is considered contextually, as we have done, no prejudicial error appears. *State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901 (1970). Although not a model charge, the jury was

adequately instructed that before recommending the death sentence it must be satisfied that the sentence is justified and appropriate upon considering the totality of the aggravating circumstances with the totality of the mitigating circumstances found by the jury. The charge and the sentencing procedure satisfied the requirements of N.C.G.S. 15A-2000 and the holding in *Lockett v. Ohio, supra*, 438 U.S. 586, 57 L.Ed. 2d 973 (1978), that the death penalty should not be imposed where the sentencer may be prevented from considering all mitigating circumstances in making the ultimate life or death determination.

The jury is not required to assign a value to the aggravating circumstances, subtract from it the value of the mitigating circumstances, and then look to the remainder to determine if that value is sufficiently substantial to deserve the death penalty. We reject and disapprove such a mechanical mathematical approach to the decision of life or death.

The instructions given in this case are substantially the same as those approved by this Court in *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. den.*, --- U.S. ---, 74 L.Ed. 2d 642 (1982); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. den.*, --- U.S. ---, 74 L.Ed. 2d 622 (1982); *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. den.*, --- U.S. ---, 74 L.Ed. 2d 622 (1982); *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. den.*, 455 U.S. 1038, 72 L.Ed. 2d 155 (1982); *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. den.*, 454 U.S. 933, 70 L.Ed. 2d 240 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. den.*, 448 U.S. 907, 65 L.Ed. 2d 1137 (1980).

As stated earlier, although the instructions are free from prejudicial error, they are not a model charge. The form of the fourth issue can also be more appropriately framed. We therefore urge the bench and bar to carefully consider the following with respect to this question.

[9] We note that the order and form of the issues in capital trials have varied from case to case. The order and form of the issues to be submitted to the jury should be substantially as follows:

(1) Do you find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances?

(2) Do you find from the evidence the existence of one or more of the following mitigating circumstances?

(3) Do you find beyond a reasonable doubt that the mitigating circumstance or circumstances you have found is, or are, insufficient to outweigh the aggravating circumstance or circumstances you have found?

(4) Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

With respect to the fourth issue we find the following statement by the Utah Supreme Court in *State v. Wood*, 648 P. 2d 71, 83 (Utah), *cert. den.*, --- U.S. ---, 74 L.Ed. 2d 383 (1982), quoted by the United States Supreme Court in *Smith v. North Carolina*, --- U.S. ---, 74 L.Ed. 2d 622 (1982), to be instructive:

> It is our conclusion that the appropriate standard to be followed by the sentencing authority—judge or jury—in a capital case is the following:
>
> "After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances."
>
> These standards require that the sentencing body compare the totality of the mitigating against the totality of the aggravating factors, not in terms of the relative numbers of the aggravating and the mitigating factors, but in terms of their respective substantiality and persuasiveness. Basically, what the sentencing authority must decide is how compelling or persuasive the totality of the mitigating factors are when compared against the totality of the aggravating factors. The sentencing body, in making the judgment that aggravating factors "outweigh," or are more compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death

penalty is justified and appropriate after considering all the circumstances.

The sentencing procedure in each capital case must assure reliability in the decision that death is the proper punishment. *Lockett v. Ohio, supra,* 438 U.S. 586, 57 L.Ed. 2d 973 (1978). Appropriate instructions on the fourth issue should be given to the jury substantially as follows:

> "In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by you. After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue 'yes.' In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. The number of circumstances found is only one consideration in determining which circumstances outweigh others. The jury may very properly emphasize one circumstance more than another in a particular case.[5] You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances found by you.[6] After so doing, if you are satisfied beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, it would be your duty to answer the issue 'yes.' If you are not so satisfied or have a reasonable doubt, it would be your duty to answer the issue 'no.' "[7]

5. *State v. Melton,* 307 N.C. 370, 298 S.E. 2d 673 (1983); *State v. Davis,* 58 N.C. App. 330, 293 S.E. 2d 658, *disc. rev. denied,* 306 N.C. 745 (1982).

6. *Smith v. North Carolina,* --- U.S. ---, 74 L.Ed. 2d 622 (1982).

7. *Cf. State v. Smith,* 305 N.C. 691, 292 S.E. 2d 264, *cert. den.*, --- U.S. ---, 74 L.Ed. 2d 622 (1982).

Bench and bar should note that the foregoing is not intended to be a complete charge on this issue.[8]

We find no prejudicial error in the sentencing phase of defendant's trial.

IV.

Finally, we turn to the duties required of this Court in every capital case in which a sentence of death has been imposed. We are directed by N.C.G.S. 15A-2000(d)(2), (Cum. Supp. 1981) to determine:

> (1) Whether the record supports the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death;
>
> (2) Whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We have thoroughly reviewed the transcript, record on appeal, briefs of the defendant and the State, as well as the recorded oral arguments of counsel before this Court. After so doing, we find that the record fully supports the aggravating circumstances found by the jury. We hold that the death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor. There is no indication in the transcript or record that any impermissible factor influenced the imposition of the death sentence.

[10] We must next determine whether the sentence in this case is excessive or disproportionate to the penalty imposed in similar cases. In our opinion in *State v. Douglas Williams, Jr.* (No.

8. In the event the jury fails to find the existence of any mitigating circumstances, the jury must still answer the fourth issue. In such case, the jury must determine whether the aggravating circumstances found by the jury are of such value, weight, importance, consequence, or significance as to be sufficiently substantial to call for the imposition of the death penalty. Substantial circumstances may be contrasted with circumstances that are tenuous, flimsy, abstract, imaginary, deceptive, or negligible.

277A82, Edgecombe County, filed 5 April 1983), this Court set forth the pool of cases to be considered in proportionality review of sentences in capital cases. *Williams* also states the method of such review. The pool of cases for a proportionality review is composed of all capital cases tried after the effective date of our capital punishment statute, 1 June 1977, in which there were convictions of murder in the first degree, regardless of the sentences imposed, and which have been reviewed on appeal by this Court. In making this review, this Court will rely upon its own case reports of the pool of cases, together with the transcript, record and briefs when necessary. *See, Williams, supra.*

[11] Upon review of the transcript, record, briefs and recorded oral arguments, we do not find the death sentence in this case disproportionate when compared with the pool of similar cases. In carrying out this review we have considered both the crime and the defendant. N.C. Gen. Stat. § 15A-2000(d)(2), (Cum. Supp. 1981). In so doing, we have complied with the constitutional requirement that individualized consideration be given to the defendant before the death sentence can be upheld. *Lockett v. Ohio, supra,* 438 U.S. 586, 57 L.Ed. 2d 973 (1978). In considering the defendant, we note that the jury found as statutory mitigating circumstances that defendant was under the influence of mental or emotional disturbance when he committed the murder, and that the defendant's capacity to appreciate the criminality of his conduct or to conform to the requirements of law was impaired. N.C. Gen. Stat. § 15A-2000(f)(2) and (6). While these findings are often persuasive on the jury in recommending life imprisonment,[9] they are not conclusive.[10] It is also apparent from the transcript and record that, although there is evidence to the contrary, these mitigating circumstances may have resulted from the defendant's voluntary injections of cocaine. The trial court instructed the jury that defendant could be under a mental or emotional disturbance as a

9. *See State v. Adcox,* 303 N.C. 133, 277 S.E. 2d 398 (1981); *State v. King,* 301 N.C. 186, 270 S.E. 2d 98 (1980); *State v. Myers,* 299 N.C. 671, 263 S.E. 2d 768 (1980); *State v. Ferdinando,* 298 N.C. 737, 260 S.E. 2d 423 (1979); *State v. Taylor,* 298 N.C. 405, 259 S.E. 2d 502 (1979); *State v. Poole,* 298 N.C. 254, 258 S.E. 2d 339 (1979); *State v. Crews,* 296 N.C. 607, 252 S.E. 2d 745 (1979).

10. *State v. Rook,* 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. den.,* 455 U.S. 1038, 72 L.Ed. 2d 155 (1982); *State v. Hutchins,* 303 N.C. 321, 279 S.E. 2d 788 (1981); *State v. Johnson,* 298 N.C. 47, 257 S.E. 2d 597 (1979).

result of the "consumption of drugs." Likewise, with respect to impaired capacity, the jury was instructed that this condition could be caused by "drug intoxication." In this case, although finding the existence of these two mitigating circumstances, the jury could have reasonably given them less weight in making the ultimate decision of life or death than did the juries in the cases cited in footnote 9.

The jury found the existence of three aggravating circumstances: defendant had been previously convicted of a felony involving the use of violence to the person, the murder was especially heinous, atrocious or cruel, and the murder was part of a course of conduct which included a crime of violence by defendant against another person, Vicki Dunno. N.C. Gen. Stat. § 15A-2000(e)(3), (9) and (11) (Cum. Supp. 1981). Two of these aggravating circumstances could not have been caused or influenced in any way by defendant's emotional state or diminished capacity. The transcript and record do not support the theory that this murder was the product of defendant's unfortunate childhood or a deficient personality exacerbated by the voluntary injection of cocaine.

After voluntarily injecting cocaine, defendant gained entry into the home of Diane Parker and Vicki Dunno by cunning, guile and misrepresentation. Once in their home, he commenced a campaign of terror against the two young women, cutting, stabbing and slashing them with a butcher knife. There is strong evidence that defendant killed Diane Parker while attempting to rape her. There is no reason to repeat here the gory details of the crime.

No duty of this Court is more serious or important than the review of a sentence of death. With this in mind, our careful comparison of this crime and this defendant with similar cases leads us to the conclusion that the death sentence imposed upon this defendant is not disproportionate or excessive. We find nothing in our review that would justify treating this defendant differently from those defendants who were given death sentences which this Court has upheld since 1 June 1977. Nor does our review of the life sentence cases in the pool of similar cases lead us to the conclusion that defendant should receive a life sentence. Our review discloses a meaningful basis for distinguishing this case from those in which life sentences were imposed. *Lockett v. Ohio,*

supra, 438 U.S. 586, 57 L.Ed. 2d 973 (1978); *Harris v. Pulley*, 692 F. 2d 1189 (9th Cir. 1982), *cert. granted*, 43 C.C.H. S.Ct. Bull. B1442 (21 March 1983). We do not find the death sentence in this case to be inappropriate as a matter of law. We decline to exercise our discretion to set aside the death sentence imposed.

Defendant was also convicted of assault on Vicki Dunno with a deadly weapon with intent to kill inflicting serious injury, and kidnapping of Diane Parker. Although he gave notice of appeal of these convictions, defendant does not bring forward any assignments of error or make any argument with respect to these charges in his brief. We find no error in these convictions.

The result is:

No. 79CRS47734—assault with a deadly weapon with intent to kill inflicting serious injury—no error.

No. 79CRS67081—kidnapping—no error.

No. 79CRS47697—murder in the first degree—no error in guilt determination; no error in the sentencing phase.

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

Justice EXUM dissenting as to sentence.

I concur fully in the majority's treatment of the guilt phase of this case. With respect to the sentencing phase I dissent and vote to remand for a new sentencing hearing.

A.

In my view the trial court failed to exercise sufficient control over the direct examination and cross-examination of the witness Mary Huff so that her testimony resulted in a "mini-trial" of the Georgia rape case, a phenomenon which we sought to warn against in *State v. Silhan*, 302 N.C. 223, 273, 275 S.E. 2d 450, 484 (1981), and which the majority today agrees should not be allowed to occur. The primary danger of the mini-trial is that it distracts the jury from its appointed task of determining whether defendant will live or die by focusing too much of its attention on the

question of defendant's guilt or degree of culpability in some prior crime. If permitted, the practice could also greatly extend the time required for sentencing hearings to unreasonable lengths as each prior conviction of defendant is, in turn, relitigated.

In *Silhan* the state at the sentencing hearing offered testimony tending to show that defendant had been convicted in another county for various crimes involving violence. The aggravating circumstance defined by G.S. 15A-2000(e)(3), that "defendant had been previously convicted of a felony involving the use or threat of violence to the person," was not submitted to the jury. Apparently, as we concluded in *Silhan*, the state offered this testimony to rebut defendant's contention that he had no significant prior criminal history. In ordering a new sentencing hearing for other reasons, we noted in *Silhan* that the state would be able to use these other convictions to prove the subsection (e)(3) aggravating circumstance. With concern about the state's use of witnesses to prove the prior convictions and in order to guard against this practice except where necessary, we said in an effort to guide the trial court at the new sentencing hearing:

> We note in this regard that the most appropriate way to show the 'prior felony' aggravating circumstance would be to offer duly authenticated court records. Testimony of the victims themselves should not ordinarily be offered *unless such testimony is necessary to show that the crime for which defendant was convicted involved the use or threat of violence to the person.* There should be no 'mini-Trial' at the sentencing hearing on the questions of whether the prior felony occurred, the circumstances and details surrounding it, and who was the perpetrator. Whether a defendant has, in fact, been convicted of a prior felony involving the use or threat of violence to a person would seem to be a fact which ordinarily is beyond dispute. It should be a matter of public record. If, of course, defendant denies that he was the defendant shown on the conviction record, the occurrence of the conviction, or that the crime involved the use or threat of violence to the person, then the state should be permitted to offer such evidence as it has to overcome defendant's denials.

302 N.C. at 272, 275 S.E. 2d at 484 (emphasis supplied).

I strongly disagree with the majority that this language in *Silhan* "may properly be referred to as obiter dictum." It is no more dictum than the majority's present instruction to the trial court with regard to the proper form and instructions on what it refers to as the "fourth issue" in a capital sentencing proceeding. Indeed, the majority relies on the italicized portions of the above *Silhan* passage to sustain its decision here. Furthermore, the majority agrees that a mini-trial of the previous charge ought not to be permitted to occur. The majority states, and I agree, that the proper exercise of the trial judge's authority to control both the direct examination and cross-examination of a witness "will prevent the determination of [the prior conviction] aggravating circumstance from becoming a 'mini-trial' of the previous charge."

The majority concludes, however, that the trial judge in this case did properly exercise his authority to this effect. I disagree with this conclusion.

The trial judge here permitted the witness's direct examination by the state to continue until it now occupies more than six pages in the transcript. The examination covers such details of the prior offense as the victim's age, size and weight; marital status; victim's residence next door to defendant's sister; the time of the offense; defendant's size and weight; and various details involving the act of sexual intercourse with the victim, including defendant's statements during the act and whether defendant ejaculated. This rather extensive direct examination which would have been appropriately complete for the trial of the rape itself prompted an extensive cross-examination by defendant which occupies some nineteen pages of the record. The cross-examination ranges over such subjects as the victim's estrangement from her husband at the time of the rape; the manner in which defendant gained entry into the victim's home; certain prior inconsistent statements allegedly made by the victim; the victim's alleged possession with her husband of certain pornographic movies; and the manner in which defendant exited the victim's home.

An extremely small portion of both the direct examination and the cross-examination dealt with the question of defendant's use or threat of violence to the victim of the Georgia rape. Although the majority agrees that this would have been the only appropriate purpose for the testimony, nevertheless it somehow

concludes that Judge Ferrell did not commit error in allowing the wide-ranging direct examination and cross-examination on subjects irrelevant and immaterial to the only appropriate evidential inquiry. Suffice it to say that if what occurred at this sentencing hearing did not constitute a "mini-trial" on the Georgia rape conviction, then I am hard put to conceive of what would be a mini-trial.

Finally, the majority relies on *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981) (*Taylor II*), to sustain its decision on this point. What happened in *Taylor II* bears no resemblance to what happened in the instant case. Defendant in *Taylor II* had, in fact, been convicted of the first degree murder of Cathy King at the 25 September 1978 Session of Johnston Superior Court. *State v. Taylor*, 298 N.C. 405, 259 S.E. 2d 502 (1979) (*Taylor I*). The murder in *Taylor I* was prosecuted as a capital case. The record reveals that only one aggravating circumstance was submitted to the jury, *i.e.*, was the murder "especially heinous, atrocious or cruel." Although the jury answered this aggravating circumstance affirmatively, it also found the existence of the mitigating circumstance that the murder was committed while defendant "was under the influence of mental or emotional disturbance." The jury found beyond a reasonable doubt that the mitigating circumstance was insufficient to outweigh the aggravating and that the aggravating was sufficiently substantial to call for the imposition of the death penalty. Nevertheless, it recommended life imprisonment. This Court found no error in defendant's conviction in *Taylor I*.

In *Taylor II*, relied on by the majority here, the state was permitted to offer the testimony of the pathologist who performed the autopsy on the body of Cathy King, the victim in *Taylor I*. The record in *Taylor II* reveals that the pathologist testified simply as follows:

> I did an autopsy on the body of Cathy King on January 3, 1978. I found six separate gunshot wounds. We found two on the chest, one on the left side below the neck, and one on the right side. There was one on the left back, and there were two on the left arm and one on the right hand. The wounds were very close indicating that the gun was properly several feet away when it was fired, rather than a few

inches. In my opinion, her death was a result of the gunshot wounds that I have described.

There was no cross-examination of the pathologist.

The brief testimony of the pathologist in *Taylor II* was not permitted to degenerate into a mini-trial of defendant's guilt of the Cathy King, *Taylor I*, murder. *Silhan* was not referred to in *Taylor II*. There is no hint in *Taylor II* that this Court intended to, nor in my view did it, retreat from what it said in *Silhan* on this subject.

In *Taylor II* the state argued that it should be permitted to offer this brief testimony of the pathologist, a disinterested witness, to show not only that defendant Taylor had previously been convicted of first degree murder, but also that this murder was accompanied by an aggravating circumstance, *i.e.*, the murder was "especially heinous, atrocious or cruel," G.S. 15A-2000(e)(9), which qualified the murder as potentially deserving of the death penalty. This Court in *Taylor II* agreed essentially with this argument, holding that "[i]f the capital felony of which defendant has previously been convicted was a particularly shocking or heinous crime, the jury should be so informed." 304 N.C. at 279, 283 S.E. 2d at 780. *Taylor II* does not hold that testimony will be admissible to show any and all circumstances of the commission of every crime defendant's conviction of which is sought to be offered as an aggravating circumstance. *Taylor II* holds only that when the prior crime is a capital crime, *i.e.*, first degree murder, then brief testimony will be allowed to show those agggravating and mitigating circumstances which were found by the jury in the prior case to have existed.

Finally, there was no necessity for offering any testimony for the purpose of showing that defendant's Georgia rape conviction was a crime involving violence or threat of violence to the victim. The majority notes that defendant's Georgia rape conviction was obtained under section 16-6-1(a) of the Georgia Code which provides, "A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will . . . ." Ga. Code Ann. § 16-6-1(a) (1982). This Court said, moreover, in *Taylor II*, 304 N.C. at 279, 283 S.E. 2d at 780: "Nothing else appearing, rape involves the use or threat of violence to the person." Thus, defendant's Georgia rape conviction was "of a felony involving the

use or threat of violence to the person" as a matter of law. Defendant's stipulation that he had been so convicted was in law also a stipulation that the crime involved violence or threat of violence to the person.

There being no necessity then for the state to prove this element through the testimony of witnesses, I think it was error prejudicial to defendant to permit any testimony at all on this point.

The Fair Sentencing Act, now our statutory scheme for sentencing most classes of felons, was recently enacted by our General Assembly. *See* Comment, *The North Carolina Fair Sentencing Act*, 60 N.C. L. Rev. 631, 631 n. 1 (1982). It supports my position that testimony in a capital sentencing hearing should be permitted on the prior conviction aggravating circumstance *only if necessary* to show that the prior conviction did involve the use or threat of violence or that a prior conviction for first degree murder was accompanied by statutory aggravating or mitigating circumstances, or both. This Act provides for presumptive sentences to be imposed for each felony conviction unless aggravating or mitigating circumstances are shown which might justify a greater or a lesser sentence. One of the statutory aggravating circumstances is that "[t]he defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement." G.S. 15A-1340.4(a)(1)(o). Subsection (e) of this statute provides:

> A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein.

Because the legislature has so clearly stated its intent as to how prior convictions should ordinarily be proved in the Fair Sentencing Act, I am satisfied the legislature had a similar intent with regard to the proof of prior felony convictions in our capital punishment sentencing statute.

State v. McCormick, 397 N.E. 2d 276 (Ind. 1979), also supports my position on this question. In *McCormick* the Indiana Supreme Court considered provisions of the Indiana capital sentencing statute which permitted the state to prove as aggravating circumstances the following (numbered as they appear in the statute):

> (7) The defendant has been convicted of another murder.
>
> (8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.
>
> (9) The defendant was under a sentence of life imprisonment at the time of the murder.

397 N.E. 2d at 278 (citing Ind. Code § 35-50-2-9(b) (Burns 1979)). The Indiana Supreme Court concluded that subsection eight of the sentencing statute violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Court reasoned that this subsection would permit the state to try during the sentencing phase of a capital case another, unrelated murder. The Court concluded that this procedure would be so inflammatory and impermissibly prejudicial in the sentencing phase it would deny defendant due process. The Court considered subsection eight to be qualitatively different from subsections seven and nine of the statute. It said, 397 N.E. 2d at 280-81:

> Similarly, evidence introduced to prove subparts (7) and (9) also does not carry with it the emotional and prejudicial impact which would cause the death penalty to be imposed capriciously. *Gregg v. Georgia*, (1976) 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859. Subparts (7) and (9) concern whether '[t]he defendant has been convicted of another murder' and whether '[t]he defendant was under a sentence of life imprisonment at the time of the murder.' Evidence of these aggravating circumstances will almost always be in the form of court or prison records. Unlike a complete presentation of evidence regarding an unrelated murder, this evidence, in the context of this sentencing procedure, would not be of an inflammatory and improperly prejudicial nature. *See Spencer v. Texas*, (1967) 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed. 2d 606.

Thus, permitting the sentencing phase of a capital case to degenerate into a mini-trial or retrial of a previous offense, as happened here, may raise serious constitutional questions. Clearly, permitting such a retrial is contrary to the legislature's intent.

B.

For the reasons stated in my dissenting opinion in *State v. Pinch*, 306 N.C. 1, 38, 292 S.E. 2d 203, 230, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 622, 103 S.Ct. 474 (1982), I also disagree with the majority's position that it was not error for the trial judge to instruct the jury that it had a duty to recommend death if it answered the various issues submitted favorably to the state. I continue to think that a jury never has a duty to recommend death no matter how it answers the issues. It may *not* recommend death unless it answers the issues in a certain way. Even if it answers these issues that way, however, the jury ought still be permitted to recommend life as, indeed, juries did in *State v. King*, 301 N.C. 186, 270 S.E. 2d 98 (1980), and *State v. Taylor*, *supra*, 298 N.C. 405, 259 S.E. 2d 502 (*Taylor I*).

C.

I concur with the majority's view of the manner in which the issues should be submitted in a capital case as set out in Part III D of its opinion. I believe, however, that the trial judge's formulation of and instruction on the fourth issue constituted error entitling defendant to a new sentencing hearing. The jury was told on this issue to determine the substantiality of the aggravating circumstances standing alone and without regard to and not discounted by the mitigating circumstances.

Justice Stevens, in a concurring opinion on a denial of certiorari, *Pinch v. North Carolina*, --- U.S. ---, 74 L.Ed. 2d 622-23, 103 S.Ct. 474, 475 (1982), cautioned that such an instruction might be contrary to the holding in *Lockett v. Ohio*, 438 U.S. 586 (1978). He wrote:

> In each of these three capital cases the trial judge instructed the jury that it had a duty to impose the death penalty if it found: (1) that one or more aggravating circumstances existed; (2) that the aggravating circumstances were sufficiently substantial to call for the death penalty; and (3) that the aggravating circumstances outweighed the miti-

gating circumstances. There is an ambiguity in these instructions that may raise a serious question of compliance with this Court's holding in *Lockett v Ohio*, 438 US 586, 57 L Ed 2d 973, 98 S Ct 2954, 9 Ohio Ops 3d 26 (1978).

On the one hand, the instructions may be read as merely requiring that the death penalty be imposed whenever the aggravating circumstances, discounted by whatever mitigating factors exist, are sufficiently serious to warrant the extreme penalty. Literally read, however, those instructions may lead the jury to believe that it is required to make two entirely separate inquiries: First, do the aggravating circumstances, considered apart from the mitigating circumstances, warrant the imposition of the death penalty? And second, do the aggravating circumstances outweigh the mitigating factors? It seems to me entirely possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that 'death is the appropriate punishment in a specific case.' *Lockett*, supra, 438 US, at 601, 57 L Ed 2d 973, 98 S Ct 2954, 9 Ohio Ops 3d 26 (plurality opinion), quoting *Woodson v North Carolina*, 428 US 280, 305, 49 L Ed 2d 944, 96 S Ct 2978 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

. . . .

The petitions for certiorari in these three cases request the Court to review the decision of the Supreme Court of North Carolina affirming the death penalty in each case. I do not criticize the Court's action in denying certiorari because the question whether the instructions to the juries are consistent with *Lockett* remains open for consideration in collateral proceedings. Moreover, even if relief may not be warranted in these cases, the North Carolina judiciary may find it appropriate to make slight changes in the form of its instructions to avoid the ambiguity I have identified.

--- U.S. ---, 74 L.Ed. 2d at 622-23, 103 S.Ct. at 474-75 (footnote omitted).

The majority recognizes that this kind of instruction is not contemplated by the statute. Justice Stevens is of the opinion that it may be unconstitutional. I agree with both of these positions and would give defendant a new sentencing hearing on the strength of this error committed by the trial judge.

STATE OF NORTH CAROLINA v. DOUGLAS WILLIAMS, JR.

No. 277A82

(Filed 5 April 1983)

1. **Criminal Law §§ 75.2, 75.15 — confession not result of intoxication or promises**

The evidence on voir dire supported the trial court's determination that defendant's confession was voluntary and was not the result of intoxication or promises by the investigating officers that defendant would receive a shorter sentence in exchange for his admission of guilt.

2. **Criminal Law §§ 75.3, 76.10 — attack on confession — theory not raised in trial court — confronting defendant with evidence**

Where defendant failed to attack his confession at trial on the theory that it was coerced because he had been advised by the investigating officers that a comparison of his tennis shoes with shoe prints at the crime scene revealed similarities, he could not attempt to do so for the first time on appeal. Moreover, defendant's confession was not rendered involuntary and inadmissible as a result of his being so advised since the evidence with which defendant was confronted was competent; the fact that an investigating officer confronts a person in custody with evidence of his implication in a crime or evidence from the crime scene does not amount to "interrogation" within the meaning of *Miranda*; confronting a person in custody with such evidence is not the type of "subtle coercion" prohibited by *Miranda*; and defendant by sworn affidavit and testimony at trial stated that his confession was given only for other reasons.

3. **Homicide § 20.1 — photographs of deceased's body — admissibility for illustrative purposes**

Five photographic slides portraying the body of the deceased shortly after she was killed were properly admitted for the purpose of illustrating the testimony of a pathologist concerning the size, number and location of the various wounds and marks he observed on the body during an autopsy.

4. **Criminal Law § 112.1 — instructions on reasonable doubt**

When the trial court's instructions are read contextually and in their entirety, it is clear that the court's instruction that a reasonable doubt is a substantial misgiving "generated by the insufficiency of the proof" referred to insufficiency of the proof arising from the evidence as well as insufficiency of proof arising from the lack of evidence and was not improper.

5. Homicide § 21.6— murder committed in perpetration of first degree burglary—intent to commit larceny—sufficiency of evidence

The State's evidence of defendant's intent to commit larceny at the time he broke into and entered a murder victim's home was sufficient to justify submission to the jury of the question of defendant's guilt of murder committed in the perpetration of first degree burglary, notwithstanding the State introduced defendant's confession in which he stated that he broke into and entered the home with the intent to find a place to sleep, where the State rebutted the exculpatory statement and showed an intent to commit larceny by other evidence tending to show that defendant armed himself with a stick prior to entering the victim's home, that he then proceeded to attack the victim by knocking her down with the stick and inflicting serious injuries upon her, and that defendant then went through the entire house and committed larceny therein by taking the victim's checkbook and keys and possibly other items.

6. Homicide § 21.6— murder committed in perpetration of sex offense—sufficiency of evidence

The trial court did not err in permitting the jury to consider the question of defendant's guilt of first degree murder in the perpetration of a sex offense where defendant admitted in his confession that, while the 100-year-old victim was lying helpless on the floor, he forced a mop handle into her vagina, and a forensic pathologist testified that this act was done with such force that the cavity of the vagina was torn with the tear extending through and into the rectum and continuing two and one-half inches into the sacrum bones, and that it was his opinion that this injury occurred while the victim was alive and, in combination with other injuries inflicted at the time, caused her death.

7. Homicide § 21.5— first degree murder based upon premeditation and deliberation—sufficiency of evidence

The trial court properly permitted the jury to consider the question of defendant's guilt of first degree murder based upon premeditation and deliberation where defendant stated during his confession that he first struck the victim when she threw a handful of salt at him after he broke into her home, and all the evidence tended to show that the killing was performed in a brutal manner, that the victim died as a result of numerous injuries inflicted to various parts of her body over a considerable period of time, and that several of the wounds inflicted upon the victim were the result of attacks after she had been felled and rendered helpless.

8. Criminal Law § 135.4— first degree murder—sentencing hearing—aggravating circumstance of first degree burglary—failure to instruct on intoxication

In a sentencing hearing in which the court submitted the aggravating circumstance as to whether the murder was committed while defendant was engaged in the commission of first degree burglary, the trial court did not err in failing to instruct the jury concerning evidence of defendant's intoxication as affecting his ability to form the intent to commit larceny at the time he broke into and entered the victim's home where all of the evidence, except a statement in defendant's confession, indicated that he was not so intoxicated or impaired as to be unable to form a specific intent at the time in question. Even if the evidence had required the trial court to instruct on intoxication,

the failure to do so during the sentencing phase was not prejudicial error where the issue of intoxication was determined against defendant at the guilt-innocence determination phase of the trial when he had the benefit of full and correct instructions on the defense of intoxication.

9. **Criminal Law § 135.4— sentencing hearing—effect of jury's inability to agree—instruction not required**

The trial court did not err in failing to instruct the jury that a sentence of life imprisonment would be imposed upon the defendant in the event that the jury was unable to reach unanimous agreement on the proper sentence.

10. **Criminal Law § 135.4— first degree murder—premeditation and deliberation and felony murder theories—underlying felonies as aggravating circumstances**

Where defendant was convicted of first degree murder on both the theory of premeditation and deliberation and the theory of murder in the perpetration of felonies, the felonies upon which the conviction for murder in the perpetration of a felony was based could properly be considered as aggravating circumstances.

11. **Criminal Law § 135.4— first degree murder—sentencing hearing—mitigating circumstances—no significant history of prior criminal activity—form of issue**

While the form of the submission of the mitigating circumstance, "Does the defendant have a significant history of prior criminal activity?" is disapproved, the submission of such statutory mitigating circumstance in this form was not error under the circumstances of this case where the trial court specifically instructed the jury that a negative answer to the question would be an indication that they were satisfied that the mitigating factor existed, the court additionally specifically informed the jury that an affirmative answer would indicate only that the defendant had "failed to so satisfy you," and it is clear that the jury was not misled and did not consider its affirmative answer to the question as an affirmative finding of an aggravating circumstance.

12. **Criminal Law § 135.4— first degree murder—sentencing hearing—form of fourth issue**

The trial court's instructions on the fourth issue submitted to the jury in a sentencing hearing in a first degree murder case were sufficient where the court submitted an issue as to whether the jury unanimously found from the evidence and beyond a reasonable doubt that the aggravating circumstances found by it were sufficiently substantial to call for the death penalty, and the court instructed the jury that they must answer this fourth issue based upon their findings concerning both aggravating and mitigating circumstances.

13. **Criminal Law § 135.4— death penalty—pool of cases for proportionality review**

In determining whether a sentence of death imposed in a particular case is excessive or disproportionate to the penalty imposed in similar cases, the pool of "similar cases" used for comparison purposes will be all cases arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by the N.C. Supreme Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

14. Criminal Law § 135.4— death penalty not disproportionate to penalty in similar cases

Sentence of death imposed upon defendant was not disproportionate or excessive considering both the crime and the defendant where the evidence showed that defendant, after having struck the 100-year-old victim several times and felled her, continued to batter her with two heavy metal clock weights; after ransacking her home, defendant returned to the prostrate victim, pulled up her dress, and proceeded to force a mop handle into her vagina in such a fierce manner as to cause her to suffer massive internal injuries including multiple fractures of the sacrum and pubic bones; and defendant then took the victim's property and left her to die in a pool of her own blood.

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

Justice EXUM dissenting as to sentence.

BEFORE *Fountain, Judge,* at the 16 November 1981 Criminal Session of Superior Court, EDGECOMBE County.

The defendant was charged in a bill of indictment, proper in form, with the murder of Adah Herndon Dawson. The jury found the defendant guilty of murder in the first degree and recommended that he be sentenced to death. Based upon the jury's recommendation, the trial court entered judgment sentencing the defendant to death. The defendant appealed to the Supreme Court as a matter of right.

Rufus L. Edmisten, Attorney General, by Ralf F. Haskell, Assistant Attorney General, for the State.

H. Vinson Bridgers and Edward B. Simmons, for the defendant-appellant.

MITCHELL, Justice.

The defendant brings forward assignments of error relating to the guilt-innocence determination phase and to the sentencing phase of his trial. Having carefully considered each of these assignments, as well as the entire record before us, we find no prejudicial error in either phase of the defendant's trial. Therefore, we do not disturb the defendant's conviction or the sentence of death.

I.

The evidence presented by the State during the guilt-innocence determination phase of the trial tended to show that

Adah Herndon Dawson was approximately one hundred years old in August, 1981. She lived in a house on her farm in Edgecombe County. She was visited by Rosella Spencer from approximately 3:30 to 4:00 p.m. on 1 August 1981 and appeared to be all right at that time. At approximately 8:00 p.m. on that date Adah Dawson talked by telephone with Lester Andrews for approximately fifteen minutes at which time she advised him that she was all right.

On the evening of 1 August 1981, Rosella Spencer went to a party at the home of her brother Clifton Edwards. Edwards' house was located in a field approximately one-half mile behind the Dawson home. A path leading to the Edwards home goes directly by the Dawson home. While attending the party in her brother's home, Rosella Spencer observed the Dawson home and noticed that the lights in the kitchen and breakfast room were on at approximately 10:30 p.m. At about the same time, Spencer observed the defendant at the party talking to her sister. She noticed what appeared to be a liquor bottle in the defendant's front pocket but did not see the defendant drinking or know whether he had been drinking. Spencer last noticed the defendant at her brother's home when he went outside sometime between 11:00 p.m. and midnight. Spencer left her brother's home between 1:30 and 2:00 a.m. and noticed that the light in the Dawson kitchen was off at that time while the light in the breakfast room was still on. At approximately 8:00 a.m. on Sunday morning 2 August 1981, Spencer's brother Clifton Edwards saw Adah Dawson's dogs running loose. He went to the Dawson home to put the dogs in their pen. He noticed that the screen porch door was unlatched and the wooden door to the Dawson home was open. He went inside and saw the body of the victim Adah Dawson lying on the floor in the kitchen. He then ran back to his home and called his sister Rosella Spencer. After receiving a call from her brother at approximately 8:05 a.m., Spencer went to the Dawson home. She went inside and saw the victim lying on her back on the kitchen floor. Spencer observed that the victim's dress was up to her waist and that there were no clothes on the lower half of her body. There were numerous wounds to the victim's face and head.

Members of the Edgecombe County Sheriff's Department arrived at the Dawson home at approximately 8:45 a.m. on 2 August 1981. They asked Rosella Spencer to reenter the Dawson home

with them because of her familiarity with the home. After entering the home, Spencer noticed that the weights to a cuckoo clock which hung in a front hall were missing. A drawer in the victim's bedroom was out of the dresser and her pocketbook, papers and other items were lying on the bed and floor. Other drawers were out in another room and screwdrivers and other items were strewn on the floor. A padlock used to keep the door to another room locked had been broken. A flashlight which the victim always kept on the nightstand in her bedroom was on a dresser in the room in which the screwdriver and other items were found on the floor. Spencer also observed that the drapes in the victim's bedroom, which were normally kept open, were closed over the window with a table pushed up to the window. Spencer had never known the victim to close the bedroom curtains in this manner. The curtains in the bathroom were also pulled together and were held shut by a cup placed in the window. Spencer had never known the victim to close these curtains in this manner.

Deputy Sheriff Jerry Wiggs of the Edgecombe County Sheriff's Department arrived at the Dawson home at approximately 8:45 a.m. on 2 August 1981. As he entered the home, Wiggs saw that the screen door to the porch had been torn away at the bottom. He saw the body of the victim on the floor. He also saw a large puddle of blood on the floor together with a puddle of melted ice cream which was between the victim's legs. The victim's head was against the refrigerator and her dress was pulled up to her waist with a mop lying over her vagina. He also saw a metal object in the shape of a pine cone on the floor near her leg and another near the upper part of her body. These objects were later identified as the weights from the clock in the hallway. Wiggs observed red and brown spots on the refrigerator, red spots on the wall and blood smeared on the floor. The blood was smeared across the floor from the door to the victim's body.

Chief Deputy Sheriff Tom Moore arrived at the Dawson home at approximately 9:45 a.m. When he entered the home, he saw the victim's body on the kitchen floor. His testimony tended to corroborate the testimony of Deputy Wiggs. Deputy Moore also observed blood on the screen door to the kitchen, a pair of glasses on the porch floor just outside the kitchen door, and the telephone off its cradle in the kitchen. He also observed that the handle to the mop located at the lower portion of the victim's

body extended between the victim's legs. Deputy Moore observed the general disarray of the house as described by the other witnesses.

Deputy Moore also observed that a person would be required to go through a fenced-in area outside the home in order to enter the porch from the outside of the home. While examining this fenced-in area, he noticed that a part of the fence was pushed down at the top. A chair was beneath the pushed down portion of the fence on the side closest to the home. On the other side of the fence from the chair, Deputy Moore found the victim's checkbook and key ring and some paper money and change.

Deputy Moore saw the defendant for the first time on 2 August 1981 while the defendant was sitting outside the Dawson home in Alcoholic Beverage Control Officer James Johnson's car. State Bureau of Investigation Agent Jim Wilson was also present at that time. The defendant was informed of his Miranda rights at that time and made a statement indicating that he had been to a party at one of the houses on the Dawson farm the night before where he had taken pills and consumed a pint of Vodka. The defendant stated he had gone home around 1:30 or 2:00 a.m., returned to the party later and finally returned home at approximately 3:00 a.m. He denied having been to the Dawson home on the night of 1 August 1981. After making this statement to the officers, the defendant went home.

A few hours later, Deputy Moore and Agent Wilson went to the defendant's home and asked for his tennis shoes. The defendant gave them the shoes and gave them permission to take the shoes to the Dawson home to compare them with the shoe prints found there. After making the comparison, Moore and Wilson returned to the defendant's home and told him that, based upon the results of the comparisons made, they wanted to take him to the Sheriff's Department in Tarboro for questioning. The defendant voluntarily went with them. When they arrived at the Sheriff's Department, the defendant was again given the Miranda warnings. He then agreed to talk with the officers and signed a written waiver of rights form. The officers told the defendant that a comparison had revealed that his tennis shoes made the shoe prints found at the Dawson home. The defendant thereafter made a statement to the officers. He first indicated that he had

gone to the Dawson home with someone else but later admitted that he had gone there alone. The defendant stated to the officers that he was "crazy drunk" from taking "speed" and drinking Vodka on that night. He stated that he had gone to the Dawson home looking for a place to sleep and had pulled open the screen door leading to the porch off the kitchen. He had not thought that anyone lived in the home and was surprised by the presence of the victim when he went inside. The defendant stated that the victim Adah Dawson threw a handful of salt at him as he was entering the house. He struck her several times with a stick he had picked up on the porch, and she fell toward him. He laid her on the floor and then went through the house looking for anything he could find. He washed some blood off of his clothing in one of the bathrooms. After going through the house, he went back into the kitchen and forced a mop handle into the victim's vagina. He stated that she then asked him to "please leave." He then threw the mop handle down and left. This statement by the defendant was reduced to writing by Agent Wilson and signed by the defendant. The officers questioned the defendant again and recorded the questions and answers. A typed transcript of the recording was made.

A forensic pathologist, Dr. Lewis Levy, performed an autopsy on the body of the victim Adah Dawson. During the course of the autopsy, he found numerous lacerations to the skin of the neck, face, scalp, ear, arms, vagina and rectum together with fractures of the face, skull, pubic bones and hip bone. Among numerous other injuries, he observed a laceration at the superior portion of the vagina which entered posterially into the rectum with a communicating tear in that area. Dr. Levy testified that in his opinion the fractures to the pubic bones were caused by a large amount of pressure applied to that area. He described the laceration to the victim's vagina as a tear inside her body continuing from her vagina to her rectum. The deepest part of her vagina cavity was torn with the tear extending through and into the rectum. Dr. Levy testified that these injuries were consistent with a stab or jab into the vagina cavity and that it would have taken considerable force to create these injuries. Dr. Levy testified that in his opinion the victim was alive at the time these injuries were inflicted upon her. He did not believe that any of the injuries alone caused her death, but that she died as a result

of the multiple injuries including the lacerations and fractures. Dr. Levy additionally testified that several of the lacerations and injuries to the victim were consistent with her being struck by a blunt force instrument such as a stick, while others were consistent with her being struck by the metal clock weights found near her body.

Several witnesses were accepted by the trial court as experts and testified for the State concerning fingerprint, shoe print and handwriting evidence. Special Agent Stephen Jones, Supervisor of the State Bureau of Investigation Crime Laboratory, testified that comparison tests made between footprint evidence taken from the Dawson home and the shoes the defendant gave the officers showed that some of the footprints were made by the defendant's shoes. This evidence further showed that some of the footprints were *probably* made by the defendant's shoes and some were *possibly* made by his shoes. Jones further testified that some of the tracks appeared to have been made at the time of the crime and that many of them were bloody. One of the tracks was found on the victim's underpants and another on a dishcloth in the kitchen. Fingerprint comparisons made by Special Agent Jones showed that several fingerprints found on various objects which apparently had been touched by the intruder in the Dawson home were made by the defendant.

Special Agent Dennis J. Mooney, an expert in handwriting analysis, testified that a comparison of the signature on a check found in the victim's checkbook outside the home with handwriting samples taken from the defendant by a court order showed that the signature in the checkbook was made by the defendant. David J. Spittle, a forensic serologist with the State Bureau of Investigation, testified concerning blood found throughout the house including the presence of tennis shoe prints in several rooms. Agent Spittle further testified that his investigation revealed human blood on the bottom of the defendant's tennis shoes and on one of the laces to the shoes.

The defendant offered no evidence during the guilt-innocence determination phase of the trial.

At the conclusion of the guilt-innocence determination phase of the trial, the jury returned a verdict finding the defendant guilty of murder in the first degree in the perpetration of first

degree burglary, in the perpetration of a sex offense, and with malice and premeditation and deliberation.

The trial court then convened a sentencing hearing to determine the sentence to be imposed. During the sentencing phase of the trial, the State introduced a written psychological report by Dr. Mary Rood, a forensic psychiatrist at Dorothea Dix Hospital. This report was prepared pursuant to a pre-trial psychiatric evaluation of the defendant ordered by the court. The report stated in pertinent part that the examining psychiatrist found no mental defect or disorder which would have prevented the defendant from distinguishing right from wrong at the time of the killing. The report further stated that, even though the defendant stated that he was intoxicated at the time of the killing and that intoxication may have impaired his judgment, it would not have relieved him of the responsibility for his actions. The State indicated that it would additionally rely upon the evidence presented at the guilt-innocence determination phase of the trial and offered no further evidence during the sentencing hearing.

The defendant offered into evidence at the sentencing hearing the "psychiatric testing" portion of Dr. Rood's report showing that the defendant scored in the range of mild mental retardation with an I.Q. of 63 and a reading ability of grade level 3.9. This portion of the report also indicated the possibility of significant organic brain impairment. The defendant also introduced evidence of his past criminal record including convictions for larceny, simple assault, assault on a female, damage to real property, using profane language, unauthorized use of a motor vehicle, trespass, and public drunkenness. No further evidence was presented at the sentencing hearing for the defendant.

Based upon the evidence introduced during the sentencing phase of the trial, the trial court presented four possible aggravating circumstances and five possible mitigating circumstances for the jury's consideration. The possible aggravating and mitigating circumstances and the jury's answers concerning the existence or lack of those aggravating and mitigating circumstances were as follows:

ISSUES

1. Do you unanimously find from the evidence and beyond a reasonable doubt that one or more of the following

aggravating circumstances existed at the time of the commission of the murder?

(A) Was the murder committed while the defendant was engaged in the commission of first degree burglary?

Answer: Yes

(B) Was the murder committed while the defendant was engaged in a sexual act?

Answer: Yes

(C) Was the murder committed for pecuniary gain?

Answer: Yes

(D) Was the murder especially heinous, atrocious or cruel?

Answer: Yes

2. Do you unanimously find that one or more of the following mitigating circumstances existed at the time of the murder?

(A) Does the defendant have a significant history of prior criminal activity?

Answer: Yes

(B) Was the defendant under the influence of mental or emotional disturbance at the time of the murder?

Answer: No

(C) Was the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law impaired?

Answer: No

(D) The age of the defendant at the time of the murder?

Answer: No

(E) Do you find any other circumstances arising from the evidence which the jury deems to have mitigating value?

Answer: No

3. Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances are sufficient to outweigh the mitigating circumstances?

Answer: Yes

4. Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?

Answer: Yes

Based upon their answers to these issues, the jury returned a sentence recommendation in which they recommended the death sentence. Following the recommendation by the jury of the penalty of death, the trial court entered judgment sentencing the defendant to death. The defendant appealed.

II.

GUILT-INNOCENCE DETERMINATION PHASE

The defendant has brought forward numerous assignments of error and supporting contentions concerning the guilt-innocence determination phase of his trial. We consider each of them in the order in which it is presented by the defendant.

[1] The defendant first contends that the trial court erred in admitting his confession into evidence. Over the defendant's objection, the trial court admitted into evidence the testimony of Deputy Moore regarding the confession made by the defendant at the Edgecombe County Sheriff's Office, the written summary of the defendant's confession prepared by S.B.I. Agent Wilson and the tape recording and transcript of the defendant's confession. The defendant contends that this constituted error by the trial court necessitating a new trial.

Prior to trial, the defendant filed a motion to suppress the extrajudicial confession made by him. In that motion the defendant specifically contended that his oral statements admitting guilt and any paper writings signed by him to that effect were solely the result of promises by the investigating officers to the defendant that he would receive a shorter sentence in exchange for his

admission of guilt. In an affidavit filed with that motion, the defendant swore that:

> [Y]our affiant was promised that if he would make a statement admitting his guilt that they, the above named officers, would see that he received a sentence of from Twenty years to Thirty years. That your affiant, in reliance of this promise, made a confession in which he admitted his guilt to the crimes under investigation.

The defendant did not seek a hearing on his motion prior to trial. At trial the defendant's counsel entered a general objection to testimony concerning the confession made by the defendant. The trial court excused the jury and conducted an extensive *voir dire* examination concerning the voluntariness of the defendant's confession. Evidence was presented by both the State and the defendant. In addition to the previously described affidavit, the defendant offered evidence through his own testimony. That testimony consumes several pages of the transcript, but is adequately summarized by the following:

> Q. Why did you make the statement?
>
> A. Because they promised me 20 to 30 years.
>
> Q. Is that the only reason you made the statement?
>
> A. Yes, sir.

The defendant also testified that he was drunk at the time he confessed. The State offered evidence contrary to the defendant's testimony and affidavit.

The trial court made extensive findings of fact and conclusions of law based upon the evidence introduced during the *voir dire* hearing. The trial court found that no threats or promises were made to induce the defendant's confession. Further, the trial court found that the defendant was fully informed of his rights and was fully aware of those rights when he knowingly, freely, voluntarily and intelligently waived his right to remain silent and to have counsel present. The court specifically found *inter alia*, "the defendant's testimony that he was threatened to be put away and that he was promised no more than 20 to 30 years if he talked and that he was drunk, to be unbelievable." Based upon its findings, the trial court concluded that the defendant fully

understood all of his rights and "knowingly, freely and voluntarily and intelligently waived those rights." The court then concluded that the confession was voluntary and admissible.

The defendant specifically concedes on appeal that, although there was conflicting evidence, the trial court's findings of fact were supported by substantial competent evidence. We agree. The findings were supported by competent evidence and themselves support the trial court's conclusions. These findings and conclusions, therefore, are binding upon this Court on appeal. *State v. Saults*, 299 N.C. 319, 261 S.E. 2d 839 (1980); *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978); *State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976). Therefore, the trial court's ruling will not be disturbed on appeal, notwithstanding the fact that there was evidence from which a different conclusion could have been reached. *State v. Gray*, 268 N.C. 69, 150 S.E. 2d 1 (1966), *cert. denied*, 386 U.S. 911 (1967).

[2] Nevertheless, the defendant attempts on appeal to this Court to raise for the first time an additional challenge to the admissibility of his confession. He contends that his confession was inadmissible, due to the fact that prior to making the confession he was advised by the investigating officers that a comparison of his tennis shoes with shoe prints found at the scene of the crime revealed similarities. The defendant asserts that evidence of the shoe print comparison he was confronted with was not competent or admissible. He further contends that his confession induced by his being confronted with such evidence was a product of improper mental coercion employed in order to obtain his confession and that the resulting confession was inadmissible. Having failed to attack the admissibility of his confession on this ground during the trial, the defendant will not be allowed to attempt to do so for the first time on appeal to this Court. *State v. Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1982); *State v. Oxendine*, 305 N.C. 126, 286 S.E. 2d 546 (1982). We specifically reject the defendant's contention for this reason.

Even should we choose to reach and decide the issue raised by this contention, however, the defendant would not be entitled to relief. At trial, SBI Agent Jones was accepted as an expert witness and testified extensively concerning the unique characteristics of the tread on the shoes taken from the defendant

and the shoe prints found at the scene of the crime. He further testified concerning his comparison of the shoes with the shoe prints and the basis for his conclusion that some of the shoe prints at the scene were definitely made by the defendant's shoes. Such testimony was clearly competent. *State v. Long*, 293 N.C. 286, 237 S.E. 2d 728 (1977).

The fact that an investigating officer confronts a person in custody with evidence of his implication in a crime or evidence from the crime scene does not amount to "interrogation" within the meaning of *Miranda*. *State v. Temple*, 302 N.C. 1, 273 S.E. 2d 273 (1981); *State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978). Further, confronting a person in custody with such evidence is not the type of "subtle coercion" prohibited by *Miranda*. *Id.* Additionally, the defendant by sworn affidavit and testimony at trial stated that his confession was given *only* for other reasons than the reason he asserts here. The defendant's in-custody statement, therefore, was not rendered involuntary and inadmissible as a result of his being informed that a comparison of his shoes with shoe prints at the scene of the crime revealed similarities.

[3] The defendant next contends that the trial court erred by admitting into evidence for illustrative purposes five photographic slides portraying the body of the deceased shortly after she was killed. The defendant argues that these slides could have been properly introduced during the sentencing phase of the trial as evidence of the aggravating factor of an especially heinous, atrocious or cruel offense, but that their introduction during the guilt-innocence determination phase of the trial was error. The defendant argues that the inflammatory and prejudicial effect of these slides outweighed any probative value they may have had.

Photographs are admissible into evidence to illustrate the testimony of a witness, and their admission with limiting instructions for that purpose is proper. *State v. Horton*, 299 N.C. 690, 263 S.E. 2d 745 (1980). The fact that, as here, photographs depict a gruesome and revolting scene indicating a vicious crime does not render them incompetent in evidence when they are properly authenticated as accurate portrayals of conditions observed and related by the witness who uses them to illustrate his testimony. *State v. Gibbons*, 303 N.C. 484, 279 S.E. 2d 574 (1981).

The five slides in question were introduced during the State's examination of Dr. Lewis Levy, a forensic pathologist, who performed the autopsy on the victim and testified concerning her injuries and the cause of her death. The slides, having been properly authenticated, were used by Dr. Levy to illustrate his testimony concerning the size, number and location of the various wounds and marks he observed on the victim during the autopsy. Our viewing of these slides indicates that no slide was repetitious of another and each related to specific wounds which Dr. Levy described and testified that he had observed. Each slide had distinct probative value and was admissible for purposes of illustrating Dr. Levy's testimony. If the things portrayed in the slides were in fact gory and gruesome, this resulted solely from the nature of the crime committed and its consequences and not from any excessive use of slides to illustrate the testimony of the pathologist. The admission of these slides by the trial court for the limited purpose of illustrating the testimony of the witness was not error.

[4] The defendant next contends that the trial court erred in its instructions to the jury by incorrectly defining the term "reasonable doubt." The defendant argues that, by instructing the jury that a reasonable doubt can only be "generated by the insufficiency of the proof," the trial court precluded the jury from finding a reasonable doubt based upon the evidence. The defendant points out that this Court has held it to be error for a trial court to instruct the jury that a reasonable doubt may be based upon the evidence presented but fail to inform the jury that a reasonable doubt may also arise from the lack of evidence. *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954). The defendant, relying upon the converse to the holding in *Hammonds* and citing *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976), argues that it is also error for the trial court to instruct the jury that a reasonable doubt may be based upon the insufficiency of proof but fail to instruct that a reasonable doubt may also arise out of the evidence. The defendant contends, therefore, that the failure of the trial court in the present case to instruct the jury that a reasonable doubt may arise from the evidence was error requiring a new trial.

The trial court in the present case instructed the jury as follows, in pertinent part:

> The burden of proof is upon the state to satisfy the jury *from the evidence* in the case and beyond a reasonable doubt of his guilt.
>
> Now, a reasonable doubt is not a vain, imaginary or fanciful doubt but it is a sane, rational doubt. When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charge. If after *considering*, comparing and weighing *all of the evidence* the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt. Otherwise, they do not.
>
> A reasonable doubt as that term is employed in the administration of criminal law is an honest, substantial misgiving, generated by the insufficiency of the proof; an insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused.
>
> It is not a doubt suggested by the ingenuity of counsel or by your own ingenuity not legitimately warranted by the testimony. Nor is it one born of a merciful inclination or disposition to permit the defendant to escape the penalty of the law, nor one prompted by sympathy for him or those connected with him.

(Emphasis added.) The portions of the trial court's instructions complained of by the defendant in the present case are almost identical to the instructions suggested in *State v. Schoolfield*, 184 N.C. 721, 114 S.E. 466 (1922) and *State v. Steele*, 190 N.C. 506, 130 S.E. 308 (1925), which were later cited with approval in *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954), relied upon by the defendant here. We find the trial court's instructions on reasonable doubt in the present case free from reversible error.

A trial court's instructions to the jury must be construed contextually and in their entirety. When the portion of the trial court's instructions of which the defendant complains is considered in this manner, it is apparent that the instructions carry

the very meaning that the defendant contends were omitted. In the sentence immediately preceding the trial court's efforts to define the term "reasonable doubt," the trial court instructed the jury that "the burden of proof is upon the State to satisfy the jury *from the evidence* in the case and beyond a reasonable doubt of his guilt." (Emphasis added.) Additionally, the court referred to the jury's responsibility to consider matters arising *from the evidence* at several other points in the instructions when speaking to the State's burden of proof and reasonable doubt. When the instructions are read contextually and in their entirety, it is apparent that, when the trial court used the phrase "insufficiency of the proof" in its instructions on reasonable doubt, it was referring to insufficiency of proof arising from the evidence as well as insufficiency of proof arising from the lack of evidence. *See State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976). The instructions of the trial court in this regard were without error.

The defendant next contends that the trial court erred in permitting the jury to consider returning verdicts of guilty of first degree murder in the perpetration of a felony upon either the theory that he murdered the victim in the perpetration of first degree burglary or the theory that he murdered the victim in the perpetration of a sex offense. We will discuss the evidence and applicable law with regard to each of these theories separately.

Before the question of a defendant's guilt of a particular crime may be submitted to the jury for its consideration, the trial court must find substantial evidence has been introduced tending to prove each essential element of the offense charged and that the defendant was the perpetrator of the offense. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Substantial evidence must be existing and real, but need not exclude every reasonable hypothesis of innocence. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). In determining whether such substantial evidence has been introduced, "[t]he 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, 261 S.E. 2d 114 (1980).

[5] The defendant argues that the evidence was insufficient to permit the issue of murder committed in the perpetration of first degree burglary to be submitted to the jury. The elements of burglary in the first degree are the (1) breaking and (2) entering, (3) in the nighttime, (4) of a dwelling house, (5) of another, (6) which is actually occupied, (7) with the intent to commit a felony therein. *State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981). For purposes of defining the crime of burglary, the intent to commit larceny is deemed the intent to commit a felony without regard to the value of the property in question. *See* G.S. 14-51. In order to justify submission to the jury of the issue of a defendant's guilt of burglary in the first degree, there must be substantial evidence tending to show that the intent charged in the bill of indictment was in the mind of the intruder at the time he forced entrance into the house. *See State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967). The defendant contends that the evidence bearing on his intent at the time he broke into and entered the Dawson home was insufficient to justify the submission of the question of his guilt of murder in the perpetration of burglary in the first degree to the jury.

When the evidence is considered in the light most favorable to the State, as it must be, we find that there was substantial competent evidence sufficient to justify the submission to the jury of the question of the defendant's guilt of murder in the perpetration of burglary in the first degree. Here, the defendant admitted breaking and entering into the victim's home while it was actually occupied and in the nighttime. Ordinarily, evidence of an unexplained breaking and entering into a dwelling house in the nighttime constitutes substantial evidence in itself that the breaking and entering was done with the intent to commit larceny. *State v. Hedrick*, 289 N.C. 232, 221 S.E. 2d 350 (1976). The defendant argues, however, that in the present case evidence of the breaking and entering into the dwelling house in the nighttime was explained by him in his confession and that the principle of law arising upon evidence of an unexplained breaking and entering into a dwelling at night is, therefore, inapplicable. The defendant further argues that, since the State introduced and relied upon his confession in which he stated that he broke into and entered the Dawson home only with the intent to find a place to sleep, the State is bound by this explanation.

When the State introduces into evidence a defendant's confession containing exculpatory statements which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by the exculpatory statements. *State v. Johnson*, 261 N.C. 727, 136 S.E. 2d 84 (1964). The introduction by the State of a confession of the defendant which includes such exculpatory statements, however, does not prevent the State from showing facts which contradict the exculpatory statements. The State is not bound by the exculpatory portions of a confession which it introduces if it introduces other evidence tending to contradict or rebut the exculpatory statements of the defendant contained in the confession. *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982); *State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 434 U.S. 928 (1977).

In the present case, the State offered substantial evidence tending to rebut the exculpatory portions of the defendant's confession in which he indicated that he broke into and entered the Dawson home solely for the purpose of finding a place to sleep. The State offered evidence, in the form of the defendant's confession and otherwise, tending to show that the defendant armed himself with a stick prior to entering the Dawson home. He then proceeded to attack the victim by knocking her down with the stick and inflicting serious injuries upon her. The defendant then went through the entire house and committed larceny therein by taking the victim's checkbook and keys and, possibly, some paper money and change. The evidence that the defendant armed himself before entering the home tends to contradict his version that he entered only for the purpose of finding a place to sleep. Therefore, the State was not bound by this exculpatory statement in his confession. Additionally, the fact that the defendant actually committed larceny after entering the home, although not conclusive, is substantial evidence which would support a finding that the defendant had formed the intent to commit larceny at the time he broke into and entered the home. *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967). Therefore, the State was not required to rely upon any inference of law arising from an unexplained breaking and entering of a dwelling at night. Instead, the State offered substantial evidence, albeit circumstantial evidence, that the defendant had formed the intent to commit larceny at

the time he broke into and entered the Dawson home. The trial court did not err in permitting the jury to consider the question of the defendant's guilt of murder committed in the perpetration of the felony of burglary in the first degree.

[6] The defendant further contends that the trial court erred in permitting the jury to consider the question of his guilt of first degree murder in the perpetration of a sex offense. In support of this contention, the defendant points out that the forensic pathologist who performed the autopsy upon the victim testified that he did not believe that any one of her injuries alone would have necessarily caused her death. Based upon this evidence he asserts that there was no substantial evidence that the forcing of a mop handle into the victim's vagina caused her death and, therefore, no substantial evidence that he murdered the victim while in the perpetration of this sex offense. We find this contention and these arguments without merit.

While an interrelationship between the felony and homicide must exist in order for the rules concerning murder in the perpetration of a felony to be applicable, there is no requirement that the felony must be the proximate cause of the victim's death. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). It is immaterial whether the felony occurred prior to or immediately after the killing so long as it is a part of a series of incidents which form one continuous transaction. *State v. Wooten*, 295 N.C. 378, 245 S.E. 2d 699 (1978). During the defendant's confession, he stated that, while the one hundred year old victim was lying helpless on the floor, he forced a mop handle into her vagina. The forensic pathologist testified that this act was done with such force that the cavity of the vagina was torn with the tear extending through and into the rectum and continuing two and one-half inches into the sacrum bones. The pathologist further testified that it was his opinion that this injury occurred while the victim was alive and, in combination with other injuries inflicted at the time, caused her death. Such evidence was substantial evidence that the defendant murdered the victim in the perpetration of a sex offense and the trial court did not err in submitting the issue to the jury.

[7] The defendant also contends that the trial court improperly permitted the jury to consider the question of his guilt of murder

in the first degree based upon premeditation and deliberation. In support of this contention, the defendant again argues that the State was bound by the exculpatory statements in his confession and that the evidence, therefore, conclusively established that the killing was not done with premeditation and deliberation. We find that portions of the defendant's confession and other evidence introduced by the State tend to conflict with and rebut the exculpatory portions of the confession and tend to establish premeditation and deliberation. Therefore, the exculpatory portions of the confession in which the defendant indicated that he was drunk, did not know the house was occupied, and entered only to find a place to sleep were not binding upon the State or the trial court. *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982).

If there was substantial evidence of each essential element of murder in the first degree based upon premeditation and deliberation, the trial court properly permitted the jury to consider the question of the defendant's guilt of murder in the first degree on that theory. *See State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Murder in the first degree is the intentional and 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 means thought out beforehand for some length of time, however short, but no particular time is required for the mental process of premeditation. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). 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 (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 overcome 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). Premeditation and deliberation refer to processes of the mind. They are not ordinarily subject to proof by direct evidence, but must generally be proved, if

at all, by circumstantial evidence. *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975). Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978); *State v. Fountain*, 282 N.C. 58, 191 S.E. 2d 674 (1972); *State v. Walters*, 275 N.C. 615, 170 S.E. 2d 484 (1969).

In the present case, all of the evidence introduced tended to indicate that the killing was performed in a brutal manner. The victim died as a result of numerous injuries inflicted to various parts of her body over a considerable period of time. Both the defendant's confession and the physical evidence tend to show that several of the wounds inflicted upon the victim were the result of attacks after she had been felled and rendered helpless. The defendant stated during his confession that he first struck the victim when she threw a handful of salt at him after he broke into her home. We do not believe that the throwing of salt at an intruder by a one hundred year old woman constituted provocation on the part of the deceased. Instead, all of the evidence tends to indicate an unprovoked and murderous assault carried out over a protracted period of time upon a woman of great age in her own home and with an utter lack of provocation on her part. The evidence was clearly sufficient to support the submission of the issue of the defendant's guilt of premeditated and deliberate murder to the jury and to support the jury's verdict of guilty. The trial court did not err in submitting this issue to the jury.

III.

SENTENCING PHASE

The defendant also has brought forward several assignments of error and supporting contentions relating to the sentencing phase of his trial. We now consider each of his contentions in this regard.

[8] The defendant contends that the trial court erred in failing to instruct the jury during the sentencing phase of the trial concerning evidence of the defendant's intoxication as affecting his ability to form the intent to commit a felony which is an essential element of burglary in the first degree. Following the presentation of evidence at the sentencing hearing, the trial court instructed the jury concerning the aggravating circumstances which could be considered by the jury in reaching its sentencing recommendation, including the aggravating circumstance that "the murder was committed while the defendant was engaged in the commission of first degree burglary." During this portion of the trial court's instructions, it did not instruct the jury concerning evidence of the defendant's intoxication as affecting his ability to form the intent to commit larceny. The defendant argues that, had the trial court done so, the jury might have found that his intoxication precluded him from forming the necessary intent and found this aggravating circumstance not to exist.

When instructing the jury during the guilt-innocence determination phase of the trial concerning the specific intent element of burglary in the first degree, the trial court gave the instruction on intoxication that the defendant contends also should have been given in the instructions during the sentencing phase of the trial. When instructing the jury during the sentencing phase of the trial concerning the aggravating circumstance of burglary in the first degree, the trial court referred to its previous instructions given during the guilt-innocence determination phase and stated that "unless requested to do so, I will not go into as much detail as I did at the first phase of the trial when I charged you this morning on the question of guilt or innocence." The trial court then correctly instructed the jury on the elements of burglary in the first degree including the intent to commit larceny. The trial court did not again instruct the jury concerning intoxication, however, as it had in its instructions on burglary in the first degree during the guilt-innocence determination phase of the trial. The defendant did not object to this failure or make a request for any such instruction, despite the trial court's indication that it would give a more detailed instruction on burglary in the first degree if the parties desired. We find no error by the trial court in this regard.

Although voluntary intoxication is not a legal excuse for a crime, where a specific intent is an essential element of the crime charged, the fact of intoxication may negate the evidence of that specific intent if it is shown that the defendant was so intoxicated at the time he committed the crime that he was utterly unable to form the necessary specific intent. *State v. Gerald*, 304 N.C. 511, 284 S.E. 2d 312 (1981); *State v. Fowler*, 285 N.C. 90, 203 S.E. 2d 803 (1974), *death sentence vacated*, 428 U.S. 904 (1976). The trial court is not required, however, to instruct the jury concerning the defense of intoxication when the evidence does not tend to show that the defendant was so completely intoxicated as to be utterly unable to form the specific intent necessary at the time the crime was committed. *Id.; State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979); *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975), *death sentence vacated*, 428 U.S. 903 (1976).

In the present case there was no evidence in the record tending to show that the defendant was intoxicated at all other than his own statements contained in his confession. Rosella Spencer testified that she saw the defendant at a party in her brother's home shortly before the victim was killed. She observed what appeared to be a bottle of liquor in his front pocket but testified that he did not drink any liquor in her presence that evening. Although the defendant stated in his confession that he had been drinking and taking "speed" and was "crazy drunk" at the time he killed the deceased, he did not state that he was so intoxicated that he did not know what had occurred when he killed the deceased or that he had been unable to control his thoughts or actions at that time. With the exception of the statement that he was "crazy drunk," the defendant's confession tended to show that he was entirely able to form a specific intent to commit larceny at the time he broke into and entered the Dawson home. The defendant gave a complete and detailed description of the events which he contended occurred at the time of the killing. He described in great detail the manner in which he broke into the home as well as apparently recalling every word of the conversation he had with the deceased when he found her in the home. He was able to describe the property he stole and where he found it in the home. He was also able to describe in detail the various wounds he inflicted upon the deceased and the manner in which he then went to the bathroom sink and washed his hands and got

the blood off his pants before leaving the scene. He was even able to recall that there was dew on the grass as he entered the Dawson home.

Perhaps more importantly, the defendant's own "exculpatory" statements in his confession contain direct testimony by him that he was able to form and in fact had formed a specific intent at the time he entered the home. In this regard, the defendant clearly and directly stated that he had formed the specific intent to find a place to sleep at the time he entered the Dawson home. Thus, the only statement from the defendant directly relating to his ability to form a specific intent at the time of the crime indicated that he was able to form such an intent. This entirely negated any probative value on the issue that his statement that he was "crazy drunk" otherwise might have had.

All of the evidence except the defendant's one brief statement clearly indicated that he was not so intoxicated or impaired as to be unable to form a specific intent at the time in question. We hold, therefore, that there was not sufficient evidence of intoxication in the present case to require any instruction at all as to the law concerning the defense of intoxication. *State v. Fowler*, 285 N.C. 90, 203 S.E. 2d 803 (1974), *death sentence vacated*, 428 U.S. 904 (1976); *State v. Doss*, 279 N.C. 413, 183 S.E. 2d 671 (1971), *death sentence vacated*, 408 U.S. 939 (1972); *State v. Bunton*, 247 N.C. 510, 101 S.E. 2d 454 (1958). The failure of the trial court to instruct the jury with regard to the defense of intoxication during the sentencing phase of the trial was not error.

The trial court in the present case should not have instructed the jury with regard to the defense of intoxication during the guilt-innocence determination phase of the trial, as the evidence introduced entirely failed to tend to show that at the time of the commission of the crime in question the defendant's mind and reason were so overcome by intoxication that he could not form the specific intent to commit a felony which is a necessary element of burglary in the first degree. The trial court's error of instructing the jury with regard to the defense of intoxication in the guilt-innocence determination phase, when that defense did not arise from the evidence, however, was error clearly favorable to the defendant which could not have prejudiced him.

Further, even had the evidence required the trial court to instruct the jury on the defense of intoxication, the failure to do so during the sentencing phase of the trial in the present case would not be prejudicial error. In instructing the jury with regard to the elements of burglary in the first degree during the guilt-innocence determination phase of the trial, the trial court fully instructed as to the defense of intoxication as it related to the essential element of the defendant's specific intent to commit larceny. The jury then found the defendant guilty of murder in the commission of burglary in the first degree and necessarily found, even in light of the defendant's contention that he was intoxicated, that the defendant entered the victim's home with the required specific intent to commit larceny. The issue was, therefore, determined against the defendant during the guilt-innocence determination phase of the trial when he had the benefit of full and correct instructions on the defense of intoxication. No additional evidence concerning intoxication was presented to the jury during the sentencing phase of the trial. It would be unreasonable to believe that the jury would have come to a different conclusion during the sentencing phase, based upon the same evidence it had previously considered and rejected, even had the trial court again given instructions on the defense of intoxication. Clearly no prejudice to the defendant could have resulted from the trial court's failure to instruct the jury concerning the defense of intoxication during the sentencing phase of the defendant's trial.

[9] The defendant next contends that the trial court erred by failing to instruct the jury that a sentence of life imprisonment would be imposed upon the defendant in the event that the jury was unable to reach unanimous agreement on the proper sentence. We have frequently held and hold in this case that such an instruction is improper because it would be of no assistance to the jury and would invite the jury to escape its responsibility to recommend the sentence to be imposed by the expedient of failing to reach a unanimous verdict. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569 (1982); *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264 (1982); *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981). The trial court did not err in failing to give this instruction.

[10] The defendant next contends that the trial court erred during the sentencing phase of the trial in permitting the jury to con-

sider as aggravating circumstances the underlying felonies upon which his convictions for murder in the perpetration of felonies were based. Specifically, the defendant contends that the trial court erred in submitting as aggravating factors for the jury's consideration that the murder was committed in the perpetration of first degree burglary and in the perpetration of a sex offense.

We have previously held, in cases in which the defendant is convicted of murder in the perpetration of a felony, that it is error for the jury to be allowed to consider as aggravating circumstances the underlying felonies upon which the murder conviction is based. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980). Here, however, the defendant was convicted of murder in the first degree on both the theory of premeditation and deliberation and the theory of murder in the perpetration of felonies. In such cases, we have held that a felony upon which the conviction for murder in the perpetration of a felony is based may also be considered as an aggravating circumstance. *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982); *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). In such cases, the commission of the felony underlying the conviction for murder in the perpetration of a felony is not an essential element of the crime of premeditated and deliberate murder and may properly be submitted to the jury as an aggravating circumstance. *Id.* The trial court did not err in the present case by allowing the jury to consider as aggravating circumstances the felonies underlying the convictions for murder in the perpetration of felonies.

The defendant next contends that the trial court erred in refusing to grant the defendant's motion for a new trial and for appropriate relief for errors committed during the trial. The defendant advances no additional arguments in support of this contention and relies upon his prior assignments, contentions and arguments. For the reasons previously discussed herein, we find this contention to be without merit.

IV.

Although the defendant has presented no additional assignments of error or contentions, we also undertake to discuss two issues not raised at trial or on appeal.

A.

[11] One of the statutory mitigating circumstances which may be considered during the sentencing phase of a capital case is that: "The defendant has no significant history of prior criminal activity." G.S. 15A-2000(f)(1). During the sentencing phase of the trial, the defendant sought to establish this mitigating circumstance by introducing evidence of his past criminal record to show that he had no *significant* history of prior criminal activity. In this context, he introduced evidence of his past convictions for larceny, simple assault, assault on a female, damage to real property, using profane language, unauthorized use of a motor vehicle, trespass, and public drunkenness. At the conclusion of the evidence in the sentencing phase of the trial, the trial court submitted five mitigating circumstances and required the jury to determine whether each or any of them existed. The first mitigating circumstance the trial court submitted was: "(A) Does the defendant have a significant history of prior criminal activity?" In its written answer to this question, the jury answered, "Yes." The submission of the question of the existence of the statutory mitigating circumstance in this form and the resulting answer did not convert the negative finding as to the mitigating circumstance into an affirmative finding of an aggravating circumstance. Therefore, the submission of the issue to the jury in this form was not error. Nevertheless, we do not approve of submitting the question of the existence of this mitigating circumstance to the jury in the form used here. Under circumstances other than those presented in the present case, the form in which the issue was submitted might well constitute error.

In the present case, the trial court fully and correctly instructed the jury with regard to the manner in which they were to determine the existence of the aggravating circumstances if any. The trial court then instructed the jury concerning mitigating circumstances as follows:

> After considering issue number one and the subsections (A), (B), (C) and (D), you will consider issue number two which reads: "Do you unanimously find that one or more of the following mitigating circumstances existed at the time of the murder?
>
> Now, members of the jury, the burden as to that issue and the subsections is upon the defendant, but he does not

have the burden of satisfying you beyond a reasonable doubt as to the existence of any mitigating circumstance. He has the duty merely to satisfy you from the evidence in the case, and "(A)" under that section reads: "Does the defendant have a significant history of prior criminal activity?" Of course, if he does not that is a mitigating circumstance.

The defendant contends that his criminal record has been offered and that it consists of simple offenses, offenses of little consequence. He contends that even though there has been offered in evidence certified copies of a record of seven—eight—nine convictions that many of them were he contends when he was much younger. That they were principally simple assaults. That in most instances he was released from jail when he was convicted because he had been in jail a week or two, and that in many of them he was fined only a small fine or court costs or given probation; and that only once has he served an active prison sentence. So, he contends, members of the jury, that there is nothing significant about that.

The word, "significant," as used in this issue means important, momentous; and the question is whether the defendant has a significant history of criminal activity or whether he does not.

If he has satisfied you, merely satisfied you, that he does not have a significant history of prior criminal activity, then you will answer that, "No", that is to say that he does not. If he has failed to so satisfy you and if you believe that the record which has been offered as to his prior criminal record is a significant history of prior criminal activity, you would answer it, "Yes."

Although the defendant took an exception to this portion of the trial court's instructions, he did not bring this exception forward on appeal or incorporate it under any of his assignments of error. Even in capital cases, a defendant may waive his right to contend that the trial court erred in a particular manner by failing to take exceptions or by failing to bring his exceptions forward and make them part of an assignment of error and argue them on appeal. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 622 (1982); *State v. Hutchins*, 303 N.C. 321, 279

S.E. 2d 788 (1981); *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979). Here the defendant failed to object to the form of the proposed issues concerning mitigating circumstances as submitted to the jury in writing by the trial court and failed to bring forward his exception to the trial court's instructions on this mitigating circumstance or present an assignment of error or argument based on that exception. Therefore, any error with regard to the manner in which this mitigating circumstance was submitted to and answered by the jury is deemed waived.

However, we undertake to review this point in the exercise of our supervisory powers. Upon reviewing the form in which the mitigating circumstance was submitted to the jury and the trial court's explanatory instructions relative thereto, it is apparent that the jury was not misled and did not consider its failure to find the mitigating circumstance of "no significant history of prior criminal activity" an affirmative finding of an aggravating circumstance. The trial court specifically instructed the jury that a negative answer to the question as put to them in writing would be an indication that they were satisfied that the mitigating factor existed. The trial court additionally specifically informed the jury that an affirmative answer would indicate only that the defendant had "failed to so satisfy you . . . ." The trial court in no way hinted, nor could the jury reasonably have concluded, that the absence of the mitigating circumstance of "no significant history of prior criminal activity" should be or could be considered as an aggravating factor. Therefore, *given the specific instructions to the jury in this case*, the affirmative answer indicating that the defendant had a significant history of prior criminal activity was no more damaging than a negative finding with regard to any other mitigating circumstance the jury was required to consider.

We again caution, however, that the form used by the trial court in submitting this mitigating factor to the jury here is not approved. Trial courts will do well to follow strictly the terminology used in the statute in formulating issues concerning aggravating and mitigating circumstances to be considered by the jury in capital cases. *E.g.* G.S. 15A-2000(e) and (f). We additionally point out that today we have given specific guidance to the Trial Bench concerning the order in which juries should be required to consider the issues arising during the sentencing phase of capital

cases and the instructions juries should be given during that phase. *State v. Michael Van McDougall* (case No. 86A81, filed this date).

B.

[12] In *McDougall* we have set forth the principles controlling the manner and form in which the pertinent issues are to be put to the jury during the sentencing phase of a capital case. In *McDougall* we also suggested the following as the proper form of the fourth issue:

> Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

We have additionally set forth in detail in *McDougall* recommended instructions relative to the fourth issue and have held that the trial court must instruct the jury substantially in accord with those recommended instructions.

In the present case, the fourth issue put to the jury during the sentencing phase of the trial was, "Do you unanimously find from the evidence and beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the imposition of the death penalty?" The form of the question itself did not inform the jury that they should resolve this issue in light of the totality of both the aggravating and mitigating circumstances as required by *McDougall.* In his instructions to the jury, however, Judge Fountain informed the jury that they must answer this fourth question based upon their findings concerning both aggravating and mitigating circumstances. Therefore, we hold that Judge Fountain's instructions to the jury in this regard substantially complied with the requirements and recommendations set forth by us today in *McDougall* and were free of prejudicial error. Judge Fountain did not, of course, have the guidance we have given today in *McDougall* available to him at the time this case was tried. We suggest, however, that the Trial Bench give its immediate attention to the requirements and recommendations set forth in that case.

V.

As a final matter in every capital case, we must turn to the performance of our independent statutory duties. We are directed by G.S. 15A-2000(d)(2) to review the record in a capital case to determine (1) whether the record supports the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, (2) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. After a thorough review of the transcript, record on appeal and briefs of the defendant and the State in the present case, we find that the record for reasons previously pointed out herein completely supports the jury's written findings of four aggravating circumstances. We further find that the death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor and that the transcript and record are devoid of any indication that such impermissible influences were a factor in the sentence.

[13] We next reach our final statutory duty of proportionality review, *i.e.* the duty of determining whether the sentence of death in the present case is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. This Court has not previously announced the manner in which our proportionality review is conducted. Specifically, we have not indicated the types of cases we view as being "similar cases" to be used for the comparisons required during our statutorily mandated proportionality review. We do so now.

In comparing "similar cases" for purposes of proportionality review, we use as a pool for comparison purposes *all cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time. We are aware that the Supreme Court of the United States has declined to invalidate a proportionality review process which failed to con-

sider cases other than those which were appealed and in which the death sentence was imposed. *Proffitt v. Florida*, 428 U.S. 242, 259, n. 16 (1976). We are also aware that the Supreme Court has upheld capital punishment procedures which did not include the same standard for appellate review of death sentences which we apply today. *Jurek v. Texas*, 428 U.S. 262 (1976). Nevertheless, we believe that the use of the pool of "similar cases" which we announce today for purposes of our proportionality review provides a meaningful basis for distinguishing in a principled way the few cases in which the death penalty is imposed from the many cases in which it is not imposed. *See Godfrey v. Georgia*, 446 U.S. 420 (1980); *Gregg v. Georgia*, 428 U.S. 153 (1976).

Having described the pool of "similar cases" we use for proportionality review in capital cases, we will also describe briefly the methods we will employ in making our comparisons. We do not propose to attempt to employ mathematical or statistical models involving multiple regression analysis or other scientific techniques, currently in vogue among social scientists, which have been described as having "the seductive appeal of science and mathematics." *Blake v. Zant*, 513 F. Supp. 772, 827 App. (S.D. Ga. 1981). The factors to be considered and their relevancy during proportionality review in a given capital case are not readily subject to complete enumeration and definition. Those factors will be as numerous and as varied as the cases coming before us on appeal. This truth is readily revealed by a comparison of the opinions of the Justices of the Supreme Court of the United States concerning the relevancy of certain factors as revealed in *Godfrey v. Georgia*, 446 U.S. 420 (1980). Even those with extensive training in data collection and statistical evaluation and analysis are unable to agree concerning the type of statistical methodology which should be employed if statistical or mathematical models are adopted for purposes of proportionality review. *E.g.* Baldus, Pulaski, Woodworth and Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 Stan. L. Rev. 1 (1980); Dix, *Appellate Review of the Decision to Impose Death*, 68 Geo. L.J. 97 (1979). Additionally, the categories of factors which would be used in setting up any statistical model for quantitative analysis, no matter how numerous those factors, would have a natural tendency to become the last word on the subject of proportionality rather than serving as an initial point

of inquiry. After making numerical determinations concerning the number of similar and dissimilar characteristics in the case before it and in other cases in which the death sentence was or was not imposed, a reviewing court might well tend to disregard the experienced judgments of its own members in favor of the "scientific" evidence resulting from quantitative analysis. To the extent that a reviewing court allowed itself to be so swayed, it would tend to deny the defendant before it the constitutional right to "individualized consideration" as that concept was expounded in *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (Burger, C.J., plurality opinion). This is so because, a "close reading of the actual records of cases identified as 'similar' by a quantitative measure may reveal factual distinctions which make them legally dissimilar." Baldus, Pulaski, Woodworth and Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 Stan. L.Rev. 1, 68 (1980). Further, the reviewing court would still be required to rely upon a "best estimate" of the factors that actually influenced the sentencing juries. *Id.* at 24-25. Therefore, this Court will not attempt to engage in the systematic and scientific collection of statistical data or its evaluation and analysis through the theory of probability, multiple regression analysis, graphs or the other tools of statistical analysis which are of value to scientists engaged in the physical sciences and dealing with matters other than proportionality review in capital cases.

We do not mean to imply that counsel representing defendants in capital cases on appeal to this Court may not collect, evaluate and analyze such data and argue their conclusions or the conclusions of statistical experts to this Court. Counsel in capital cases are, of course, always free to present arguments concerning such matters to this Court, and we will give them due consideration. In the final analysis, however, when engaging in our statutorily mandated duty of proportionality review in a particular capital case, we will rely upon our own case reports in the "similar cases" forming the pool of cases which we have indicated we use for comparison purposes. Where necessary we also will resort to the records and briefs in those "similar cases."

Further, this Court will not necessarily feel bound during its proportionality review to give a citation to every case in the pool of "similar cases" used for comparison. We have chosen to use *all* of these "similar cases" for proportionality review purposes. The

Bar may safely assume that we are aware of our own opinions filed in capital cases arising since the effective date of our capital punishment statute, 1 June 1977. *See, e.g., State v. Pinch*, 306 N.C. 1, 38-61, 292 S.E. 2d 203, 230-243 (1982) (Justice Exum dissenting as to sentence.), *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 622 (1982); *State v. Rook*, 304 N.C. 201, 237-249, 283 S.E. 2d 732, 754-761 (1981) (Justice Exum concurring in part and dissenting in part.), *cert. denied*, 455 U.S. 1038 (1982). We believe that the use of these methods for comparison of "similar cases" in our proportionality review "substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury." *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).

[14] Having announced the pool of "similar cases" and the methods of comparison we use, we reach the very serious responsibility of proportionality review in the case before us. We have carefully reviewed the transcript and record in this case together with the briefs and oral arguments. We have also made a comparison of this case with the other cases in the pool of "similar cases" which have been appealed to this Court. The record before us reveals a case in which the one hundred year old victim suffered what can only be described as torture at the merciless hands of a defendant who, after having struck the victim several times and felled her, continued to batter her with two heavy metal clock weights. He then ransacked her home taking what he wanted. At his leisure he returned to the prostrate and aged victim, pulled up her dress, pulled off her underpants, and proceeded to force a mop handle into her vagina in such a fierce and unrelenting manner as to cause her to suffer massive internal injuries including multiple fractures of the sacrum and pubic bones. Having tortured the victim in this manner, the defendant took her property and left her to die in a pool of her own blood. As a result of the accumulation of the numerous wounds inflicted upon her by the defendant, the victim died alone in her home that evening. The record before us reveals a vicious and prolonged murderous assault resulting in a defenseless victim's death which was so brutal and so utterly senseless as to lead us to conclude that the sentence of death imposed in this case is not disproportionate or excessive considering both the crime and the defendant. We so conclude after making a proper comparison of this case to the cases in the pool of "similar cases" which we employ

in proportionality review. Therefore, we decline to exercise our discretion to set aside the sentence of death.

In all phases of the trial below, we find

No error.

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

Justice EXUM dissenting as to sentence.

In this case the trial court, on its own motion and without request from defendant,[1] submitted the following issue to the jury during the sentencing phase: "Does the defendant have a significant history of prior criminal activity?" Because there was plenary, uncontradicted evidence showing that defendant did have a significant history of prior criminal activity,[2] the jury naturally answered this issue "Yes." Thus the jury in effect was

1. The record fails to reveal a request from defendant's counsel for the submission of this mitigating circumstance, although defendant's counsel did introduce the evidence of his previous criminal activity. On oral argument defendant's counsel advised the Court that no request for the submission of such an issue was made. I must assume that defense counsel did not request this instruction particularly in the form in which it was given.

2. Evidence of the following convictions, dates and dispositions was introduced:

(1) Simple assault, 15 March 1974, ordered to pay court costs.

(2) Larceny, 24 September 1974, six months suspended sentence with probation for four years, $25 and costs.

(3) Trespassing, 18 July 1975, six months suspended sentence with probation for two years, costs.

(4) Public drunkenness, 19 July 1975, released for time served in jail—4 days.

(5) Two counts of unauthorized use of a vehicle, 6 September 1978, two years imprisonment.

(6) Use of profane language, 11 December 1979, thirty days suspended sentence, $10 and costs.

(7) Damage to real property, 24 July 1980, seven months suspended sentence with probation for three years upon payment of costs, $25 fine and $105 restitution.

(8) Assault on a female, 29 April 1981, thirty days suspended sentence with probation for two years (he was released for 12 days served in jail), costs remitted.

permitted to consider an additional aggravating circumstance which is not permitted by our statute.

I cannot agree with the majority's position that the result is no different than had the issue been submitted in proper form, *i.e.*, "The defendant has no significant history of prior criminal activity," G.S. 15A-2000(f)(1), and answered "No." First, the issue, absent a request from the defendant and in light of the evidence adduced, should not have been submitted at all. Defendant has the burden of proof on mitigating factors. *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979). Here, defendant failed to carry that burden and apparently conceded as much at his trial. There was, therefore, no basis for the submission of the issue. Second, for a jury to fail to find a mitigating fact is not the same as affirmatively finding a fact which can only be considered aggravating. When the jury is permitted to do this and when the aggravating fact is not permitted by the statute, I think error occurs which requires a new sentencing hearing.

For the reasons stated in my dissent in *State v. Johnson*, 298 N.C. 355, 378, 259 S.E. 2d 752, 766 (1979), I think it was error for the trial judge to fail to instruct the jury upon defendant's request that if it could not agree on a sentence, the court would impose a sentence of life imprisonment.

I vote, therefore, for a new sentencing hearing.

(9) Simple assault, 5 June 1981, released for time served in jail—14 days.

Defendant had compiled the above record even though he was only 23 years old at the time of trial. Thus the jury could not have answered the question as posed other than affirmatively.

MARGARET RUTLEDGE, EMPLOYEE, PLAINTIFF v. TULTEX CORP./KINGS YARN, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 415PA82

(Filed 5 April 1983)

1. **Master and Servant § 68— occupational disease—last injurious exposure to hazards of disease**

Under G.S. 97-57, it is not necessary that claimant show that the conditions of her employment with defendant, her last employer, caused or significantly contributed to her occupational disease, it being necessary for her to show only that (1) she has a compensable occupational disease and (2) she was "last injuriously exposed to the hazards of such disease" in defendant's employment.

2. **Master and Servant § 93.3— workers' compensation—expert opinion testimony—omission of fact from hypothetical question**

A medical expert's opinion testimony that plaintiff's exposure to cotton dust for in excess of 25 years in her employment was probably a cause of her chronic obstructive lung disease and that impairment of her ability to perform labor is related to her pulmonary disease was admissible even though claimant's counsel made no reference in the assumed facts to claimant's having smoked cigarettes for most of her life since (1) the witness was asked to express his opinion not solely on the assumed facts but also on his own examination and testing of claimant, which examination included the taking of claimant's history which in turn revealed to the witness that claimant had a smoking habit, and (2) the omission of a material fact from a hypothetical question did not necessarily render the question objectionable or the answer incompetent.

3. **Master and Servant § 68— workers' compensation—chronic obstructive lung disease—occupational disease**

A textile worker's chronic obstructive lung disease may be an occupational disease under G.S. 97-53(13) when it is caused in part by the worker's on-the-job exposure to cotton dust and in part by exposure to other substances such as cigarette smoke, and when the disease has other components like bronchitis and emphysema which in their incipience are not work-related, provided (1) the occupation in question exposed the worker to a greater risk of contracting this disease than members of the public generally and (2) the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development.

4. **Master and Servant § 68— workers' compensation—cause of chronic obstructive lung disease—factors which may be considered**

In determining whether a claimant's exposure to cotton dust has significantly contributed to, or been a significant causative factor in, chronic obstructive lung disease, the Industrial Commission is not limited to a consideration of medical testimony but may consider other factual circumstances

in the case, among which are (1) the extent of the worker's exposure to cotton dust during employment, (2) the extent of other non-work-related, but contributing, exposures and components, and (3) the manner in which the disease developed with reference to the claimant's work history.

5. Master and Servant § 68— workers' compensation—chronic obstructive lung disease—occupational disease—remand for proper determination

A workers' compensation proceeding is remanded to the Industrial Commission for a determination as to whether plaintiff's chronic obstructive lung disease is an occupational disease for which plaintiff is entitled to benefits for total incapacity for work where the evidence would support findings that (1) plaintiff has chronic obstructive lung disease; (2) the two primary causes of this disease are the inhalation of cotton dust for 25 years while claimant was a textile worker and the inhalation of cigarette smoke over a similar period of time; (3) the disease also has components of chronic bronchitis and emphysema; (4) the disease developed gradually over the period of plaintiff's working life until by 1971 plaintiff had developed a breathing difficulty; (5) by January 1979 plaintiff's lung disease had rendered her physically unable to work in the textile industry; (6) the disease would not have developed to this extent had it not been for her exposure to cotton dust and her inhalation of cigarette smoke, both of which significantly contributed to, or were significant causative factors in, the development of the disease; (7) claimant is neither trained nor qualified to do other kinds of work and, at this time, is not able to be gainfully employed; (8) plaintiff's chronic obstructive lung disease was aggravated to some extent by her exposure to cotton dust at defendant employer's plant; and (9) plaintiff's job in the textile industry exposed her to a greater risk of contracting chronic obstructive lung disease than members of the public generally, and where there was also evidence which would support a finding that plaintiff's exposure to cotton dust played an insignificant role in the development of her pulmonary disease.

Justice MEYER dissenting.

Chief Justice BRANCH and Justice COPELAND join in this dissent.

ON plaintiff's petition for discretionary review, allowed 3 August 1982, of a Court of Appeals' decision affirming the Industrial Commission's denial of workers' compensation benefits claimed by plaintiff on the basis of an alleged occupational disease.

Hassell, Hudson & Lore by Robin E. Hudson for plaintiff appellant.

Mason, Williamson, Etheridge and Moser, P.A., by James W. Mason and Terry R. Garner, for defendant appellees.

EXUM, Justice.

The questions for decision are whether the Industrial Commission applied the wrong legal standard in its order denying benefits to claimant and whether there is evidence from which the Commission could have made findings, using the correct legal standard, that would support a conclusion that claimant contracted an occupational disease. We answer both questions affirmatively.

After hearing evidence for claimant and defendants, Deputy Commissioner Denson concluded that claimant had not contracted an occupational disease. This conclusion was based in part on the following factual findings, which are summarized unless quoted, to which no exception has been taken: Plaintiff, born 8 August 1935, has a tenth grade education and now lives in Georgia. She has smoked cigarettes from about age fifteen until February 1979 at the rate of approximately one pack per day. She has worked for four textile mills: (1) United Merchants in Buffalo, South Carolina, from 1953 until 1971 as a weaver; (2) Milliken at Union, South Carolina, from 1971 to 1973 as a "dry cleaner"; (3) Aleo Manufacturing, Rockingham, North Carolina, from 1975 to 1976 as a weaver; and (4) for defendant from 25 October 1976 until 12 January 1979 as a winder and then as a spinner. She was absent "for bronchitis" from 28 January 1977 until 13 May 1977. She "retired" on 12 January 1979.

All the plants where plaintiff worked "had a lot of cotton dust and lint" but defendant's premises, both in the weaving and spinning areas, were "relatively clean." Defendant's mill processed essentially 50 percent cotton blend materials and occasionally blends made of even a smaller percentage of cotton. "Although there was respirable cotton dust in [defendant's] weave room, there was much less than . . . in other premises." Plaintiff began developing a cough at work in 1969 or 1970. "[H]er cough was associated with her presence at work. Her shortness of breath became severe in December of 1976 and she has had various bouts with it since that time having to be out of work. . . . Plaintiff suffers from chronic obstructive pulmonary disease [with elements] of pulmonary emphysema and chronic bronchitis. . . . Plaintiff is disabled, because of her pulmonary impairment from all but sedentary . . . work which must be in a clean environment because of her reaction to cotton dust and other such irritants."

Deputy Commissioner Denson also made certain findings to which claimant excepted. The first was that in 1971 claimant "began developing a shortness of breath." Second was the following which the Deputy Commissioner included in the findings of fact:

> 6. . . . Cigarette smoking and recurrent infection have played prominent roles in the pulmonary impairment. Cotton dust may aggravate it, but since plaintiff was showing her symptomatology in problems prior to her employment with defendant employer, *exposure at defendant employer has neither caused not significantly contributed to plaintiff's chronic obstructive pulmonary disease.*
>
> . . . .
>
> 8. Plaintiff has not contracted chronic obstructive lung disease *as a result of any exposure while working with defendant employer.* [Emphasis added.]

The Full Commission, with one commissioner dissenting, adopted Deputy Commissioner Denson's findings, conclusions, opinion and award as its own.

The Court of Appeals concluded that although the Commission erred "in requiring plaintiff to prove that her last employment was the cause of her occupational disease," the error was harmless since there was insufficient evidence before the Commission to show that plaintiff had ever contracted an occupational disease during her working life. *Rutledge v. Tultex Corp./Kings Yarn*, 56 N.C. App. 345, 350, 289 S.E. 2d 72, 74 (1982).

[1] Because of the italicized portions of findings 6 and 8, it does appear that the Commission thought that in order successfully to claim against defendant, claimant's last employer, claimant must establish that her exposure there either caused or significantly contributed to her chronic obstructive pulmonary disease. This is not the law. That part of G.S. 97-57 pertinent to this case provides:

> In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the

risk when the employee was so last exposed under such employer, shall be liable.

Under this statute, consequently, it is not necessary that claimant show that the conditions of her employment with defendant caused or significantly contributed to her occupational disease. She need only show: (1) that she has a compensable occupational disease and (2) that she was "last injuriously exposed to the hazards of such disease" in defendant's employment. The statutory terms "last injuriously exposed" mean "an exposure which proximately augmented the disease to any extent, however slight." *Haynes v. Feldspar Producing Company*, 222 N.C. 163, 166, 169, 22 S.E. 2d 275, 277, 278 (1942).

Haynes was a silicosis case. The evidence showed that claimant worked in North Carolina feldspar mines for about twenty-eight years. From 1927 to 1940 he worked for Tennessee Mineral Corporation where he was constantly exposed to "silica dust." He then worked for defendant producing company from 24 September 1940 until 24 January 1941 where he was also exposed to dust from feldspar and flint. On 21 January 1941 Dr. T. F. Vestal diagnosed plaintiff as having "moderately advanced silicosis with probable infection [which] may be of a tuberculous nature." Plaintiff worked no more after 24 January 1941. Further evidence at the hearing was that samples taken at defendant's mine showed sufficient concentrations of dust "to constitute a silicosis hazard." Dr. Vestal testified that he had examined plaintiff in 1936, 1937, 1938 and 1940. By 1937 plaintiff "had early silicosis" and by 28 November 1940 plaintiff "had moderately advanced silicosis with probable infection." Dr. Vestal also testified that plaintiff was "disabled to perform normal labor as a mucker." Dr. Vestal could not state whether plaintiff's silicosis advanced any at all between the time that he entered the defendant's employment and the time that he left it. He was asked whether plaintiff was "last injuriously exposed" to the hazards of silicosis within the meaning of the predecessor to G.S. 97-57. He was told by the Commission that the phrase "last injuriously exposed" as used in the statute "meant an exposure which proximately augmented the disease to any extent, however slight." *Id.* at 166, 22 S.E. 2d at 277. The doctor then replied, to a hypothetical question, "You haven't left me much leeway. I have an opinion that it

did constitute an injurious exposure." *Id.* at 167, 22 S.E. 2d at 277. The Industrial Commission gave an award against defendant.

On defendant's appeal it contended there was no evidence to support the Commission's finding that claimant was injuriously exposed to the hazards of the disease during his short employment with defendant. This Court affirmed the Commission. The Court held that "the definition [of last injuriously exposed] supplied by the Commission was substantially correct." *Id.* at 169, 22 S.E. 2d at 278. The Court said, *id.* at 170, 22 S.E. 2d at 279:

> Perhaps on a comparative basis, the chief responsibility for plaintiff's condition morally rests upon his Tennessee employers; but not the legal liability. It must have been fully understood by those who wrote the law fixing the responsibility on the employer in whose service the last injurious exposure took place, that situations like this must inevitably arise, but the law makes no provision for a partnership in responsibility, has nothing to say as to the length of the later employment or the degree of injury which the deleterious exposure must inflict to merit compensation. It takes the breakdown practically where it occurs—with the last injurious exposure.

The Court of Appeals correctly concluded, therefore, that the Industrial Commission applied the wrong legal standards to this claim.

[2] We hold that the Court of Appeals erred, however, in concluding that there is no evidence that plaintiff had contracted an occupational disease. We think there is evidence from which the Industrial Commission could have made findings which in turn would have supported a conclusion that claimant's chronic obstructive lung disease was an occupational disease. Dr. Williams, after a lengthy recitation of certain assumed facts, was asked the following question:

> Now, based upon these facts and upon your examination and testing of Ms. Rutledge, do you have an opinion satisfactory to yourself to a reasonable medical certainty as to whether Ms. Rutledge's exposure to cotton dust for in excess of 25 years in her employment was probably a cause of her chronic obstructive lung disease which you diagnosed in your report?

When he replied, "Yes," the following colloquy occurred:

> Q. What is that opinion?
>
> A. Yes. That it probably was a cause.
>
> Based upon the same facts and upon my examination and testing of Mrs. Rutledge, I have an opinion as to whether her impairment with respect to her ability to perform labor is related to her pulmonary disease. That opinion is that it is.

In putting the hypothetical question to Dr. Williams, claimant's counsel made no reference in the assumed facts to claimant's having smoked cigarettes regularly for most of her life. Defendant argues that because of this omission we should not consider Dr. Williams' answer to the hypothetical as competent evidence. We reject this argument. First, defendants did not object to the question, nor did they move to strike the answer. Second, the answer is competent despite the omission of claimant's smoking habit from the assumed facts. Dr. Williams was not asked to express his opinion based solely on the assumed facts; he was asked to base it also on his own examination and testing of claimant—an examination which included the taking of claimant's history which in turn revealed to Dr. Williams that she had a smoking habit. Indeed, Dr. Williams' very next statement on cross-examination was:

> When I was examining Mrs. Rutledge I got a history from her. This history included her history as to smoking. She gave me the history that she began smoking at age 15 and averaged one pack of cigarettes daily until she stopped smoking in February, 1979.

Further, the omission of a material fact from a hypothetical question does not necessarily render the question objectionable or the answer incompetent. *Dean v. Carolina Coach Co.*, 287 N.C. 515, 215 S.E. 2d 89 (1975); *State v. Stewart*, 156 N.C. 636, 72 S.E. 193 (1911); 1 Brandis, Stansbury's N. C. Evidence § 137 (2d rev. ed. 1982). It is left to the cross-examiner to bring out facts supported by the evidence that have been omitted and thereby determine if their inclusion would cause the expert to modify or reject his earlier opinion. *Id.*

Indeed, defendants on cross-examination proceeded to do precisely this and succeeded in having Dr. Williams testify:

> I think cigarette smoking is a very important, often the primary cause, of chronic obstructive pulmonary disease. Based upon the facts that Ms. Hudson has given me and based upon my examination and particularly upon the history of cigarette smoking that Mrs. Rutledge gave me it is my opinion satisfactory to myself to a reasonable degree of medical certainty is that her history of cigarette smoking could or might have been the cause of her pulmonary emphysema and chronic bronchitis. Based upon my examination and these facts, I would say it was one of the more probable causes. This is after taking into consideration her exposure to cotton dust.

The thrust of Dr. Williams' entire testimony, then, seems to be that both her exposure to cotton dust over her working life and her cigarette smoking were causative factors in claimant's chronic obstructive lung disease. He also said other components of the lung disease were "pulmonary emphysema" and "chronic bronchitis" and that "chronic obstructive lung disease includes pulmonary emphysema, chronic bronchitis, and possibly asthma."

After relating his considerable experience in the treatment and study of respiratory diseases among textile workers, such as claimant here, Dr. Williams testified that these workers are "at an increased risk of contracting chronic obstructive pulmonary disease." Dr. Williams also testified that when claimant began such work in October 1976 "she was suffering from pulmonary emphysema, chronic bronchitis and chronic obstructive pulmonary disease . . . caused by circumstances which existed prior to her employment by Kings Yarn." Although testifying that claimant's exposure to cotton dust at Kings Yarn's plant would have "minimal" effect on her condition and that she would not have had there a "very substantial exposure" to cotton dust, Dr. Williams did say that such exposure as she had at Kings Yarn "could have some aggravating effect on [her] underlying condition" and that removal from the Kings Yarn "environment would probably improve her symptoms . . . primarily, her symptoms of cough." Dr. Williams testified flatly that claimant's exposure to respirable cotton and synthetic dust at Kings Yarn "would have aggravated her condition." Medical records offered in evidence tended to show that claimant's lung function had

decreased some 25 to 30 percent during the period from January 1977 to March 1979, while she worked for defendant employer.

Claimant, herself, described in some detail the dusty conditions under which she had worked for twenty-five years in various textile mills. She said she developed a breathing difficulty in 1971 which by 1977 had begun "affecting my ability to do my job" because it caused her to be too fatigued to work. She said she stopped work in January 1979 "because I was unable to perform my duties on my job. From tiredness, short of breath, cold sweats, headaches and I felt I was not being fair to myself or the company. I did not just quit, I was advised by my doctor . . . to quit." Claimant testified that when she quit work "my symptoms were difficulty breathing, wheezing, tiredness, cold sweats, [and] stiffness in my neck. I coughed so hard until the [neck] muscle, you know, it's ruptured in the left side." By January 1979 claimant said that she did not have the "strength or ability to do my housework, my shopping or any of those things. I am able to do my daily routine, I can make a bed, at which time I have to rest. . . . I help [my mother] watch dinner and the rest of my day consists of soap operas and rest. I crochet, anything to pass time. I just cannot be exerted because if I do I just don't have the breath. I do drive. I don't have any training for jobs besides working in the mill."

For a disease to be occupational under G.S. 97-53(13) it must be (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be "a causal connection between the disease and the [claimant's] employment." *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E. 2d 101, 105-06 (1981); *Booker v. Duke Medical Center*, 297 N.C. 458, 468, 475, 256 S.E. 2d 189, 196, 200 (1979). To satisfy the first and second elements it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question. All ordinary diseases of life are not excluded from the statute's coverage. Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded. *Booker v. Duke Medical Center, supra*, 297 N.C. at 472-75, 256 S.E. 2d at 198-200. Thus, the first two elements are satisfied if, as

a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally. *Id.* "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation." *Id.* at 475, 256 S.E. 2d at 200.

This Court has had little difficulty either articulating or applying the first two standards in occupational disease cases generally. They were articulated and properly applied in *Booker*, a hepatitis case, and reiterated and properly applied in *Hansel*, a lung disease case. We have had some difficulty in the lung disease cases, however, in both articulating and applying a factual standard for determining whether there is an appropriate causal connection between the employment and the disease. *Compare* the majority and dissenting opinions in *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981), *and Hansel v. Sherman Textiles, supra*, 304 N.C. 44, 283 S.E. 2d 101. *See also Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822, *amended on rehearing*, 305 N.C. 296, 285 S.E. 2d 822 (1982).

This difficulty in the lung disease cases stems largely from the complex medical picture often presented by chronic obstructive lung disease and chronicled in the medical testimony in *Walston*, *Hansel* and *Morrison*. This disease, as we understand it from the medical testimony presented in these cases and the literature to which we have been referred, *see, e.g.*, Bouhuys, Schoenberg, Beck and Schilling, *Epidemiology of Chronic Lung Disease in a Cotton Mill Community*, Service Volume Five of Traumatic Medicine and Surgery for the Attorney 607, reprinted from *Lung—An International Journal on Lungs, Airways, and Breathing*, 154(3): 167-86 (1977), has several components. Some of these components are seemingly not, in their incipience at least, work related, for example, bronchitis, emphysema and asthma; while at least one component, *i.e.*, byssinosis, is work related. Byssinosis may be understood as the adverse effect on the lungs resulting from the inhalation of cotton dust, a substance generally present in the work environment of textile mill employees. Other complicating factors are that chronic obstructive lung disease may apparently be brought on by just the continuous inhalation of cotton dust, just the continuous inhalation of other substances, such as cigarette smoke, or by the inhalation of both kinds of substances together. It is apparently medically impossible even

on autopsy objectively to distinguish the effect on the lungs of cigarette smoke inhalation and the inhalation of cotton dust, or between the effects of bronchitis and the inhalation of these substances. Thus when a textile worker who is also an habitual cigarette smoker and who suffers from bronchitis, emphysema, or asthma, contracts disabling chronic obstructive lung disease, the medical experts and, in turn, the Commission and the courts are presented with a difficult factual question on the causation issue. Since courts generally develop principles of law to deal as justly as possible with the facts of given cases, complex facts which the experts themselves have difficulty unraveling make the articulation of appropriate legal principles correspondingly difficult for the courts.

In *Morrison* claimant was physically disabled for all but sedentary work, but the Commission, after concluding that only 55 percent of her disability was caused by her occupational disease, which the Commission saw as only byssinosis, entered an award for 55 percent partial incapacity for work. A majority of this Court affirmed; it, like the Commission, viewed Morrison's occupational disease as byssinosis, *i.e.*, that part of her chronic obstructive lung disease caused by her exposure to cotton dust. The Commission found:

> 7. Plaintiff suffers from chronic obstructive lung disease, due, in part, to causes and conditions characteristic of and peculiar to her particular trade, occupation or employment in the textile industry. *That part of her lung disease which is related to her employment is not an ordinary disease of life to which the general public is equally exposed outside of such employment.*
>
> 8. Due to the chronic obstructive lung disease suffered by plaintiff, and due to her other physical infirmities, including bronchitis, phlebitis, varicose veins and diabetes, plaintiff has no earning capacity in any employment for which she can qualify in the labor market.
>
> 9. *The claimant is only partially incapacitated for work as a result of conditions which were caused, aggravated, or accelerated by exposure to cotton dust during the course of her employment at Burlington Industries. Although the plaintiff is totally incapacitated for work, only fifty-five percent of*

her incapacity was caused, aggravated, or accelerated by exposure to cotton dust during the course of her employment at Burlington Industries. The remaining forty-five percent of the plaintiff's incapacity for work was not caused by an occupational disease, and was not caused, aggravated, or accelerated by an occupational disease or by exposure to cotton dust during the course of her employment at Burlington Industries.

. . . .

11. *As a result of the chronic obstructive pulmonary disease caused by her exposure to cotton dust, plaintiff has only a partial incapacity for work. She has sustained a fifty-five percent loss of wage-earning capacity or ability to earn wages by reason of her cotton dust exposure.*

304 N.C. at 4-5, 282 S.E. 2d at 462-63 (emphasis added). Thus the Commission found that only that part of Mrs. Morrison's chronic obstructive lung disease caused by her exposure to cotton dust, *i.e.*, her byssinosis, was an occupational disease, and that this disease caused her to suffer a fifty-five percent partial incapacity for work. It made an award for fifty-five percent partial disability, the *full amount* of claimant's disability which it found to have been caused by claimant's occupational disease. A majority of this Court concluded that the Commission's findings were supported by the evidence and the Court was bound by them. The majority posed the question for decision and its answer as being:

> When the Industrial Commission finds as fact, supported by competent evidence, that a claimant is totally incapacitated for work and 55 percent of that incapacity is caused, accelerated or aggravated by an occupational disease and the remaining 45 percent of that incapacity for work was not caused, accelerated or aggravated by an occupational disease, must the Commission, under the Workers' Compensation Act of North Carolina, award compensation for 55 percent disability or 100 percent disability? Upon such findings of fact, our Act mandates an award for 55 percent partial disability.

304 N.C. at 6, 282 S.E. 2d at 463. This Court's majority thought the evidence specifically supported the Commission's findings

that only that part of Mrs. Morrison's chronic obstructive lung disease caused by her exposure to cotton dust, *i.e.*, her byssinosis, was an occupational disease and that it was bound by this finding. It said:

> The evidence in this case, especially the medical evidence, overwhelmingly supports the Industrial Commission's findings that 55 percent of Mrs. Morrison's inability to work and earn wages is caused by 'chronic obstructive lung disease, due in part, to causes and conditions characteristic of and peculiar to her particular . . . employment in the textile industry,' and the remaining 45 percent is caused independently by her other physical infirmities, including chronic obstructive lung disease not caused, aggravated or accelerated by an occupational disease, as well as bronchitis, phlebitis, varicose veins and diabetes, none of which are job related and none of which have been aggravated or accelerated by her occupational disease. This Court must accept such findings as final factual truth.

304 N.C. at 6-7, 282 S.E. 2d at 463.

The dissenters in *Morrison* believed that both the Commission and the majority had misconstrued the evidence. The dissenters argued that the Commission's finding that only that part of Mrs. Morrison's lung disease caused by her exposure to cotton dust, *i.e.*, byssinosis, was an occupational disease was not supported by the evidence. The dissenters argued that *all* the evidence tended to show: (1) Mrs. Morrison's entire physical disability was caused by her chronic obstructive lung disease; (2) her byssinosis had significantly contributed to this disease; (3) her chronic obstructive lung disease was an occupational disease; (4) therefore Mrs. Morrison was entitled to an award for total disability.

Thus, the difference between the majority and the dissenters in *Morrison* rested largely on how the evidence in that case should have been interpreted and whether the Commission's findings were supported by the evidence.

In *Hansel* the Commission in a lung disease case again made an award for permanent *partial* incapacity for work which the Court of Appeals vacated for insufficient evidence. There was

medical testimony that claimant had chronic obstructive lung disease with "three distinct syndromes" contributing to it. These "syndromes" were identified by the medical witness as asthma, byssinosis and chronic bronchitis. There was also evidence that claimant was a cigarette smoker. 304 N.C. at 55-56, 283 S.E. 2d at 109.

The Commission found and concluded:

> 4. Plaintiff has both asthma and byssinosis which are causing her respiratory impairment. Her impairment is severe and irreversible.
>
> 5. Plaintiff *has byssinosis* as a result of her exposure to cotton dust in her employment with defendant-employer and this is partly responsible for her disability.
>
> 6. Plaintiff has not worked since May 5, 1977.
>
> * * *
>
> The foregoing findings of fact and conclusions of law engender the following additional
>
> CONCLUSIONS OF LAW
>
> 1. *Plaintiff has contracted the disease byssinosis* as a result of exposure to cotton dust in her employment with defendant-employer. *This disease* is compensable under the provisions of G.S. 97-53(13).
>
> 2. *Defendants owe plaintiff compensation for permanent, partial disability* from May 5, 1977 for her period of disability not to exceed 300 weeks. G.S. 97-30.

Id. at 47-48, 283 S.E. 2d at 103 (emphasis added). This Court concluded, contrary to the Court of Appeals' decision, that the evidence *was* sufficient to support the findings of the Commission, stating: "We . . . find competent evidence to support the findings of the Commission, but we are unable to say that the findings justify the Commission's conclusion as to the causation and its award." 304 N.C. at 50, 283 S.E. 2d at 105. The Court on this ground and also on the ground that the medical evidence was "not sufficiently definite on the cause of plaintiff's disability to permit effective appellate review," 304 N.C. at 55, 283 S.E. 2d at 107, remanded the matter to the Commission for further proceedings. The Court said:

> In the case before us in which the Commission made an award of compensation, there was not sufficient determination by the finders of fact, and certainly no explicit findings, upon which this Court can determine the sufficiency of the evidence to support the Commission's findings and conclusion. It is explicitly stated in the Commission's finding number 5 that plaintiff's byssinosis 'is partly responsible for her disability' and thus implicit that some other disease or infirmity is likewise 'partly responsible for her disability.' The evidence indicates that the other disease or infirmity is probably asthma and chronic bronchitis, although plaintiff also testified that two other doctors told her previously that she had emphysema. It also appears from the evidence that she is apparently also allergic to, among other things, dust, mold, mildew, trees, grass, animals, feathers, cotton dust, nylon dust and polyester dust. Because of the presence of these other infirmities and because this is a case of partial disability as opposed to one of total disability, it must be determined what percentage of claimant's disability is due to her occupational disease. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981).
>
> The medical evidence appearing in the record before this Court is not sufficiently definite on the cause of plaintiff's disability to permit effective appellate review. The only medical witness before the Commission, Dr. Harris, did not address the crucial medical question of interrelationship, if any, between plaintiff's occupational disease and her disability.

304 N.C. at 54-55, 283 S.E. 2d at 107. The Court directed that at the new hearing before the Commission medical testimony be adduced to shed light on various questions dealing generally with the extent of claimant's disability; the nature of the disease or diseases causing the disability; and whether these diseases were occupational or were aggravated in such a way as to cause them to be compensable.

Again, as in *Morrison*, the Commission had found that claimant's byssinosis was the occupational disease which had caused claimant to be partially disabled for work. Again, a majority of the Court seemed to believe that if claimant had an occupational

disease at all, it was byssinosis. The majority noted that claimant sought recovery "on the grounds that she contracted byssinosis as a result of exposure to cotton dust in the course of her employment as a textile worker in defendant's plant." *Id.* at 46, 283 S.E. 2d at 102. The Court noted further that "[b]yssinosis is 'not mentioned in and compensable under' the [Workers' Compensation] Act, except by virtue of G.S. 97-53[13]." *Id.* at 51, 283 S.E. 2d at 105. The Court pointed out that "neither Mrs. Hansel's asthma nor her chronic bronchitis is an 'occupational disease' which *standing alone* is compensable." *Id.* at 53, 283 S.E. 2d at 106 (emphasis added).

The concurring justices in *Hansel* doubted that medical evidence could provide the answers to several of the questions posed by the majority on the ground that these questions really constituted legal conclusions which the Commission in the first instance and this Court ultimately would have to make. Again, as in *Morrison*, the concurring justices believed, despite the finding of the Commission to the contrary, the evidence demonstrated that if Mrs. Hansel had an occupational disease at all, it was chronic obstructive lung disease to which Mrs. Hansel's cotton dust exposure might have significantly contributed. Again, the concurring justices believed the Commission and the majority had misconstrued the evidence.

Thus the results in both *Morrison* and *Hansel* rest on the proposition that when byssinosis is or may be the occupational disease in question and causes a worker to be partially physically disabled, and other infirmities, acting independently of and not aggravated by the byssinosis, also cause the worker to be partially disabled, the worker is entitled to compensation for so much of the incapacity for work as is due to the physical disability caused by the byssinosis.

[3] This case is the first we have considered in which the Commission *has found on supporting evidence* both that claimant is totally physically disabled except for sedentary work and that this physical disability is due entirely to *chronic obstructive lung disease*. What we have to decide is whether there is evidence in the record from which the Commission could have made findings to support a conclusion that this disease, chronic obstructive lung disease, is an occupational disease. The question now clearly

before us for the first time is whether a textile worker's *chronic obstructive lung disease* may be an occupational disease under G.S. 97-53(13) when it is caused in part by the worker's on-the-job exposure to cotton dust and in part by exposure to other substances, such as cigarette smoke, and when the disease has other components like bronchitis and emphysema which in their incipience at least are not work-related. Neither *Hansel* nor *Morrison* provide an answer to this question.

It is clear in this case, as it was *not* clear in *Hansel* and *Morrison*, that if plaintiff has an occupational disease at all it is chronic obstructive lung disease. The Commission has found that "plaintiff suffers from chronic obstructive pulmonary disease [with elements] of pulmonary emphysema and chronic bronchitis. . . . Plaintiff is disabled, because of her pulmonary impairment from all but sedentary . . . work . . . ." Dr. Williams diagnosed the condition which he thought physically disabled plaintiff as chronic obstructive lung disease. Dr. Williams testified that claimant's exposure to cotton dust "probably was a cause" of her chronic obstructive lung disease which in turn was the cause of her disability. He also testified as follows:

> The patient has definite chronic obstructive pulmonary disease representing a combination of pulmonary emphysema and chronic bronchitis. It is most likely that cigarette smoking and recurrent infection has played prominent roles in her pulmonary impairment. It is not possible to completely exclude cotton dust as playing some role in causing an irritative bronchitis but she does not give a classical history of byssinosis.

Our answer to the question posed is that chronic obstructive lung disease may be an occupational disease provided the occupation in question exposed the worker to a greater risk of contracting this disease than members of the public generally, and provided the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work-related factors also make significant contributions, or were significant causal factors.

Significant means "having or likely to have influence or effect: deserving to be considered: important, weighty, notable."

Webster's Third New International Dictionary (1971). *Significant* is to be contrasted with *negligible, unimportant, present but not worthy of note, miniscule,* or *of little moment.* The factual inquiry, in other words, should be whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work.

This Court in *Vause v. Vause Farm Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173 (1951), recognized that the hazards of employment do not have to be the sole cause of a worker's injury in order for the worker to receive compensation for the full extent of his incapacity for work caused by the injury. Although concluding that there was no causal relationship between the worker's employment and his injury, the Court in *Vause* said, *id.* at 92-93, 63 S.E. 2d at 176:

> The hazards of employment do not have to set in motion *the sole causative* force of an injury in order to make it compensable. By the weight of authority it is held that where a workman by reason of constitutional infirmities is predisposed to sustain injuries while engaged in labor, nevertheless the leniency and humanity of the law permit him to recover compensation *if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition which renders him susceptible to such accident and consequent injury.* But in such case 'the employment must have some definite, discernible relation to the accident.' [Citation omitted.]
>
> Similarly, it is generally held that where an employee is seized with an epileptic fit . . . and falls due to such . . . causes, even so compensation will be awarded if a particular hazard inherent in the working conditions also contributes to the fall and consequent injury. [Citation omitted.]
>
> . . . .
>
> It appears . . . that the better considered decisions adhere to the rule that *where the accident and resultant injury arise out of both the idiopathic condition of the workman and hazards incident to the employment, the employer is liable.*

But not so where the idiopathic condition is the sole cause of the injury. [Emphasis supplied.]

In *Hansel*, this Court recognized that *Vause* stands for the proposition that "the rule of causation is that where the right to recover is based on injury by accident, the employment need not be the sole causative force to render an injury compensable." 304 N.C. at 52, 283 S.E. 2d at 106. The Court also noted in *Hansel* that "[i]t has on occasion been implied that a similar rule of causation should prevail in cases where compensation for occupational disease is sought; however, if a disease is produced by some extrinsic or independent agency, it may not be imputed to the occupation or the employment. *Duncan v. Charlotte*, 234 N.C. 86, 66 S.E. 2d 22 (1951); *Moore v. Stevens & Co.*, 47 N.C. App. 744, 748, 269 S.E. 2d 159, 162 (1980)." 304 N.C. at 53, 283 S.E. 2d at 106. In both *Duncan* and *Moore*, as in *Vause*, there was *no* causal relation between the disease and the employment.

In *Smith v. Fieldcrest Mills, Inc.*, 224 Va. 24, 294 S.E. 2d 805 (1982), claimant Smith, employed as a textile worker for more than thirty-four years and exposed to "large quantities" of cotton dust, was diagnosed as having "severe chronic obstructive pulmonary disease." Medical testimony was that the disease's components were emphysema, chronic bronchitis, and that "chronic byssinosis is a significant component of [Mrs. Smith's] pulmonary problem." Medical testimony showed that byssinosis was "more likely than not [an] etiologic factor in the evolution of chronic bronchitis" and "cigarette smoking may be a relative causative factor." *Id.* at ---, 294 S.E. 2d at 806-07. The Virginia Industrial Commission denied an award on the ground that "it is just as probable that [Mrs. Smith's condition] resulted from a non-compensable cause (smoking) as that it resulted from a compensable cause (cotton dust exposure)." *Id.* at ---, 294 S.E. 2d at 807. The Virginia Supreme Court, in an opinion by Chief Justice Carrico, reversed the Commission and remanded the matter for further proceedings. The Court relied on its earlier case of *Bergmann v. L. & W. Drywall*, 222 Va. 30, 278 S.E. 2d 801 (1981), in which the worker had suffered a back injury at work. Following this injury the worker was stricken with a non-occupational neurological disorder which, together with the back injury, rendered him incapable of working. The Industrial Commission denied any benefits on the ground that the neurological disorder

was just as probable a cause of the incapacity for work as the work-related back injury. The Virginia Supreme Court reversed this ruling, stating that it was not necessary that the work-related injury be the sole cause of the worker's incapacity for work but that full benefits would be allowed when it is shown that "the employment is a contributing factor to the disability." *Id.* at 32, 278 S.E. 2d at 803. In *Smith*, the lung disease case, the Court said that the same rule should apply. It remanded the matter to the Commission in order for it to determine whether Mrs. Smith's exposure to cotton dust, *i.e.*, her byssinosis, was "a contributing factor" to Mrs. Smith's ultimate disability. 224 Va. at ---, 294 S.E. 2d at 808.

Cases from jurisdictions other than Virginia with statutes like ours support our holding here. *Newport News Shipbuilding & Dry Dock Co. v. Director*, 583 F. 2d 1273 (4th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979); *Pullman Kellogg v. Workmen's Compensation Appeals Bd.*, 26 Cal. 3d 450, 605 P. 2d 422, 161 Cal. Rptr. 783 (1980); *McAllister v. Workmen's Compensation Appeals Bd.*, 69 Cal. 2d 408, 445 P. 2d 313, 71 Cal. Rptr. 697 (1968); *Thornton Chevrolet, Inc. v. Morgan*, 148 Ga. App. 711, 252 S.E. 2d 178 (1979); *Riley v. Avondale Shipyards*, 305 So. 2d 742 (La. App. 1975); *Langlais v. Superior Plating, Inc.*, 226 N.W. 2d 891 (Minn. 1975); *Bolger v. Chris Anderson Roofing Co.*, 112 N.J. Super. 383, 271 A. 2d 451 (1970), *aff'd* 117 N.J. Super. 497, 285 A. 2d 228 (1971); *Mueller v. State Accident Ins. Fund*, 33 Or. App. 31, 575 P. 2d 673 (1978). *See generally* 1B Larson, Workmen's Compensation Law, § 41.64(a)-(c) (1982).

In these cases cigarette smoking together with the inhalation of occupational substances produced either lung disease, *see Newport News Shipbuilding, Pullman Kellogg, Thornton Chevrolet, Riley, Langlais* and *Mueller*, or lung cancer, *see McAllister* and *Bolger*. The courts concluded in all cases, however, that because there was evidence that inhalation of occupational substances contributed to the diseases, the diseases were compensable occupational diseases. The courts, therefore, either affirmed compensation awards, as they did in *Newport News Shipbuilding, Pullman Kellogg, Thornton Chevrolet, Riley, Langlais* and *Bolger*, or reversed denials of awards by administrative agencies, as they did in *McAllister* and *Mueller*.

Indeed, the significant contribution principle which we adopt puts upon the claimant in these lung disease cases a somewhat

heavier burden than our sister states seem to require or that we require in industrial accident cases. Our purpose in adopting this principle is to strike a fair balance between the worker and the employer in the administration of our Workers' Compensation Act as it is applied to the difficult lung disease cases. To hold that the inhalation of cotton dust must be the sole cause of chronic obstructive lung disease before this disease can be considered occupational establishes too harsh a principle from the standpoint of the worker and the purposes and policies of our Workers' Compensation Act. This Act "should be liberally construed so that the benefits under the Act will not be denied by narrow, technical or strict interpretation." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E. 2d 281, 283 (1972). On the other hand, to hold the causation requirement is satisfied if cotton dust exposure contributes to the slightest extent, however miniscule or insignificant, to the etiology of chronic obstructive lung disease, places too heavy a burden on industry. This holding would compromise the valid principle that our Workers' Compensation Act should not be transformed into a general accident and heath insurance law.

[4] In determining whether a claimant's exposure to cotton dust has significantly contributed to, or been a significant causative factor in, chronic obstructive lung disease, the Commission may, of course, consider medical testimony, but its consideration is not limited to such testimony. It may consider other factual circumstances in the case, among which are (1) the extent of the worker's exposure to cotton dust during employment; (2) the extent of other non-work-related, but contributing, exposures and components; and (3) the manner in which the disease developed with reference to the claimant's work history. *See Booker v. Duke Medical Center, supra*, 297 N.C. at 476, 256 S.E. 2d at 200.

[5] In the case before us it is clear that claimant suffers from chronic obstructive lung disease, which prevents her from doing anything but sedentary work. The Commission has so found. There is also evidence that claimant's exposure to cotton dust in her employment "probably was a cause" of her lung disease, that cigarette smoking "was one of the more probable causes . . . after taking into consideration her exposure to cotton dust," and that "emphysema" and "chronic bronchitis" were components of the disease. Further evidence, largely from the claimant herself,

detailed her twenty-five years of exposure to cotton dust and the gradual development during those years of her breathing difficulty to the point where it simply rendered her so physically disabled that she could no longer work at the only trade she knew and for which she was qualified. There was also evidence that textile workers, such as claimant here, are "at an increased risk of contracting chronic obstructive pulmonary disease" and that her exposure to cotton dust at Kings Yarn would have aggravated claimant's pulmonary condition existing at the time she went to work there. There was also some evidence that claimant's exposure to cotton dust played an insignificant role in the development of claimant's lung disease. Dr. Williams, as already noted, said: "It is not possible to completely exclude cotton dust as playing some role in causing an irritative bronchitis but she does not give a classical history of byssinosis."

From this evidence the Commission could have found as facts, although it would not have been compelled to find, that: (1) claimant has chronic obstructive lung disease; (2) the two primary causes of this disease are the inhalation of cotton dust for twenty-five years while claimant was a textile worker and the inhalation of cigarette smoke over a similar period of time; (3) the disease also has components of chronic bronchitis and emphysema; (4) the disease developed gradually over the period of claimant's working life until by 1971 claimant had developed a breathing difficulty; (5) by 1977 her breathing difficulty began to affect her ability to do her job because it caused her to be too fatigued to work; (6) by January 1979 claimant's lung disease had rendered her physically unable to work in the textile industry; (7) the disease would not have developed to this extent had it not been for her exposure to cotton dust and her inhalation of cigarette smoke, both of which significantly contributed to, or were significant causative factors in, the development of the disease; (8) because of her age, limited education, and her lifetime of employment in the textile industry, claimant is neither trained nor qualified to do other kinds of work and, at this time, is not able to be gainfully employed; (9) claimant's chronic obstructive lung disease was aggravated to some extent by her exposure to cotton dust at Kings Yarn; and (10) claimant's job in the textile industry exposed her to a greater risk of contracting chronic obstructive lung disease than members of the public generally.

These findings of fact, if made by the Commission, would support the following legal conclusions: (1) claimant's chronic obstructive lung disease is due to causes and conditions characteristic of and peculiar to the textile industry under G.S. 97-53(13); (2) claimant's chronic obstructive lung disease is not an ordinary disease of life to which the general public not employed in the textile industry is equally exposed under G.S. 97-53(13); (3) claimant's chronic obstructive lung disease is, therefore, an occupational disease under G.S. 97-53(13); (4) claimant is totally incapacitated for work under G.S. 97-29, 97-54, and 97-2(9); (5) claimant's total incapacity for work results from her occupational disease under G.S. 97-52; and (6) claimant's last injurious exposure to the hazards of her occupational disease were in the employment of defendant Kings Yarn under G.S. 97-57. These conclusions of law would, in turn, support an award against defendants and in favor of claimant for workers' compensation benefits for total incapacity for work by reason of an occupational disease.

On the other hand there is some testimony from Dr. Williams which would have supported a finding that claimant's exposure to cotton dust played an insignificant causal role in, or did not significantly contribute to, the development of Ms. Rutledge's lung disease. If the Commission so finds, it would have to conclude that the disease is not an occupational disease in this case.

The Court of Appeals relied on *Walston v. Burlington Industries, supra*, 304 N.C. 670, 285 S.E. 2d 822, *amended on rehearing*, 305 N.C. 296, 285 S.E. 2d 822, for its conclusion that the evidence was insufficient to show claimant had an occupational disease. In *Walston* the principal medical witness could testify only that claimant's exposure to cotton dust "could *possibly* have played a role in the causation of his pulmonary problems." *Id.* at 672, 285 S.E. 2d at 827 (emphasis supplied). This Court held, 304 N.C. at 679, 285 S.E. 2d at 828:

> While smoking 'was almost certain[ly] the primary etiologic agent,' there was only a 'possibility' that any portion of plaintiff's disability was caused by the inhalation of cotton dust. Such evidence supports the findings and conclusions of the Commission that plaintiff failed to meet his burden of proof, *i.e.*, failed to prove that he had an occupational disease defined in G.S. 97-53(13). A mere possibility of causation is neither 'substantial' nor sufficient.

In the case at bar the medical witness testified claimant's exposure to cotton dust *"probably was* a cause" (emphasis supplied) of her chronic obstructive lung disease. Therein lies the difference in this case and *Walston. See Moore v. Stevens & Co.*, 47 N.C. App. 744, 752, 269 S.E. 2d 159, 164, *disc. review denied*, 301 N.C. 401, 274 S.E. 2d 226 (1980) (physician's opinion that "referred to 'possibility' rather than 'probability' " justified Commission's finding that "plaintiff's chronic pulmonary disease 'is not due to her exposure to cotton dust and lint in her employment' "); *see also, Lockwood v. McCaskill*, 262 N.C. 663, 668-69, 138 S.E. 2d 541, 545-46 (1964) ("The 'could' or 'might' as used by Stansbury [in discussing hypothetical questions propounded to expert witnesses] refers to probability and not mere possibility. . . . If it is not reasonable probable . . . that a particular effect is capable of production by a given cause . . . the evidence is not sufficient to establish *prima facie* the causal relation . . . ."; the Court stated that testimony showing a particular causal relation is a mere possibility or conjecture should have been excluded).

We conclude that the Court of Appeals correctly determined that the Industrial Commission decided this case under a misapprehension of applicable law and that the Court of Appeals erred in determining that there was no evidence from which the Commission could make findings sufficient to support a conclusion that claimant suffered from an occupational disease. The decision of the Industrial Commission, therefore, is vacated and the case is remanded to the Commission for a new determination of claimant's entitlement to benefits under the legal principles herein set out.

The dissent argues that there is evidence that claimant had other physical ailments unrelated to her pulmonary disease which might have contributed independently of this disease to her incapacity for work. It is true that there was some evidence of these other ailments. The Commission, however, has found that plaintiff's incapacity for work is due entirely to her pulmonary disease. This finding is supported by the evidence and forecloses the argument in the dissent that these other ailments might have contributed to the claimant's incapacity for work. By our remand of the case, therefore, we do not intend to suggest to the Commission that it re-open this aspect of the case. The only question for reconsideration by the Commission is whether the pulmonary

disease is an occupational disease when the legal principles set out in this opinion are applied to the facts.

Affirmed in part; reversed in part and remanded.

Justice MEYER dissenting.

I respectfully dissent. The majority today, although without expressly so stating, has subtly but effectively reversed the position of this Court, adopted so recently in *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981), *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981), and *Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822 (1982). In these three cases the Court was confronted, as it is in the present case, with difficult and complex issues relating to causation, apportionment, and disability. I believe that a careful reading of the majority opinions in *Morrison*, *Hansel* and *Walston* will reveal a correct, logical and consistent approach to these issues and that adherence to the principles enunciated in these cases leads to the inescapable conclusion that this claimant has failed to prove that she is entitled to compensation.

The majority would have us believe that the "difference between the majority and the dissenters in *Morrison* rested largely on how the evidence in that case should have been interpreted and whether the Commission's findings were supported by the evidence." In fact, the difference was far more significant and fundamental. It is that difference, as expressed in the *Morrison* dissent, which today forms the basis for the majority's opinion.

In *Morrison* the dissenters first found as a "fundamental legal" error the majority's position that "unless an occupational disease medically aggravates or accelerates some pre-existing condition, it must be the *sole* cause of a worker's incapacity for work in order for the worker to be compensated for the full extent of the incapacity." *Id.* at 23, 282 S.E. 2d at 473. In this respect, the dissenters wrote:

> Neither must the worker in such cases, contrary to the majority's assertion, show that the occupational disease is medically related to his pre-existing infirmities or that these infirmities have somehow been medically aggravated by the disease. The question is not how the occupational disease and

> the other infirmities are medically connected. The question is how they are connected vis-a-vis the worker's capacity to work. This is the true meaning of the aggravation principle, recognized but wrongly restricted by the majority to aggravation in a medical sense.

Id. at 24-25, 282 S.E. 2d at 473-74.

The dissenters further commented that:

> Neither is it necessary that the industrial accident or occupational disease be medically related to, or medically aggravate, the worker's pre-existing infirmities. It is enough if the industrial accident or occupational disease physically combines or interacts with the worker's pre-existing infirmities to produce incapacity for work so long as these pre-existing infirmities are themselves insufficient to cause any incapacity for work. In such cases the award may not be made as if the worker were incapacitated only to the extent of the industrial accident's or occupational disease's contribution.

Id. at 37, 282 S.E. 2d at 481.

The second fundamental legal error committed by the majority, as alleged by the *Morrison* dissenters, was its position "that occupational conditions must be the sole cause of an occupational disease in order for a worker to be compensated for the full extent of the incapacity for work caused by the disease." *Id.* at 23, 282 S.E. 2d at 473.

Speaking to this question, the dissenters would have adopted the "significant contribution" test as follows:

> The notion of 'reasonable' or 'substantial' contribution referred to in these cases is better expressed by the term 'significant.' The occupational conditions, in other words, must have significantly contributed to the disease's development in order for the disease to be occupational. Significant means 'having or likely to have influence or effect: deserving to be considered: IMPORTANT, WEIGHTY, NOTABLE.' Webster's Third New International Dictionary (Merriam-Webster 1971). Significant is to be contrasted with negligible, unimportant, present but not worthy of note, miniscule, of little moment. The factual inquiry, in other words, should be

> whether the occupational exposure was such a significant factor in the disease's development that without it the disease would either (1) not have developed or (2) not have developed to such an extent as to result in the employee's incapacity for work for which he claims benefits.

Id. at 43, 282 S.E. 2d at 484.

The issue in the present case, as framed by the majority, is "whether a textile worker's *chronic obstructive lung disease* may be an occupational disease under G.S. 97-53(13) when it is caused in part by the worker's on-the-job exposure to cotton dust and in part by exposure to other substances, such as cigarette smoke, and when the disease has other components like bronchitis and emphysema which in their incipience at least are not work related." It seems clear to me that the majority today has adopted the dissenting opinion in *Morrison* in its holding that "chronic obstructive lung disease may be an occupational disease provided the occupation in question exposed the worker to a greater risk of contracting this disease than members of the public generally, and provided the worker's exposure to cotton dust *significantly contributed* to, or was a significant causal factor in, the disease's development. *This is so even if other non-work-related factors also make significant contributions, or were significant causal factors.*" (Emphasis added.)

In adopting the dissenters' position in *Morrison*, the majority in the case *sub judice* must now understandably find that the "Industrial Commission decided this case under a misapprehension of applicable law . . . ." The majority attempts to distinguish this case from *Morrison*, *Hansel* and *Walston* in that Mrs. Rutledge suffers from chronic obstructive lung disease rather than byssinosis. The majority attempts to distinguish this case on the basis of slight factual variations. These attempted distinctions, in my opinion, do not disguise the fact that the "applicable law" has undergone a drastic and significant change. In effect, the majority has redefined "occupational disease" to include all ordinary diseases of life to which conditions of the workplace have significantly contributed, irrespective of non-work-related causal factors. The proposition has no statutory basis. We should leave the adoption of new laws to the Legislature, especially when the new law replaces old law which is exclusively statutory in origin.

To fully appreciate just how significantly the majority opinion departs from our existing law, it is necessary to review at least the highlights of the testimony of the only expert medical witness who testified, Dr. Charles D. Williams, Jr., a specialist in pulmonary disease and a member of the Industrial Commission's Occupational Disease Panel. The following represents a fair summary of his testimony:

> I had occasion to examine and evaluate Margaret Rutledge in this particular case. That was in August of 1979. At that time I took a history from Mrs. Rutledge and I did pulmonary function testing and we did complete blood counts, urinalysis, chest X-ray, chemistry profile, electrocardiogram. I also examined Mrs. Rutledge.
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> . . . . To describe the particular kinds of pulmonary conditions that I am familiar with that exist with some frequency in textile workers, byssinosis is the primary disease associated with textile workers. Byssinosis is a disease which in its acute phase is characterized by symptoms of chest tightness, wheezing, shortness of breath and cough, which typically occur on the first day of the week after returning from the weekend, and initially improve as the work week goes on. Later it is possible to progress into a chronic phase which is indistinguishable from other chronic obstructive pulmonary disease. Based upon my experience and familiarity with the literature I can state whether or not textile workers are at an increased risk of contracting chronic obstructive pulmonary disease. That opinion is that they are. That opinion is irrespective of whether or not the textile worker can relate symptoms of the Monday morning or startup day symptoms I mentioned, since apparently, it is possible to develop chronic obstructive pulmonary disease without having the classical acute phase symptoms. There are other named conditions that would fit within that general category. Chronic obstructive pulmonary disease includes pulmonary emphysema, chronic bronchitis, and possibly asthma.
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> . . . .
>
> As a result of my objective findings, that is my physical examination and pulmonary function tests and other studies that I had performed, I formulated an opinion regarding Mrs.

Rutledge's capability of physical labor. That opinion was that I felt that she should not work around irritating dust, fumes or smoke, and that she should not be expected to do any type of work requiring significant physical exertion. I felt that she would be able to do sedentary type work in a clean environment assuming that she had the necessary training and other capabilities and that such work were available.

. . . .

As to my diagnosis of Mrs. Rutledge's condition at the time of my examination, it was my feeling that she had pulmonary emphysema, chronic bronchitis, possibly arteriosclerotic heart disease with angina pectoris and congestive heart failure which was then compensated, migraine, urinary incontinence of undetermined etiology, arthralgia of her back and fingers of undetermined etiology, and hypertriglyceredema. I would not expect Mrs. Rutledge's obstructive pulmonary disease to improve significantly; she would probably show progressive impairment with time although this would be influenced in some measure by her therapy.

Q: . . . . Now, based upon these facts and upon your examination and testing of Ms. Rutledge, do you have an opinion satisfactory to yourself to a reasonable medical certainty as to whether Ms. Rutledge's exposure to cotton dust for in excess of 25 years in her employment was probably a cause of her chronic obstructive lung disease which you diagnosed in your report?

A: Yes.

Q: What is that opinion?

A: Yes. That it probably was a cause.

Based upon the same facts and upon my examination and testing of Mrs. Rutledge, I have an opinion as to whether her impairment with respect to her ability to perform labor is related to her pulmonary disease. That opinion is that it is.

. . . .

When I was examining Mrs. Rutledge I got a history from her. This history included her history as to smoking.

She gave me the history that she began smoking at age 15 and averaged one pack of cigarettes daily until she stopped smoking in February, 1979. I think cigarette smoking is a very important, often the primary cause, of chronic obstructive pulmonary disease. Based upon the facts that Ms. Hudson has given me and based upon by examination and particularly upon the history of cigarette smoking that Mrs. Rutledge gave me it is my opinion satisfactory to myself to a reasonable degree of medical certainty is that her history of cigarette smoking could or might have been the cause of her pulmonary emphysema and chronic bronchitis. Based upon my examination and these facts, I would say it was one of the more probable causes. This is after taking into consideration her exposure to cotton dust.

. . . .

. . . In other words at the time of her employment on that date [October 25, 1976] she was suffering from pulmonary emphysema, chronic bronchitis and chronic obstructive pulmonary disease.

. . . .

Q: Do you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty as to what effect, if any . . . [the] exposure . . . [at defendant's mill] to Ms. Rutledge would have had to her?

MS. HUDSON: Objection to the form.

A: Yes.

Q: What is that opinion?

A: I think it would be minimal.

Based upon the history of exposure that she gave me of her employment at Kings Yarn, in my opinion the exposure during that two-year period would not be a very substantial exposure; assuming this was in the spinning department and that she was using a synthetic and cotton blend being processed, not having actual dust measurements available. In my opinion her condition of pulmonary emphysema and chronic bronchitis was not caused by this exposure in this period of

23 months. I do have an opinion satisfactory to myself and to a reasonable degree of medical certainty as to whether or not this exposure had any affect upon her condition. I think that exposure to any type of dust in someone with pre-existing chronic bronchitis could have some aggravating effect on the underlying condition.

. . . .

Assuming that Mrs. Rutledge was capable of doing her job in October of 1976 at Kings Yarn, and she was exposed to respirable dust of cotton and synthetic yarns at her job at Kings Yarn, and she was unable to do her job at the time she left, I would not have an opinion as to whether her exposure at Kings Yarn aggravated her condition. I feel that whether a person is capable of performing a job or not is quite a subjective matter that is influenced by many factors of physical, emotional and sociological. I would not have an opinion.

I stated that exposure to any kind of dust in an individual with underlying lung disease would have an aggravating effect. It would also be my opinion that in Mrs. Rutledge's individual case, her exposure to respirable cotton and synthetic dust at Kings Yarn would have aggravated her condition.

Our statute relating to occupational diseases is very specific and does not support the majority's conclusion. I need only repeat what this Court said in *Hansel v. Sherman Textiles*, 304 N.C. 44, 51-52, 283 S.E. 2d 101, 105.

G.S. 97-52 provides in effect that disablement of an employee resulting from an 'occupational disease' described in G.S. 97-53 shall be treated as the happening of an injury by accident. This section provides specifically:

> The word 'accident' . . . shall not be construed to mean a series of events in employment of a similar or like nature occurring regularly, continuously . . . whether such events may or may not be attributable to the fault of the employer and *disease attributable to such causes shall be compensable only if culminating in an occupational disease mentioned in and compensable under this article.* (Emphasis added.)

G.S. 97-53 contains the comprehensive list of occupational diseases for which compensation is provided in the Act.

By the express language of G.S. 97-53, only the diseases and conditions enumerated therein shall be deemed to be occupational diseases within the meaning of the Act.

Byssinosis is not 'mentioned in and compensable under' the Act, except by virtue of G.S. 97-53, which provides in pertinent part as follows:

> Section 97-53. Occupational diseases enumerated; . . . the following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this Article:
>
> . . .
>
> (13) Any disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

My interpretation of our Act is detailed in *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458. It suffices here to say only that any disease, in order to be compensable, must be an *occupational disease*, or must be *aggravated or accelerated* by an occupational disease or by an injury by accident arising out of and in the course of the employment. G.S. § 97-53(13); *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979); *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951). Today the majority severs this causation link and, in its place, inserts the new principle of "significant contribution." We also said in *Hansel*: "The clear language of G.S. 97-53 is that for any disease, other than those specifically named, to be deemed an 'occupational disease' within the meaning of the Article, it must be 'proven to be due to,' causes and conditions as specified in that statute." *Hansel v. Sherman Textiles*, 304 N.C. at 52, 283 S.E. 2d at 105. I fail to see how the "significant contribution" principle originated in the majority opinion can satisfy the "proven to be due to" requirement of the statute.

Thus far the opinions of this Court have, for the most part, been faithful to the intent of the Legislature when it enacted the

occupational disease provisions of the statute, *i.e.*—that compensation is to be paid only for disabilities *unmistakably caused by* exposure to causes and conditions peculiar to the workplace rather than for disabilities *more likely than not* to have been caused by exposure to such causes and conditions. *See Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822.

In my view the operative facts of the case *sub judice* are indistinguishable from those in *Walston* and are very close to those of *Morrison* and *Hansel*. This may be demonstrated by the following comparison of the cases:

Rutledge v. Tultex Corp.

MORRISON	HANSEL

FACTS

Claimant was totally disabled, her disability being due to chronic obstructive lung disease. 50 to 60 percent of her disability was due to cotton dust exposure. Cigarette smoking as a related factor was assigned an etiologic contribution to her total lung disease of 40 to 50 percent. There was no contribution to her disability from her phlebitis, diabetes, sinusitis, or rhinitis. There was other medical testimony that up to 20 percent of her disablement resulted from an occupational disease.

Claimant had a pattern of chronic obstructive lung disease, the components of which were asthma, chronic bronchitis and byssinosis. Every person with asthma will react to cotton dust. Cigarette smoking is certainly a major contributing factor to chronic bronchitis. Diagnosis of byssinosis was made on the basis of chronic obstructive lung disease in a patient with a typical work history of byssinosis and presumably has had exposure to cotton textile dust over a period of time. No determination was made as to the extent of the condition or the weight added to its presence because the symptoms could be explained by the other two conditions.

FINDINGS

Claimant suffered from chronic obstructive lung disease . . . 50 to 60 percent of her incapacity to work resulting from the disease was caused by exposure to cotton dust while the balance was due to diseases and conditions which were not caused, aggravated, or accelerated by exposure to cotton dust. Another opinion is that she is only 20 percent incapacitated for work and exposure to cotton dust could have caused, aggravated or accelerated as much as 20 percent or as little as none. Phlebitis, varicose veins and diabetes constitute an added factor in causing her incapacity and were not caused, aggravated or accelerated by exposure to cotton dust. That part of claimant's lung disease which is related to her employment is not an ordinary disease of life to which the general public is equally exposed. Claimant is only partially incapacitated for work as a result of conditions which were caused or aggravated or accelerated by exposure to cotton dust.

Claimant has both asthma and byssinosis which are causing her respiratory impairment, which is severe and irreversible. She has byssinosis as a result of her exposure to cotton dust in her employment and this is partly responsible for her disability.

HOLDING

The Commission's conclusion that claimant was entitled under G.S. 97-30 to compensation for a 55 percent partial disability is correct. The award must be based on that portion of a pre-existing, *non-disabling, non-job-related* condition that is aggravated or accelerated by an occupational disease.

The Court reiterated its position in *Morrison* and held that the medical evidence in the record was not sufficiently definite as to the cause of claimant's disability to permit effective review. The case was remanded.

Rutledge v. Tultex Corp.

WALSTON — RUTLEDGE

FACTS

Claimant was treated for pulmonary emphysema (chronic pulmonary obstructive disease—pulmonary fibrosis). He was diagnosed as having chronic bronchitis, emphysema, possible intrinsic asthma, and possible byssinosis. Cigarette smoking would most likely play a part in his pulmonary disability. It was the primary etiological agent. He did not have a classical history of byssinosis. With intrinsic asthma he could have noticed an aggravation of his symptoms by cotton dust without necessarily invoking the diagnosis of byssinosis. Exposure to cotton dust could have played a role in the causation of his pulmonary problems, contributory rather than cause and effect.

Claimant was diagnosed as having chronic obstructive pulmonary disease representing a combination of emphysema, and chronic bronchitis. Cigarette smoking is a very important, often the primary cause of chronic obstructive pulmonary disease. It was one of the more probable causes of claimant's disease. Recurrent infection also played a prominent role. She did not give a classical history of byssinosis. It was not possible to rule out cotton dust as playing some role. Exposure to cotton dust was probably a cause of the lung disease. Textile workers are at an increased risk of contracting chronic obstructive pulmonary disease (includes pulmonary emphysema, chronic bronchitis and possibly asthma).

FINDINGS

During the period beginning 1962 to retirement claimant has been ill due to bronchitis, emphysema, asthma, and chronic pulmonary fibrosis. From an examination, the physician gained the impression that he might also suffer from possible byssinosis. His symptoms appear to be clearly related to pulmonary emphysema and chronic bronchitis and may be, at least in part, related to cigarette smoking. With intrinsic asthma he could have noticed an aggravation of his symptoms by dust in the mill without necessarily invoking the diagnosis of byssinosis. The history of byssinosis is somewhat equivocal.

Cigarette smoking and recurrent infection have played prominent roles in the pulmonary impairment. Cotton dust may aggravate it, but since claimant was showing her symptomatology in problems prior to her employment with defendant employer, exposure at defendant employer has neither caused nor significantly contributed to her disease. She has not contracted chronic obstructive lung disease as a result of any exposure while working with defendant employer.

HOLDING

The Commission was correct in concluding that claimant did not have an occupational disease. Substantially all of the competent medical evidence tended to show that he suffered from several ordinary diseases of life to which the general public is equally exposed, none of which were caused, aggravated or accelerated by an occupational disease.

The fallacy of the "significant contribution principle" and the majority's disregard of the causal effect of non-occupational factors, arises from the failure to attach significance to the following facts:

I. "Chronic obstructive lung disease" is not a specific disease but rather a term which describes one or a combination of several obstructive pulmonary diseases including chronic bronchitis, emphysema, asthma (ordinary diseases of life), and byssinosis (the only such component which is occupational in origin).

II. Medical science has no reliable means of distinguishing the cotton-dust-related occupational disease of byssinosis in its chronic phase from other obstructive pulmonary diseases caused by non-occupational factors.

III. Physicians rely primarily on the "classical history" of byssinosis in diagnosing that occupational disease. No such history was present here.

IV. Where, as in the present case, claimant's obstructive lung disease is not solely due to byssinosis, but in fact the byssinosis component is absent, there can be no causal connection between claimant's lung disease and her disability. If non-occupational disease components are present and these components are aggravated or accelerated by an occupational disease, it must then be determined *what percentage* of claimant's disability is due to the non-occupational diseases which were aggravated or accelerated by an occupational disease or by causes and conditions characteristic of and peculiar to the workplace. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101.

V. At least one component of claimant's obstructive lung disease, emphysema, was not aggravated or accelerated to any degree by her exposure to cotton dust.

VI. While claimant's disability was due in part to her lung disease, the components of which were pulmonary emphysema and chronic bronchitis, her diagnosis also included several significant non-lung related diseases and conditions including "possibly arteriosclerotic heart disease with angina pectoris and congestive heart failure which was then compensated, migraine, urinary incontinence of undetermined etiology, arthralgia of the back and fingers of undetermined etiology and hypertriglyceredema."

I now address each of the six factors *seriatim:*

I

The case at bar cannot be distinguished from *Morrison*, and *Hansel*, by the "word trick" of saying, as does the majority opinion, that in those cases the Court's emphasis was on "byssinosis" whereas here the emphasis is on "chronic obstructive lung disease." If one examines the medical testimony in the cases rather than the "emphasis of the court," it is apparent that no such distinction is justified. Even a cursory reading of the summary of the cases reveals the lack of distinction urged by the majority. The majority opinion here simply mischaracterizes *Morrison* and *Hansel* as being "byssinosis" cases and thus somehow different from "chronic obstructive lung disease cases."

"Chronic obstructive lung disease" is not a specific "disease" in and of itself. It is merely a shorthand description of one or a combination of several obstructive pulmonary diseases which may include, but may not be limited to, chronic bronchitis, emphysema, asthma, byssinosis, etc., which have similar pathologic results such as tightness in the chest, shortness of breath, small airway obstruction and production of sputum.

The majority opinion does however correctly state the holding of the two cases as follows:

> Thus both *Morrison* and *Hansel* hold that when byssinosis is the occupational disease in question and causes a worker to be partially physically disabled, and other infirmities, acting independently of and not aggravated by the byssinosis, also cause the worker to be partially physically disabled, the worker is entitled to compensation for so much of the incapacity for work as is related to the physical disability caused by the occupational disease.

What the majority opinion fails to recognize is that the same holding applies whether we use the term "byssinosis" or substitute therefor the words "chronic obstructive lung disease." It is clear from the facts in *Morrison* and *Hansel* that this Court was indeed addressing itself in both those opinions to "chronic obstructive lung disease."

II

In the records of cases which reach this Court we are repeatedly told by medical experts that the symptoms of cotton-dust-related occupational disease (*i.e.* byssinosis) are generally the same as those of ordinary diseases of life caused by non-occupational factors. A chronically disabled victim of byssinosis exhibits the same breathing difficulties as a person who has never been exposed to cotton dust but who has asthma, chronic bronchitis or emphysema. As pointed out by the majority opinion, the respiratory systems of both will appear the same on autopsy. What the majority opinion fails to point out is that both will look similar on x-ray film and they will perform the same way on pulmonary function tests. The truth is simply that medical science has no reliable means of distinguishing the cause of the disease in its chronic phase.

As pointed out by the majority opinion, Dr. Reginald T. Harris, also a pulmonary specialist and, like Dr. Williams, a member of the Industrial Commission's Textile Occupational Disease Panel, testified in *Hansel* that "[p]eople who have byssinosis for many years, have a lung disease that is indistinguishable from chronic bronchitis." *Hansel v. Sherman Textiles*, 304 N.C. at 57, 283 S.E. 2d at 108. In the case before us, Dr. Williams testified that it is possible for byssinosis "to progress into a chronic phase which is indistinguishable from other chronic obstructive pulmonary disease."

Dr. Williams testified in *Walston* that:

> There is not specifically any objective finding to say that a man does or doesn't have byssinosis that you could put your finger on, such as a biopsy or autopsy, such as with silicosis and asbestosis, although in the early stages one can demonstrate a reactivity to the dust by doing pulmonary function studies before and after six hours exposure to the work environment. But in the latter stages, such as one might see with chronic obstructive pulmonary disease, this is no longer valid and these are not specific diagnostic criteria. Therefore, any diagnosis I am making of Mr. Walston is predicated almost entirely, if not entirely, upon his history and subjective findings.

R. p. at 18.

III

In *Walston* Dr. Williams explained the type of "classic history" usually employed and primarily relied upon in diagnosing byssinosis:

> For the record, 'classic history' of byssinosis, that of textile workers, is that after having worked for several years, the worker begins to notice symptoms on Monday morning, after being back at work for a short period of time, symptoms of chest tightness, shortness of breath, sometimes coughing, wheezing and sputum production, the symptoms usually being improved on Tuesday and the rest of the week, but after a number of years the symptoms become more persistent throughout the rest of the week, until finally the symptoms are more or less chronic. This history is part of the diagnosing of byssinosis.

Walston v. Burlington Industries, 304 N.C. at 672-73, 285 S.E. 2d at 824. In *Walston* Dr. Williams, referring to the claimant Walston, testified "[t]his man did not have a completely classical history." *Id.* at 673, 285 S.E. 2d at 824. In the case now before us, referring to the claimant Rutledge, he testified "[i]t is not possible to completely exclude cotton dust as playing some role in causing an irritative bronchitis but she does not give a classical history of byssinosis."

IV

With such heavy dependence on the "classical history" in diagnosing byssinosis and the total absence of such a history by Mrs. Rutledge, Dr. Williams' reluctance to state unequivocally that the inhalation of cotton dust "caused" claimant's chronic obstructive lung disease is understandable. He would only testify, as the majority readily admits, that Mrs. Rutledge's exposure to cotton dust "probably was *a* cause" of her chronic obstructive lung disease and that "her impairment with respect to the ability to perform labor is *related to* her pulmonary disease." Even these tentative statements were, as the majority admits, based upon a hypothetical which omitted a factor which Dr. Williams considered "very important," *i.e.*, some approximately thirty years of relatively heavy cigarette smoking. He subsequently testified:

> When I was examining Mrs. Rutledge I got a history from her. This history *included her history* as to smoking. She gave me the history that she began smoking at age 15 and averaged one pack of cigarettes daily until she stopped smoking in February, 1979. *I think cigarette smoking is a very important, often the primary cause, of chronic obstructive pulmonary disease.* Based upon the facts that Ms. Hudson has given me and based upon my examination and particularly upon the history of cigarette smoking that Mrs. Rutledge gave me it is my opinion satisfactory to myself to a reasonable degree of medical certainty is that *her history of cigarette smoking could or might have been the cause of her pulmonary emphysema and chronic bronchitis.* Based upon my examination and these facts, I would say it *was one of the more probable causes.* This is after taking into consideration her exposure to cotton dust.

(Emphasis added.)

It should be noted that while Dr. Williams said claimant's exposure to cotton dust "probably was a cause," it is obvious that he felt, and he so testified, that cigarette smoking was "one of the more probable causes." From this evidence emerges the indisputable fact that under our holdings in *Morrison* and *Hansel*, this case could at best be remanded for findings as to the percentage contribution of non-occupational diseases and factors to claimant's disability. However, to its new concept of "significant contribution" the majority adds that there can be full recovery "even if other non-work-related factors also make significant contributions, or were significant causal factors." This latter provision flies fully in the face of our recent decisions in *Morrison*, *Hansel* and *Walston* and essentially overrules those cases.

I do not wish to be interpreted as saying that a claimant suffering from chronic obstructive lung disease may never recover for disability resulting from that condition. Chronic obstructive lung disease may be compensable in whole or in part if: (1) it is due solely to byssinosis or (2) byssinosis is one of several components (together with other ordinary diseases of life such as chronic bronchitis, asthma, emphysema) and conditions of the workplace materially aggravate or accelerate these other components, in which case it must be determined (a) what percentage

of the disability is compensable due to byssinosis, (b) what percentage is compensable due to the other components which have been materially aggravated or accelerated by the inhalation of cotton dust and (c) what percentage is due to non-compensable causes unrelated to the work environment (for instance, recurring infections, cigarette smoking, etc.).

V

At least one component of claimant's obstructive lung disease, emphysema, was not aggravated or accelerated to any degree by her exposure to cotton dust. It seems to be widely accepted by the medical experts in the field that the inhalation of cotton dust aggravates pre-existing bronchitis but does not aggravate emphysema. Perhaps this can be demonstrated by a quotation from a paper presented at the International Conference on Byssinosis by Phillip C. Pratt, M.D., F.C.C.P. of the Department of Pathology, Durham Veterans Administration and Duke University Medical Center, Durham:[1]

> It seems important to identify emphysema in the cotton worker population. Bronchitis and emphysema each can cause COPD and enhance the degree of obstruction produced by the other. The lesions in bronchi shown here to be significantly associated with cotton mill work are generally agreed to be morphologic correlates of clinical bronchitis. Since they represent hyperplastic or metaplastic epithelial changes occurring in response to an irritant in the mill atmosphere, and since such epithelial changes are well known from studies of exsmokers to be at least partially reversible, with associated functional improvement, one might predict that removing from the mill a symptomatic cotton worker whose lungs were not emphysematous should result in gradual restoration toward normal epithelium and reduction of the symptoms. Such a sequence of events has been observed repeatedly, although not frequently reported.

1. An International Conference on Byssinosis, attended by experts on the subject from throughout the world was held in Birmingham, Alabama, in April, 1981. Some approximately thirty-five of the papers presented at that conference are collected and published in the official publication of the American College of Chest Physicians—CHEST for Pulmonologists, Cardiologists, Cardiothoracic Surgeons and Related Specialists, Volume 79/number 4/April 1981 Supplement. Dr. Pratt's article appears at page 49S and the quotation appears on page 51S.

> On the other hand, the destructive lesions of emphysema are not reversible. Thus, removal of such a patient from the mill may not result in disappearance of the symptoms, and the functional impairment may well persist and produce permanent disability. However, since the mill exposure could not have been responsible for the emphysema, the irreversible impairment should not be attributed to the occupational exposure.
>
> . . . .
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> Second, can any rationale be proposed to explain the fact that cotton mill work does not cause pulmonary emphysema? It is now recognized that the destructive process involving alveolar walls in emphysema is probably a local effect produced by proteolytic enzymes probably derived from inflammatory cells. Cigarette smoke is almost ideally suited to provide the stimulus for such cellular reaction in alveoli, since the particulate material is in such a uniform minute size range, namely 0.2 to 1 [microns]. Thus an appreciable portion of the total material can reach alveoli both by mass movement of inhaled air and by diffusion. In contrast, the size range of fibers and particles in a mill atmosphere ranges from 0.3 to 25 [microns], with a median size of 7 [microns]. The particles are more likely than cigarette smoke to be impinged onto bronchial surfaces, and the smaller end of the size range, which can move by diffusion, constitutes only a minute portion of the total mass. Thus, little or no cotton dust can reach the alveoli to produce the excessive cellularity that has been shown to occur in cigarette smokers. The absence of excess pulmonary pigmentation in the lungs of the cotton workers . . . supports this reasoning.

This being so it must be conceded that whatever portion of the claimant's chronic obstructive pulmonary disease is due to emphysema, it was not contributed to in any degree by her exposure to cotton dust. This alone demonstrates the fallacy of grouping all lung diseases under one name, "chronic obstructive lung disease," and making that "disease" compensable if any part of it was "significantly contributed" to by the inhalation of cotton dust.

VI

The majority today departs from our longstanding precedent by allowing recovery of benefits when causes and conditions of the workplace "significantly contribute" to any ordinary disease of life which results in a disability. An attempt is made to justify this departure from our statute and the case law by this statement from the majority opinion:

> All ordinary diseases of life are not excluded from the statute's coverage. Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded. *Booker v. Duke Medical Center, supra*, 297 N.C. at 472-75, 256 S.E. 2d at 198-200. Thus, the first two elements are satisfied if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally. *Id.* 'The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation.' *Id.* at 475, 256 S.E. 2d at 200.

The majority obviously believes that the testimony of Dr. Williams to the effect that the mere exposure to cotton dust creates an increased risk of lung disease somehow establishes that all of Mrs. Rutledge's diseases (including, we must assume, her many non-lung related diseases) are "occupational diseases" provided any "significant contribution" to those diseases by the cotton dust can be established. This position was rejected by the majority opinion in *Morrison*. I find it shocking that a disability from this range of diseases and conditions, most of which are ordinary diseases of life, would be fully compensable because of the "significant contribution" to only the lung conditions by the inhalation of cotton dust. While her non-lung related conditions did not contribute to her pulmonary conditions, it is inescapable that they contributed to her disability.

Nor do I find it unusually significant, as does the majority, that Dr. Williams was of the opinion that textile workers are "at an increased risk of contracting chronic obstructive pulmonary disease," which according to Dr. Williams includes "pulmonary emphysema, chronic bronchitis and possibly asthma" as well as byssinosis. We are repeatedly told by expert medical witnesses

that the same is true of cigarette smokers and others who may be in no way connected with the textile industry. We are even told that the same is true of those exposed to concentrations of ordinary household or yard dust. It is interesting that in this very case Dr. Williams testified: "I think that exposure to *any type of dust* in someone with pre-existing chronic bronchitis could have some aggravating effect on the underlying condition." He also said "I stated that exposure to *any* kind of dust in an individual with underlying lung disease would have an aggravating effect." (Emphasis added.) It is indeed on the basis of the last quoted sentence that the majority opinion characterizes Dr. Williams as saying "that such exposure as she had at Kings Yarn 'could have some aggravating effect on [her] underlying condition.' " As is obvious, this characterization of that testimony is completely misleading.

This particular case is one wherein the claimant has failed to meet her burden of proof that she has a compensable claim. *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950). The evidence does not establish the claim. In cases where there is continuing medical difficulty in determining the etiology of disease and injury, compensation awards cannot be sustained in the absence of expert medical testimony on the matter of causation. *See Click v. Freight Carriers*, 300 N.C. 164, 265 S.E. 2d 389 (1980); *see also Gillikin v. Burbage*, 263 N.C. 317, 139 S.E. 2d 753 (1965). In the present case, the expert testimony does not establish the claim of occupational disease. *See Walston v. Burlington Industries*, 304 N.C. 670, 285 S.E. 2d 822.

The majority opinion attempts to distinguish the case *sub judice* from *Walston* because in *Walston* the term "possible" is used while the word "probable" is used in the present case. It is a distinction without a difference. A mere "probability" of causation is no more substantial or sufficient than a mere "possibility." The fact that the medical witness testified that claimant's exposure to cotton dust in her twenty-five years of employment *"probably"* was *a* cause of her chronic obstructive lung disease but that "cigarette smoking" was one of the *more* probable causes . . . after taking into consideration her exposure to cotton dust (emphasis added) does not take the causation effect out of the realm of speculation. In *Walston* Dr. Williams testified that claimant's exposure to cotton dust "could *possibly have played a role* in the

causation of his pulmonary problems" whereas here Dr. Williams testified that such exposure *"probably was a cause."* (Emphasis added.) Moreover, as to Mrs. Rutledge, Dr. Williams further testified that "[i]t is *not possible to completely exclude* cotton dust as playing some role in causing an irritative bronchitis *but she does not give a classical history of byssinosis."* This latter statement, of course, is essentially the same as the statement in *Walston* that "[t]his man did not have a completely classical history."

Claimant has failed to prove that an "occupational disease" caused her disability. She has failed to show that her "chronic obstructive lung disease" is an occupational disease within the meaning of our statute. Had this case been tried and decided on the basis of aggravation and acceleration of a pre-existing condition by causes and conditions of the workplace, an award of compensation benefits might have been justified. The theory insisted upon by the claimant, and adopted by the majority, that her ordinary diseases of life were somehow transformed into an "occupational disease" by the "significant contribution" of causes and conditions of the workplace, is, to say the least, new law in this jurisdiction and will no doubt come as a shock to our legislators as somehow being within their intent.

Surely some assessment must be made of the percentage of claimant's disability, if any, due to her emphysema as well as her arteriosclerotic heart disease, angina pectoris, congestive heart failure, migraine, arthralgia, and hypertriglyceredema.

I believe this Court in *Hansel* (where there were only lung conditions) gave the Industrial Commission good advice as to what it must consider in cases like this:

> In cases in which a claimant has other infirmities related solely to the lungs or respiratory system, the Commission should, as a matter of course, consider whether claimant's disablement (*i.e.* inability to work and earn wages) results from aggravation of those other non-occupational diseases or infirmities by causes and conditions peculiar to claimant's employment.
>
> . . . .

In order for the Court to determine whether the Commission's findings and conclusions are supported by competent evidence, the record before us must [contain] medical testimony to indicate answers to the following questions:

(1) Is plaintiff totally or partially incapacitated to work and earn wages? If partial, to what extent is she disabled; *i.e.*, what is the percentage of her disability?

(2) What disease or diseases caused this disability?

(3) Which of the plaintiff's disabling diseases are occupational in origin, *i.e.*, which diseases are due to causes and conditions which are characteristic of and peculiar to plaintiff's occupation as distinguished from ordinary diseases of life to which the general public is equally exposed outside of the employment?

(4) Does plaintiff suffer from a disabling disease or infirmity which is not *occupational* in origin, *i.e.*, which is not due to causes and conditions characteristic of and peculiar to plaintiff's occupation as distinguished from ordinary diseases of life to which the general public is equally exposed outside of the employment?

If so, specify the non-occupational disease(s) or infirmities?

(5) Was plaintiff's non-occupational disease(s) or infirmity aggravated or accelerated by her occupational disease(s)?

(6) What percentage of plaintiff's incapacity to work and earn wages results from (a) her occupational disease(s) or (b) her non-occupational disease(s) which were aggravated or accelerated by her occupational disease(s)?

(7) What percentage of plaintiff's incapacity to work and earn wages results from diseases or infirmities which are non-occupational in origin?

Hansel v. Sherman Textiles, 304 N.C. at 53, 58-59, 283 S.E. 2d at 106, 109 (1981).

The case should *not* be remanded for the purpose of applying the new "substantial contribution" principle—if it is to be remanded at all it should be for the purpose of apportionment of

Mrs. Rutledge's disability to work-related and non-work-related causes.

I agree with the majority's conclusion that it is not necessary that Mrs. Rutledge show that the conditions of her last employer's workplace were the *sole* causes of her disability and that it is only necessary for her to show that the conditions of her last employer's workplace "augmented the disease to any extent, however slight."[2] I vote to affirm the opinion of the Court of Appeals and to modify it to the extent necessary to correct this error.

Chief Justice BRANCH and Justice COPELAND join in this dissent.

NORTH CAROLINA DEPARTMENT OF CORRECTION v. EARL GIBSON

No. 495A82

(Filed 5 April 1983)

1. Master and Servant § 7.5; State § 12— employment discrimination—standards to be applied

The claimant carries the initial burden of establishing a prima facie case of employment discrimination, and the burden then shifts to the employer to articulate some legitimate nondiscriminatory reason for the claimant's rejection or discharge. If a legitimate nondiscriminatory reason for rejection or discharge has been articulated, the claimant has the opportunity to show that the stated reason for rejection was, in fact, a pretext for discrimination.

2. Master and Servant § 7.5; State § 12— employment discrimination—prima facie case—burden of producing rebutting evidence

Once a prima facie case of employment discrimination is established, the employer has the burden of producing evidence to rebut the presumption of discrimination raised by the prima facie case. The employer's burden is satisfied if he simply explains what he has done or produces evidence of legitimate nondiscriminatory reasons.

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2. I must point out, however, what I consider to be a significant omission in the majority's statement that "She need only show: (1) that she has a compensable occupational disease and (2) that she was 'last injuriously exposed to the hazards of such disease' in defendant's employment." The omission from (1) that the occupational disease be the cause of her disability is fatal and will come back to haunt us. The first requirement should be accurately stated as follows: "that she has an occupational disease which caused her disability."

3. Master and Servant § 7.5; State § 12— employment discrimination—burden of proof

In an employment discrimination action, the ultimate burden of persuading the trier of fact that defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

4. Master and Servant § 7.5; State § 12— employment discrimination—rebutting presumption of prima facie case

To rebut the presumption of employment discrimination raised by a prima facie case, the employer must clearly explain by admissible evidence the nondiscriminatory reasons for the employee's rejection or discharge, and the explanation must be legally sufficient to support a judgment for the employer.

5. Master and Servant § 7.5; State § 12— employment discrimination—rebuttal of prima facie case—showing reasons are pretext for discrimination

When the employer explains the nondiscriminatory reasons for challenged employment action, the plaintiff is then given the opportunity to show that the employer's stated reasons are in fact a pretext for intentional discrimination, and plaintiff may rely on evidence offered to establish his prima facie case to carry his burden of proving pretext.

6. Master and Servant § 7.5; State § 12— employment discrimination—no review of employer's business judgment

The trier of fact is not at liberty to review the soundness or reasonableness of an employer's business judgment when it considers whether alleged disparate treatment is a pretext for employment discrimination, since the only relevant question, and the sole focus of the inquiry, is the employer's motivation.

7. Master and Servant § 7.5; State § 12— discharge of black correctional officer—prima facie case of discrimination—rebuttal by employer

Plaintiff, a black correctional officer at a youthful offender prison, established a prima facie case of employment discrimination because of race by showing that even though he and several white employees failed to make proper checks on 23-24 April 1979 to ensure the presence of two inmates who escaped, only he was discharged. However, defendant employer rebutted the prima facie case by testimony that plaintiff was discharged for his failure to make proper checks throughout his entire shift and his failure to report the condition of the inmates' cell and his inability to arouse them at breakfast before leaving work at the end of his shift, and by testimony that plaintiff's conduct constituted greater negligence than the conduct of the other employees.

8. Master and Servant § 7.5; State § 12— employment discrimination action—errors by State Personnel Commission

In an employment discrimination suit brought by a discharged black correctional officer pursuant to G.S. 126-36 and G.S. 143-422.2, the State Personnel Commission erred by placing an improper burden of proof upon defendant employer to show an absence of discrimination, in reviewing the correctness of

defendant employer's business judgment, and in failing to resolve the ultimate question of whether plaintiff was the victim of intentional discrimination.

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

DEFENDANT appealed pursuant to G.S. 7A-30 from the decision of the Court of Appeals reported at 58 N.C. App. 241, 293 S.E. 2d 664 (1982), *Becton, J.*, with *Hill, J.*, concurring and *Hedrick, J.*, dissenting, reversing the order entered 28 January 1981 in Superior Court, WAKE County, by *Godwin, J.*, which reversed the 29 August 1980 decision of the State Personnel Commission ordering reinstatement of plaintiff to the position from which he was dismissed and awarding net back pay loss and attorney's fees.

Sandhills Youth Center (SYC) is a minimum security prison which houses youthful offenders ages 18 to 21. It does not normally house dangerous inmates. SYC has a segregation area and a nonsegregation area. Inmates reside in the nonsegregation area under less security than any other prison facility in the State. Prisoners are placed there during the last phase of incarceration and given an opportunity to be exposed to a degree of freedom before they are released. They are on their honor to remain at the facility. Conversely, the segregation area is more like a traditional prison and inmates are typically assigned to this area for either administrative or disciplinary segregation.

During the five years preceding the incident in question there had been 119 escapes from the SYC. Eight of these escapes were from the segregation area but the escape involved in this case was only the first or second made from within a segregation cell.

On 24 April 1979, it was discovered that two inmates had escaped from their segregation cell. The inmates, Crumpler and Dunlap, were in segregation for having been found in "an unauthorized area" and they were considered escape risks by SYC supervisors. Crumpler and Dunlap escaped by making a hole in the ceiling of their cell, crawling through a heating duct, entering the attic, and then escaping over the roof of the building. The exact time of their escape remains unknown.

On 23 April 1979, Earl Gibson was a Correctional Program Assistant I (CPA I) and had been so employed for 14 months. He had been recommended for employment by Superintendent F. D. Hubbard. He had made steady progress in his job and was rated a satisfactory employee on two separate evaluations.

Gibson reported for duty in the segregation area at 11:00 p.m. on 23 April 1979. As a CPA I assigned to segregation, Gibson had the responsibility of checking each inmate once each hour throughout the entire shift period. This check involved looking into the cell and seeing "living, breathing flesh." The officer was required to see signs of life before he could count the inmate as present. The purpose for conducting checks was to detect an escape within at least one hour of its occurrence and to insure the mental and physical health of inmates.

When Gibson first looked into the Crumpler-Dunlap cell sometime after 11:00 p.m. on 23 August 1979, he saw that a bed was turned over in the corner with the mattress lying on the floor. It appeared as if a figure was lying on the mattress underneath the blanket. On the other side of the cell, he could see part of another bed in the corner. He could not see who was lying on this bed because it was located in a blind spot.

Gerhard Kunert, the guard who preceded Gibson on the 3:00 p.m. to 11:00 p.m. shift, told Gibson that the cell had been in that condition for a while and that nothing was wrong. At 3:15, one of the inmates told Kunert that the mattress had been taken off the bed because the inmate wanted to sleep on the floor since it was cooler and better for his back. Kunert failed to make a proper check on his last inspection of the cell.

Throughout his shift, Gibson did not notice any change in the condition of the cell. He assumed that Crumpler and Dunlap were asleep in the cell, but did not see "flesh." When Gibson tried to arouse the inmates for breakfast, he received no reply. He then threw a milk carton into the cell but received no response. Gibson departed at the end of his shift without reporting these unusual circumstances to his supervisor.

Carl Smith, a black employee, was the guard who took over Gibson's duty the following shift. He did not check all of the cells at 7:30. Instead he asked another employee, Dennis Deese, to

check the portion of the segregation area housing Dunlap and Crumpler. Deese did not see the inmates and did not report this fact to Smith. On the next hourly check, Smith discovered the escape.

Angus Currie was a CPA I who on 23 April 1979 was the acting shift supervisor in segregation. Part of his duty was to check segregation at least once on his shift to see if all the inmates were present. He failed to make this check.

As a result of this incident, the following disciplinary action was taken: 1. Gibson, a black employee—discharged for his failure to make proper checks during his entire shift and his failure to report a suspicious situation. 2. Kunert, a white employee—oral warning with a follow-up letter for his failure to insure presence on one check. 3. Deese, a white employee—oral warning with a follow-up letter for his failure to insure presence on one check. 4. Carl Smith, a black employee—no discipline. 5. Angus Currie, a white employee and acting shift supervisor on 23 April 1979—no discipline.

Gibson appealed to the State Personnel Commission asserting that he was discharged because of his race, and prayed for reinstatement to employment, back pay and attorney's fees. The hearing officer found in his favor and recommended the relief prayed for. The full Commission adopted the hearing officer's findings and conclusions and ordered relief as recommended.

Department of Correction (DOC) appealed and Judge Godwin reversed the Commission's order. Gibson appealed to the Court of Appeals. The Court of Appeals reversed the judgment of the Superior Court and DOC appealed to this Court pursuant to G.S. 7A-30(2).

Rufus L. Edmisten, Attorney General, by Richard L. Kucharski, Assistant Attorney General, for defendant-appellant Department of Correction.

Phillip Wright, Lumbee River Legal Services, Inc., for plaintiff-appellee.

BRANCH, Chief Justice.

Plaintiff instituted this action pursuant to G.S. 126-36, which provides:

> Any State employee or former State employee who has reason to believe that employment, promotion, training, or transfer was denied him or that demotion, layoff or termination of employment was forced upon him in retaliation for opposition to alleged discrimination or because of his age, sex, race, color, national origin, religion, creed, political affiliation, or physical disability except where specific age, sex or physical requirements constitute a bona fide occupational qualification necessary to proper and efficient administration, shall have the right to appeal directly to the State Personnel Commission.

The above statute relates only to State employees and is consistent with the legislative policy announced in G.S. 143-422.2 as follows:

> It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.
>
> It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general.

This case is one of first impression in this jurisdiction and we look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases.

[1] The United States Supreme Court considered a similar question in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973). There, the claimant had been employed by McDonnell Douglas, but was laid off during a general reduction of the work force. During the period following his layoff, he participated in a stall-in against McDonnell Douglas to protest what he and others believed to be discriminatory practices by the company. His conduct was illegal and unprotected

under the Civil Rights Act. Later, when the company resumed hiring, the claimant made application but was denied employment. He brought an action under Title VII asserting that he was denied employment because he was black and because of his legitimate civil rights activities. McDonnell Douglas maintained that his application was denied because of his involvement in the illegal stall-in. The Court established the following standards to be applied in Title VII cases:

(1) The claimant carries the initial burden of establishing a prima facie case of discrimination.

(2) The burden shifts to the employer to articulate some legitimate nondiscriminatory reason for the applicant's rejection.

(3) If a legitimate nondiscriminatory reason for rejection has been articulated, the claimant has the opportunity to show that the stated reason for rejection was, in fact, a pretext for discrimination. The evidentiary standard set forth in *McDonnell Douglas* has also been applied to cases in which an employee has been discharged. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed. 2d 493 (1976).

The burden of establishing a prima facie case of discrimination is not onerous. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981). It may be established in various ways. For example, a prima facie case of discrimination may be made out by showing that (1) a claimant is a member of a minority group, (2) he was qualified for the position, (3) he was discharged, and (4) the employer replaced him with a person who was not a member of a minority group. *Coleman v. Braniff Airways, Inc.*, 664 F. 2d 1282 (5th Cir. 1982); *Marks v. Prattco, Inc.*, 607 F. 2d 1153 (5th Cir. 1979).

A prima facie case of discrimination may also be made out by showing the discharge of a black employee and the retention of a white employee under apparently similar circumstances. *Turner v. Texas Instruments, Inc.*, 555 F. 2d 1251 (5th Cir. 1977); *Brown v. A. J. Gerrard Mfg. Co.*, 643 F. 2d 273 (5th Cir. 1981). *See also McDonald v. Santa Fe Trail Transp. Co., supra* (white employees were discharged while black employees were retained under similar circumstances).

When a prima facie case is established, a presumption arises that the employer unlawfully discriminated against the employee. *Texas Dept. of Community Affairs v. Burdine, supra.* The showing of a prima facie case is not equivalent to a finding of discrimination. *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed. 2d 957 (1978). Rather, it is proof of actions taken by the employer from which a court may infer discriminatory intent or design because experience has proven that in the absence of an explanation, it is more likely than not that the employer's actions were based upon discriminatory considerations. *Id.*

[2] Once a prima facie case of discrimination is established, the employer has the burden of *producing* evidence to rebut the presumption of discrimination raised by the prima facie case. *McDonnell Douglas Corp. v. Green, supra; Texas Dept. of Community Affairs v. Burdine, supra.* Some of the earlier federal cases held that the employer had the burden of proving by a preponderance of the evidence his legitimate nondiscriminatory reasons for his actions. *Whiteside v. Gill,* 580 F. 2d 134 (5th Cir. 1978); *Silberhorn v. General Iron Works Co.,* 584 F. 2d 970 (10th Cir. 1978); *Turner v. Texas Instruments, Inc., supra.* The United States Supreme Court settled this question, however, in *Texas Dept. of Community Affairs v. Burdine, supra.* In that case the Court held that after a plaintiff proves a prima facie case of discrimination, the employer's burden is satisfied if he simply explains what he has done or produces evidence of legitimate nondiscriminatory reasons. The employer is not required to prove that its action was actually motivated by the proffered reasons for it is sufficient if the evidence raises a genuine issue of fact as to whether the claimant is a victim of intentional discrimination. *Id.*

[3] It is thus clear that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. at 253, 101 S.Ct. at 1093, 67 L.Ed. 2d at 215. We are of the opinion that footnote 8 in *Texas Dept. of Community Affairs v. Burdine* clearly states the rationale of this holding. We quote:

> This evidentiary relationship between the presumption created by a prima facie case and the consequential burden of

> production placed on the defendant is a traditional feature of the common law. "The word 'presumption' properly used refers only to a device for allocating the production burden." F. James & G. Hazard, Civil Procedure § 7.9, p. 255 (2d ed. 1977)(footnote omitted). See Fed. Rule Evid. 301. See generally 9 J. Wigmore, Evidence § 2491 (3d ed. 1940). Cf. J. Maguire, Evidence, Common Sense and Common Law 185-186 (1947). Usually, assessing the burden of production helps the judge determine whether the litigants have created an issue of fact to be decided by the jury. In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.

Id. at 255, 101 S.Ct. at 1094, 67 L.Ed. 2d at 216 n. 8.

[4] To rebut the presumption of discrimination, the employer must clearly explain by admissible evidence, the nondiscriminatory reasons for the employee's rejection or discharge. *Id.* The explanation must be legally sufficient to support a judgment for the employer. *Id.* If the employer is able to meet this requirement, the prima facie case, and the attendant presumption giving rise thereto, is successfully rebutted. *Id.*

[5] When the employer explains the nondiscriminatory reasons for his action, the plaintiff is then given the opportunity to show that the employer's stated reasons are in fact a pretext for intentional discrimination. We note parenthetically that the plaintiff may rely on evidence offered to establish his prima facie case to carry his burden of proving pretext. *Texas Dept. of Community Affairs v. Burdine, supra.*

We believe it helpful to note some of the factors which courts have considered as relevant evidence of pretext. They are:

(1) Evidence that white employees involved in acts against the employer of comparable seriousness were retained or rehired,

(2) Evidence of the employer's treatment of the employee during his term of employment,

(3) Evidence of the employer's response to the employee's legitimate civil rights activities, and

(4) Evidence of the employer's general policy and practice with respect to minority employees.

See McDonnell Douglas Corp. v. Green, supra.

[6] The trier of fact is not at liberty to review the soundness or reasonableness of an employer's business judgment when it considers whether alleged disparate treatment is a pretext for discrimination.

In *Loeb v. Textron*, 600 F. 2d 1003 (1st Cir. 1979), the Court stated:

> While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason must be reasonably articulated and nondiscriminatory, but does not have to be a reason that the judge or jurors would act upon or approve . . . . An employer is entitled to make his own policy and business judgment. . . .
>
> * * *
>
> The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one. The jury must understand that its focus is to be on the employer's motivation, however, and not on its business judgment.

Id. at 1012, n. 6. (Citations omitted.) *See also Olsen v. Southern Pacific Transp. Co.*, 480 F. Supp. 773 (N.D. Cal. 1979), *aff'd sub nom. Willey v. Southern Pacific Transp. Co.*, 654 F. 2d 733 (9th Cir. 1981).

In determining what discipline is appropriate in a given case an employer has the discretion to consider all the facts and make a determination of whether an employee's conduct warrants discharge or a milder form of punishment. *Osborne v. Cleland*, 620 F. 2d 195 (8th Cir. 1980).

In *Turner v. Texas Instruments, Inc.*,[1] *supra*, the employer investigated alleged time card violations by two of its employees. Turner, a black employee, was discharged because the company believed that he had knowingly violated a company rule by allowing another employee to punch his (Turner's) time card. Burns, a white employee, was not discharged because the company found that he had not knowingly violated the rule. Turner filed a Title VII action in federal district court. The court held that Turner had not approved the punching of his time card and entered judgment for him.

The Fifth Circuit reversed, pointing out that the trial court erroneously identified the controlling question as being whether Texas Instruments was wrong in its belief that Turner was guilty of knowing time card violations and Burns was not. The proper question was whether Texas Instruments sincerely held this belief. The Court stated, "[e]ven if TI wrongly believed that Turner knowingly violated this policy, if TI acted on this belief it was not guilty of racial discrimination." *Id.* at 1256. *See also Wright v. Western Electric Co.*, 664 F. 2d 959 (5th Cir. 1981). Thus, it is clear that it is not important that the trier of fact believes the employer's judgment or course of action to be erroneous or even unreasonable as the *only* relevant question, and the *sole* focus of the inquiry, is the employer's motivation.

The ultimate purpose of G.S. 126-36, G.S. 143-422.2, and Title VII (42 U.S.C. 2000(e), *et seq.*) is the same; that is, the elimination of discriminatory practices in employment. We find the principles of law and the standards above set forth as applied to Title VII are sound and properly focus the inquiry upon the ultimate issue of whether the employee was the victim of *intentional* discrimination. We therefore adopt the evidentiary standards and principles of law above set forth insofar as they are not in conflict with our statutes and case law.

1. *Turner v. Texas Instruments, Inc., supra*, is one of the cases decided before *Texas Dept. of Community Affairs v. Burdine, supra*, holding that employers had to prove by the preponderance of the evidence that an applicant was rejected or an employee discharged for the articulated reasons and not for race, sex, or some other unlawful consideration. While this part of *Turner* has been overruled by *Burdine*, other parts of the opinion are unaffected by the Supreme Court's decision.

[7] In the case before us the Commission found, and we think correctly so, that Gibson established a prima facie case of discrimination by showing that even though he and several white employees failed to make proper checks to insure the presence of Dunlap and Crumpler on 23-24 April 1979, only he was discharged.

We also agree with the Commission's conclusion that DOC rebutted the prima facie case by clearly articulating legitimate nondiscriminatory reasons for plaintiff's discharge. Superintendent F. D. Hubbard testified that Gibson was discharged for his failure to make proper checks throughout his entire shift and his failure to report an obviously suspicious situation (the condition of the cell and his inability to arouse the inmates at breakfast) before leaving work at the end of his shift. He testified that plaintiff's conduct constituted greater negligence than the conduct of Currie, Kunert and Deese. This explanation was sufficient to raise a genuine issue of fact as to whether DOC intentionally discriminated against plaintiff.

Plaintiff then attempted to prove that the reasons given for his discharge were a pretext for discrimination by showing that DOC had not discharged a white employee, O'Neal, for what plaintiff contended were acts of comparable seriousness. Angus Currie testified that several months before Dunlap and Crumpler escaped, he and O'Neal were on duty in a nonsegregation area. On that night, O'Neal was working in the supervisor's office totaling the merits and demerits inmates had received in the dormitory, kitchen and at work. During this time O'Neal was also responsible for insuring the presence of inmates in two cell areas. He failed to do so on three or four occasions. Toward the end of his shift, he discovered that an inmate was missing. O'Neal was reprimanded by the Department for his conduct.

Mr. Hubbard, who recommended plaintiff's dismissal, testified that he considered plaintiff's "transgressions" to be more serious than O'Neal's. He pointed out that the area O'Neal was working in was a minimum security area while plaintiff was working in a segregation area where security was especially emphasized. He also pointed out that O'Neal, after having failed to insure presence on three or four checks, discovered the escape when an inmate failed to respond to O'Neal's attempts to awaken

him. Plaintiff, on the other hand, made improper checks on eight occasions. When he was unable to arouse Dunlap and Crumpler by calling their names, he threw a milk carton at one of the beds, still evoking no response. Shortly thereafter, plaintiff left work at the end of his shift without reporting this situation. His failure to report the suspicious situation was the most influential factor in Hubbard's decision to recommend plaintiff's discharge.

In addition to distinguishing the conduct of O'Neal and plaintiff, DOC attempted to show that plaintiff was not discharged on account of his race by showing the absence of the other factors the United States Supreme Court held to be relevant to the question of pretext in *McDonnell Douglas Corp. v. Green, supra.* DOC showed that plaintiff was treated well during his term of employment. F. D. Hubbard, who recommended plaintiff's discharge, had initially written a letter recommending plaintiff for employment as he then considered plaintiff to be an excellent candidate. DOC also showed that after his training, plaintiff was making steady progress in his job performance, having been rated a satisfactory employee in two separate evaluations.

DOC filed documentary exhibits which showed that at the time of plaintiff's discharge over 40% of the work force at SYC were black employees. There were one black and four white employees at the level CPA II, and 11 white and 14 black employees at the level CPA I. There was no evidence presented to show that plaintiff was involved in or discharged for his legitimate civil rights activities.

The hearing officer, after hearing the evidence, found facts and entered, *inter alia,* the following relevant conclusions of law:

> 4. It is now incumbent upon Petitioner to show that the reasons elicited by Respondent for imposing a harsher disciplinary punishment upon him were a pretext for racial discrimination. Mr. Gibson has shown that Mr. O'Neal, a white correctional officer, failed to make a proper check (see living, breathing flesh) on several rounds during a night shift which resulted in an escape by an inmate from a non-segregation area and that Respondent only reprimanded Mr. O'Neal for this offense. It is essential that we examine the distinction Respondent makes between the escapes in which Mr. Gibson and Mr. O'Neal were involved. Respondent

asserts vigorously that Petitioner was not dismissed due to the escape by the inmates but rather for not making a proper check during his entire shift and for failing to investigate further after he threw a milk carton into the cell and received no response. The Department contended that the key distinction between Petitioner's and Mr. O'Neal's situations was that Mr. O'Neal recognized the escape and Petitioner did not. It must be noted that in both cases (Petitioner's and Mr. O'Neal's) the Department had just cause to dismiss the employees involved. Yet, Respondent chose to retain Mr. O'Neal and dismiss Petitioner. It is difficult to rationalize or comprehend the justification for retaining an employee who missed several checks and was presumably responsible for an escape simply because he later discovered the escape. I find the distinction illusory. On one hand, the inmates under Petitioner's supervision in the segregation unit were housed in the most secure area of the Center and it was generally understood by the employees of the Center that an inmate could escape the segregation area only through the barred window or through the door. After seeing no change in the room and no way an inmate could effect an escape, it is readily discernible why Mr. Gibson had a lackadaisical attitude about conducting a proper check (seeing living, breathing flesh). It is understandable how an employee could overrely on the supposedly "escape proof nature" of the segregation area, but not necessarily excusable. On the other hand, inmates readily effected escapes from the non-segregation area where Mr. O'Neal supervised and employees knew that the area was not as secure as the segregation unit. It is not so easily understandable how an employee could fail to conduct proper checks in an area of the Center where he knew inmates could readily effect an escape. An officer who has failed to conduct several proper checks in such a situation is more apt to suspect that an escape has occurred.

5. When just cause exists to terminate an employee and absent some compelling justification for his retention, the employee should be dismissed. Yet, no compelling justification can be raised for the instant aberration (Mr. O'Neal's retention). It is reasonable for a member of a minority group to feel that he has been discriminated on the basis of his

membership in the group when he and a fellow employee not of his group commit substantially similar offenses and his (the minority's) disciplinary action is substantially harsher than his fellow employee's. Likewise, the Commission can reasonably conclude, that in the absence of some compelling justification for the difference in treatment of the two employees, the Respondent discriminated against the Petitioner due to his race.

6. Without an admission that prohibited discrimination has occurred, one may never be certain that it was or was not a factor in a particular decision. Proof of discrimination often must be gleaned from the bits and pieces of evidence which indicate a probability that discrimination has occurred. As a practical matter, discriminatory acts may not be recognized as such by those who commit them. Respondent has shown that it had just cause to dismiss Petitioner, but the treatment accorded Petitioner as opposed to a similarly situated white employee was unequal. Therefore, the inference that Petitioner was dismissed due to his race must be sustained.

The hearing officer thereupon entered judgment in favor of Gibson. The full Commission adopted the findings of fact and "Conclusions of Law" of the hearing officer as its own. The Commission ordered DOC to reinstate plaintiff to his former position or a similar one, to reimburse plaintiff for his net back pay loss, to pay plaintiff's attorney's fees and to consider plaintiff's letter of dismissal as a final warning.

The cause came on to be heard before Judge Godwin on DOC's appeal who reversed the Commission's order on the grounds that the Commission failed to consider a substantial amount of evidence tending to show an absence of discrimination on the part of DOC, that the order was arbitrary and capricious, that the order was not supported by substantial evidence, that the order was affected by error of law and made upon unlawful procedure, and that the order constituted the Commission's

substitution of its business judgment for that of DOC in violation of G.S. 150A-51.[2]

The Court of Appeals reversed *in toto.*

[8] DOC contends that the Court of Appeals erroneously held that the Commission properly applied the Title VII evidentiary standards. DOC's position is that the Commission's order was made upon unlawful procedure and affected by error of law in violation of G.S. 150A-51(3)and (4).

We first consider DOC's contention that the Commission erroneously placed a burden of proof on DOC in conclusion No. 5 where it stated, "the Commission can reasonably conclude that in the absence of some *compelling justification* for the difference in treatment of the two employees, the Respondent discriminated against the Petitioner due to his race." (Emphasis added.)

We reiterate that *Texas Dept. of Community Affairs v. Burdine, supra,* makes it clear that the only burden placed upon the employer is a burden of producing evidence to rebut the plaintiff's prima facie case. We find nothing in the case law or statutory law which purports to place a burden of proof upon the employer. The above-quoted language clearly imposes a stringent burden of proof upon DOC to prove the absence of discriminatory

2. G.S. 150A-51 provides:

Scope of review, power of court in disposing of case.—The Court may affirm the decision of the agency or remand the case for further proceeding; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification.

purpose. We therefore hold that the Court of Appeals erred in deciding that no burden had been erroneously placed on defendant.

A cursory examination of conclusion No. 4 discloses that the Commission exceeded the bounds of its authority by deciding that DOC was incorrect in its determination that security should be a greater concern in segregated areas than in nonsegregated areas. Further, the Commission improperly concluded that DOC incorrectly considered O'Neal's discovery of escape as a fact in mitigation of his transgressions. These matters related to the soundness of the employer's business judgment and the trier of fact may not be concerned with whether this judgment was unreasonable or even erroneous. *See Loeb v. Textron, supra.* The sole question for the trier of fact in the context of this case is whether defendant DOC was racially motivated in its discharge of plaintiff. The Commission failed to conclude that DOC did not honestly believe that the two instances of deviant conduct were distinguishable and warranted different disciplinary action.

Finally, the Commission completely failed to resolve the ultimate question involved in this appeal. This record does not disclose that the Commission found or concluded that plaintiff was the victim of *intentional* discrimination. Indeed the language in conclusion No. 6 that "[a]s a practical matter discriminatory acts may not be recognized as such by those who commit them" reveals that the Commission acted under a misapprehension of the law. This statement flies in the face of the holdings in *Turner v. Texas Instruments, supra,* and *Wright v. Western Electric Co., supra.* Further, it defies reason to say that a person could have the animus or motivation to *intentionally* practice discrimination upon a person because of his race without being aware of such animus or motivation.

Accordingly, the Court of Appeals erred by holding that the Commission's order was not made upon unlawful procedure or affected by error of law.

In light of the present condition of this record, we elect not to consider the question of whether there was substantial evidence to support the Commission's conclusions of law and its resulting order.

In summary, we hold that the Commission erred by placing an improper burden of proof upon defendant to show an absence of discrimination, by reviewing the correctness of defendant's business judgment and in failing to resolve the ultimate question of whether plaintiff was the victim of *intentional* discrimination. These errors require remand to the State Personnel Commission for a new hearing consistent with this opinion.

The decision of the Court of Appeals is reversed and this cause is remanded to that Court with direction that it be returned to the Superior Court for remand to the Personnel Commission for further proceedings consistent with this opinion.

Reversed and remanded.

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

DEPARTMENT OF TRANSPORTATION v. RAY HARKEY, JOHN REAVIS & CHARLES SULLIVAN, AS TRUSTEES OF SOUTHSIDE BAPTIST CHURCH

No. 314A82

(Filed 5 April 1983)

Eminent Domain § 2.3— elimination of direct access to highway—compensation for a taking

The elimination of defendant property owners' direct access to an abutting highway is a taking under G.S. 136-89.53, entitling them to compensation for damages in a condemnation proceeding, when access to the highway remains available only via a series of residential streets.

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

Justice COPELAND dissents.

ON appeal pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals, 57 N.C. App. 172, 290 S.E. 2d 773 (1982), with one judge dissenting, in which the judgment for plaintiff entered on 7 May 1981 in GUILFORD Superior Court by *Judge Robert A. Collier* was affirmed.

Rufus L. Edmisten, Attorney General, by James B. Richmond, Special Deputy Attorney General, for plaintiff appellee.

Turner, Rollins, Rollins & Clark, by Clyde T. Rollins and Walter E. Clark, Jr., for defendant appellants.

EXUM, Justice.

The sole question presented by this appeal is whether the elimination of defendant property owners' direct access to an abutting highway is a taking under G.S. 136-89.53, entitling them to compensation for damages in a condemnation proceeding, when access to the highway remains available via a series of residential streets. We conclude there has been a taking under well-established principles in this state, and the property owners are entitled to compensation for the loss of direct access.

Plaintiff filed its complaint pursuant to article nine of chapter 136 of the General Statutes of North Carolina to acquire fee simple title to a portion of property owned by defendants. Defendants are trustees of Southside Baptist Church, which is located on approximately 2.55 acres of land abutting Freeman Mill Road in Greensboro. The church's property actually abuts three streets—Freeman Mill Road on its front or western side, Corregidor Street on its northern side and Kindley Street on its southern line. The back or eastern boundary of the church is adjacent to residential property. The church currently has direct ingress and egress to all three roads on which it abuts.

Plaintiff plans to construct what will be known as United States Highway 220 on what is currently Freeman Mill Road. Plaintiff is taking an approximately one-quarter acre strip of land along the western line of defendants' property, including the entire length of the property abutting Freeman Mill Road, for a right of way. The new highway 220 will be a controlled-access facility, which is statutorily defined as a "highway, especially designed for through traffic, and over, from or to which highway owners or occupants of abutting property, or others, shall have only a controlled right of easement of access." G.S. 136-89.49. The new highway 220 will become a part of a full cloverleaf interchange with Interstate Highway 40 to the south of defendants' property. According to plaintiff's plan, the church property will have no direct access to the new highway once it is completed.

Furthermore, Kindley Street and Corregidor Street will be blocked so they will not provide access to the new highway, as they had done to Freeman Mill Road.

Plaintiff does not list in its complaint access as an interest taken by the construction of the new closed access facility. Rather, it asserts that although "[a]ccess [to the new highway] is controlled under the police power of the Department of Transportation . . . reasonable and adequate access [will be] provided by local traffic roads." The defendants contend all reasonable access has been taken by plaintiff and they are entitled to have a jury consider the loss of access as an element of damages in determining what compensation is owed defendants.

The evidence shows and the trial court found that after the highway project and improvements to certain streets are completed, defendants' remaining property will be afforded access to the new highway 220 via various paved streets in what is generally a residential area. Instead of having direct access to the abutting highway, drivers going from the church to the new highway must travel on one of several alternative routes along residential streets. Specifically, drivers leaving the church may choose one of four ways to reach Glenhaven Drive: (1) Corregidor Street to Cliffwood Drive (via an unnamed street yet to be constructed) to Glenhaven Drive; (2) Kindley Street to Glenhaven Drive; (3) Kindley Street to Monterey Street to Cliffwood Drive to Glenhaven Drive; or (4) Corregidor Street to Monterey Street to Cliffwood Drive to Glenhaven Drive. Once on Glenhaven Drive travellers will go to West Meadowview Drive, which they will take to Lovett Street. They will travel on Lovett Street until it intersects with the new highway 220, formerly Freeman Mill Road. Drivers going from the church to I-40 or other points to the south of the church will be required to go approximately one mile further after the new highway is completed. Instead of turning directly onto Freeman Mill Road (or the new highway 220) from the church property, they will have to take one of the routes set forth above to the Lovett Street intersection with the new highway and then essentially backtrack to where the church property abuts the new highway. Travelers going north from the church will not be required to travel a greater distance, but will be required to travel on a number of streets rather than just Freeman Mill Road (or the new highway).

The trial court found as a fact that the new highway will provide "less convenient" access than the church previously had to Freeman Mill Road. The court concluded, however, that "the defendants' remaining property abutting [the new highway] will have access thereto 'by way of the reasonable and adequate access provided by local traffic roads.' " Thus, the court apparently concluded that the elimination of direct access was a reasonable exercise of plaintiff's police power rather than a compensable taking under eminent domain. It concluded, therefore, that defendants were not entitled to have the jury instructed on loss of access as an element of damages.

The Court of Appeals affirmed, with the majority and dissenting opinions turning on their interpretations of this Court's opinion in *Dr. T. C. Smith Co., Inc. v. North Carolina State Highway Commission*, 279 N.C. 328, 182 S.E. 2d 383 (1971). We agree with defendants and the dissenter in the Court of Appeals that *Smith* controls this case. In order to understand some of the language in *Smith* and its holding, however, it is necessary to review the rules set forth in the cases upon which it relies.

An owner of land abutting a highway or street has the right of direct access from his property to the traffic lanes of the highway. This is "a right in the street beyond that which is enjoyed by the general public, or by himself as a member of the public, and different in kind, since egress from or ingress to his own property is a necessity peculiar to himself." *Sanders v. Town of Smithfield*, 221 N.C. 166, 170, 19 S.E. 2d 630, 633 (1942). "This right of access is an easement appurtenant which cannot be damaged or taken from him without compensation." *Snow v. North Carolina State Highway Commission*, 262 N.C. 169, 173, 136 S.E. 2d 678, 682 (1964); *see also, Dr. T. C. Smith Co., Inc. v. North Carolina State Highway Commission, supra*, 279 N.C. 328, 182 S.E. 2d 383; *State Highway Commission v. Raleigh Farmers Market, Inc.*, 263 N.C. 622, 139 S.E. 2d 904 (1965); *Moses v. Highway Commission*, 261 N.C. 316, 134 S.E. 2d 664, *cert. denied* 379 U.S. 930 (1964); *Abdalla v. State Highway Commission*, 261 N.C. 114, 134 S.E. 2d 81 (1964); *Hedrick v. Graham*, 245 N.C. 249, 96 S.E. 2d 129 (1957).* The right to compensation for the taking of

*Although North Carolina does not have an express provision in our constitution against the taking of private property without just compensation, it is a prohibition firmly imbedded in our law. As stated in *Long v. City of Charlotte*:

access by the state for a controlled-access facility is codified in G.S. 136-89.53:

> The Department of Transportation may designate and establish controlled-access highways as new and additional facilities or may designate and establish an existing street or highway as included within a controlled-access facility. *When an existing street or highway shall be designated as and included within a controlled-access facility the owners of land abutting such existing street or highway shall be entitled to compensation for the taking of or injury to their easements of access.* [Emphasis added.]

But not all interferences with easements of access constitute a compensable taking pursuant to a state agency's power of eminent domain. In an early case involving a controlled-access highway, *Hedrick v. Graham, supra*, 245 N.C. at 255, 96 S.E. 2d at 133-34, this Court noted:

> The most important private right involved in limited-access highway cases is the right of access to and from the highway by an abutting landowner. The basic problem in every case involving destruction or impairment of right of access is to reconcile the conflicting interests—*i.e.* private *versus* public rights. . . . Two methods are available for curtailing the right of access—the right of eminent domain and the police power.

The distinction between the police power and the power of eminent domain was explained in *Barnes v. North Carolina State Highway Commission*, 257 N.C. 507, 514-17, 126 S.E. 2d 732, 737-39 (1962):

> We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of 'the law of the land' within the meaning of Article I, Section 19 of our State Constitution. The requirement that just compensation be paid for land taken for a public use is likewise guaranteed by the Fourteenth Amendment to the Federal Constitution.

306 N.C. 187, 196, 293 S.E. 2d 101, 107-08 (1982) (citations and footnotes omitted).

'The question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain. If the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable.' McQuillin, Municipal Corporations, Third Edition, Volume 11, § 32.27. 'The state must compensate for property rights taken by eminent domain; damages resulting from the exercise of police power are noncompensable.' *State v. Fox* [53 Wash. 2d 216], 332 P. 2d 943, 946 [1958]; *Walker v. State* [48 Wash. 2d 587], 295 P. 2d 328 [1956], and cases cited.

. . . .

As stated in *People v. Ayon* [54 Cal. 2d 217, 352 P. 2d 519, *cert. denied sub nom Yor-Way Markets v. California*, 364 U.S. 827 (1960)]: 'The compensable right of an abutting property owner is to direct access to the adjacent street and to the through traffic which passes along that street. (Citation.) If this basic right is not adversely affected, a public agency may enact and enforce reasonable and proper traffic regulations without the payment of compensation although such regulations may impede the convenience with which ingress and egress may thereafter be accomplished, and may necessitate circuity of travel to reach a given destination.'

Guided by these principles, our Court has determined certain reasonable restrictions on access to be proper exercises of the police power. Thus, in *Smith v. State Highway Commission*, 257 N.C. 410, 126 S.E. 2d 87 (1962), a change of grade in an existing highway which caused a diminution in the value of abutting property was held to be a proper exercise of the state's regulatory power and not a "taking" in the constitutional sense. In *Barnes v. North Carolina State Highway Commission, supra*, 257 N.C. at 518, 126 S.E. 2d at 741, the Court upheld the Highway Commission's separation of the northbound and southbound traffic lanes so the plaintiff only had direct access to the southbound lanes of traffic. It held this was a permissible traffic regulation under the police power and did not entitle the plaintiff to damages. Furthermore the plaintiff could recover damages for curbing constructed between the highway and his business establishments only if the

curbing substantially impaired "free and convenient access" to the improvements on his property. *Id.* at 517, 126 S.E. 2d at 740.

It is apparent from these cases that discussion of "reasonable access" and "circuity of travel" in connection with the highway department's liability is appropriate when access to and from a highway and its abutting property has been affected by some regulatory action under the police power afforded highway authorities. But where all direct access to a highway has been eliminated or substantially interfered with, causing diminution in value of an abutting property, the landowner is entitled to damages therefor. *State Highway Commission v. Raleigh Farmers Market, Inc., supra,* 263 N.C. 622, 139 S.E. 2d 904.

These principles guided this Court in *Dr. T. C. Smith Co., Inc. v. North Carolina State Highway Commission, supra,* 279 N.C. 328, 182 S.E. 2d 383. On facts very similar to those before us now, the Court determined the loss of direct access to be a compensable taking. *Id.* at 334-35, 182 S.E. 2d at 387.

The plaintiff in *Smith* owned a tract of land abutting Highway 191 and Wilmington Streets at a corner formed by two streets in Asheville. The plaintiff had developed the back portion of the property with warehouse, office and parking areas. Plaintiff had full right of access to Highway 191, although its driveway actually entered Wilmington Street and Highway 191 was reached via Wilmington Street. Pursuant to a highway project, Highway 191 was made a controlled-access facility and the plaintiff's access to Highway 191 was totally denied by the erection of a chain link fence. Wilmington Street was also dead-ended and blocked by the fence so the plaintiff no longer had access to Highway 191 via it. The plaintiff was given alternative access to Highway 191 through various public streets of Asheville which were constructed or improved as part of the project. Specifically, a person traveling from the plaintiff's property to Highway 191 would travel from Wilmington Street to Southwick Lane to Seven Oaks Drive to Westwood Place to Haywood Road to Highway 191. The Court expressly noted that no service or frontage road had been constructed to connect any part of the plaintiff's property with Highway 191. *Id.* at 329-30, 182 S.E. 2d at 384-85.

In analyzing the issue before it, the Court first cited numerous authorities for the proposition that a right of access is

an appurtenant easement which may not be taken or damaged by the state without just compensation. *Id.* at 332-34, 182 S.E. 2d at 386-87. It then stated: "If afforded reasonable access to the highway *on which his property abuts*, the owner is not entitled to compensation merely because of circuity of travel to reach a particular destination." *Id.* at 334, 182 S.E. 2d at 387 (emphasis original).

The Court of Appeals in the instant case viewed the quoted language as inconsistent with the holding in *Smith* that direct access has been denied when the only available access to the adjacent highway was "by circuitous travel over residential streets." 57 N.C. App. at 174, 290 S.E. 2d at 774 (quoting *Dr. T. C. Smith Co., Inc. v. North Carolina State Highway Commission, supra*, 279 N.C. at 334, 182 S.E. 2d at 387). It resolved what it viewed as an inconsistency by noting that the "main question in cases such as this one concerns the reasonableness of the substitute access provided." *Id.* at 174, 290 S.E. 2d at 774. For this statement the Court of Appeals relied on *North Carolina State Highway Commission v. Rankin*, 2 N.C. App. 452, 163 S.E. 2d 302 (1968), a service road case which, as we demonstrate below, involved the exercise of police power, not the power of eminent domain. But as we have shown above, it is established in this state by statute and case law, when all direct access has been eliminated, there has been *pro tanto* a taking; the availability and reasonableness of any other access goes to the question of damages and not to the question of liability for the denial of access. We conclude the statement in *Smith* that "reasonable access" precludes compensation had reference to the reasonable exercise of the state's police power, not its power of eminent domain.

We recognize that in both *Smith* and the instant case the highway authorities attempted to have their actions characterized as noncompensable exercises of the police power. The Court in *Smith* did not discuss the highway commission's position that the control of access was implemented under the police power. 279 N.C. at 331, 182 S.E. 2d at 386. It simply held that the elimination of direct access was a taking which entitled the landowner to just compensation under G.S. 136-89.53, without examining the reasonableness of the alternative access. *Id.* at 334, 182 S.E. 2d at 387. Thus, *Smith* stands for the principle that when all direct ac-

cess is taken no inquiry into the reasonableness of alternative access is required to determine liability.

In the instant case the state again asserted in defining the interest taken that "[a]ccess is controlled under the police power of the Department of Transportation . . . and there will be no access to, from, or across the [controlled-access lines] to the main traffic lanes, ramps, or approaches from the property abutting said highway right of way except *by way of the reasonable and adequate access provided by local traffic roads* as shown . . . ." (Emphasis added.) The italicized language was quoted by the trial court in his conclusion of law.

The language employed by the state and adopted by the trial court is not pertinent to the issue of liability for a taking under eminent domain. Apparently, transportation authorities have misinterpreted language used in a series of access cases arising in situations in which frontage roads provided access to the property from the abutting highway. In *Moses v. State Highway Commission, supra*, 261 N.C. 316, 134 S.E. 2d 664, the Court was presented with an access question arising when Highway 301 was converted to Interstate 95, a controlled-access highway. The highway had four lanes designated for through traffic which were separated by a fence from service roads. These service roads abutted the landowner's property and connected it with the "inner lanes" of traffic. *Id.* at 317, 134 S.E. 2d at 665. The Court defined the question before it in this manner:

> If the denial of immediate access to the inner traffic lane is a taking of property compensation must be paid; but if the substitution of a service road for the direct access theretofore enjoyed is an exercise of the police power, any diminution in the value of petitioners' property is *damnum absque injuria*.

Id. at 318, 134 S.E. 2d at 666 (citations omitted). After noting the landowners were not claiming a denial of access, just that it was less convenient, the Court concluded:

> [A]n abutting property owner is not entitled to compensation because of the construction of a highway with different lanes for different kinds and directions of traffic, if he be afforded *direct access by local traffic lanes* to points designated for access to through traffic.

Id. at 320, 134 S.E. 2d at 667-68 (emphasis added).

Thus the Court viewed the provision of a service road as an exercise of the police power and not a taking. It viewed a service road as just another lane of traffic in the highway system, regulated for use by local traffic and affording direct access between the through traffic lanes and the abutting property for members of the public and landowners alike. *Id.* at 321, 134 S.E. 2d at 668.

Subsequent cases have similarly viewed service or frontage roads running parallel to the highway as a part of the highway system that provides direct access for abutting property owners to the through traffic. *See, e.g., North Carolina State Highway Commission v. Rankin, supra,* 2 N.C. App. 452, 163 S.E. 2d 302. In *North Carolina State Highway Commission v. Nuckles,* 271 N.C. 1, 155 S.E. 2d 772 (1967), this Court again determined an abutting landowner was not entitled to compensation when his property was connected to a controlled-access highway via service roads which ran parallel to the main traffic lanes of the highway and were a part of the highway system. The trial court in *Nuckles* left it to the jury to determine if the landowners had been denied reasonable access. He instructed the jury that there is no taking if the landowner is afforded reasonable access to the highway. *Id.* at 19, 155 S.E. 2d at 787. This Court determined these instructions were erroneous because as a matter of law access has not been taken when landowners are "afforded direct access by local traffic lanes to points designated for access to through traffic." *Id.* at 22, 155 S.E. 2d at 789 (quoting *Moses v. State Highway Commission, supra,* 261 N.C. at 320, 134 S.E. 2d at 667-68).

The state attempted in *Smith* and the instant case to have the courts use the analysis developed for review of regulatory actions and employed in service or frontage road cases to determine liability for an elimination of direct access. The state specifically argues in its brief before us that "[s]ince the net result is the same, there is no reason not to apply the principles of the frontage road cases to other service road cases. The improvements to the street system which will connect the property of the Church to the travel lanes of Freeman Mill Road serve the same function that a frontage road would serve."

We believe this argument is without merit. While it is true that drivers on the new highway 220 will still have access to defendants' property via a number of city streets, that access is in no sense direct. Their access to the highway directly from the church property has been eliminated. In addition, no frontage or service road directly visible and accessible from the highway has been provided. Access is only available through a series of *local roads* which are part of the city street system, not "*local traffic lanes*" which are part of the new highway.

Furthermore, we do not believe that the net result is the same as if a frontage or service road had been provided, or that the frontage road principles should apply. As we have previously set forth, the frontage road cases are based on a police-power analysis and the determinative question is whether reasonable, direct access has been provided. But when there is no question that direct access has been taken and no frontage or service road has been provided, as in the case before us, eminent domain analysis is used. Under established precedent and G.S. 136-89.53, the elimination of direct access is a taking as a matter of law. Defendants are entitled to have the jury consider what damages are due for the diminution in value, if any, of defendants' property because of the loss of access. The availability of alternative access and its reasonableness would be appropriate considerations in awarding damages.

Finally, we are unable to distinguish *Smith* from the instant case, as did the Court of Appeals' majority, on the bases, first, that it involved commercial rather than church property, and second, that in the present case the state had "made a greater effort to provide adequate alternative access routes" than it had in *Smith*. 57 N.C. App. at 174, 290 S.E. 2d at 774. We do not believe the *Smith* opinion turned on the use of the property as a commercial enterprise. There is no intimation that the result would have been any different had the property been used for residential or institutional purposes. In short, we find no good reason in *Smith* itself, or in logic, for distinguishing between a church and a commercial establishment in determining liability of the state for taking an abutter's right of direct access. Nor are we able, as did the Court of Appeals, to distinguish the case on the basis that the Department of Transportation "has made a greater effort to provide adequate alternative access routes in this case than in

Smith." *Id.* In both cases no service or frontage road was provided, and in both cases the alternative access was provided by improvements made to various residential streets.

For the reasons stated, the decision of the Court of Appeals is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

Justice COPELAND dissents.

STATE OF NORTH CAROLINA v. CLEVELAND SYLVESTER HARRIS

No. 589A82

(Filed 5 April 1983)

1. **Criminal Law § 66.9— pretrial photographic identification—mug book disassembled before trial—procedure not impermissibly suggestive**

A pretrial photographic identification procedure will not be deemed impermissibly suggestive because the mug book had been disassembled before trial and thus its contents were not available for examination by the trial court when ruling on the pretrial identification procedure where the witness was shown the mug book in 1974 and defendant was not arrested until 1981, and all of the evidence indicates that the mug book was disassembled in good faith for legitimate administrative reasons and not to cover up an impermissibly suggestive procedure.

2. **Criminal Law § 66.9— pretrial photographic identification—photograph of defendant wearing cap and scarf—no impermissible suggestiveness**

A photographic identification procedure was not impermissibly suggestive because the mug book shown to a rape and robbery victim contained a photograph of defendant wearing a cap and scarf similar to the ones the victim had previously described her assailant as wearing at the time of the crimes where the identification occurred the day of the crimes; the victim had been with her assailant for about three hours on the day of the crimes; the victim was within approximately three feet of her assailant during the assaults on a sunny afternoon; at the time of the crimes the victim had a strong motive for and intention to remember the appearance of her assailant; a few hours after the incident she gave a detailed description of her assailant and the clothes he

was wearing; the victim testified that after the incident, she remembered the scarf as distinctive but the most vivid thing was the way her assailant's eyes looked; when the victim looked through the mug book, she picked out defendant's photograph without hesitation as being that of her assailant; and the photograph the victim picked out had been taken eleven days before the crimes in question when defendant was arrested for armed robbery, since it is clear that the victim's identification of the photograph was based on her memory of the encounter she had had with defendant the day before.

3. **Criminal Law § 66.16— pretrial photographic identification—independent origin of in-court identification**

Assuming arguendo that a pretrial photographic identification procedure could be found impermissibly suggestive, there was more than adequate evidence in the record to support the trial court's decision to hold a rape and robbery victim's in-court identification of defendant admissible as being of independent origin based upon the victim's observation of him on the day of the crimes.

4. **Criminal Law § 99.2— court's reading of statement to jury—no expression of opinion**

The trial court did not express an opinion or otherwise err in reading to the jury a written statement a rape and robbery victim had given to an officer the day after she was assaulted and in offering to allow defendant to recall the victim for cross-examination about the statement.

5. **Criminal Law § 102.3— exceptions to jury argument—failure to object at trial**

Defendant's exceptions to remarks by the prosecutor in his jury argument are deemed waived for purposes of appellate review where defendant failed to object to such remarks at trial and the record reveals that the remarks were not so improper as to require the trial court to curb the prosecutor's argument *ex mero motu*.

ON appeal by defendant from judgments entered by *Godwin, J.*, during the 19 April 1982 Criminal Session of Superior Court, WAKE County.

Defendant was charged in separate indictments proper in form with rape, crime against nature, common law robbery, and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was convicted of rape in the second degree, crime against nature, common law robbery, and assault with a deadly weapon with intent to kill inflicting serious injury.

Evidence for the State tended to show that on 30 May 1974 Ms. Katherine Troyer was a Yale College student driving a taxi as a summer job. On that date she was on duty in Raleigh when defendant approached her cab about 2:00 p.m. It was a sunny

afternoon and Ms. Troyer could see defendant clearly. Defendant asked Ms. Troyer if she could take him to Rolesville. She told him she could and gave him an estimate of the fare. Defendant walked away but returned shortly and got in the back seat of the cab, saying he wished to go to Rolesville. Defendant gave Ms. Troyer various instructions about where to turn to take him to his destination. Eventually he directed her to turn left into a road which immediately dead-ended in a field. As Ms. Troyer applied the brakes, defendant leaned forward quickly and grabbed the keys out of the ignition.

During the next several hours, defendant raped, robbed, and sexually assaulted Ms. Troyer. Ms. Troyer testified at trial that during this period she deliberately tried to remember things about her assailant in hopes of identifying him later. After sexually assaulting the victim, defendant strangled her unconscious with a scarf. When Ms. Troyer regained consciousness, she realized she was being held under water. She was in a pond and defendant was standing on her chest. Ms. Troyer struggled with the defendant and he dragged her out of the pond, but then threw her back in. Ms. Troyer managed to swim across the pond and, upon emerging, went through a small patch of woods and a plowed field. She came to a dirt road and walked down it until she encountered a farmer who took her to a nearby store. There, she contacted the sheriff's department.

When officers arrived Ms. Troyer described her assailant as a Negro male, approximately 21 years of age, six feet one inch tall, weighing about one-hundred-sixty pounds, having short black hair, two small patches of chin whiskers, and wearing a small blue cap and a pink and blue scarf. She also stated that he was wearing a dark V-neck shirt with two ties at the waist and light blue high waisted pants, and that he had a pierced left ear with what appeared to be a stick in the hole, a bumpy face, and crooked front teeth.

Defendant presented no evidence.

Rufus L. Edmisten, Attorney General, by Guy A. Hamlin, Assistant Attorney General, for the State.

Joseph B. Cheshire, V, and Barbara A. Smith for defendant.

MARTIN, Justice.

In this appeal defendant argues that he is entitled to a new trial because of errors committed by the trial 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.

Defendant first argues that the trial court erred in denying his motion to suppress testimony concerning the victim's view of a photographic lineup which defendant claims was impermissibly suggestive. He also claims the lineup was so suggestive that the victim's in-court identification of him as the assailant was tainted and also should have been suppressed.

Identification evidence must be excluded as violating a defendant's right 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. Hammond*, 307 N.C. 662, 300 S.E. 2d 361 (1983); *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). In the present case a voir dire was held upon defendant's motion to suppress. The court's findings of fact included the following: On 31 May 1974, the day after she had been assaulted, Ms. Troyer went to the Raleigh Police Department where she prepared a composite sketch of her assailant. Later on the same day Deputy Sheriff May of the Wake County Sheriff's Office brought Ms. Troyer a three-inch thick "mug" book containing about one-hundred-fifty color photos of black males, some of whom were wearing hats. Each photograph depicted either a head and shoulders front view or an upper body front view of one individual. A color photograph of the defendant wearing a cap and scarf similar to those described by Ms. Troyer as having been worn by her assailant, and similar to a cap and scarf found at the scene of her assaults, was about halfway through the mug book. This photograph showed the defendant full face and had been taken shortly after his arrest in Raleigh for armed robbery on 19 May 1974. Ms. Troyer was handed the mug book and asked to look through it to see whether she could identify a photo of her assailant. No remarks were made to Ms. Troyer which in any way suggested that defendant's photo was in the book, or

that Ms. Troyer should select it as best portraying her assailant. Ms. Troyer carefully examined dozens of photos in the book, and selected the defendant's without hesitation as being a photo of her assailant. The trial court concluded that this pretrial identification procedure was carried out in a fair and nonsuggestive manner and was not so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification.

[1] Defendant argues that the trial court's conclusion was clearly erroneous and that the pretrial identification procedure was impermissibly suggestive for two reasons. First, defendant contends that the mug book must be deemed impermissibly suggestive as a matter of law because the mug book had been disassembled before trial and thus its contents were never available for examination by the trial court when ruling on the pretrial identification procedure.[1] Second, defendant argues that the procedure was impermissibly suggestive as a matter of fact because the photograph of him picked out by the victim portrayed the defendant wearing a cap and scarf similar to those described by Ms. Troyer as having been worn by her assailant. In support of his first contention defendant argues that when a photographic array cannot be reassembled for trial the court must presume that police prevented the composition of the array from being preserved to hide the fact that something about the array was impermissibly suggestive. *See United States v. Sonderup*, 639 F. 2d 294 (5th Cir.), *cert. den.*, 452 U.S. 920, 69 L.Ed. 2d 426 (1981); *Branch v. Estelle*, 631 F. 2d 1229 (5th Cir. 1980). We decline to adopt this presumption.

All of the evidence in the present case indicates that the mug book was disassembled in good faith for legitimate administrative reasons, not to cover up an impermissibly suggestive procedure. Defendant has failed to introduce any evidence to show the contrary. Ms. Troyer was shown the mug book in 1974, and defendant was not arrested for the crimes for which he was indicted in this case until 1981. During this period the contents of the mug book may have changed daily as photos were added or deleted with the ebb and flow of suspects having similar features. In addition, a new filing system for photographs of suspects has been im-

1. The photograph of the defendant that Ms. Troyer selected from the mug book was in evidence at trial.

plemented in the Raleigh Police Department, and it is likely that some of the photos from the 1974 mug book have been misplaced or destroyed in the changeover. In the absence of any evidence tending to show that the original book of photos was not available because of a "cover-up," we decline to endorse a presumption that the reason the book was unavailable was due to police misconduct. *See People v. Kaiser*, 113 Cal. App. 3d 754, 170 Cal. Rptr. 62 (1980). *Cf. United States v. Rivera*, 465 F. Supp. 402 (SDNY), *aff'd*, 614 F. 2d 1292 (2d Cir. 1979).

[2] Defendant next argues that the photographic show-up procedure in the present case was impermissibly suggestive as a matter of fact because the mug book shown to Ms. Troyer contained a photograph of defendant wearing a cap and scarf similar to the ones the victim had previously described her assailant as wearing at the time of the crime. A cap and scarf similar to those described by the victim were found at the crime scene the day after the assaults occurred.

Whether a pretrial identification procedure is so suggestive as to give rise to a very substantial likelihood of irreparable misidentification must be determined by a consideration of all the circumstances in each case. *Simmons v. United States*, *supra*, 390 U.S. 377, 19 L.Ed. 2d 1247 (1968). Even though a pretrial identification procedure may be suggestive, it will be *impermissibly* suggestive only if all the circumstances indicate that the procedure resulted in a very substantial likelihood of irreparable misidentification. The factors to be considered in evaluating the likelihood of irreparable misidentification include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 53 L.Ed. 2d 140 (1976); *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401 (1972). *See*, e.g., *State v. Thompson*, 303 N.C. 169, 277 S.E. 2d 431 (1981).

In the present case we find no error in the trial court's conclusion that the pretrial identification procedure was not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. Ms. Troyer had been

with her assailant for about three hours on the day of the crimes. It was a sunny afternoon, Ms. Troyer was wearing her glasses, and she was within approximately three feet of her assailant during the assaults. At the time of the crimes Ms. Troyer had a strong motive for and intention to remember the appearance of her assailant. A few hours after the incident she described him as a Negro male, approximately 21 years of age, six feet one inch tall, weighing about one-hundred-sixty pounds, having short black hair, two small patches of chin whiskers, a bumpy face, crooked front teeth, and a pierced left ear with a stick through the hole. She stated that he was wearing a dark V-neck shirt with two ties at the waist, light blue high waisted pants, a small blue cap and a pink and blue neck scarf. On voir dire she testified that "after the incident, I remembered the scarf as distinctive . . . [but] the most vivid thing was the way his eyes looked. His eyes looked real sinister, very angry." The mug book shown to Ms. Troyer the day after she was assaulted contained some photographs of men wearing hats. When Ms. Troyer looked through it that day she picked out defendant's photo without hesitation as being that of her assailant.

The photograph Ms. Troyer picked out had been taken 19 May 1974, eleven days before her assaults, when defendant was arrested for armed robbery by Sergeant McLamb of the Raleigh Police Department. Sergeant McLamb had taken the photograph. During voir dire in the present case McLamb testified that when he arrested defendant on 19 May 1974 defendant "had a pierced left ear. I noticed it because he had an earring. As I recall when I arrested him he had a little patch of hair on his chin. He was unshaven, but these were more outstanding[:] [h]e was dressed in light blue pants, a black shirt, a blue cap, and [had] a rather unusual scarf around his neck." On 30 May 1974 when McLamb was shown the cap and scarf which were found at the scene of Ms. Troyer's assaults, McLamb recognized them as the cap and scarf defendant had worn on 19 May 1974, the day on which McLamb had arrested and photographed the defendant.

Under all of these circumstances we cannot agree that the fact that the photograph of defendant in the mug book showing him wearing clothes fitting Ms. Troyer's description of her assailant resulted in a very substantial likelihood of irreparable misidentification. It is clear that Ms. Troyer's identification of the

photograph was based on her memory of the encounter she had had with the defendant the day before. As Ms. Troyer stated on voir dire, "I believe that the appearance of the defendant prior to and during the assaults he made upon me left an indelible impression on my mind." She obviously remembered what he looked like the day after she was assaulted. Because the pretrial identification procedure was not unconstitutionally suggestive it was not error for the trial court to admit into evidence testimony concerning the photographic procedure.

[3] In addition, we hold that the trial court did not err in allowing Ms. Troyer to identify defendant in court as her assailant. Even assuming arguendo that the pretrial photographic lineup procedure could be found impermissibly suggestive, we find more than adequate evidence in the record to support the trial court's decision to hold Ms. Troyer's in-court identification admissible as being of independent origin. As stated in *State v. Thompson*, 303 N.C. 169, 172, 277 S.E. 2d 431, 434 (1981):

> 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.

Considering Ms. Troyer's in-court identification of defendant in light of all the circumstances adduced earlier in this opinion, it is clear that this identification of Cleveland Sylvester Harris was based upon Ms. Troyer's observation of him on 30 May 1974, the day of the assaults.

[4] Defendant next contends that the trial court erred by reading to the jury a written statement Ms. Troyer had prepared the day after she was assaulted. Ms. Troyer had given the statement to Officer May on 31 May 1974. On the stand at defendant's trial Officer May identified the statement and was asked to read it aloud to the jury to corroborate earlier testimony of Ms. Troyer. Defendant objected to this, and argued that "it speaks for itself. It's just—if the jury wants to take it back and read it I don't have any objection." The court replied that the witness

would be allowed to read the statement because it is not customary to permit the jury to take anything into the jury room. Defendant then objected again on grounds that the statement was repetitive. The court stated that it was unable to say whether or not the statement was repetitive and asked to see the exhibit. The court then read Ms. Troyer's statement to the jury. Following this, defendant made an oral motion to strike and a written motion for mistrial, both of which were denied. The court did offer defendant an opportunity to recall Ms. Troyer for the purpose of cross-examining her concerning the written statement. Defendant chose not to recall her.

Defendant now assigns as error the court's reading of Ms. Troyer's statement to the jury and its offer to allow defendant to recall Ms. Troyer for cross-examination about the statement. Defendant argues that by reading the victim's statement the court in effect became a witness for the prosecution, thus casting off its judicial cloak of impartiality. He claims that the court's offer to allow cross-examination was error because defendant's subsequent failure to recall Ms. Troyer probably caused the jury to believe that cross-examination would be useless and that therefore the jury gave Ms. Troyer's statement added weight. Defendant claims that these errors were so egregious that the court ought to have granted defendant's motion for a mistrial.

It is fundamental to our system of justice that each and every person charged with a crime be afforded the opportunity to be tried "before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." *State v. Carter*, 233 N.C. 581, 583, 65 S.E. 2d 9, 10 (1951). As the standard-bearer of impartiality the trial judge must not express any opinion as to the weight to be given to or credibility of any competent evidence presented before the jury. E.g., N.C. Gen. Stat. § 15A-1222 (1978); *State v. Brady*, 299 N.C. 547, 264 S.E. 2d 66 (1980); *State v. Guffey*, 39 N.C. App. 359, 250 S.E. 2d 96 (1979). However, it is a common practice in the courts of this State for a trial judge to read exhibits to the jury. The court's position as neutral governor of trial proceedings prevents this from being anything other than an impartial exposition of evidence, by itself not favorable to any party involved in the proceedings. In the instant case defendant does not contend that the manner in which the court read the victim's statement conveyed an opinion as to the truth or falsity of its contents.

Rather, defendant argues that the mere fact that the court read the victim's statement to the jury was an expression of opinion in favor of the State's case. On the record before us we cannot agree.

The manner of the presentation of evidence is largely in the discretion of the trial judge. His control of the case will not be disturbed absent a manifest abuse of discretion. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). There is nothing in the record before us to support a finding that the trial court abused its discretion by reading Ms. Troyer's statement aloud to the jury. The record is silent as to the manner in which Judge Godwin read the exhibit. The record does not support a finding that defendant was prejudiced by the manner in which the statement was read. *State v. Clanton*, 278 N.C. 502, 180 S.E. 2d 5 (1971). We reject defendant's argument that the judge's reading of the exhibit is in itself an expression of opinion.

The statement in question was admissible to corroborate the previous testimony of both the victim and an investigating officer. *See, State v. Sauls*, 291 N.C. 253, 230 S.E. 2d 390 (1976), *cert. den.*, 431 U.S. 916, 53 L.Ed. 2d 226 (1977). Both Ms. Troyer and Officer May had described before the jury the crimes which were perpetrated upon Ms. Troyer on the afternoon of 30 May 1974. Ms. Troyer's statement of 31 May 1974 contained an account of the assaults wholly consistent with her testimony at trial. Defendant did not object to the jury reading her statement, only to the statement being read aloud. In this case it may have helped rather than hurt defendant to have the statement read by an impartial third person instead of an interested witness for the State who had already testified about the crimes from his firsthand knowledge of the investigation. Moreover, defendant was given a full opportunity to recall and cross-examine the author of the statement. That defendant chose not to do so will not convert the entirely proper offer from the trial judge for defendant to cross-examine Ms. Troyer into error. Defendant's trial strategy is irrelevant to the propriety of the trial court's action in this instance.

[5] Defendant next argues that the court erred in failing to curb portions of the State's closing argument. Defendant brings forth one exception to a ruling in which the trial court overruled his ob-

jection to a remark made by the State. Defendant also excepts to remarks to which he did not object at trial. We will address the latter first. Ordinarily, "[w]hen counsel makes an improper remark in arguing to the jury, an exception must be taken before the verdict or the impropriety is waived." *State v. Davis*, 305 N.C. 400, 421, 290 S.E. 2d 574, 587 (1982). Only when the State's comments "stray so far from the bounds of propriety as to impede the defendant's right to a fair trial [does] the trial court [have] the duty to act *ex mero motu*." *Id.*, at 422, 290 S.E. 2d at 587. *See also, State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982). The record in this case reveals that the State's remarks were not so improper as to require the trial court to curb the prosecution's argument *ex mero motu*. Therefore, defendant's exceptions to those remarks to which he failed to object at trial are deemed waived for purposes of appellate review.

Returning to the State's remark to which the defendant did object at trial, we observe that defendant offers no argument in his brief to support his claim that the court's ruling was erroneous. Instead, defendant's claim rests on his general contention that the remark to which he objected and the other remarks of the State to which he did not object, amounted to a "pattern of improper or hardly proper comment." Upon our examination of the record we do not find such a pattern. The trial court's ruling was not error.

We find that the defendant received a fair trial, free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. DENNIS JESSIE CHATMAN

No. 429A82

(Filed 5 April 1983)

1. Constitutional Law § 31— denial of funds for psychiatric examination

In a prosecution for first degree rape, first degree sexual offense and first degree burglary, defendant was not denied due process and equal protection by the trial court's denial of his pre-trial request pursuant to G.S. 7A-454 for funds for a psychiatric examination to determine his mental condition at the

time of the offenses, even if defendant was also accused of sexual offenses involving five other victims, where defendant had previously undergone an examination for purposes of determining his capacity to proceed to trial and the screening evaluation revealed that defendant's capacity to proceed was not an issue and "further evaluation for capacity to proceed to trial [did] not appear to be needed," and there was nothing in the record which would support a reasonable likelihood that defendant could establish a meritorious defense of insanity at his trial.

2. **Criminal Law §§ 66.6, 66.15— pretrial photographic and lineup identifications—no unnecessary suggestiveness—independent origin of in-court identification**

In a prosecution for rape, sexual offense and burglary, pretrial photographic and lineup identification procedures were not impermissibly suggestive because the victim was told prior to being shown the photographs that the police had a suspect, the victim had only a short time to view her assailant, the victim was unable positively to identify defendant from the photographs but narrowed her choice to two, one of which was defendant, the individual in the second photograph was not present in the lineup, and no other individual in the lineup had the same hairline as the defendant. Moreover, the evidence and findings supported the court's conclusion that the victim's in-court identification of defendant was of independent origin based solely on what she saw at the time of the crimes, and evidence concerning the pretrial and in-court identifications was properly admitted by the trial court.

3. **Criminal Law § 75.11— in-custody statements—waiver of rights—voluntariness**

The trial court's conclusion that defendant's incriminating in-custody statements were admissible in evidence was supported by the court's findings that, prior to questioning, defendant was advised of his rights and signed his name to the waiver of rights form; defendant was fully aware of his rights and was familiar with police procedures; defendant was not pressured, coerced, or in any way threatened or influenced; and defendant at no time indicated that he wished to contact an attorney.

4. **Criminal Law § 173— invited error**

In a prosecution for rape, sexual offense and burglary, testimony elicited by defense counsel on cross-examination of an officer who testified as a State's witness that the witness had told defendant that the police had identified his fingerprints in five rape cases at different locations was invited error about which defendant could not complain on appeal.

5. **Criminal Law § 162.5— unresponsive answer—necessity for motion to strike**

Failure to move to strike the unresponsive part of a witness's answer to a question by opposing counsel, even though the answer is objected to, results in a waiver of the objection. Therefore, defendant waived objection to an unresponsive answer by a State's witness on direct examination which revealed that defendant had committed other distinct, independent offenses of a similar nature to those for which he was charged where defendant objected to the answer but failed to move to strike the unresponsive portion thereof.

6. **Criminal Law § 138— burglary case—aggravating factors—use of deadly weapon—offense planned**

The evidence supported the trial court's findings as aggravating factors in a first degree burglary case that defendant was armed with a deadly weapon, a knife, at the time he committed the burglary, and that the offense was planned.

7. **Criminal Law § 138— first degree burglary—aggravating circumstance—defendant as dangerous sex offender**

The trial court properly found as an aggravating circumstance in a first degree burglary case that defendant is a dangerous sex offender since this factor is reasonably related to the overall purposes of sentencing, one of which is to protect the public by restraining offenders, and since defendant's propensity to commit sex offenses was connected to a pattern of breaking into the homes of his victims during the nighttime.

8. **Criminal Law § 138— first degree burglary—aggravating factors—sentence necessary to deter others—lesser sentence would depreciate seriousness of crime**

The trial court erred in finding as aggravating factors in a first degree burglary case that the sentence imposed was necessary to deter others and that a lesser sentence would unduly depreciate the seriousness of the crime since neither factor relates to the character or conduct of the offender.

BEFORE *Albright, J.*, at the 29 March 1982 Criminal Session of Superior Court, FORSYTH County, defendant was convicted of first degree rape, first degree sexual offense, and first degree burglary. He appeals pursuant to G.S. § 7A-27(a) from the imposition of two life sentences. On 11 November 1982 we allowed defendant's motion to bypass the Court of Appeals on the first degree burglary conviction for which he received a prison sentence of fifty years.

Defendant assigns as error the trial court's denial of his pretrial request for funds to obtain an examination by a private psychiatrist; the admission of testimony concerning (1) pre-trial photographic and line-up identification, (2) statements made during custodial interrogation, and (3) defendant's involvement in other similar offenses. Upon these issues we find no error. Because the trial judge erroneously considered two factors in aggravation in sentencing defendant to the maximum term of 50 years on the burglary conviction, that case must be remanded for re-sentencing.

At trial, the prosecuting witness, Constance Laverne Ross, testified that at approximately five-thirty on the morning of 7 Oc-

tober 1981, she was awakened by an intruder who had apparently entered her home through a window by removing the air conditioning unit. He approached her from the foot of her bed, placed a knife at her throat, and stated "I'm not going to hurt you, I'm just going to rape you." He tied a piece of cloth over her eyes, committed an act of oral sex upon her and then forcibly raped her. Before he left, he informed Ms. Ross that her air conditioner was sitting outdoors on the ground and advised her that she should get up and close the window and leave the air conditioning unit outside until morning. Ms. Ross described her assailant to the police as being about 28 to 30 years old, 5'8" tall, and weighing 170 lbs. He wore a dark buttoned shirt, an old coat, and trousers. She particularly noticed his hairline.

Several months after this incident, law enforcement authorities asked Ms. Ross to view a photographic display, having informed her that they had a suspect. From seven photographs, she selected two, one of which was the defendant. On defendant's motion, a line-up was conducted and Ms. Ross made a positive identification of the defendant.

Officers Branscomb and Charles testified for the State to the effect that on 7 December 1981 at approximately 12:30 a.m., the defendant was arrested at his mother's home. He was taken to the police station. He requested and was permitted to telephone his mother to whom he spoke for fifteen to twenty minutes. At 1:50 a.m. he signed a waiver of rights. According to the officers, most of what defendant said thereafter was vague and repetitive. No written statement was taken and it was not possible to record the conversation. Defendant stated that he was the man they were looking for. He kept repeating "I'd go out and I'd do it." "I went in, I did it, and I left." When questioned as to what he meant, he responded that he would "just go out at nighttime in the early morning hours, break into apartments or houses and rape women." He answered in the affirmative when asked if he remembered breaking into Ms. Ross's home and removing the air conditioning unit. He stated that he needed help. At the time of the interrogation the officers had as many as seven other warrants for the defendant. He was aware of these warrants during questioning.

During voir dire, defendant asserted that when he said he needed help, he meant he needed the help of an attorney; that the

officers promised not to serve the other warrants if he cooperated; that he was questioned for one and one-half hours before being read his rights; and that he felt he had to "go along" with the officers and told his mother so when he telephoned her.

William Weis, a forensic serologist, testified that based on an analysis of blood and saliva specimens taken from the defendant, the donor of these samples could have been the donor of the semen found to be present in specimens taken from the rape kit administered to Ms. Ross.

Fingerprints lifted from Ms. Ross's air conditioning unit matched those of the defendant.

The defendant did not offer any direct evidence on his own behalf.

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

Nancy S. Mundorf, Attorney for defendant-appellant.

MEYER, Justice.

[1] Defendant first contends that he was denied due process and equal protection due to the trial court's denial of his pre-trial request for funds for a psychiatric examination to determine his mental condition at the time of the offense. His motion was made pursuant to G.S. § 7A-454 and stated that:

> 1. The defendant has been indicted on charges of Rape, Burglary, and First Degree Sexual Offenses, each of which are punishable by maximum Life Sentence.
>
> 2. That there are six separate victims of the alleged offenses at six separate times, that the proof which is expected to be offered by the State of each offense is separate and distinct.
>
> 3. That it is necessary for the fair determination of the Defendant's guilt or innocence of each offense to sever the offenses and try each one separately on its own merits.
>
> 4. That due to the nature of the charges and the Defendant's mental state as observed by his Attorney, his Attorney respectfully request[s] the court for the approval of a fee for

> the Defendant to be examined by a Psychiatrist to determine the question of insanity at the time of the alleged offenses. That said Defendant does not have the resources available to pay a private Psychiatrist to undergo evaluation, and counsel feels that such is necessary to protect any possible defenses at trial.

The trial court, in denying the motion, concluded that "the Defendant [had] not made a showing of necessity for appointment with a Psychiatrist to determine the question of sanity at the time; in that Defendant has had no previous indication of psychiatric disorders."

It appears from the record that defendant had previously undergone an examination for purposes of determining his capacity to proceed to trial. *See* G.S. § 15A-1002. The screening evaluation revealed that defendant's capacity to proceed was not an issue and "further evaluation for capacity to proceed to trial [did] not appear to be needed." Defendant argues that further psychiatric evaluation was necessary to determine his sanity at the time of the offense.

On this issue we find the case of *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980), to be dispositive. In *Easterling* a psychiatrist's report indicated that the defendant was capable of proceeding to trial and that he was legally sane at the time of the alleged crimes. While it is true in the case *sub judice* that there was no determination made of Chatman's sanity at the time of the offense, we do not view this distinction as significant. In *Easterling* this Court relied on the following:

> We are not persuaded by defendant's contention that further psychiatric inquiry could have revealed expert information 'as to the possibility of insanity as a defense.' There was simply no evidence presented in the motion or at the hearing which tended to support even a suspicion, much less a reasonable likelihood, that defendant could establish a meritorious defense of insanity. Under these circumstances, the court's refusal to require the State to pay for an additional psychiatric evaluation was not error. *See, e.g., State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975), *death sentence vacated*, 428 U.S. 904 (1976).

Id. at 600, 268 S.E. 2d at 804. Likewise, we see nothing in the record before us which would support a reasonable likelihood that defendant could establish a meritorious defense of insanity at his trial. Even if we accept defendant's argument that the request for funds for additional psychiatric evaluation was made because he had been indicted on charges of rape, burglary, and first degree sex offense, and there were six separate incidents involved, we find nothing to differentiate this particular defendant from any other defendant charged with multiple offenses. We can only repeat 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," and 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." *State v. Gray*, 292 N.C. 270, 277-78, 233 S.E. 2d 905, 911 (1977). We find no error.

[2] Defendant next contends that his constitutional right to due process was violated by the trial court's permitting the introduction of evidence obtained from suggestive photographic and line-up procedures. As the basis for this assignment of error, defendant first points to the fact that Ms. Ross was told prior to being shown the photographs that the police had a suspect. He concedes that this alone would not make the procedure unduly suggestive. *See State v. Dunlap*, 298 N.C. 725, 259 S.E. 2d 893 (1979). Added to this was the fact that Ms. Ross had only a few moments to view the intruder, and she was not able to positively identify the defendant from the photographs, narrowing her choice to two, one of which was the defendant. The individual in the second photograph was not present in the line-up and no other individual in the line-up had the same hairline as the defendant.

The law is well-settled 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. *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)." *State v. Hammond*, 307 N.C. 662, 668-69, 300 S.E. 2d 361, 364 (1983).

On the record before us we find sufficient evidence to support the trial court's findings that "[t]he witness based her in-court identification of the defendant upon her having seen him in her bedroom on October 7, 1981; and that identification was not influenced by any photographic identification procedure or by any pretrial identification procedure." Furthermore, defendant did not except to any finding of fact and therefore it is presumed that they are supported by the evidence and thus conclusive on appeal. *State v. Dobbins*, 306 N.C. 342, 293 S.E. 2d 162 (1982). The findings of fact fully support the trial court's conclusion that Ms. Ross's in-court identification of the defendant was of independent origin based solely on what she saw at the time of the crime and "[t]he totality of the circumstances reveal no pretrial identification procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend the fundamental standards of decency, fairness, and justice . . . ." We find no error in the introduction of the identification evidence.

[3] Defendant assigns as error the admission of statements obtained as the result of custodial interrogation. A voir dire hearing was conducted prior to the admission of these statements. The trial judge made detailed findings which included, *inter alia*, the following: prior to questioning, defendant was advised of his rights and signed his name to the rights waiver form; defendant was fully aware of his rights and was familiar with police procedures; defendant was not pressured, coerced, or in any way threatened or influenced; and defendant at no time indicated that he wished to contact an attorney. The findings are fully supported by the evidence, were not excepted to, and support the trial court's conclusion that defendant's statements were "purposely, freely, knowingly, expressly, intelligently, and voluntarily" given. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800; *State v. Herndon*, 292 N.C. 424, 233 S.E. 2d 557 (1977).

Defendant contends that he was denied a fair trial by the admission of testimony suggesting that he had committed other similar offenses. He points to four instances in which reference was made to the fact that he had committed other sex offenses. The first two references occurred during voir dire, out of the

presence of the jury. Therefore, defendant can show no prejudice within the meaning of G.S. § 15A-1443(a).

[4] During defendant's cross-examination of Officer Branscomb in the presence of the jury, the following exchange took place:

> Q. What did you tell him?
>
> A. I told him that we had identified his fingerprints in five rape cases at different locations.
>
> MS. MUNDORF: I object and move to strike to five, Your Honor.
>
> MR. TISDALE: Your Honor, she asked the question . . . .
>
> The objection was overruled.

As we stated in *State v. Waddell*, 289 N.C. 19, 25, 220 S.E. 2d 293, 298 (1975):

> Defendant cannot invalidate a trial by introducing evidence or by eliciting evidence on cross-examination which he might have rightfully excluded if the same evidence had been offered by the State. *State v. Gaskill*, 256 N.C. 652, 124 S.E. 2d 873; *State v. Williams*, 255 N.C. 82, 120 S.E. 2d 442; *State v. Case*, 253 N.C. 130, 116 S.E. 2d 429. Neither is invited error ground for a new trial. *State v. Payne*, 280 N.C. 170, 185 S.E. 2d 101; *Overton v. Overton*, 260 N.C. 139, 132 S.E. 2d 349.

We find that the error, if any, was invited and one about which the defendant may not complain on appeal.

[5] The final incident took place during Officer Branscomb's testimony concerning his interrogation of the defendant. The witness was asked whether defendant was reluctant to answer questions. The officer responded "Yes. At one point I asked him how many rapes he thought he had committed, and he said he just—" The court sustained defense counsel's objection. There was no motion to strike.

We agree that in this case evidence that defendant committed other distinct, independent offenses of a similar nature to those for which he was charged was properly excludable. *See State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972). While the

question put to Officer Branscomb was proper, his answer including the objectionable material was unresponsive. Under these circumstances the following law applies:

> 'In case of a specific question, objection should be made as soon as the question is asked and before the witness has time to answer. Sometimes, however, inadmissibility is not indicated by the question, but becomes apparent by some feature of the answer. In such cases the objection should be made as soon as the inadmissibility becomes known, and should be in the form of a motion to strike out the answer or the objectionable part of it.' Stansbury, Evidence, § 27, p. 51, citing *Gibson v. Whitton*, 239 N.C. 11, 79 S.E. 2d 196. McIntosh, 2d Ed., N. C. Practice and Procedure, § 1533, states the rule: 'Where a party has failed to object to evidence at the proper time, he may still ask the court to strike it out.'

State v. Battle, 267 N.C. 513, 520, 148 S.E. 2d 599, 604 (1966).

> [A]n objection on the ground that the witness's answer is unresponsive to the question is properly available only to the party propounding the question. 'The mere fact that the answer is unresponsive is not an objection available to the opponent.' C. McCormick, *Handbook of the Law of Evidence* § 52 at 113, n. 26 (1954), citing cases. The opponent's appropriate remedy, when it becomes apparent that some feature of the answer is objectionable, is by way of a motion to strike the answer or its objectionable parts. 1 Stansbury's N.C. Evidence, *Witnesses* § 27 (Brandis rev. 1973).

State v. Beam, 45 N.C. App. 82, 84, 262 S.E. 2d 350, 351-52 (1980). Failure to move to strike the unresponsive part of an answer, *even though the answer is objected to*, results in a waiver of the objection. *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599; *State v. Beam*, 45 N.C. App. 82, 262 S.E. 2d 350; *accord State v. Norman*, 19 N.C. App. 299, 198 S.E. 2d 480, *cert. denied*, 284 N.C. 257, 200 S.E. 2d 657 (1973).

Defendant's failure to move to strike the unresponsive portion of the witness's answer therefore waived the objection. Furthermore, given the overwhelming evidence against this defendant, including the in-court identification, defendant's own admissions, fingerprint evidence, and the results of the blood-type

analysis, any error in the admission of this one statement was harmless. G.S. § 15A-1443(a); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981).

Finally defendant contends that the trial court abused its discretion in imposing the maximum sentence of fifty years for first degree burglary, the presumptive sentence for which is fifteen years.

Pursuant to G.S. § 15A-1340.4(a)(1), Judge Albright found the following factors in aggravation:

9. The defendant was armed with or used a deadly weapon at the time of the crime.

15. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement.

16. Additional written findings of factors in aggravation.

a. The defendant has served a prior prison sentence.

b. The offense was planned.

c. The defendant is a dangerous sex offender whose history makes it necessary to segregate him for an extended term from the public for its safety and protection.

d. The sentence pronounced by the court is necessary to deter others from committing the same crime.

e. A lesser sentence than that pronounced by the court will unduly depreciate the seriousness of the defendant's crime.

In mitigation, Judge Albright found only one factor: Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrong-doing in connection with the offense to a law enforcement officer.

[6] Defendant first contends that because the knife was used in the rape, but was not actually used in the burglary, finding No. 9 was erroneous. We are not persuaded. Defendant was armed with a deadly weapon, the knife, *at the time he committed the*

burglary offense. Judge Albright properly found as a factor in aggravation that defendant was armed at the time of the crime.

Defendant also contends that the evidence was insufficient to support finding No. 16(b) that the offense was planned. There was evidence that the defendant would drive around in his car at night and break into homes for the purpose of raping women. We reject defendant's position that in order to find that the offense was planned it was necessary to show that defendant "methodically surveyed . . . houses or carefully chose a particular night before entering." The argument is specious. We find plenary evidence to support finding No. 16(b).

[7] With respect to the finding that "defendant is a dangerous sex offender," we find that this factor is reasonably related to the overall purposes of sentencing, one of which is to protect the public by restraining offenders. *See* G.S. § 15A-1340.4(a) and -1340.3. A defendant's dangerousness to others may be legitimately considered as an aggravating factor. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). Furthermore, this defendant's propensity to commit sex offenses was inextricably connected to a pattern of breaking into the homes of his victims during the nighttime, thereby injecting into each sex offense an added element of dangerousness. On this aggravating factor we find no error.

[8] Judge Albright erred in finding as factors in aggravation that the sentence was necessary to deter others, and that a lesser sentence would unduly depreciate the seriousness of the crime. These two factors fall within the exclusive realm of the legislature and were presumably considered in determining the presumptive sentence for this offense. While both factors serve as legitimate purposes for imposing an active sentence, neither may form the basis for increasing or decreasing a presumptive term because neither relates to *the character or conduct of the offender. See State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

Because "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," we held in *Ahearn* 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." *Id.* at 602, 300 S.E. 2d at 701. Therefore defendant is entitled to a new sentencing hearing on his burglary conviction for error found in two aggravating factors.

Case number 81CRS48691—Count I (first degree burglary) is remanded to the Superior Court, Forsyth County, for resentencing.

Case number 81CRS48691—Count II (first degree rape)—no error.

Case number 81CRS49222—(first degree sex offense)—no error.

STATE OF NORTH CAROLINA v. RICKY WALLACE BROWN

No. 527PA82

(Filed 5 April 1983)

1. Arson § 4.2; Criminal Law § 106.4— burning of personal property—insufficient evidence independent of confession

The State's evidence was insufficient for the jury in a prosecution for burning personal property, a mobile home, where the State failed to establish, independent of defendant's confession, that the fire had a criminal origin.

2. Criminal Law § 124.5— verdict not inconsistent

It was not inconsistent for the jury to determine that the defendant broke into and entered a mobile home with the intent to commit larceny and then to find defendant not guilty of larceny.

ON defendant's petition for discretionary review of the decision of the Court of Appeals, 58 N.C. App. 606, 294 S.E. 2d 380 (1982) (opinion by *Judge Webb* with *Judges Robert Martin* and *Wells* concurring), finding no error in the judgment of *Britt, J.*, entered 26 March 1981 in Superior Court, WAKE County.

The State presented evidence at trial that showed that a mobile home located at Sid Jones Trailer Park in Wake County and owned by Cindy Blackman was destroyed by fire in the early

morning hours of 2 May 1980. At the time of the fire all appliances were turned off with the exception of the hot water heater and the refrigerator. In addition, there was no fuel in the oil drum connected to the heating unit in the mobile home. At the time of the fire Cindy Blackman had been out of town for two weeks. Ms. Blackman's mother, Joyce O'Neal, lived next door and she testified that the mobile home was locked at the time of the fire and that she had observed no unusual conditions in or around the mobile home within eight hours of the fire.

On the afternoon of 2 May 1980 the Wake County Sheriff's department found several personal possessions belonging to Cindy Blackman inside a suitcase in defendant's bedroom. Ms. Blackman identified the items, stated that she had last seen them in her mobile home and that defendant had never received permission to enter her mobile home or take the articles found in his bedroom. The defendant was picked up on the afternoon of 2 May 1980 and taken to the Wake County Sheriff's Office where he signed a confession stating, "I, Ricky Brown, burnt down a trailer last night at Sid Jones Trailer Park belonging to Cindy." At the time of this confession the State's evidence indicated the defendant had been drinking and was unable to keep any food on his stomach.

The defendant presented no evidence at trial.

On 26 March 1981 in Superior Court, Wake County, a jury found defendant guilty of felonious breaking or entering and guilty of burning personal property. However, defendant was found not guilty of felonious larceny. Judge Samuel E. Britt imposed upon defendant a three to five years sentence for the felonious breaking or entering conviction and a seven to ten years sentence for the burning of personal property conviction. The sentences were ordered to run consecutively.

From the judgment of the Superior Court, defendant appealed to the Court of Appeals. That court, in an opinion filed 3 August 1982, found no error in defendant's trial. On 7 December 1982 we allowed defendant's petition for discretionary review.

Rufus L. Edmisten, Attorney General, by George W. Lennon, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by James H. Gold, Assistant Appellate Defender, for the defendant.

COPELAND, Justice.

[1] In defendant's first assignment of error he contends that the trial court erred in denying his motion to dismiss the charge of burning personal property. The basis of this contention is that the State failed to present evidence, independent of defendant's confession, which establishes that the crime of burning personal property was committed. Upon review of the evidence we agree with defendant's contention.

The rule in this State is, "[T]he State must establish two propositions in the prosecution of a criminal charge: (1) that a crime has been committed; and (2) that it was committed by the person charged." *State v. Chapman*, 293 N.C. 585, 587, 238 S.E. 2d 784, 786 (1977); *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960). The first element, that a crime be shown to have been committed is called the *corpus delicti*. *Corpus delicti* is defined as, "the substance or foundation of a crime; the substantial fact that a crime has been committed." Black's Law Dictionary 310 (5th ed. 1979).

In North Carolina, "a conviction cannot be sustained upon a naked extra-judicial confession. There must be independent proof, either direct or circumstantial, of the *corpus delicti* in order for the conviction to be sustained." *State v. Green*, 295 N.C. 244, 248, 244 S.E. 2d 369, 371 (1978); *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975). Even though the defendant's confession identifies him as the person who committed the burning, the State must first establish the *corpus delicti*, that a crime was in fact committed.

The *corpus delicti* in this case is the criminal burning of personal property, to-wit Cindy Blackman's mobile home. There is no dispute either that Ms. Blackman's mobile home was destroyed by fire or that the origin of the fire was never discovered. The State presented evidence designed to show that the fire was most probably not the result of some condition present inside the mobile home. However, the State's evidence was insufficient to show the fire had a criminal origin. In fact it is just as reasonable to assume from the State's evidence that the fire was the result of a negligent act or an accident. "[I]f nothing more appears, the presumption is that the fire was the result of accident or some providential cause." *Phelps v. Winston-Salem*, 272 N.C. 24, 31, 157

S.E. 2d 719, 724 (1967). The most the State has shown in this case is that the fire could have possibly been the result of a criminal act. "Beyond that we must sail in a sea of conjecture and surmise. This we are not permitted to do." *State v. Minor*, 290 N.C. 68, 75, 224 S.E. 2d 180, 185 (1976). As a result we hold that the conviction for burning personal property must be vacated.

[2] In his second assignment of error defendant contends that the felonious breaking or entering conviction must be vacated because that conviction is inconsistent with his acquittal on the felonious larceny charge. Although the not guilty verdict on the felonious larceny charge is not inconsistent with the guilty verdict on felonious breaking or entering as defendant contends, "a jury is not required to be consistent and mere inconsistency will not invalidate the verdict." *State v. Davis*, 214 N.C. 787, 794, 1 S.E. 2d 104, 108 (1939).

The verdicts in this case are not inconsistent because they involve two separate and distinct crimes. The first verdict concerns felonious breaking or entering as prohibited by G.S. 14-54(a) whereas the second verdict concerns larceny as prohibited by G.S. 14-72. "If two statutes are violated, even by a single act, and each offense requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the one statute." *State v. Malpass*, 189 N.C. 349, 355, 127 S.E. 248, 252 (1925); *State v. Stevens*, 114 N.C. 873, 19 S.E. 861 (1894). The crime of larceny has an element not present in the crime of felonious breaking or entering, to wit a wrongful taking and carrying away of the personal property of another. *State v. Bowers*, 273 N.C. 652, 161 S.E. 2d 11 (1968). As a result it is not inconsistent for the jury to determine that the defendant entered the mobile home with the intent to commit larceny yet find that no larceny was in fact committed.

In the case *sub judice* there was sufficient evidence for the jury to convict the defendant on both the felonious larceny charge and the felonious breaking or entering charge. Although the acquittal on the larceny charge was charitable, it was not legally inconsistent. Therefore, this assignment of error is overruled.

Affirmed in part and reversed in part.

STATE OF NORTH CAROLINA v. CLIFTON RUDOLPH TAYLOR

No. 407A82

(Filed 5 April 1983)

1. **Criminal Law § 146.5— appeal from sentence entered on pleas of guilty or no contest**

Defendant had no right of appeal where he entered pleas of guilty and no contest pursuant to a plea bargain. G.S. 7A-27(a).

2. **Criminal Law § 23.4— guilty plea under plea bargain—failure to call defendant to testify—no withdrawal of plea**

Defendant was not entitled to withdraw pleas of guilty and no contest entered pursuant to a plea bargain with the State in which defendant agreed to testify truthfully against a third party because the third party also entered into a plea arrangement with the State and the State did not call defendant to testify against the third party.

APPEAL by defendant from *Battle, Judge,* at the 16 February 1982 Criminal Session of WAKE County Superior Court.

On 6 January 1981, the Wake County grand jury returned indictments charging defendant with murder, armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury.

On 17 September 1981, before Judge Edwin S. Preston, Jr., defendant entered a plea of guilty to the armed robbery charge and a plea of no contest to second-degree murder. The charge of assault with intent to kill inflicting serious injury was dismissed by the prosecutor.

Defendant entered these pleas pursuant to a plea bargain with the State. In exchange for defendant's pleas of guilty to armed robbery and no contest to second-degree murder, as well as his agreement to truthfully testify against Cornelius Douglas concerning Douglas's involvement in a murder and two cases of armed robbery, defendant was to receive two concurrent life sentences on the charges to which he entered pleas and a consecutive sentence of 10 to 25 years on another robbery charge of which defendant had been earlier convicted. Defendant was not, however, called to testify against Douglas because Douglas also entered into a plea arrangement with the State.

On 16 February 1982, defendant moved to withdraw his pleas on the ground that the State had failed to honor its part of the plea bargain by failing to call defendant to testify against Cornelius Douglas. Defendant stated that he was told by his attorney that if he did not testify, Douglas would go free and that he entered the plea only because of the opportunity to testify against Douglas.

A hearing on this motion was held before Judge F. Gordon Battle on 4 March 1982. The trial court made findings of fact and concluded that the pleas entered by defendant were made freely, voluntarily and understandingly. Judge Battle denied defendant's motion to withdraw the pleas for the reason that no legal basis of any kind had been shown to support the motion.

Defendant gave notice of appeal to this Court.

Rufus L. Edmisten, Attorney General, by W. Dale Talbert, Assistant Attorney General, for the State.

Marc D. Towler, Assistant Appellate Defender, for defendant-appellant.

BRANCH, Chief Justice.

[1] We note initially that this matter is not properly before us. G.S. 7A-27(a) provides:

> § 7A-27. Appeals of right from the courts of the trial divisions.
>
> (a) From a judgment of a superior court which includes a sentence of death or imprisonment for life, *unless the judgment was based on a plea of guilty or nolo contendere*, appeal lies of right directly to the Supreme Court.

(Emphasis added.) Defendant has no appeal of right since he entered pleas of guilty and no contest pursuant to a plea bargain. His purported appeal is therefore subject to dismissal. However, in order to put this matter to rest, we elect to treat his attempt to appeal as a petition for writ of certiorari and grant that petition.

[2] Defendant's position that he should be entitled to withdraw his pleas of guilty and no contest because the State did not call

upon him to testify against Cornelius Douglas is utterly without merit. The provision in the plea agreement regarding defendant's testimony was not a promise by the State to permit him to testify against Douglas, but rather a promise by defendant to do so if called upon. The fact that Douglas pleaded guilty simply relieved defendant of his obligation under the plea bargain to testify. There is no impropriety whatsoever in the State's failure to afford defendant the opportunity to testify against Douglas. Defendant got exactly what he bargained for when he was sentenced according to the terms provided for in the plea agreement.

This assignment is overruled and the trial court's refusal to permit defendant to withdraw his pleas of guilty and no contest is

Affirmed.

BILLY RAY BOOTH v. UTICA MUTUAL INSURANCE COMPANY

No. 659PA82

(Filed 5 April 1983)

Appeal and Error § 14— failure to give timely notice of appeal—dismissal of appeal

Plaintiff's purported appeal is dismissed where the record shows that plaintiff neither gave oral notice of appeal in open court nor filed and served written notice of appeal within ten days of the entry of the judgment from which he attempts to appeal. G.S. 1-279; App. Rule 3.

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

ON certiorari to review the order of the Court of Appeals filed 18 November 1982 dismissing plaintiff appellant's appeal from a judgment of *Albright, J.*, entered at the 21 June 1982 Civil Session of Superior Court, FORSYTH County, granting summary judgment for the defendant.

This civil action was instituted on 16 October 1981 by the plaintiff against Utica Mutual Insurance Company to recover from said insurance company on the basis of a default judgment previously entered in a separate lawsuit by the plaintiff against Steven E. Davis, d/b/a Archdale Insurance Agency, for failure to

procure insurance. In the earlier action against Davis the alleged act of negligence on the part of Davis, who was holding himself out to the public as an insurance agent, was his receipt of $206.00 of plaintiff's money to procure collision insurance on plaintiff's truck and his failure to procure the insurance. Plaintiff's truck was subsequently totally demolished in an accident.

The complaint in the action *sub judice* alleged that Steven E. Davis was an insured of Utica Mutual under an errors and omission policy; that plaintiff was a third party beneficiary of the policy; and that Utica Mutual was, therefore, liable for the earlier default judgment against Davis. Utica Mutual answered the complaint in the action *sub judice* and raised as defenses numerous breaches by the insured, Davis, of the mandatory policy provisions. Following discovery by each side, defendant moved for summary judgment. By judgment dated 22 June 1982, Judge Albright allowed Utica Mutual's motion for summary judgment. Plaintiff gave no oral notice of appeal in open court and never filed a formal "notice of appeal." Plaintiff did file appeal entries on 23 June 1982, one day after entry of judgment. The document entitled "appeal entries" provided in pertinent part as follows:

> To the granting of defendant's motion and to the dismissal of plaintiff's action, plaintiff excepts and appeals to the Court of Appeals of North Carolina for errors assigned and to be assigned.

The document entitled "appeal entries" was not served on defendant's attorney until 17 August 1982, almost two months after entry of judgment, and then only as a part of the Proposed Record on Appeal. Subsequently Utica Mutual moved before the Court of Appeals to dismiss the appeal on the ground that the plaintiff had failed to give timely notice of appeal. The Court of Appeals allowed Utica Mutual's motion to dismiss on 18 November 1982. Plaintiff petitioned this Court for certiorari on 29 November 1982 and this Court's writ of certiorari was granted on 11 January 1983 to review the order of the Court of Appeals dismissing plaintiff's appeal.

William M. Speaks, Jr., Attorney for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by William C. Raper and S. Fraley Bost, Attorneys for defendant-appellee.

PER CURIAM.

The order of the Court of Appeals dismissing the plaintiff's appeal dealt solely with a procedural issue, *i.e.*, whether the plaintiff properly gave notice of appeal. The Court of Appeals has never considered the substantive issue raised in the plaintiff's brief before that court concerning the granting of the motion of defendant-appellee for summary judgment nor do we. The only issue presented before this Court is the propriety of the Court of Appeals' order dismissing plaintiff-appellant's appeal. The record on appeal clearly shows that the plaintiff-appellant failed to give timely notice of appeal. Failure to give timely notice of appeal in compliance with G.S. 1-279 and Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional, and an untimely attempt to appeal must be dismissed. *Oliver v. Williams*, 266 N.C. 601, 146 S.E. 2d 648 (1966); *Teague v. Teague*, 266 N.C. 320, 146 S.E. 2d 87 (1966); *Walter Corporation v. Gilliam*, 260 N.C. 211, 132 S.E. 2d 313 (1963); *Aycock v. Richardson*, 247 N.C. 233, 100 S.E. 2d 379 (1957). The plaintiff here neither gave oral notice of appeal in open court nor filed and served written notice of appeal within ten days of the entry of the Judgment. Thus, the Court of Appeals acted correctly in dismissing the purported appeal.

Affirmed.

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

ASHLEY v. DELP

No. 10P83.

Case below: 59 N.C. App. 608.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1983.

BOYCE v. BOYCE

No. 141P83.

Case below: 60 N.C. App. 685.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 April 1983.

BROCK v. DAY

No. 109P83.

Case below: 60 N.C. App. 266.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1983.

CP&L v. CENTRAL TELEPHONE CO.

No. 98P83.

Case below: 60 N.C. App. 440.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 April 1983.

DONNELL v. CONE MILLS CORP.

No. 102P83.

Case below: 60 N.C. App. 338.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1983.

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

IN RE BUTLER v. J. P. STEVENS

No. 131P83.

Case below: 60 N.C. App. 563.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 April 1983.

IN RE FARMER

No. 104P83.

Case below: 60 N.C. App. 421.

Petition by Farmer for discretionary review under G.S. 7A-31 denied 5 April 1983.

PUGH v. DAVENPORT

No. 92PA83.

Case below: 60 N.C. App. 397.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 5 April 1983.

ROPER v. THOMAS

No. 44P83.

Case below: 60 N.C. App. 64.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 April 1983.

SETTLE v. BEASLEY

No. 67PA83.

Case below: 59 N.C. App. 735.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 5 April 1983.

STATE v. CASEY

No. 99P83.

Case below: 60 N.C. App. 414.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1983.

STATE v. COURTRIGHT

No. 75P83.

Case below: 60 N.C. App. 247.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1983. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 April 1983.

STATE v. DORSEY

No. 128P83.

Case below: 60 N.C. App. 595.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1983. Motion by Attorney General to dismiss appeal for lack of significant public interest allowed 5 April 1983.

STATE v. EVANS

No. 5P83.

Case below: 59 N.C. App. 738.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1983.

STATE v. GREENE

No. 649PA82.

Case below: 59 N.C. App. 360.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 5 April 1983. Motion of Attorney General to dismiss appeal for lack of significant public interest denied 5 April 1983.

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

STATE v. HAMLETTE

No. 87P83.

Case below: 60 N.C. App. 306.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 5 April 1983.

STATE v. HOUGH

No. 155P83.

Case below: 61 N.C. App. 132.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1983.

STATE v. KOBERLEIN

No. 103PA83.

Case below: 60 N.C. App. 356.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 5 April 1983.

STATE v. MILLER

No. 46P83.

Case below: 60 N.C. App. 208.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1983.

STATE v. PEOPLES

No. 106PA83.

Case below: 60 N.C. App. 479.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 5 April 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 5 April 1983.

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

STATE v. POWELL

No. 122P83.

Case below: 61 N.C. App. 124.

Petition by defendant for discretionary review under G.S. 7A-31 denied 16 March 1983.

STATE v. SIMPSON

No. 78P83.

Case below: 60 N.C. App. 436.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1983.

STATE v. WELLS

No. 70P83.

Case below: 59 N.C. App. 682.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 5 April 1983.

STATE v. WHITE

No. 128P83.

Case below: 60 N.C. App. 595.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1983. Motion of Attorney General to dismiss appeal for lack of significant public interest allowed 5 April 1983.

UNITED LEASING CORP. v. MILLER

No. 49P83.

Case below: 60 N.C. App. 40.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 April 1983.

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

VANLANDINGHAM v. PETERS

No. 72P83.

Case below: 60 N.C. App. 439.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 April 1983.

WATERS v. BIESECKER

No. 63PA83.

Case below: 60 N.C. App. 253.

Petition by ABC Board for discretionary review under G.S. 7A-31 allowed 5 April 1983.

STATE OF NORTH CAROLINA v. CLINTON RONDALE KIRKLEY

No. 155A81

(Filed 3 May 1983)

1. **Criminal Law § 135.3; Jury § 7.11— exclusion of jurors for capital punishment views**

The trial court in a first degree murder prosecution properly excused for cause six prospective jurors who gave absolute, unequivocal statements that they would be unable to follow the law and would not vote to recommend a sentence of death even if the State had convinced them beyond a reasonable doubt that the aggravating circumstances required the death penalty. Furthermore, the trial court did not err in excusing for cause another prospective juror who stated, in response to questions by the court as to whether she could vote for the death penalty under appropriate circumstances, that she didn't "feel" like she would or didn't "think" she could since her answers reflected her inability to put aside her personal views and follow the law when considered in the context of her entire examination.

2. **Criminal Law § 135.3; Jury § 7.11— exclusion of jurors for capital punishment views—fair cross-section of community**

Defendant was not deprived of a jury composed of a fair cross-section of the community by the exclusion of seven jurors who indicated that they could not impose the death penalty under any circumstances.

3. **Criminal Law § 63— mental condition one week after crimes—exclusion not prejudicial error**

While a psychologist's opinion testimony as to defendant's mental status one week after the shootings in question was admissible for consideration on the issue of defendant's mental condition at the time of the shootings, the exclusion of such testimony cannot be held prejudicial error where defendant failed to take exception to the court's ruling at trial and failed to have the excluded testimony placed in the record. G.S. 15A-1446(a).

4. **Criminal Law § 102.7— jury argument—credibility of expert witness—no gross impropriety**

In a prosecution for first degree murder, disparaging remarks about defendant's expert psychiatrist made by the prosecutor in his jury argument were not so grossly improper as to require the trial court to intervene *ex mero motu* in light of the psychiatrist's testimony reflecting both a lack of preparation and an absence of thorough investigation into defendant's mental and physical condition at the time of the crimes.

5. **Criminal Law § 102.6— jury argument—intoxication necessary to negate premeditation and deliberation—no gross impropriety**

Statements made by the prosecutor concerning the level of intoxication necessary to negate premeditation and deliberation were not so grossly improper as to require the trial judge to intervene *ex mero motu*.

6. Criminal Law § 102.6— how murders were committed—jury argument—supporting evidence

In a prosecution for two murders, there was sufficient evidence in the record from which the prosecutor's scenarios in his jury argument as to how each murder was committed could reasonably be inferred.

7. Criminal Law § 6; Homicide § 8.1— first degree murder—intoxication defense—effect of mental disorder

The trial court in a first degree murder case did not err in failing to instruct the jury to consider evidence of defendant's mental condition as well as evidence of his intoxication in determining his ability to premeditate and deliberate and form a specific intent, since the insanity and intoxication defenses are treated separately, and a mental disorder which is insufficient to establish legal insanity may not be used to negate premeditation and deliberation and specific intent.

8. Criminal Law § 135.4— first degree murder—sentencing hearing—prosecutor's remarks about mitigating factors—absence of prejudice

Defendant was not prejudiced by the prosecutor's remarks concerning the weight several mitigating factors should be afforded and suggesting that one mitigating factor was really aggravating where any possible confusion created in the minds of the jurors by the prosecutor's argument was eliminated by the trial court's instruction making it clear that there was only one aggravating factor to be considered by the jury.

9. Criminal Law §§ 102.12, 135.4— death sentence as deterrent—jury argument—impropriety not gross

The prosecutor's argument that the jury should impose the death sentence as a deterrent was not grossly improper so as to warrant intervention by the trial court *ex mero motu.*

10. Criminal Law § 135.4— first degree murder—sentencing hearing—order of issues

The trial court did not err in submitting an issue as to whether the jury found that the aggravating circumstance found by it was sufficiently substantial to call for imposition of the death penalty as issue number two which was to be decided prior to the consideration of any mitigating circumstances, and in instructing the jury that if it answered the second issue "no" it would have to recommend a sentence of life imprisonment, since the procedure employed by the court simply allowed the jury the opportunity to impose a life sentence without first considering the mitigating circumstances and neither allowed the jury to contemplate imposing the death penalty prior to its consideration of all the mitigating circumstances nor diminished the impact the mitigating circumstances had on the jury.

11. Criminal Law § 135.4— first degree murder—sentencing hearing—form of fourth issue

The form of the fourth issue submitted to the jury as to whether the jury found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances was not erroneous.

12. Criminal Law § 135.4— first degree murder—sentencing hearing—aggravating and mitigating circumstances—unanimity of verdict

The jury must unanimously find that an aggravating circumstance exists before that circumstance may be considered by the jury in determining its sentence recommendation. Likewise, the jury must unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing, and the trial court did not err in instructing the jury that a mitigating circumstance must be deemed not to exist in the absence of unanimous agreement on its existence. G.S. 15A-2000; Art. I, §§ 24 and 25 of the N.C. Constitution.

13. Criminal Law § 135.4— first degree murder—sentencing hearing—no history of prior criminal conduct—peremptory instruction required

In a sentencing hearing in a first degree murder case in which the trial court determined that the evidence showed no significant history of prior criminal conduct and instructed the jury to that effect, the trial court should have instructed the jury to answer "yes" to the finding of no significant criminal history, and the court committed prejudicial error in instructing the jury that it could find such factor not to be mitigating and therefore that it did not exist, since the legislature has determined that in all capital cases the absence of a significant history of prior criminal activity is a mitigating circumstance. G.S. 15A-2000(f)(1).

14. Criminal Law § 135.4— first degree murder—sentencing hearing—motion to impose life sentence after jury had deliberated for some time

The trial court did not abuse its discretion in refusing to impose a life sentence in each of two capital cases on the ground that the jury had not reached a unanimous sentence recommendation within a reasonable time where the jury's deliberations were interrupted twice for meals and twice for further instructions; the total time the jury actually spent deliberating was approximately seven hours; the longest uninterrupted span of time for deliberations was one hour and fifty-two minutes; and the jury was confronted with fourteen mitigating factors which had to be considered in two separate cases. G.S. 15A-2000(b).

15. Criminal Law § 135.4; Homicide § 31.3— first degree murder—premeditation and deliberation—submission of second degree murder—death penalty not unconstitutional

Although the practice overruled in *State v. Strickland*, 307 N.C. 274 (1983), of requiring the trial court to instruct on second degree murder in all first degree murder cases in which the State relied on premeditation and deliberation, regardless of whether there was evidence to support the lesser offense, was in use at the time of defendant's trial for first degree murder, the death penalty was not unconstitutional in defendant's case because of such practice where defendant's evidence supported the trial court's submission of an issue of the lesser offense of second degree murder.

16. Criminal Law § 135.4; Homicide § 31.3— first degree murder—guilt and penalty phases—same jury—constitutionality

The procedure set out in G.S. 15A-2000(a)(2) which requires the same jury to hear both the guilt and penalty phases of a first degree murder trial is not unconstitutional.

17. Criminal Law § 135.4— first degree murder—sentencing hearing—submission of two killings as aggravating circumstance for each other

It is not unconstitutional for the State to try, convict and sentence a defendant for a series of crimes and then submit those same crimes as aggravating factors during the sentencing hearing in a capital case.

18. Criminal Law § 135.4— course of conduct aggravating circumstance—constitutionality

The "course of conduct" aggravating circumstance set forth in G.S. 15A-2000(e)(11) is not unconstitutionally vague.

19. Criminal Law § 135.4— mitigating circumstances—burden of proof

The trial court properly placed upon the defendant the burden of proving, by the preponderance of the evidence, the existence of each mitigating factor.

Justice EXUM concurring in part and dissenting in part.

ON appeal by defendant as a matter of right from the judgments of *Snepp, Judge*, entered at the 8 September 1981 Schedule A Criminal Session of Superior Court, MECKLENBURG County. Defendant was charged in indictments, proper in form, with the first degree murders of William Leroy Brown and Willie James Potts and with assault with a dangerous weapon with the intent to kill causing serious injury on Jerry T. Kelly and Gregory Curtis Anthony. The jury returned verdicts of guilty on each charge and recommended the sentence of death in both murder cases. *Judge Snepp* imposed consecutive twenty year sentences for each assault conviction and ordered the imposition of the death penalty for each murder conviction. On 26 August 1982 we granted the defendant's motion to by-pass the Court of Appeals on the two assault convictions.

In relevant part, the State's evidence tended to show the following: In the early morning hours of 18 May 1981, Ms. Jane Green, a resident of 3900 Rozzells Ferry Road in Charlotte, heard two gunshots outside her home and as she peered out of a window, she observed a small car leaving the area in front of her home. At that time she saw a person lying in the ditch on the side of the road. She called the police. While awaiting the arrival of

the police Ms. Green saw a car, similar to the one she had seen in the area in front of her house, drive down Crigler Street and come to a stop. The driver got out of the car, walked around and then returned to the vehicle and drove off.

The police arrived at the scene in response to Ms. Green's call and discovered William Leroy Brown lying in a ditch along Rozzells Ferry Road. Mr. Brown had sustained a gunshot wound to the chest and two gunshot wounds to the head with a wound to the right forehead being fatal.

At approximately the same time that Ms. Green saw an automobile travel down Crigler Street, Mr. Gilbert Hargrove, a resident of 330 South Crigler Street, heard two gunshots. Upon investigation Mr. Hargrove observed a car drive away from the dead end portion of the street. After the car drove away, Mr. Hargrove saw a person stagger and fall three times. He immediately called the police.

The police arrived on the scene shortly after Mr. Hargrove's call and discovered Willie James Potts lying along the side of Crigler Street. At that time Mr. Potts was alive but he was unable to identify his assailant. Mr. Potts had been shot twice in the chest and he died as the result of a gunshot wound to the left chest. The bullet passed through his left lung.

The police investigation of each homicide scene resulted in the recovery of some bullets and bullet fragments. On Rozzells Ferry Road, at the scene of William Leroy Brown's murder, the police recovered bullet fragments on the very spot where Mr. Brown's body was discovered. In addition to the projectiles found at the scenes of these two murders, the medical examiner recovered several bullet fragments from the cranial cavity of William Leroy Brown.

Shortly before 4:00 a.m. on the morning of 18 May 1981 Jerry Kelly was sitting in his car smoking a cigarette in the parking lot of Arby's restaurant located on East Independence Boulevard. A small yellow car pulled up alongside of him. After a short conversation with the driver of the small yellow car, the driver, whom Mr. Kelly identified as the defendant, shot Kelly in the neck. As Mr. Kelly attempted to protect himself by lying down on the floor of his car, the defendant shot him in the elbow resulting in a per-

manent injury to the arm. After being shot the second time, Mr. Kelly heard the car drive away. The location of the assault on Mr. Kelly is approximately eight miles from the scenes of the two homicides on Rozzells Ferry Road and South Crigler Street.

Around 4:30 a.m., approximately thirty minutes after Mr. Kelly was shot in Arby's parking lot, Gregory Anthony was leaving work at Bojangle's restaurant on the corner of West Boulevard and South Tryon Street when a yellow car drove up and the driver offered to sell Mr. Anthony some marijuana. Anthony identified the defendant as the driver of the yellow car. Anthony and the defendant left the Bojangle's parking lot and went to Kingston Street where they smoked some marijuana. While Anthony was smoking the marijuana, the defendant shot him in the jaw causing paralysis in Anthony's tongue and vocal cords. In response to this assault Anthony pointed a replica of a gun at the defendant, who in turn ran away. Anthony summoned the police who immediately responded.

Officer Harlee of the Charlotte Police Department, while investigating the shooting of Mr. Anthony on Kingston Street, observed a small yellow car traveling slowly by his location. Upon stopping this vehicle, Officer Harlee found the defendant in the driver's seat holding a silver pistol which was later identified as a five shot .44 caliber revolver. A subsequent search of the defendant uncovered several spent .44 caliber shell casings.

Tests conducted by the Charlotte crime lab revealed that the defendant had recently fired a firearm. Further tests showed that the bullets recovered at the homicide scenes on Rozzells Ferry Road and South Crigler Street and the projectile removed from Jerry Kelly's elbow had been fired from the .44 caliber revolver found in the defendant's possession at the time of his arrest.

The defendant gave a statement to the police which reads as follows:

> I am giving Investigator Rick Sanders permission to write this for me. Sometime after midnight, early Monday morning, I left a party at Jay's house off of Senaca. I had taken a Quaalude at the party. I was riding around and I rode over to Rozzells Ferry Road. I seen a black male walking down the

street, and I stopped and talked to him. I don't remember what I said. The next thing I know, I was shooting him. I then went down a dead-end close by, and seen another black male walking. I said something to him, and then shot him. A little while later, I went to Bojangle's Chicken on West Boulevard. There I started talking to another black male in a little sports car. He asked me if I wanted to smoke a joint. I also told him I had something to sell. I told him I was getting paranoid, and I wanted to go somewhere else. He followed me around the corner. I went to his car on the passenger side. I had my gun on the left side with the holster unsnapped just in case he tried something. As I got up to the car, he pulled a gun on me, and I pulled mine and shot him in the face. I then ran back to my car and left. A short time later, I came back to the road, and as I was turning onto the road, I seen Investigator Sanders. I drove on down and was stopped by a black uniformed officer. I was coming back to turn myself in.

A search of defendant's car resulted in the recovery of cocaine, marijuana, diazepam (valium) and another drug which is a non-controlled substance. Drug use paraphernalia and some empty beer containers were also found in defendant's car. In addition, the license tag on defendant's vehicle was bent upward in a manner which made it very difficult to read the number on the plate.

Dr. McBay, a toxicologist from the North Carolina Chief Medical Examiner's office, reported that blood samples taken from the defendant, approximately six hours after his arrest, revealed the presence of cocaine and diazepam (valium). A similar test conducted by Dr. Bryan Finkle from the Center for Human Toxicology in Salt Lake City, Utah, revealed the presence of cocaine, diazepam (valium), benzoylecgonine and nordiazepam in defendant's blood.

Throughout its presentation of evidence the State produced the testimony of witnesses who stated that the defendant's movements and speech patterns were normal. Several witnesses also testified that the defendant displayed no erratic or unusual driving pattern.

The defendant presented evidence tending to show that he acted in self-defense in shooting Mr. Anthony and that he lacked

the specific intent necessary to have committed first degree murder or assault with a deadly weapon with the intent to kill.

Numerous witnesses testified that the defendant was a heavy drug user and due to family problems had gone on a drug spree for the three days prior to the shootings. According to the defendant's fiancee, Kim Strother, the defendant consumed large quantities of cocaine and alcohol three days before the shootings. Further testimony of several defense witnesses indicated the defendant drank beer and took several drugs two days prior to the shootings.

Defendant testified that he "partied" on the night before the shootings, at which time he consumed large quantities of beer and cocaine. His testimony concerning the shootings was very similar to the statement he gave the police at the time of his arrest with the exception that he also vaguely remembered talking to a white male before hearing a shot. In short, defendant testified that he had a vague recollection of three shootings but was unaware of his thoughts at the time of each. However, he did remember in detail the circumstances surrounding the assault on Anthony which he contends was committed in self-defense.

Dr. Bryan Finkle testified that the amount of diazepam (valium) found in defendant's blood was greater than that normally prescribed for medicinal purposes. Dr. Finkle also testified that the presence of cocaine and diazepam in the blood at the same time could result in considerable turbulence within the brain.

Defendant also called Mr. O. B. Starnes, a psychologist who had administered several psychological tests to the defendant. Mr. Starnes testified for the purpose of establishing the professional manner in which the tests were administered. These tests were in part the basis of the testimony given by Dr. Selwyn Rose, a psychiatrist.

Dr. Rose testified that an examination of the defendant, interviews with his family, and the test results provided by Mr. Starnes revealed that the defendant was suffering from a mental disorder which by itself would not result in defendant's criminal behavior. However, Dr. Rose testified further that defendant's mental condition when coupled with drug intoxication would prevent defendant from premeditating and deliberating his actions.

At the end of all the evidence the jury found defendant guilty of two counts of first degree murder and two counts of assault with a dangerous weapon with the intent to kill causing serious injury. Judge Snepp imposed consecutive twenty year sentences for the assault convictions. The State relied on its evidence presented during the guilt determination of the trial and did not present any additional evidence at the sentencing hearing. The sole aggravating factor relied on by the State was that each murder was part of a course of conduct which included the commission of other violent crimes. On the other hand, the defendant offered the testimony of seven witnesses, including himself and offered in part the following in mitigation: his age; that he had no significant history of prior criminal behavior; that the crimes were committed while he was under the influence of mental or emotional disturbance; that he confessed to the crimes; that he surrendered to police without resistance and that he expressed remorse for his actions.

In its instructions during the sentencing hearing in each case, the court submitted one aggravating circumstance for the jury's consideration: The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons, G.S. 15A-2000(e)(11). The court also submitted fourteen mitigating circumstances for the jury to consider. The jury found that seven mitigating circumstances and one aggravating circumstance existed in each case. However, the jury unanimously found in each case that the mitigating factors were outweighed by the aggravating circumstance beyond a reasonable doubt. As a result the jury recommended the imposition of the death penalty for both murders, and the court so ordered.

Additional facts relevant to defendant's specific assignments of error will be incorporated into the opinion.

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

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

COPELAND, Justice.

Defendant brings forward numerous assignments of error which he contends require a new trial for these crimes, or a new sentencing hearing for the murder convictions, or both. We disagree as to the defendant's arguments for a new trial and affirm his convictions but we conclude that he is entitled to a new sentencing hearing.

GUILT PHASE

I.

[1] Defendant contends that he was deprived of his right to life without due process of the law and that he was deprived of right to trial by jury because seven potential jurors were struck for cause upon the State's challenge for cause, due to their scruples against capital punishment, in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968). This issue has been raised many times before this Court. In *State v. Pinch*, 306 N.C. 1, 9, 292 S.E. 2d 203, 213 (1982), *cert. denied*, --- U.S. ---, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982), we stated:

> The applicable constitutional standard permits the excuse of a potential juror for cause if it is established that he 'would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case. . . .' *Witherspoon v. Illinois*, 391 U.S. 510, 522 at n. 21, 88 S.Ct. 1770, 1777, 20 L.Ed. 2d 776, 785 (1968); see *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed. 2d 796 (1980).

(Original emphasis.) Prior to the *Witherspoon* decision prospective jurors were excused for cause if they had a personal or religious conviction that the death penalty was wrong. Such a practice resulted in 79 of 150 veniremen being excused for cause in *State v. Spence*, 274 N.C. 536, 164 S.E. 2d 593 (1968). As recognized in *Witherspoon* the fact that someone opposes the death penalty, for whatever reason, does not mean they will not fulfill their duty to the state and refuse to impose the death penalty.

In the case *sub judice* sixty-three veniremen were examined over a period of four days resulting in seven hundred and forty-

nine pages of transcript. Seven of these sixty-three veniremen were successfully challenged for cause by the State. Of these seven potential jurors struck for cause, six veniremen gave absolute, unequivocal statements that they would be unable to follow the law and would not vote to recommend a sentence of death even if the State had convinced them beyond a reasonable doubt that the aggravating circumstances required the death penalty. For each of these six prospective jurors it was not his feelings against the death penalty which resulted in his being challenged for cause, instead it was his inability to follow the law. Therefore, each of these six jurors was properly challenged for cause under the rule established in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968).

The seventh venireman to be excused for cause was Mrs. William McKee. A review of the transcript which covered her questioning during the jury selection process reveals in part of the following:

Examination by the Court:

* * * * *

Q. If you were satisfied beyond a reasonable doubt of the things the law requires you to be satisfied about then would you recommend, in accordance with the law, recommend a sentence of death, or do you have such strong feelings about the death penalty that even though you were satisfied beyond a reasonable doubt as to those things, you would not vote for the death penalty?

MRS. MCKEE: I don't feel like I would.

Q. You feel that even though the State had satisfied you of the three elements of the presence of an aggravating circumstance, that it was sufficiently substantial to call for the imposition of the death penalty, and that any mitigating circumstances were insufficient to outweigh the aggravating circumstances, you still feel that you could not vote for the death penalty, even though you were convinced of those things?

MRS. MCKEE: I don't think I could.

* * * * *

Examination by defense attorney, Mr. Chapman.

Q. Could you tell us what your personal views are on the death penalty?

MRS. MCKEE: I'm not sure I know exactly how I feel about it definitely. Given a certain set of personal circumstances, I might have had one feeling one way and another feeling the other way.

Juror McKee indicated, in response to a question concerning her personal views on the death penalty, that she wasn't exactly sure how she felt about it "definitely," but that it would depend on the circumstances. While the question had some relevance in determining Mrs. McKee's ability to function within the law as a "death qualified" juror, the answer was not dispositive; that is, an equivocal answer respecting a juror's *personal views* on the death penalty does not answer the question of whether this prospective juror, in this particular case, would in fact recommend death if legally bound to do so. When asked whether she would vote for the death penalty under the appropriate circumstances, Mrs. McKee answered that she didn't feel she could and she didn't feel she would. We find no equivocation in these answers, which are clearly negative in import. We find no significance in the fact that juror McKee stated that she didn't *feel* or *think* she could vote for the death penalty. While the Court might have gone further and required a simple yes or no answer, failure to do so is not fatal, where the court is satisfied, after observing the demeanor of the juror and hearing the responses, that the juror has indicated a negative response.

Although Mrs. McKee's responses to questions asked by the court as to whether she would put her personal views aside and follow the law were phrased in the form of "I don't feel like I would" or "I don't think I could," they reflect her inability to follow the law when considered in the context of her entire examination. *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243 (1982), *cert. denied*, --- U.S. ---, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982). We therefore hold that the seven jurors were properly challenged and excused for cause.

[2] Defendant also contends that the exclusion of the seven veniremen for cause deprived him of his right to a trial by jury

drawn from a cross-section of the community. This exact issue was recently decided by this Court contrary to the defendant's position. "The excuse of these jurors for cause did not deprive defendant of his constitutional rights to trial by a jury representing a cross-section of the community or due process of law." *State v. Pinch*, 306 N.C. 1, 9, 292 S.E. 2d 203, 213 (1982), *cert. denied*, --- U.S. ---, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982). This assignment of error is overruled.

II.

[3] The defendant contends that he was prejudiced during the guilt phase of his trial due to the trial court's exclusion of opinion testimony by Mr. O. B. Starnes, a psychologist, who administered a battery of psychological examinations to the defendant on 25 May 1981, one week after the crimes were committed. Defendant's counsel at trial attempted to have Mr. Starnes give an opinion as to the defendant's mental status at the time of the examinations. The State objected to Mr. Starnes' opinion on the basis that the defense had failed to comply with the pretrial discovery concerning this testimony. The court sustained the State's objection on the basis that the defendant's mental state one week after the crimes were committed was not relevant to his mental state at the time the crimes took place. However, the trial judge did suggest that a question concerning defendant's mental capacity on the day of the crimes would be admissible.

The law in this State concerning a defendant's mental state at times before and after a crime is committed is set out in *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969). Justice Lake, speaking for the Court, stated, that "the mental condition of the accused, both before and after the commission of the act, is competent provided it bears such relation to the defendant's condition of mind at the time of the alleged crime as to be worthy of consideration in respect thereto." 275 N.C. at 314, 167 S.E. 2d at 256. Although the mental condition of the accused in this case, one week after the shootings occurred, is not determinative of his mental state at the time of the crimes, it is due some consideration.

However, it is the defendant's burden to establish that the exclusion of evidence was prejudicial to his case. *State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979). The defendant has failed to

show that the exclusion of Mr. Starnes' opinion testimony resulted in prejudice. In the first instance, the defense attorney at trial stated that Mr. Starnes' testimony was being offered to show the professional manner in which the psychological testing was administered. The court allowed testimony as to the professional manner in which the testing was conducted and only excluded the opinion testimony. Secondly, even if the defense had desired to have Mr. Starnes give his opinion concerning defendant's mental condition one week after the shootings, there is nothing in the record on which this Court can base a decision as to whether the exclusion was prejudicial. The defense failed to take exception to Judge Snepp's ruling at trial and failed to have the opinion testimony placed into the record. Under G.S. 15A-1446(a) a party is required to take an exception to a ruling excluding evidence and offer such evidence into the record when the evidence is excluded. The purpose of this rule is to enable a reviewing court to make an informed decision. As the record stands in this case, we are unable to determine whether Mr. Starnes' opinion would have been favorable to the defendant's case. "When evidence is excluded, the record must sufficiently show what purport of the evidence would have been, or the propriety of the exclusion will not be reviewed on appeal." Brandis on North Carolina Evidence; Sec. 26. Accord: *State v. Shaw*, 293 N.C. 616, 239 S.E. 2d 439 (1977). The defendant has failed to show any prejudice resulting from the exclusion of Mr. Starnes' opinion testimony. Therefore, this assignment of error is overruled.

III.

Defendant next assigns as error the prosecutor's argument to the jury. Defendant contends that the prosecutor committed three errors, any one of which entitles him to a new trial. The three contended errors are: (a) improper remarks concerning a defense witness; (b) arguments concerning false propositions of law; and (c) improper arguments of facts not supported by the record.

Prior to discussing the merits of each contended error during the prosecutor's argument to the jury, we must set forth the standard of review to be employed. The defense counsel at trial failed to object to or take exception to any part of the prosecutor's final argument to the jury. If a party fails to object to a jury

argument, the trial court may, in its discretion, correct improper arguments. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). When a party fails to object to a closing argument we must decide whether the argument was so improper as to warrant the trial judge's intervention *ex mero motu*. We are therefore reviewing the judge's action and must decide if he abused his discretion. In *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979), Chief Justice Branch stated:

> In capital cases, however, an appellate court may review the prosecution's argument, even though defendant raised no objection at trial, but the *impropriety* of the argument must be *gross* indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it.

298 N.C. at 369, 259 S.E. 2d at 761. (Emphasis added.)

[4] (A) Defendant contends the prosecutor made improper disparaging remarks about Dr. Selwyn Rose, a psychiatrist who testified on behalf of the defendant. The following statements made by the prosecutor during closing arguments are excepted to on appeal:

> . . . Dr. Selwyn Rose out of Winston-Salem by way of Los Angeles, and he breezes up here like some guru visiting his flock . . .
>
> * * * * *
>
> . . . Hot dog, we've got ourselves a doctor from California. He's got all these degrees. He's got a crystal ball, members of the jury, that allows him to look into a man's mind and see exactly what's there. Do you all believe that? Do you believe that a forensic psychiatrist, who makes a living testifying about people's state of mind in court, and don't you know he's got an incentive to give them something that will help them because if he doesn't, he's not going to get any new customers.
>
> * * * * *
>
> . . . He just breezes in here like a guru from California and says, "Ah, I looked into my crystal ball on May 16, 1981 and I

saw in Rondale's mind that he did not have the state of mind to be able to form the specific intent.

* * * * *

. . . Well, let's not mince words about the fine Dr. Rose. I submit to you he's like a whore.

In North Carolina it is well settled "that counsel is allowed wide latitude in the argument to the jury." *State v. Johnson*, 298 N.C. 355, 368, 259 S.E. 2d 752, 761 (1979); see also: *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). "Even so, 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." (Citations omitted.) *State v. Britt*, 288 N.C. 699, 711, 220 S.E. 2d 283, 291 (1975). A prosecutor must present the State's case vigorously while at the same time guarding against statements which might prejudice the defendant's right to a fair trial.

In light of the severe punishment imposed in this case, we have carefully scrutinized the record and the transcript. Dr. Rose's testimony reflects both a lack of preparation and an absence of thorough investigation into the defendant's mental and physical condition at the time of the shootings. On cross-examination Dr. Rose stated that he did not even look at the toxicologist's report of the results of defendant's blood analysis prior to determining the defendant's level of intoxication. In addition, Dr. Rose admitted that he did not make any kind of written report in this case because of the time and costs such a report would require. Although the prosecutor used language and made arguments designed to discredit the testimony of Dr. Rose, in light of the testimony given by Dr. Rose, we do not find that the statements were grossly improper requiring the court to act *ex mero motu*. We do emphasize, however, that some of the descriptive words employed by the State should have been avoided and under a separate set of circumstances might have resulted in error.

[5] (B) Defendant also contends that the prosecutor made prejudicial misstatements of law during his closing argument. Specifically defendant argues that his defense went to his inability to premeditate and deliberate due to intoxication and that the

prosecutor insinuated during his closing argument that the level of intoxication necessary to negate premeditation and deliberation was one such that the defendant must be incapable of knowing what he was doing.

"It is well settled that voluntary drunkenness is not a legal excuse for crime." *State v. Propst*, 274 N.C. 62, 71, 161 S.E. 2d 560, 567 (1968). However, drunkenness may reduce a greater offense to a lesser offense by negating a specific intent.

> [I]n cases where it becomes necessary, in order to convict an offender of murder in the first degree, to establish that the 'killing was deliberate and premeditated,' these terms contain an essential element of the crime of murder, 'a purpose to kill previously formed after weighing the matter' (citation omitted), a mental process embodying a specific definite intent, and if it be shown that an offender, charged with such crime, is so drunk that he is *utterly* unable to form or entertain this essential purpose he should not be convicted of the higher offense. (Emphasis added.)

State v. Murphy, 157 N.C. 614, 617, 72 S.E. 1075, 1076 (1911). Accord: *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968).

In reviewing the statements made by the prosecutor concerning the level of intoxication necessary to negate the required specific intent, we find no gross impropriety which would require the judge to intervene *ex mero motu*. We therefore find no prejudicial error in the prosecutor's remarks concerning the level of intoxication necessary to a defense to murder in the first degree.

[6] (C) Defendant also argues that the prosecutor in creating a "scenario" for each murder, argued matters not supported by evidence in the record. An attorney may argue the law and the facts in evidence and all reasonable inferences drawn from them but he may neither argue principles of law irrelevant to the case nor argue facts not present in the record. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). We have carefully reviewed the transcript and record in this case and find that there was sufficient evidence from which the prosecutor's scenarios of how each murder was committed could reasonably be inferred.

In reviewing all of the prosecutor's arguments to the jury, we fail to find the type of grossly improper statements which

would require a trial court to act *ex mero motu*. Therefore we overrule each of defendant's assignments of error to the prosecutor's closing arguments.

IV.

[7] The defendant next contends that the trial court's instructions to the jury on premeditation and deliberation and specific intent were constitutionally insufficient because the judge failed to instruct the jury to consider the defendant's evidence relating to his mental condition. Defendant argues that the jury should be allowed to consider the impact which intoxication has on a person's ability to premeditate, deliberate and form a specific intent when suffering from a mental condition such as the one attributed to the defendant. In other words, the defendant wants this Court to establish a separate intoxication standard for persons suffering from mental disorders. We refuse to establish such a standard.

This Court has held in numerous cases that it is not error for the trial judge to fail to instruct the jury that a mental disorder, which does not afford a defendant a defense of insanity, may be used to negate the elements of specific intent and premeditation and deliberation. *State v. Anderson*, 303 N.C. 185, 278 S.E. 2d 238 (1981); *State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980); *State v. Harris*, 290 N.C. 718, 228 S.E. 2d 424 (1976). Although intoxication may be a defense to be used to negate specific intent or premeditation and deliberation, this Court has consistently refused to permit mental incapacity, insufficient to establish legal insanity, to constitute a defense to first degree murder. *State v. Anderson*, 303 N.C. 185, 278 S.E. 2d 238 (1981). We see no reason to abandon our present posture of treating separately the insanity defense and the intoxication defense.

In the case *sub judice* the jury was properly charged as to the State's burden of proving beyond a reasonable doubt all the elements of first degree murder and assault with a deadly weapon with the intent to commit murder. Likewise the jury was properly instructed as to the effect the defendant's intoxication might have on negating those elements. The law of this State does not recognize and will not create a separate intoxication defense for a legally sane defendant who has social and mental problems. This assignment of error is therefore overruled.

PENALTY PHASE

V.

[8] Defendant contends he was deprived of his right to be free from cruel and unusual punishment when the prosecutor argued, without corrective instructions from the trial judge, that the jury ought to consider defendant's future dangerousness, diminished capacity and mental illness as aggravating factors rather than mitigating factors. In addition, defendant argues it was error for the State to suggest that the death penalty would be a deterrent in this case.

After reviewing the State's argument to the jury during the penalty phase and the trial court's subsequent instructions on the law, we find no error. Defendant contends that the State, through its argument, placed before the jury several non-statutory aggravating circumstances. We cannot agree. At the beginning of its argument the State made clear that, "the aggravating circumstance we're relying upon in this case I would like to read you now. . . . 'The murder for which the defendant was convicted was part of a course of conduct in which the defendant engaged and which included the commission of other crimes of violence against a person or persons.' "

We recognize that during its argument concerning mitigating circumstances the State made several remarks concerning the weight several mitigating factors should be afforded and suggested that one mitigating factor was really aggravating. The remarks in this case were clearly directed at the weight the jury should give the various mitigating circumstances and were not an attempt to place before the jury any non-statutory aggravating factors.

Any possible confusion created in the minds of the jurors by the State's argument was eliminated by a complete and proper instruction by the trial judge. The judge instructed,

> [U]nder the evidence in these cases there is *one* possible aggravating circumstance. . . .
>
> * * * * *
>
> If you do not unanimously find, from the evidence and beyond a reasonable doubt, that this aggravating circum-

> stance existed in one or both of the cases, you skip issues two in that case, three in that case, and four. In other words, if you find 'no' in either case, you would skip the other issues, and must then recommend in that case that the defendant be sentenced to life imprisonment.

This instruction makes it clear beyond all doubt that there was only one aggravating factor to be considered by the jury. Although we find no error in the State's argument we do suggest that any argument concerning the proper weight to be given mitigating circumstances be done without referring to those factors as aggravating.

[9] Defendant also contends error resulted from the State's request that the jury impose the death sentence as a deterrent. This Court has held that a defendant may not introduce evidence of the death penalty's lack of deterrent effect. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981); *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243 (1982), *cert. denied*, --- U.S. ---, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982). In support of this contention defendant relies on *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), in which this Court held that *evidence* concerning the death penalty's deterrent effect is irrelevant to the jury sentencing determination. Defendant asserts that it is unfair to allow the State to *argue* that the death penalty should be imposed as a deterrent while prohibiting the defendant from offering *evidence* of the death penalty's lack of deterrent effect. In his argument to the jury the prosecutor stated, "I'm asking you to impose the death penalty as a deterrent, to set a standard of conduct. . . ." This statement is an interjection of the prosecutor's personal viewpoint. Although such a statement is improper it was not objected to and we do not find that it was grossly improper so as to warrant action by the trial court *ex mero motu*. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). This argument does not constitute prejudicial error.

VI.

[10] Defendant next argues that the trial judge erred in his instruction to the jury concerning the sentence recommendation procedure. This assignment of error encompasses both the order and form of the issues presented to the jury.

Defendant first assigns as error the order in which the four issues were presented to the jury. Specifically defendant objects to issue number two which was to be decided prior to the consideration of any mitigating circumstances. Issue two provides:

> Do you unanimously find, beyond a reasonable doubt, that the aggravating circumstance found by you is sufficiently substantial to call for the imposition of the death penalty?

The trial judge instructed the jury that if they answered issue number two "no" they would have to recommend a sentence of life imprisonment. Defendant argues that such instructions allowed the jury to consider the ultimate determination of life imprisonment or death before any mitigating circumstances were considered and that such a practice violates the rule of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978) and *Eddings v. Oklahoma*, --- U.S. ---, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982). We do not agree with the defendant's contention.

The ultimate decision to be made by the jury in this case was whether the defendant should receive a punishment of life imprisonment or death. Even though the jury was able to consider issue number two prior to the consideration of any mitigating circumstances, in the event the jury answers issue number two "no," it could only recommend a sentence of life imprisonment. The instructions unquestionably restricted the determination of whether the defendant would receive the death penalty until after all mitigating factors supported by the evidence had been considered. The procedure employed by the judge in this case simply allowed the jury the opportunity to impose a life sentence without first considering the mitigating circumstances. This procedure neither allowed the jury to contemplate imposing the death penalty against the defendant prior to their consideration of all the mitigating circumstances nor did it diminish the impact the mitigating circumstances had on the jury.

[11] Defendant also assails the form of the issues presented to the jury during the sentencing procedure. Defendant argues that the jury must be given a final question which requires it to determine whether the aggravating factors substantially outweigh the mitigating factors sufficient to justify the death penalty. In the case *sub judice* the fourth and final issue presented for the jury's consideration read as follows:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances?

The precise issue raised by this defendant was recently addressed by us in *State v. McDougall*, --- N.C. ---, --- S.E. 2d --- (slip opinion filed 5 April 1983) in which we recognized that the form and order of the issues to be submitted to the jury should be as follows:

(1) Do you find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances?

(2) Do you find from the evidence the existence of one or more of the following mitigating circumstances?

(3) Do you find beyond a reasonable doubt that the mitigating circumstance or circumstances you have found is, or are, insufficient to outweigh the aggravating circumstance or circumstances you have found?

(4) Do you find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

State v. McDougall, --- N.C. ---, --- S.E. 2d --- (slip opinion p. 42 filed 5 April 1983).

Although the jury instructions given during the sentencing procedure were not a model charge, they were free from prejudicial error. Since this defendant will receive a new sentencing hearing we instruct that the format established by Justice Martin in *State v. McDougall, supra*, be employed at that new sentencing hearing. This assignment of error is overruled.

VII.

[12] Defendant next assigns as error the trial court's instruction to the jury concerning the unanimity requirements for finding mitigating circumstances. The able trial judge instructed the jury, upon a request for additional instructions, that the defendant has the burden of persuading the jury as to the existence of any

mitigating circumstance and if all twelve jurors are unable to agree that a specific mitigating circumstance exists they must find that it does not exist. Defendant argues that if the trial judge was in fact correct in his instructions concerning the unanimity requirement for finding the existence of mitigating circumstances, then the same unanimity requirement must be employed in finding a mitigating circumstance does not exist. In short, the defendant contends it was error for the trial judge to instruct the jury that something less than a unanimous rejection of the existence of a mitigating circumstance is proper in finding that circumstance not to exist. We disagree with defendant's proposition.

First, we note that both the Constitution of North Carolina, Article I, Secs. 24 and 25, and G.S. 15A-2000, the statute covering the sentencing process in capital cases, requires all verdicts of the jury to be unanimous. This Court has also held that a verdict of death in a capital case must be by unanimous vote of the twelve jurors. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979). We now hold that the jury must unanimously find that an aggravating circumstance exists before that circumstance may be considered by the jury in determining its sentence recommendation.

Although it is a settled principle that all verdicts, including those within a sentencing procedure, must be unanimous, there has never been a determination by this Court or our legislature on the issue of whether a jury must be unanimous in finding that a mitigating circumstance exists. Certainly consistency and fairness dictate that a jury unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing. This is what the trial judge instructed the jury and in that part of his instruction we find no error.

Defendant contends, however, that even if it is proper that a mitigating circumstance exists only when there is unanimous agreement by the jury, the trial judge erred when he instructed the jurors that a mitigating circumstance must be deemed not to exist in the absence of a unanimous agreement on its existence. Defendant urges this Court to impose the following requirement: that in order for a jury to find that a mitigating factor does not exist it must first unanimously agree it does not exist. If no

unanimous agreement is reached, defendant contends, the result is a hung jury and the automatic imposition of life imprisonment. Although novel, the suggested approach is unworkable and contrary to the general principles of unanimity.

The consideration of mitigating circumstances must be the same as the consideration of aggravating circumstances. The unanimity requirement is only placed upon the finding of whether an aggravating or mitigating circumstance exists. With the exceptions of who has the burden of proof and the different quantum of proof required to establish the existence of a circumstance, we see no reason to distinguish the method a jury must use in finding the existence or nonexistence of aggravating and mitigating circumstances during the sentencing procedure. It must be kept in mind that when the sentencing procedure begins there are no aggravating or mitigating circumstances deemed to be in existence. Each circumstance must be established by the party who bears the burden of proof and if he fails to meet his burden of proof on any circumstance, that circumstance may not be considered in that case.

In determining whether a mitigating circumstance exists, the jury is free to consider all the evidence relevant to that circumstance. This procedure is in accord with the requirements of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978) and *Eddings v. Oklahoma*, --- U.S. ---, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982). We therefore find no error in the trial judge's instructions to the jury concerning the unanimity requirement on mitigating circumstances.

VIII.

[13] The defendant next assigns as error the trial judge's failure to peremptorily instruct the jury on the defendant's mitigating circumstance of no significant prior criminal history which is a statutory mitigating circumstance set out in G.S. 15A-2000(f)(1). It is not for the jury's determination. The trial judge determined that the evidence showed no significant history of prior criminal conduct and he instructed the jury to that effect. However, the trial judge instructed further that, "if you reach this issue, in either or both cases, you will answer it 'yes,' if you find that fact to have mitigating value, if you fail to so find, you will answer it 'no.' " In this further instruction the trial judge erred because our

legislature has determined that in all capital cases the absence of a significant history of prior criminal activity is a mitigating circumstance. G.S. 15A-2000(f)(1). Therefore, the jury should have been instructed that they must answer "yes" to the finding of no significant criminal history. As a result it was improper for the trial judge to instruct the jury that they could find that factor not to be mitigating and therefore find it does not exist.

The State argues that since the jury failed to find the absence of a significant criminal history in mitigation, it must follow that the erroneous instruction was harmless beyond a reasonable doubt because it would have been afforded little or no weight in the final sentence determination. There are three problems with the State's position: (1) Our legislature has determined that if this circumstance exists, it may be considered mitigating and weighed in the final determination; (2) the jury's final sentence determination is very delicate and it cannot be said what effect the absence of this mitigating factor had on that final determination; and (3) allowing the jury the discretionary power to completely disregard a statutory mitigating factor proven by the evidence would return the final sentencing procedure to the realm of unguided decision making which is prohibited under *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972).

When any mitigating circumstance is unanimously found to exist, the jury must consider that mitigating circumstance in its final sentence determination. In *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979) we held that when a mitigating factor is uncontroverted the trial judge must give a peremptory instruction to the jury on that circumstance. The effect of this type of instruction is to remove the question of whether the mitigating circumstance exists from the jury's determination and to conclusively establish the existence of that factor. It also requires the jury to consider the peremptorily instructed circumstance in its final determination of a sentence recommendation. It does not, however, affect the weight that ultimately may be assigned to that circumstance by the jury. The weight any circumstance may be given is a decision entirely for the jury. *State v. McDougall*, --- N.C. ---, --- S.E. 2d --- (slip opinion filed 5 April 1983). As a result of the trial court's failure to properly peremptorily instruct the jury as to the absence of a significant history of prior criminal activity, we remand this case to Superior Court, Mecklenburg

County, for a new sentencing hearing on both first degree murder convictions.

IX.

[14] Defendant next contends that the trial court erred by denying defendant's motion for a directed verdict of life imprisonment. Defendant grounds this assignment of error on G.S. 15A-2000(b) which provides that a life sentence must be imposed if the jury is unable to reach a unanimous verdict within a reasonable time period. We recently held in *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979) that, "(W)hat constitutes a 'reasonable time' for jury deliberation in the sentencing stage should be left to the trial judge's discretion." 298 N.C. at 370, 259 S.E. 2d at 762. The approach set out in *Johnson* is sound since the trial judge is in the best position to determine how much time is reasonable under the facts of a specific case. Some cases may involve numerous aggravating factors and no mitigating factors, while other cases may have many of both factors.

In *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979), we held that three hours and thirty-nine minutes was not an unreasonable amount of time to consider whether to impose the death penalty. In this case the jury deliberated for seven and one-half hours. The jury's deliberations were interrupted twice for meals and twice for further instructions from the judge. The total time the jury actually spent deliberating was approximately seven hours and the longest uninterrupted span of time for deliberations was one hour and fifty-two minutes. In this case the jury was confronted with fourteen mitigating factors which had to be considered in two separate cases. In addition the jury was required to make a final sentence determination and recommendation for two separate murder convictions.

We cannot say from the facts in this case that the trial judge abused his discretion by refusing to impose a life sentence in each capital case on the basis that the jury could not reach a unanimous sentence recommendation within a reasonable time period. This assignment of error is overruled.

X.

[15] Defendant next challenges, as unconstitutional, North Carolina's capital punishment law on the grounds that it permits

subjective discretion and discrimination by the jury in imposing a death sentence in violation of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972). The basic premise of defendant's claim is that it is improper to require the trial judge to instruct the jury on second degree murder any time the State relies on premeditation and deliberation to support a conviction of first degree murder, regardless of the fact that there is no evidence to support the lesser offense of second degree murder. We recently held in *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983) that the rule requiring a judge to instruct on second degree in all first degree murder cases, where the State relies on premeditation and deliberation, was not supported by precedent and was therefore overruled.

Although the practice overruled in *Strickland* was in use at the time this defendant was tried, convicted and sentenced, it has no application to this case. In the case *sub judice* the defendant's entire defense was based upon his inability to premeditate and deliberate or specifically intend his actions. During the trial the defendant offered evidence of his intoxication and his mental disorders. He also offered the testimony of Dr. Rose, a psychiatrist, who stated that in his opinion the defendant could not have premeditated and deliberated his actions on the night of the murders. Under these circumstances, where the defendant's evidence supported a lesser offense than first degree murder, the trial judge was required to instruct on the lesser offense of second degree murder.

The instructions given to the jury concerning the offense of second degree murder were proper. The defendant in this case cannot assail the practice overruled by this Court in *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983). As a result, this assignment of error is overruled.

XI.

[16] Defendant next assigns as error the procedure set out in G.S. Sec. 15A-2000(a)(2) which requires the same jury to hear both the guilt phase and the penalty phase of the trial. Defendant contends that "death qualifying" the jury prior to the guilt determination phase results in a guilt prone jury which denies the defendant the right to a fair trial and fair sentencing and subjects him to cruel and unusual punishment in violation of the Sixth,

Eighth, and Fourteenth Amendments to the United States Constitution. We have decided this issue against the defendant's position in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980), and we recently affirmed that holding in *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982), *cert. denied*, --- U.S. ---, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982). This assignment of error is overruled.

XII.

Defendant next requests that the Court reconsider its holding in *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982), *cert. denied*, --- U.S. ---, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982), that the law implies that a killing was done unlawfully and with malice when the defendant intentionally inflicts a wound upon a victim with a deadly weapon resulting in death. We refuse to depart from our holding in *Pinch* and overrule this assignment of error.

XIII.

[17] Defendant also contends that it is unconstitutional for the State to try, convict and sentence a defendant for a series of crimes and then submit those same crimes as aggravating factors during the sentencing hearing in a capital case. We rejected the defendant's argument in *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982), *cert. denied*, --- U.S. ---, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982) and in *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243 (1982), *cert. denied*, --- U.S. ---, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982). This assignment of error is overruled.

XIV.

[18] Defendant argues that G.S. 15A-2000(e)(11) is unconstitutionally vague as interpreted by this Court. G.S. 15A-2000(e)(11), a statutory aggravating circumstance provides:

> The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

We have decided this issue against the defendant's position in *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243 (1982), *cert denied*, --- U.S. ---, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982). We overrule this assignment of error.

XV.

Defendant next argues that it was improper for the trial judge to instruct the jury that if it found the aggravating circumstances outweighed the mitigating circumstances, it must return a recommendation of the death penalty. This assignment of error has been fully dealt with in part VI of this opinion. For the reasons stated in part VI of this opinion, we overrule this assignment of error.

XVI.

[19] Defendant contends he was deprived of his rights guaranteed under the Eighth and the Fourteenth Amendments to the United States Constitution by the trial court's failure to instruct the jury that the State had the burden of disproving the existence of each mitigating circumstance beyond a reasonable doubt. The trial judge properly placed upon the defendant the burden of proving, by the preponderance of the evidence, the existence of each mitigating factor. We upheld this type of instruction in *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed. 2d 1137 (1980). This assignment of error is overruled.

XVII.

Defendant contends that the North Carolina death penalty statute, G.S. 15A-2000, is unconstitutional and as a result the death penalties imposed in this case are unconstitutional. We have upheld the constitutionality of this statute in numerous cases including *State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981), *cert. denied*, --- U.S. ---, 102 S.Ct. 1985, 72 L.Ed. 2d 450 (1982), and *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed. 2d 1137 (1980). This assignment of error is overruled.

XVIII.

In his final argument the defendant contends that the death penalty imposed upon him for each first degree murder conviction is an excessive and disproportionate punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. We do not address this final assignment of error in light of our granting the defendant a new sentencing hearing. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979).

Having found no error in the guilt determination phase of defendant's trial, we therefore uphold his convictions of two counts of first degree murder and two counts of assault with a dangerous weapon with the intent to commit murder. However, we remand this case to the Superior Court, Mecklenburg County for a new sentencing hearing on both first degree murder convictions.

No error: guilt determination.

New sentencing hearing on both first degree murder convictions.

Justice EXUM concurring in part and dissenting in part.

On the guilt phase of this case I believe defendant is entitled to a new trial in the homicide cases for failure of the trial court to instruct the jury on the combined effect of his mental illness and his alcohol and drug induced intoxication on his capacity to premeditate and deliberate. I concur in the result reached by the majority on the sentencing phase of the case, but I disagree with the majority's conclusions on some of the questions presented.

GUILT PHASE

On the guilt phase it is important to note that in the homicide cases defendant's entire defense rested on his alleged inability to premeditate and deliberate. Even more important, the evidence upon which defendant relied tended to show that this inability was due not to his mental impairment, standing alone, or to his intoxication, standing alone; rather it was due to the combined effects of both his intoxication and his mental impairment. Much of defendant's evidence was designed to show the large quantity of alcohol and drugs he had consumed during the several days preceding the killings. It was left, however, to defendant's principal witness, Dr. Selwyn Rose, qualified as an expert psychiatrist, to tell the jury about defendant's mental illness and the combined effect of this illness and defendant's intoxication.

Dr. Rose testified that in his opinion defendant at the time of the homicide "was intoxicated, and that he suffered from serious underlying mental illness, and that both of these conditions were

present at the time of the offense." In Dr. Rose's opinion defendant suffered from "a borderline psychosis, borderline schizophrenia of the schizoid type. . . ." Upon his examination of defendant Dr. Rose also found "some evidence of a long-term depression . . . . [L]ife was a difficult problem for [defendant] and he stayed depressed much of the time and dealt with that depression by his own treatment, which was taking drugs." Finally, Dr. Rose made it clear that in his opinion defendant at the time of the homicides was unable to premeditate and deliberate "because of the intoxication from drugs and because of his underlying personality problems, severe mental illnesses. . . . He wasn't able to reach that level of thinking which we call premeditation and deliberation, which involved a fairly high level of thinking process, and he was not able to do that kind of thinking at that time."

Dr. Rose made it clear that defendant's mental condition standing alone would not have had this effect. When asked whether defendant's mental condition "by itself, absent any drug involvement, result[ed] in the shootings," he replied, "I don't think it did." He further testified that the intoxication, standing alone, would not have affected his ability to premeditate and deliberate. When asked whether his opinion about defendant's condition at the time of the homicides was based on his "looking solely at the drugs that he has been shown to have taken," the doctor replied:

> No. The drugs were considered in an interaction with this explosive personality. . . . The issue was how did the drugs affect that person at that time, and the way they affected it was they blew the cover, the control system, and the rage, the anger, came pouring out. So it was the combination of the two that was essential.

This testimony by Dr. Rose was the sole foundation of defendant's entire defense in the homicide cases. Yet the trial court failed in its final jury instruction to mention defendant's mental condition as being relevant on the issue of premeditation and deliberation. On this issue the trial court instructed the jury only that it could consider "the evidence with respect to defendant's intoxication or drugged condition." In light of defendant's evidence that his inability to premeditate and deliberate was caused not by his liquor and drug induced intoxication, standing

alone, nor by his mental illness, standing alone, but by the combined effects of both, I think the trial court's instructions on this aspect of the case so severely undercut the only defense proffered as practically to nullify it altogether. Defendant was thereby denied a fair trial on this, the only real issue in the homicide cases.

Had the defense on the premeditation and deliberation issue rested entirely on intoxication, the instructions would have been sufficient. Had the defense rested entirely on defendant's mental impairment, defendant would have been entitled to no instruction at all since a majority of this Court held in *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975), over the cogent dissent of then Chief Justice Sharp, a case in which neither the author of the majority opinion nor I participated, that mental illness alone, short of legal insanity, cannot negate the elements of premeditation and deliberation in a homicide case. This Court has continued to follow *Cooper* in a series of cases beginning with *State v. Wetmore*, 287 N.C. 344, 215 S.E. 2d 51 (1975), *death penalty vacated*, 428 U.S. 905 (1976), and ending with *State v. Anderson*, 303 N.C. 185, 278 S.E. 2d 238 (1981). Whether *Cooper* and its progeny were correctly decided is a question which continues to plague me. Here, however, we do not have to overrule *Cooper* and its progeny in order to decide the issue presented correctly. For here the question is not whether mental illness alone can negate the elements of premeditation and deliberation. The question is whether such illness when combined with the intoxicating effects of alcohol and drugs can negate such elements. Clearly, it seems to me, the answer to this issue should be yes.

Indeed, *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968), seems to so hold. In *Propst*, defendant was convicted at trial of first degree murder and sentenced to life imprisonment. He offered evidence that at the time of the killing he had drunk a considerable amount of whiskey and that he also suffered from schizophrenia. Although the trial court instructed the jury on defendant's mental illness insofar as it might have made out a complete insanity defense, the trial court said nothing about defendant's intoxication as it might have rendered defendant unable to premeditate and deliberate. This Court concluded that the failure was error warranting a new trial. The Court said:

> In our view, the evidence as to defendant's intoxication is insufficient to support a finding that he was so drunk that

> he was *utterly unable* to form an actual, specific intent to kill, after premeditation and deliberation, and was insufficient to support a finding that defendant was *utterly unable* to form a specific intent to shoot Taylor. Even so, when considered in connection with [some evidence of self-defense] and in connection with the testimony as to defendant's mental status and nervous condition, we think the testimony relating to his intoxication was competent *for consideration* as bearing upon whether the State had satisfied the jury from the evidence beyond a reasonable doubt that defendant had unlawfully killed Taylor in the execution of *an actual, specific intent to kill, formed after premeditation and deliberation,* and for consideration as bearing upon whether the State has satisfied the jury from the evidence beyond a reasonable doubt that defendant *intentionally* shot Taylor and thereby proximately caused his death. In our view, the court, in charging the jury, should have referred to the evidence relating to defendant's intoxication and should have given instructions as to how it should be considered.

274 N.C. at 72-73, 161 S.E. 2d at 568 (emphasis original).

For failure, therefore, of the trial court to instruct the jury as to how defendant's intoxication when considered in connection with his mental illness might have affected his ability to premeditate and deliberate, I think defendant is entitled to a new trial in the homicide cases. Since this trial began before 1 October 1981, defendant did not have to object at trial to this failure in order to raise it on appeal. *See* N.C. App. R. 10.

I also think the district attorney's unnecessarily vituperative remarks about Dr. Rose during closing argument should be more vigorously censured by this Court than the majority has done. This kind of language used with reference to a qualified psychiatric expert under the circumstances presented has no place in a court of law. I see nothing in Dr. Rose's testimony which would remotely suggest, let alone justify, this kind of attack on him personally. Indeed, his conclusions were largely corroborated during the sentencing phase by the testimony of Dr. James Groce, a psychiatrist who examined defendant at Dorothea Dix Hospital. Dr. Groce expressed the opinion that defendant had "some impairment from a mental illness" and had "been chronical-

ly depressed for some time." Dr. Groce felt that defendant was "suffering some impairment, both from the effects of his depression, his emotional state, and the intoxication that he was experiencing with more than one intoxicant." In Dr. Groce's opinion this impairment "would have impaired his reasoning, his judgment, and his control of his behavior."

SENTENCING PHASE

With regard to the sentencing phase I concur in the result reached by the majority. I believe, however, contrary to the conclusion of the majority, that error warranting a new sentencing hearing was committed when the trial court, in effect, instructed the jury that it must unanimously agree that a particular mitigating circumstance existed before it could consider that circumstance. Indeed, the state concedes in its brief that such an instruction may be constitutionally suspect under *Lockett v. Ohio*, 438 U.S. 586 (1978). The state's brief says:

> *Lockett v. Ohio*, 438 U.S. 586 (1978), holds that a statute that prevents the sentencer in all capital cases from giving independent weight to aspects in mitigation creates a risk that a death penalty will be imposed in spite of factors which call for a less severe penalty and thus is unconstitutional. It would seem manifestly improper, then, not to permit members of a jury to consider a factor in mitigation simply because all members of the jury were not satisfied with the defendant's showing concerning a particular mitigating circumstance. It would also make any sentencing procedure unmanageable if each time a jury deadlocked on an issue a new sentencing hearing was required.
>
> It is the State's position that only those mitigating circumstances found unanimously to exist should be listed on the verdict sheet recommended in *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, --- U.S. --- (1982). However, no juror should be precluded from considering anything in mitigation in the ultimate balancing process even if that mitigating factor was not agreed upon unanimously. To do otherwise, the State believes, could run afoul of *Lockett v. Ohio, supra.*

While the state's position on this question might pass constitutional muster, I think the better practice would be to in-

struct: (1) unanimity is not required in order to answer the question of the existence of a mitigating circumstance favorably to defendant; (2) such an issue should be answered unfavorably to defendant only if all jurors agreed to so answer it; (3) such an issue should be answered favorably to defendant if any juror would so answer it with an indication on the verdict form as to how many jurors so voted; and (4) in the final balancing process each juror would be free to consider only those mitigating circumstances which he or she were persuaded existed in the case.

The vice in the instructions here under consideration, which the majority apparently approves, is that the jurors were led to believe that no mitigating circumstance could be considered by any juror unless all jurors agreed that it existed. The instruction occurred when the jury, after deliberating, returned to the courtroom for a question. The question was: "Does the decision of the jury have to be unanimous on an individual circumstance in Issue Three [the issue in which all of the mitigating circumstances were individually listed and answered]"? In response to this question, the court said:

> I instruct you that the defendant has the burden of persuading all twelve jurors, unanimously, that a given mitigating circumstance exists. The jury must unanimously agree in order to find the existence of a given mitigating circumstance. . . . If the defendant satisfies you of the existence of a mitigating circumstance—satisfies all twelve of you—then it is your duty to answer the issue as to that mitigating circumstance 'Yes.' If the defendant fails to satisfy you of the existence—to satisfy the twelve jurors of the existence—of that mitigating circumstance, then it is your duty to answer it 'No.' . . . You must unanimously agree to find the existence of a mitigating circumstance.

There were no other substantive instructions on this question. Thus I am satisfied that the jury thought that unless it unanimously agreed on the existence of a mitigating circumstance, no juror could then consider that circumstance in the ultimate balancing process.

The state concedes that the instructions, if so interpreted by the jury, might run afoul of *Lockett*. I think they clearly do. The state argues, however, that since the jurors found "all factors in

mitigation except for a series of factors which were simply the negative of aggravating circumstances not present in the case," the instruction could not have prejudiced defendant. In each homicide case, however, at least some jurors failed to find that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct with the requirements of the law was impaired. Likewise, at least some jurors failed to find that defendant's age at the time of the commission of the offense was mitigating. Consequently, I don't think the state's argument that the error, if any, was not prejudicial has merit.

I also think error which should result in a new sentencing hearing was committed in the form and manner of submission of the issues, for the reasons stated in my dissenting opinion in *State v. McDougall*, No. 86A81, filed 5 April 1983.

I believe, too, that in the jury selection process *Witherspoon* error was committed which would entitle defendant to a new sentencing hearing.

STATE OF NORTH CAROLINA v. JAMES EARL NEWMAN AND STATE OF NORTH CAROLINA v. ROY LEE NEWMAN

No. 253A82

(Filed 3 May 1983)

1. **Criminal Law § 92.1— consolidation of charges against defendant and codefendant**

The trial court's consolidation of kidnapping, robbery and rape charges against two defendants was not error where the offenses were perpetrated against the same person pursuant to a common scheme or plan with each of the defendants present and participating in each offense, and where the record did not disclose that the joinder in any way deprived either defendant of a fair trial or hindered his ability to present a defense. G.S. 15A-926(b).

2. **Rape and Allied Offenses § 5— sufficiency of evidence—unsupported testimony by victim**

A conviction for rape may be based upon the unsupported testimony of the prosecuting witness.

3. **Rape and Allied Offenses § 5— guilt as aider and abettor—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of first degree rape where it tended to show that the victim positively identified

defendant as one of the two men who abducted her from a grocery store parking lot; defendant and the codefendant forced the victim to go to a wooded area where defendant held a knife to her throat while the codefendant removed his trousers; and defendant then handed the knife to the codefendant, who used it to force the victim to submit to intercourse with him.

4. Kidnapping § 1.2— removal to facilitate rape—sufficiency of evidence

The State's evidence was sufficient to support conviction of defendant for kidnapping in violation of G.S. 14-39(a) where it tended to show that defendant and a codefendant abducted the victim from the parking lot of a grocery store; the victim was taken to a wooded area behind the store where she was raped by the codefendant; and the removal of the victim from the parking lot to the location where the rape occurred was not such asportation as was inherent in the commission of the crime of rape but was done for the purpose of facilitating the felony of rape.

5. Criminal Law §§ 66.9, 66.18— in-court identification—failure to object—incorrect date for pretrial identification

Defendant waived his right to assert on appeal that the trial court erroneously admitted a rape and kidnapping victim's in-court identification testimony where the record failed to show that defendant objected to the in-court identification, requested a voir dire hearing to determine whether the in-court identification was the product of an impermissibly suggestive pretrial procedure, or moved to strike the in-court identification testimony. Furthermore, the fact that the victim incorrectly fixed the date when a pretrial photographic identification was made only affected the weight of her testimony and did not render improper the pretrial photographic procedure.

6. Criminal Law §§ 42.2, 42.6— items connected with crime—chain of custody—no material change in condition

The State established a sufficient chain of custody of grocery items taken from defendant's possession at the time of his arrest for the items to be admitted into evidence where an officer tagged these items and put them into a police locker; the officer testified that he obtained the items from the police property room and brought them into the courtroom; and the officer identified these items as being the ones he tagged on the night of the incident in question. Moreover, such evidence was not inadmissible because there was no direct testimony tending to show that there was no material change in the condition of the items between the date of the alleged crime and the time of the trial since the absence of material change could be inferred from the nature of the items themselves and the positive identification of the items by the officer.

7. Criminal Law § 42— grocery items—relevancy in kidnapping and rape case

Where the evidence showed that when defendant was taken into custody shortly after a kidnapping and rape, he had in his possession grocery items which the victim testified she had bought shortly before she was abducted, the items were relevant to corroborate the victim's testimony as to her abduction and rape and also to strengthen her testimony identifying defendant as one of her assailants.

8. Criminal Law § 89.7— impeachment of victim—past mental problems—no undue restriction on cross-examination

Defendant was entitled to discredit a kidnapping and rape victim's testimony by attempting to show by cross-examination that she suffered from a mental impairment which affected her powers of observation, memory or narration, and evidence of past mental defects was admissible for this purpose. The trial court did not unduly limit defendant's cross-examination of the victim by excluding certain questions about her past mental problems where defendant was permitted to conduct a lengthy and in-depth cross-examination into the past mental condition of the victim, and the jury had ample opportunity to observe the victim's demeanor and hear her responses to the questions posed so as to form an opinion as to whether her powers of observation, memory and narration were then so impaired that she was not a credible witness.

APPEAL by defendants from *McLelland, J.*, at the 27 January 1982 Criminal Session of DURHAM Superior Court.

Defendants Roy Lee Newman and James Newman were charged in separate bills of indictment with armed robbery, kidnapping and first-degree rape. Both defendants entered pleas of not guilty to each charge. The cases were consolidated for trial over each defendant's objection.

At trial the State's evidence tended to show:

At about 11:00 o'clock p.m. on the night of 14 July 1981, Mrs. Georgia Mae Harris was leaving the Big Star grocery store at Wellons Shopping Center in Durham County where she had purchased several items including cake mix, canned cake frosting, dishwashing liquid, a can of motor oil, and shortening. After she had entered the parking lot, she was confronted by two men who told her they were escapees from "C.P." One of the men grabbed Mrs. Harris and she dropped her grocery bag and her billfold. The other man picked up the groceries and the wallet and the two men forced Mrs. Harris into a wooded area behind the Big Star store. During the time that she was being carried into the woods, Mrs. Harris felt an object she believed to be a knife pressed against her body. After they had entered the wooded area, one of the men, later identified as Roy Lee Newman, placed a knife to her throat while the other man, later identified as James Earl Newman, removed his pants. James Earl Newman then took the knife from Roy and Roy left the scene. The defendant James Earl Newman then had sexual intercourse with Mrs. Harris by force and against her will. He then told Mrs. Harris

that he wanted her to commit a crime against nature but Roy Lee Newman returned to the scene at that point and intervened on her behalf. Roy Lee Newman helped Mrs. Harris find her way back to the parking lot.

When Mrs. Harris and the Newmans neared the parking lot, she saw two men standing near the store and sought their help. At this point her assailants fled. The police were called and came to the scene where Mrs. Harris recounted the details of the assault and robbery, including a description of the two men. Shortly thereafter, the police officers saw two men matching the description given by Mrs. Harris. When the police confronted them, they managed to detain James Earl Newman who was carrying the grocery bag. Roy Lee Newman escaped. James Earl Newman was carried to the parking lot where Mrs. Harris identified him as one of her assailants. The bag which he was carrying contained items of the same type that Mrs. Harris had purchased from the Big Star grocery. Later on the same evening, Mrs. Harris picked James Earl Newman's photograph from a photographic array and at trial she made an in-court identification of James Earl Newman as the man who had raped her.

About one week later, Mrs. Harris observed a man on a downtown Durham street who she thought was her other assailant. He was accompanied by an older couple who the prosecuting witness knew to be a Mr. and Mrs. Newman. She immediately went to the police station and informed officers that she saw a man she believed to have been one of her assailants. Pursuant to this information, Detective Smith located Roy Lee Newman and obtained his consent to be photographed. His photograph was displayed to Mrs. Harris in a photographic array. She picked defendant Roy Lee Newman's photograph from the group as one of the men who abducted her from the Big Star parking lot and later assisted her from the woods back to the parking lot.

At trial the State introduced into evidence clothes worn by Mrs. Harris on the evening of 14 July 1981 and the items found in the grocery bag taken from James Newman on that night. No medical evidence was presented by the State. Neither defendant presented any evidence at trial.

At the close of the evidence the court granted defendants' motions to dismiss the charges of armed robbery. The court

denied defendants' motions to dismiss the kidnapping and first-degree rape charges.

The jury returned verdicts of guilty against each defendant on the charges of first-degree rape and kidnapping. Each defendant was sentenced to life imprisonment for first-degree rape and twelve years for kidnapping. Defendants appealed and on 22 September 1982 we allowed defendants' motions to bypass the Court of Appeals in the kidnapping cases.

Rufus L. Edmisten, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

Henry D. Gamble, for defendant-appellant Roy Lee Newman.

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

BRANCH, Chief Justice.

Appeal of Roy Lee Newman

[1] Defendant, Roy Lee Newman, first assigns as error the action of the trial judge in consolidating his cases with those of James Earl Newman for trial.

G.S. 15A-926, in pertinent part, provides:

(b) Separate Pleadings for Each Defendant and Joinder of Defendants for Trial.—

(1) Each defendant must be charged in a separate pleading.

(2) Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:

a. When each of the defendants is charged with accountability for each offense; or

b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:

1. Were part of a common scheme or plan; or

2. Were part of the same act or transaction; or

3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

We first note that under the facts of this case the trial judge could have joined the offenses charged pursuant to any one or all of the provisions for joinder set out in G.S. 15A-926(b)(2). Further, the question of consolidation of offenses for trial is a matter which lies within the sound discretion of the trial judge, and his ruling will not be disturbed absent a showing that joinder would hinder or deprive defendant of his ability to present his defense. *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978); *State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978).

Here defendants were indicted for the same offenses, perpetrated against the same person pursuant to a common scheme or plan with each of the defendants present, and participating in each offense.

Defendant Roy Lee Newman contends that he was denied a fair trial by the joinder solely because the prosecuting witness erroneously identified Roy Lee Newman as James Earl Newman on more than one occasion. This argument is without merit. We find nothing in this record indicating that the witness erroneously identified Roy Lee Newman as James Newman. Even had there been a misidentification, such a discrepancy would go only to Mrs. Harris' credibility as a witness.

This record does not disclose that the joinder of the charged offenses amounted to an abuse of discretion on the part of Judge McLelland or that the joinder in any way deprived defendant of a fair trial or hindered his ability to present his defense.

Defendant next assigns as error the denial of his motion for nonsuit at the close of all the evidence. It is his position that because Mrs. Harris "made three or more contradictions in her testimony" the State was required to produce evidence to corroborate her testimony that she had been raped and kidnapped. Defendant cites no authority in support of this argument. In fact, the rule in North Carolina is that when ruling on a motion for judgment of nonsuit, the trial court is required to disregard any contradictions and inconsistencies in the evidence. *State v.*

Witherspoon, 293 N.C. 321, 237 S.E. 2d 822 (1977). In *Witherspoon*, Justice Lake stated the often cited rule as follows:

> It is elementary that, upon a motion for judgment of nonsuit in a criminal action, all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom.

Id. at 326, 237 S.E. 2d at 826. This assignment of error is overruled.

[2] Defendant also contends that the trial judge erred by denying his motion to set aside the verdict of guilty of first-degree rape. He asserts that the motion should have been allowed because there was no corroborative evidence to support the victim's testimony that she was raped. This argument is totally without merit. It is well settled in this jurisdiction that a conviction for rape may be based upon the unsupported testimony of the prosecuting witness. *State v. Denny*, 294 N.C. 294, 240 S.E. 2d 437 (1978); *State v. Shaw*, 284 N.C. 366, 200 S.E. 2d 585 (1973).

[3] Neither do we find any substance in defendant's position that the motion should have been allowed because the evidence does not show that he actually committed the rape. When two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *State v. Terry*, 278 N.C. 284, 179 S.E. 2d 368 (1971); *State v. Barrow*, 292 N.C. 227, 232 S.E. 2d 693 (1977).

Here the prosecuting witness positively identified Roy Lee Newman as one of the men who abducted her from the parking lot. She testified that he and James Earl Newman forced her to go to a wooded area where defendant Roy Lee Newman held a knife to her throat while James Earl Newman removed his trousers. Roy then handed the knife to James, who used it to force her to submit to intercourse with him. It is immaterial that Roy Lee Newman did not actually engage in intercourse with the victim.

Finally, we note that this motion was addressed to the discretion of the trial judge and his ruling will not be reviewed upon appeal absent a showing of an abuse of discretion. *State v. Hamm*, 299 N.C. 519, 263 S.E. 2d 556 (1980). No abuse of discretion is shown.

[4] Roy Lee Newman next assigns as error the denial of his motion to dismiss the charge of kidnapping. Relying upon the rationale of *State v. Dix*, 282 N.C. 490, 193 S.E. 2d 897 (1973) and *State v. Roberts*, 286 N.C. 265, 210 S.E. 2d 396 (1974), defendant contends that there was not sufficient asportation to make out a case of kidnapping.

In *Dix*, this Court held that there was not sufficient asportation to constitute the offense of kidnapping where the defendant by use of a gun forced a jailer to go from the front door of the jail to the jail cells, a distance of about 62 feet.

In *Roberts*, the defendant pulled a child a distance of about 80 or 90 feet apparently for the purpose of committing a sexual assault upon her. This Court reversed the defendant's conviction for kidnapping stating:

> Here, the entire incident occurred during the seconds it took defendant to pull Kathy a distance of 80 to 90 feet, . . . To constitute the crime of kidnapping the defendant (1) must have falsely imprisoned his victim by acquiring complete dominion and control over him for some appreciable period of time, and (2) must have carried him beyond the immediate vicinity of the place of such false imprisonment.

286 N.C. at 277, 210 S.E. 2d at 404.

Defendant's argument overlooks the fact that *Dix* and *Roberts* were decided before the 1975 General Assembly amended G.S. 14-39, the kidnapping statute. As amended, G.S. 14-39(a) now provides:

> (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, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

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

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

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

We considered the effect of this legislation in *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). There we concluded:

> It is equally clear that the Legislature rejected our determinations in *State v. Dix*, *supra*, and in *State v. Roberts*, *supra*, to the effect that, where the State relies upon asportation of the victim to estabish a kidnapping, the asportation must be for a substantial distance and where the State relies upon "dominion and control," i.e., "confinement" or "restraint," such must continue "for some appreciable period of time." Thus, it was clearly the intent of the Legislature to make resort to a tape measure or a stop watch unnecessary in determining whether the crime of kidnapping has been committed.

Id. at 522, 243 S.E. 2d at 351.

Subsequently, in *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981), we considered the asportation element of kidnapping and construed the phrase in G.S. 14-39(a), "remove from one place to another," to require a removal separate and apart from that which is an inherent and inevitable part of the commission of another felony. *See also State v. Adams*, 299 N.C. 699, 264 S.E. 2d 46 (1980).

The facts in this case show that defendants abducted Mrs. Harris from the parking lot of the Big Star food store. She was taken to a wooded area behind the store. Removal of Mrs. Harris from her automobile to the location where the rape occurred was not such asportation as was inherent in the commission of the crime of rape. Rather, it was a separate course of conduct designed to remove her from the view of a passerby who might have hindered the commission of the crime. To this extent, the ac-

tion of removal was taken for the purpose of facilitating the felony of first-degree rape. Thus, defendant's conduct fell within the purview of G.S. 14-39 and the evidence was sufficient to sustain a conviction of kidnapping under that section. The trial judge properly denied defendant's motion to dismiss the charge of kidnapping.

[5] By assignment of error number 5, defendant contends that the trial judge erred by denying his motion to suppress the pretrial identification procedure in this case. He asserts that this procedure was so impermissibly suggestive that it tainted and rendered the prosecuting witness' in-court identification of defendant inadmissible. Initially, we note that the record before us does not show that defendant objected to the in-court identification, or requested a voir dire hearing to determine whether in-court identification was the product of an impermissibly suggestive pretrial procedure. Neither do we find a motion to strike the in-court identification testimony. Thus, defendant waived his right to assert on appeal that the trial court erroneously admitted the prosecuting witness' in-court identification testimony. *State v. Black*, 305 N.C. 614, 290 S.E. 2d 669 (1982); *State v. Brady*, 299 N.C. 547, 264 S.E. 2d 66 (1980).

Further, we find defendant's contention that the pretrial identification procedures were "improper" to be fruitless. He argues that since Mrs. Harris was unable to identify him at the pretrial proceeding evidence of the pretrial identification was inadmissible. In fact, the victim did identify defendant Roy Lee Newman in the pretrial proceedings. It is true that Mrs. Harris incorrectly fixed the date when this identification was made but this error would only affect the weight of her testimony as contradictions and discrepancies in identification testimony are for the jury to resolve. *See State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977).

The trial judge correctly admitted the pretrial and in-court identification testimony.

[6] Defendant Roy Lee Newman by his final assignment of error contends that the trial court erroneously admitted into evidence exhibit 1, certain items taken from defendant James Newman's possession at the time of his arrest. He argues that the State

failed to establish a sufficient chain of custody and that the items were not sufficiently identified.

Generally any object with a relevant connection to a criminal case is admissible into evidence. *State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979). However, if the object has a direct role in the circumstances giving rise to the trial, there must be testimony identifying the object as the same object involved in the incident and ordinarily there must be evidence tending to show that there has been no material change in the condition of the object between the time of the alleged crime and the trial. *State v. Harbison*, 293 N.C. 474, 238 S.E. 2d 449 (1977); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981). In instant case, Officer Smith testified that James Newman had certain grocery items in a bag at the time he was apprehended. The officer tagged these items and put them into a police locker. Detective Smith testified that he obtained the items in question from the police property room and brought them into the courtroom. Officer Morris identified these items as being the ones he tagged on the night of the incident in question.

This evidence was clearly sufficient to establish a proper chain of custody.

Neither do we find that the evidence was rendered inadmissible because there was no direct testimony tending to show that there was no material change in the condition of the items between the date of the alleged crime and the time of the trial.

In *State v. Oliver, supra*, the co-defendant Moore challenged the admissibility of two "football candies," a Robesonian newspaper, a plastic bag of paper money and food stamps, a blue coat with a fur lined collar, two toboggans, several pieces of multi-colored Christmas wrappings, a red pullover shirt with a hood, and a pistol and bullets on the grounds that the State failed to establish that these items had undergone no material change in their condition since the incident occurred. There was no direct evidence that the items had not undergone a change in condition.

Rejecting the defendant's contention, this Court, in pertinent part, stated:

> In the case at bar there is no evidence that the condition of any of the items in question had changed between the time

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

Id. at 53, 274 S.E. 2d at 199.

Here, as in *Oliver*, the absence of material change may be inferred from the nature of the items themselves and the positive identification of the items by Officer Morris.

[7] The only remaining question is whether these items had any relevance to an issue in this case.

When James Newman was taken into custody shortly after the attack upon Mrs. Harris, he had in his possession items which Mrs. Harris testified she had bought shortly before she was abducted. Therefore exhibit 1 was relevant in that it corroborated the prosecuting witness' testimony as to her abduction and rape and also tended to strengthen the identification testimony to the effect that James Newman was one of her assailants. The fact that Mrs. Harris admitted on cross-examination that she was not absolutely sure that one of the items contained in the challenged exhibit was one that she purchased does not render the exhibit inadmissible since the identification of relevant exhibits need not be absolute and unequivocal. *See State v. Bishop*, 293 N.C. 84, 235 S.E. 2d 214 (1977). This slight equivocation on the part of the witness Harris would relate only to the weight of her testimony. *See State v. Fikes*, 270 N.C. 780, 155 S.E. 2d 277 (1967).

We hold that the trial judge correctly admitted exhibit 1 into evidence.

Appeal of James Earl Newman

[8] James Earl Newman's sole assignment of error presents the question of whether the trial judge erred by limiting his cross-examination of the victim, Georgia Mae Harris. Defendant argues that the limitation on his cross-examination of Mrs. Harris as to her mental condition was particularly egregious since she was the principal witness in the identification process and the sole witness as to the actual commission of the crimes.

The portion of the cross-examination relevant to this assignment of error is as follows:

> Q. Mrs. Harris, prior to your marriage were you known as Georgia Mae Green?
>
> A. That was my maiden name.
>
> Q. And what day were you born on?
>
> A. December 11th, 1947.
>
> Q. And is it not the case that you were involuntarily committed to the John Umstead Hospital in 1977?
>
> A. That's—No, it was voluntarily. It wasn't involuntary.
>
> Q. In fact, there had been three admissions to the John Umstead Hospital that you have had, isn't that correct, Mrs. Harris?
>
> A. No, that is not correct. There have been—I was treated therapy and I was there on observation, because basically all of my life I had been a lively person and I knew that depression was sinking in and I wanted help.
>
> Q. And you were not committed?
>
> A. I had one commitment is what I'm saying. I had been committed once.
>
> Q. Mrs. Harris, do you remember participating in a Court hearing on May of 1977?
>
> A. Yes, I do.
>
> Q. Is that the time that you say that you were involuntarily committed?

MR. SMITH: Objection.

THE COURT: Overruled. Answer the question.

A. This is when—This was when it was to be determined whether or not I was—should be further treated or whether I was to be released to go home. I was in the custody of the law. I had to have a hearing. That was for all patients. And it was determined at that time that I did not need to be committed.

Q. But you had been at the John Umstead Hospital in the eastern unit out there for a period of time prior to the actual hearing, isn't that the case?

A. That's right, a waiting period. I was supposed to wait there until my trial or hearing.

Q. And, in fact, the reason that you got to the John Umstead Hospital in the first place was because a person named Mary Green, who is your mother, filed a petition for an involuntary commitment with the Court in May of 1977, isn't that correct?

MR. SMITH: Objection.

THE COURT: Overruled.

A. My mother did do what you said.

Q. And isn't the fact the case that at the time that your mother took out that petition the reason was that you were walking around the City of Durham in a nightgown making praying motions, appearing to be a victim of amnesia and hallucinating and telling everyone that you were Jesus, isn't that right?

MR. SMITH: Objection.

THE COURT: Overruled. Witness will answer the question if she knows.

A. I don't remember all of that.

Q. And isn't in fact the case also that you were hearing voices of God and Angels at that time?

MR. SMITH: Objection.

THE COURT: Overruled. Answer the question.

A. I don't know that either.

Q. And isn't it also the case that you were examined by a physician at Duke Hospital prior to going to John Umstead Hospital at that time, isn't that true?

A. That is true.

Q. And at that time you told the physician that you were Jesus and that you had been to hell and back?

MR. SMITH: Objection.

THE COURT: Overruled. Answer it.

A. I don't remember that.

Q. And, in fact, you were psychotic at that time?

MR. SMITH: Objection.

J.E.N. Exception No. 1

THE COURT: Sustained.

Q. Is it not the case, Mrs. Harris, that the illness that you were treated for was for paranoia schizophrenia?

MR. SMITH: Objection.

J.E.N. Exception No. 2

THE COURT: Sustained.

Q. And is it also not the case that you received Thorazin—

MR. SMITH: Objection.

Q. — On that occasion?

J.E.N. Exception No. 3

THE COURT: Sustained.

Q. Have you ever taken the medication Thorazin, Mrs. Harris?

MR. SMITH: Objection.

THE COURT: Sustained.

Q. And isn't it a fact that in May of 1977, Judge Linwood Peoples entered an order committing you—

MR. SMITH: Objection.

Q. —To John Umstead Hospital for fourteen days on an involuntary basis?

MR. SMITH: Objection.

THE COURT: Overruled. The witness will answer the question if she knows.

A. Would you repeat your question, please?

Q. Isn't it in fact the case that in May of 1977, Judge Linwood Peoples in the District Court of Granville County entered an order committing you to John Umstead Hospital for fourteen days as an involuntary patient?

A. I never heard of the man.

Q. Now, Mrs. Harris, isn't it also the case that in January of 1978, a petition for involuntary commitment was served on you?

MR. SMITH: Objection.

A. January of '78—

MR. SMITH: I have an objection to it.

THE COURT: Objection is overruled.

Q. Is it not the case?

A. January of 1978?

Q. That's right.

A. What was your question?

Q. That a petition was served on you in January, 1978, for involuntary commitment under the name of Georgia Green?

A. At that time I was being—receiving therapy and counselling down at the Mental Health Center on Main Street.

Q. But it is in fact the case that your mother, Mary C. Green, filed a petition with the Clerk of Superior Court in Granville County on January 4th, 1978?

A. That's correct.

Q. And in that petition, wasn't that the reason in that petition that you weren't able to comprehend things. You were paranoid, and you were acting in a very depressed state of mind.

MR. SMITH: Objection.

THE COURT: Overruled.

A. All of that was at my request. I had went to talk to my mother prior to all of this.

Q. And, in fact, when you were examined you claimed that by the physician at the time that petition was filed that you claimed that your boy friend controlled your thoughts and actions?

MR. SMITH: Objection.

THE COURT: Overruled. Answer the question.

A. I don't remember that.

Q. And further that you were examined—

MR. SMITH: Objection to the form of that question. Even with it's starting out with further—

Q. Let me ask also, Mrs.—

THE COURT: Overruled. Go ahead, please.

Q. —Harris, that on January 2nd, 1978, you were examined in the Emergency Room at Duke Hospital?

MR. SMITH: Objection, relevancy.

THE COURT: Overruled. Answer the question.

A. Yes.

Q. And that was in connection with this petition that was filed by your mother, isn't that right?

A. That's right.

Q. And at that time you told the physician that you had lost your penis and you had syphilis?

MR. SMITH: Objection.

THE COURT: Overruled. Answer the question.

A. I don't know anything about that.

Q. And isn't it the case that you were taken to Butner to John Umstead Hospital at the Eastern Unit?

A. That is a fact.

Q. And that you stayed there for a period of at least fourteen days, isn't that right?

A. I stayed there for a short period of time. I'm not sure of how many days.

Q. And is it also the case that you continued to take medication for your mental illness?

MR. SMITH: Objection.

THE COURT: Overruled. Answer that.

A. I've been taking medication since '78 and God.

On re-direct examination the State presented the following evidence:

Q. A few years ago you received some counselling and/or treatment for some emotional problems that you were having at the time, is that correct?

A. That's right.

Q. Where did you receive help from?

A. John Umstead Hospital and Durham Medical Community Health Center.

Q. Did you get help at first as a result of your own efforts or did somebody take you and lock you up and force you to seek some help?

A. The first initial move was made voluntarily.

Q. You thought you were becoming depressed and sought help for that?

A. Yes, sir. And I wasn't labeled as a—

Q. —We're not talking about what you were labeled.

A. I'm sorry.

Q. Did you receive help for problems that you were experiencing during that time?

A. Yes, sir.

Q. Do you remember what was causing some of the problems that you were having?

A. Yes.

Q. What were they?

A. At that time I was the only parent and I was a working mother and a student. There was a lot of pressure on me and there could have been any number of things. I was probably, after having talked with some of the people there they let me know that I had been a person that was basically shut up and kept things inside of me, balled up inside of me, through the years and I had never really confided in or had anyone to talk with.

Q. Were you able as a result of your interaction with the workers at the agencies that you mentioned able to open up?

A. Yes.

Q. Did you feel any relief as a result of the help that you received?

MS. PETERSEN: Objection.

THE COURT: Overruled. Answer it.

A. Very much so, yes, sir.

Q. When was the last time that you received some help for emotional problems or mental problems?

A. January of 1978.

Q. Have you been better able to handle the stress causing problems that you had before that time which led you to seek help in the first place?

A. Yes, sir.

Q. Have you continued to have any problems, emotionally, psychologically, mentally, since January, 1978?

A. No, sir.

Q. In July of 1981, were you experiencing any emotional, psychological or mental problems or pressures that effected your judgment in anyway similar to the way that you were feeling during the time in 1978, that you sought help for?

A. I was of sound mind.

Q. So you felt that the help that you got back in '77 or '78, during that time, was helpful to you?

A. Yes, sir.

Then, on recross-examination, counsel for defendant attempted to show that Mrs. Harris' characterization, during redirect examination, of the seriousness of her mental illness was inaccurate and in fact grossly understated the degree and kind of her mental illness:

Q. Now, going back to the—Mr. Smith asked you some questions about the mental situation. He asked you if you remembered in 1977, in the commitment proceeding in May of 1977, were you able to fill out the information concerning the appointment of counsel and sign the necessary forms that were offered to you by the Court?

MR. SMITH: Objection, relevancy.

J.E.N. Exception No. 4

THE COURT: Objection sustained.

Q. Let me ask also, have you ever been found by a Court to have been a paranoid schizophreniac?

MR. SMITH: Objection.

J.E.N. Exception No. 5

THE COURT: Objection sustained.

Q. Do you remember participating in a Court hearing before the Honorable Linwood Peoples?

MR. SMITH: Objection.

J.E.N. Exception No. 6

THE COURT: Sustained.

Q. At the time that you were committed you were at the Eastern Unit of the John Umstead Hospital, is that correct?

MR. SMITH: Objection.

J.E.N. Exception No. 7

THE COURT: Sustained.

Q. Let me ask that you look at this document in a Court proceeding file—

MR. SMITH: May I see it.

(Hands document to Mr. Smith.)

Q. Let me ask you if that is an order of involuntary commitment in the matter of Georgia Green?

MR. SMITH: Objection.

J.E.N. Exception No. 8

THE COURT: Sustained.

Q. I have no other questions.

Upon defense counsel's request, the trial court permitted cross-examination of Georgia Mae Harris in the absence of the jury. His purpose was to place answers in the record to questions which were sustained when she was examined before the jury. We quote:

Q. Mrs. Harris, I ask you again if in May of 1977, you were able to sign and fill out the information affidavit concerning appointment of counsel in a special proceeding which was filed for your involuntary commitment in May of 1977?

A. Could you rephrase that, please?

Q. There is a form that is in the Court file in a special proceeding in May of 1977 for the involuntary commitment of Georgia Green and I'm asking whether or not you were able to fill out the information form concerning whether or not you were entitled to an attorney and whether or not you were indigent at that time?

A. I did sign papers myself.

Q. Let me ask you if you would look at the form which is in the Court file in the matter of Georgia Green and ask if you see your signature on that paper which is headed information concerning appointment of counsel?

A. That's not my signature on it.

Q. Does it in fact say on the line which has responded which is Georgia Green that respondent is unable to sign form?

A. That's what's on there.

Q. I ask that you also look at this statement in reference to financial status questionnaire and ask if you signed that document in the same Court file?

A. My name is on here.

Q. And is it again, in fact, stated on here that the respondent was unable to give information or states unable to obtain information from respondent? Is that what is stated on that document?

A. That's what's on there.

Q. I would ask that you look at that Court order, the Court order that I showed you in the matter of Georgia Green 77 SP 421, and ask if you had ever been found by a Court to be paranoid schizophreniac?

A. I cannot answer that with a yes or a no.

Q. Let me direct your attention to the fact that this is the Court file involving you, Georgia Green, and ask if there is a paragraph in here that is checked by the Court, particularly the first paragraph of this Court Order has been checked, is that correct?

A. Yes, ma'am.

Q. And would you read that first paragraph?

A. The patient is mentally ill. What is that word, please?

Q. Inebriate.

A. Inebriate suffering with a mental disorder. Diagnosed as paranoid schizophrenia.

Q. And that, in fact, is in the Court order that has your name at the top of it, isn't that correct?

A. That's correct.

Q. Now, let me ask you also if there is a paragraph in there that says that you are unable to care for yourself at the present time?

A. That's correct.

Q. And is in fact that Court order dated May 18th, 1977?

A. Yes.

Q. And is it signed by Linwood Peoples, District Court Judge?

A. Yes, it is.

Q. And that is, in fact, the Court order involuntarily committing you to the John Umstead Hospital, is that correct?

A. Yes. I remember all of it, but I just don't know that Judge. You asked me if I know him and I just don't remember his name.

Q. That's all, your Honor.

The competency of a witness to testify by reason of mental incapacity is raised by a motion requesting the trial judge to pass on the witness' competency. The resolution of this question rests largely within the discretion of the trial judge. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970); *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973). Since defendant did not make such a motion, we assume defendant was satisfied as to the witness' *competency* to testify. It follows that his cross-examination of the

prosecuting witness was directed toward impugning her credibility. *See* 1 H. Brandis on North Carolina Evidence, *Witnesses*, § 44 (2d Rev. Ed. 1982); *Moyle v. Hopkins*, 222 N.C. 33, 21 S.E. 2d 826 (1942).

It is well settled that in a criminal case an accused is assured his right to cross-examine adverse witnesses by the constitutional guarantee of the right of confrontation. N.C. Const. art. I, § 23. *State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289, *cert. denied*, 409 U.S. 1043, 93 S.Ct. 537, 34 L.Ed. 2d 493 (1972). *State v. Davis*, 294 N.C. 397, 241 S.E. 2d 656 (1978); 1 H. Brandis on North Carolina Evidence, *Witnesses*, § 35 (2d Rev. Ed. 1982). The range of relevant cross-examination is very broad, but it is subject to the discretionary powers of the trial judge to keep it within reasonable bounds. *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975); *State v. Royal*, 300 N.C. 515, 268 S.E. 2d 517 (1980).

We agree with defendant's contention that he was entitled to discredit the prosecuting witness' testimony by attempting to show by cross-examination that she suffered from a mental impairment which affected her powers of observation, memory or narration. 1 H. Brandis on North Carolina Evidence, *Witnesses*, § 44 (2d Rev. Ed. 1982). Evidence of past mental defects is admissible for this purpose. *Moyle v. Hopkins, supra; State v. Armstrong*, 232 N.C. 727, 62 S.E. 2d 50 (1950).

Defendant was permitted to conduct a lengthy and in-depth cross-examination into the past mental condition of the prosecuting witness. We are convinced that by this cross-examination the jury was made acutely aware of her prior mental problems. Additionally, the jury had ample opportunity to observe the prosecuting witness' demeanor and hear her responses to the questions posed so as to form an opinion as to whether her powers of observation, memory and narration were then so impaired that she was not a credible witness.

We hold that the trial judge did not unduly limit defendant James Newman's cross-examination of the prosecuting witness.

For the reasons set forth is this opinion, we hold that defendants Roy Lee Newman and James Earl Newman received a fair trial free of prejudicial error.

No error.

RESPONSIBLE CITIZENS IN OPPOSITION TO THE FLOOD PLAIN ORDINANCE, ET AL. v. THE CITY OF ASHEVILLE, A MUNICIPAL CORPORATION

No. 545PA82

(Filed 3 May 1983)

1. **Municipal Corporations § 30.10— municipal flood plain ordinance—valid exercise of police power**

A city ordinance setting forth land-use regulations on property designated a flood hazard district and requiring that new construction and substantial improvements made to properties in the flood hazard district be built so as to prevent or minimize flood damage constituted a valid exercise of the police power and did not effect a "taking" of property without just compensation in violation of the N.C. Constitution or the U.S. Constitution. Article I, § 19 of the N.C. Constitution; Fifth Amendment to the U.S. Constitution.

2. **Municipal Corporations § 30.10— municipal flood plain ordinance—no violation of equal protection**

A city ordinance setting forth land-use regulations on property designated a flood hazard district and requiring that new construction and substantial improvements made to properties in the flood hazard district be built so as to prevent or minimize flood damage did not violate the equal protection guarantees under either the N.C. Constitution or the U.S. Constitution, since the classification created by the ordinance is reasonable, and the ordinance benefits owners of property within the flood hazard area not only directly but indirectly as well by making available federal flood insurance and financial assistance for acquisition and construction purposes.

3. **Evidence § 45— evidence of value by property owner—exclusion as harmless error**

In an action to determine the validity of a city flood plain ordinance, the trial court erred in excluding the testimony of three property owners concerning the damaging effect of the ordinance on the value of their property, since a property owner is competent to testify as to the value of his own property, even though his knowledge on the subject would not qualify him as a witness were he not the owner, unless it affirmatively appears that the owner does not know the value. However, such error was not prejudicial since the trial court found from other evidence that the ordinance seriously depreciated the value of properties in the area, and since a mere diminution in value was not sufficient to invalidate the ordinance.

Justices MARTIN and FRYE took no part in the consideration or decision of this case.

PLAINTIFFS appeal from a judgment of *Burroughs, J.*, rendered at the 19 April 1982 civil session of Superior Court, BUNCOMBE County, determining that plaintiffs were not entitled to relief on their claims that the City of Asheville's land-use or-

dinance was unconstitutional. On 3 November 1982 we allowed plaintiffs' petition for discretionary review to hear the matter prior to determination by the Court of Appeals.

Jack W. Westall, Jr., Attorney for plaintiff-appellants.

Bennett, Kelly & Cagle, P.A., by Harold K. Bennett, Attorney for defendant-appellee.

MEYER, Justice.

The primary issue here is whether a city ordinance setting forth land-use regulations on property designated a flood hazard area constitutes an unlawful exercise of the police power because it effects a "taking" of the property without just compensation in violation of the North Carolina Constitution or the United States Constitution. In addition, we determine whether such an ordinance violates the equal protection provisions of the federal and state constitutions because it allegedly benefits one class of citizens at the expense of another class. For the reasons set forth below, we hold that the ordinance in question is constitutionally sound.

I.

Plaintiffs are owners of commercial real property located in "flood hazard districts" in Asheville, North Carolina. Plaintiffs brought this class action against the City of Asheville claiming that the effect of the city's flood plain ordinance, which establishes land-use regulations for plaintiffs' properties, "substantially deprive[s]" them of "the right to reasonable use of their property and to cause the value of the property to depreciate to a fraction" of its value. In essence, then, plaintiffs challenge the enactment of the flood plain ordinance as an invalid exercise of the police power because, they contend, it effects a violation of their constitutional rights under the federal and state[1]

1. In *Long v. City of Charlotte*, 306 N.C. 187, 195-96, 293 S.E. 2d 101, 107-08 (1982), we stated: "While North Carolina does not have an express constitutional provision against the 'taking' or 'damaging' of private property for public use without payment of just compensation, this Court has allowed recovery for a taking on constitutional as well as common law principles. *Stoebuck, supra*, 71 Dick. L. Rev. 207, 226 n. 102. We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this

constitutions to just compensation for the "taking" of private property for public use. In addition, plaintiffs claim that the flood plain ordinance violates the equal protection provisions of the federal and state constitutions. Specifically, they claim the ordinance "imposes severe restrictions on the property of some citizens for the purpose of allowing other property owners in the City of Asheville to receive the benefit of numerous Federal financial assistance programs."

The provisions of the ordinance which plaintiffs attack require, in general, that new construction and substantial improvements made to properties in the flood hazard districts be built so as to prevent or minimize flood damage. Specifically, plaintiffs challenge Article 6, Section B; Article 7, Section B; Article 8, Section B, Subsections 1-5; and Article 10, Section B, of the ordinance.

Article 6, Section B, provides:

REQUIREMENTS

(1) All new construction and substantial improvements shall be anchored to prevent flotation, collapse or lateral movement of the structure.

(2) All new construction and substantial improvements shall be constructed with materials and utility equipment reasonably resistant to flood damage as defined in N.C. Building Code.

(3) All new construction and substantial improvements shall be constructed by methods and practices which reasonably minimize flood damage.

(4) All new and replacement water supply systems, either private or public, shall be designed and installed to minimize, to the greatest extent practicable, infiltration of flood waters into the system.

State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of 'the law of the land' within the meaning of Article I, Section 19 of our State Constitution."

(5) All new and replacement sanitary sewerage systems, either private or public, shall be designed and installed to minimize, to the greatest extent practicable, infiltration of flood waters into the systems and discharge from the systems into the flood waters.

(6) On-site waste disposal systems shall be located or constructed to avoid impairment of them or contamination from them during flooding.

(7) Any alteration, repair, reconstruction or improvements to a structure, on which the start of construction was begun after the effective date of this Ordinance, shall meet the requirements of "new construction" as contained in this Ordinance.

This article applies to all property in the flood hazard districts. Flood hazard districts are divided into two types, "floodway districts" and "flood fringe districts." Plaintiffs here have property in each type of flood hazard district.

Article 7, Section B, which applies in general to property in floodway districts, provides:

REQUIREMENTS

(1) Within a designated FLOODWAY District, all fill, encroachments, new construction or substantial improvement shall be prohibited, except as otherwise provided herein as a Permitted use or Conditional Use.

(2) The construction, reconstruction or improvement of any portion of a new or existing mobile home park, the expansion of an existing mobile home park, the placement, replacement, location and relocation of a mobile home within a FWD are prohibited.

(3) Residential uses of buildings and lands within the Floodway District are prohibited.

Article 8, Section B, which applies in general to property in flood fringe districts, Subsections 1-5, provides:

REQUIREMENTS

(1) Permits are required for all grading and construction work within a FFD. Applications shall be made pursuant to ARTICLE 4 SECTION C of this Ordinance.

(2) The construction, reconstruction or improvement of any portion of a new or existing mobile home park, the expansion of an existing mobile home park, the placement, replacement, location and relocation of a mobile home within a FFD are prohibited.

(3) New construction or substantial improvement of any residential structure within a FFD shall have the lowest habitable floor (including basement) elevated to at least two feet above the Regulatory Flood Elevation and utilities shall be floodproofed as provided by Article 10 Section A of this Ordinance.

(4) New construction or substantial improvement of any commercial, industrial or other non-residential building shall either have the lowest floor (including basement) elevated to at least one foot above the Regulatory Flood Elevation and utilities shall be floodproofed as provided by Article 10 Section A of this Ordinance or shall be floodproofed up to at least the Regulatory Flood Elevation pursuant to Article 10 Section B of this Ordinance and shall have utilities floodproofed pursuant to Article 10 Section A.

(5) Outside storage of materials of inventories for allowable uses within the Flood Fringe District and not otherwise prohibited by the Ordinance shall be allowed.

Article 10, Section B, provides:

FLOODPROOFING BUILDINGS

New construction or substantial improvements of any commercial, industrial, or other nonresidential structure, together with the attendant utilities, shall be floodproofed in one of the following ways:

(a) Elevation of the lower floor, including basement above the level of the base or regulatory flood elevation at the specific site;

(b) Be floodproofed so that below the base flood level the structure is water tight with walls substantially impermeable to the passage of water, with structural components having the capacity of resisting hydrostatic and hydrodynamic loads and the effects of buoyancy;

(c) An alternative method of floodproofing structures shall be to construct nonresidential buildings in such a manner that water shall be allowed to pass into or through the structure with no substantial risk that the building will thereby be endangered or be susceptible to collapse or substantial damage. (The owners of such structure shall be advised that improvements made under this provision shall receive a specified rating for insurance purposes and that no subsidized insurance will be available for goods, inventories, materials or equipment contained in the building below the base flood elevation.) However, before this method of floodproofing is utilized the proposed use or construction shall be approved by the Board of Adjustment as set forth in Article 4 of this Ordinance.

(d) An acceptable combination of methods (a) - (c).

In all instances, however, a registered professional engineer or architect shall certify that the standards of this subsection are satisfied. Such certification shall be provided to the City as set forth in Article 4. Section C., as contained herein.

Judge Robert M. Burroughs heard the case without a jury. He concluded as a matter of law that enactment of the ordinance was "a valid exercise of police power, and the mere fact that it seriously depreciates the value of properties in said areas does not establish its invalidity." In addition, Judge Burroughs determined that the ordinance did "not substantially deprive the plaintiffs and those similarly situated of the right to reasonable use of their property and does not constitute an unlawful taking by the defendant of property owned by the plaintiffs." Finally, he found that the ordinance did not violate the equal protection provisions of the North Carolina Constitution or the United States Constitution. Plaintiffs appealed. We granted plaintiffs' petition for discretionary review to hear the matter prior to determination by the Court of Appeals.

II.

A.

[1] We address first plaintiffs' contention that the ordinance constitutes an invalid exercise of police power because it effects a "taking" of their property in violation of their right to just compensation under the North Carolina Constitution.[2]

In *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979), Justice Brock succinctly articulated the analysis to be applied in examining due process challenges to governmental regulations of private property claimed to be an invalid exercise of the police power. He wrote:

> Several principles must be borne in mind when considering a due process challenge to governmental regulation of private property on grounds that it is an invalid exercise of the police power. First, is the object of the legislation within the scope of the police power? Second, considering all the surrounding circumstances and particular facts of the case is the means by which the governmental entity has chosen to regulate reasonable?

298 N.C. at 214, 258 S.E. 2d at 448-49 (citations omitted).

In short, then, the court is to engage in an "ends-means" analysis in deciding whether a particular exercise of the police power is legitimate. The court first determines whether the ends sought, *i.e.*, the object of the legislation, is within the scope of the power. The court then determines whether the means chosen to regulate are reasonable. Justice Brock stated that this second inquiry is really a "two-pronged" test. That is, in determining if the means chosen are reasonable the court must answer the following: "(1) Is the statute in its application reasonably necessary to

2. In *Department of Transportation v. Harkey*, 308 N.C. 148, 301 S.E. 2d 64 (1983), this Court noted again that " '(t)he question of what constitutes a taking is often interwoven with the question of whether a particular act is an exercise of the police power or of the power of eminent domain.' " The Court also noted that " '(i)f the act is a proper exercise of the police power, the constitutional provision that private property shall not be taken for public use, unless compensation is made, is not applicable.' " *Id.*, *quoting* McQuillin, Municipal Corporations, Third Edition, Volume 11, 32.27. Plaintiffs here, in essence, claim that the exercise of the police power is invalid because the interference with the use of their properties is unreasonable: the ordinance effects a "taking" of their property.

promote the accomplishment of a public good and (2) is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?" *Id.* at 214, 258 S.E. 2d at 449.

In the case at bar, it is clear that the ends sought, *i.e.*, the object of this legislation—the prevention or reduction of loss of life, property damage, etc., due to flood—falls well within the scope of the police power. Indeed, the first article of the flood plain ordinance contains a finding of fact noting the harm periodic flooding inflicts on the people of Asheville thus affecting the public health, safety and welfare:

> The flood hazard areas of Asheville are subject to periodic inundation which threatens to result in loss of life and property, health and safety hazards, disruption of commerce and governmental services, extraordinary public expenditures for flood protection and relief, and impairment of the tax base all of which adversely affect the public health, safety and welfare.

In short, enactment of this ordinance satisfies the first inquiry—whether the object of the legislation is within the scope of the police power.

We turn now to an examination of the reasonableness of the means chosen to implement the public goal of preventing or minimizing flood damage. We note that the ordinance contains a second finding of fact in its first article relating to the cause of this periodic flooding. That finding states:

> These flood losses are caused by the cumulative effect of obstructions in flood plains causing increases in flood heights and velocities, and by the occupancy in flood hazard areas by uses vulnerable to floods or hazardous to other lands which are inadequately elevated, floodproofed or otherwise protected from flood damage.

It appears, therefore, that some of the flood damage is caused by properties within the flood hazard area "which are inadequately elevated, floodproofed or otherwise protected from flood damage." It follows, then, that enactment of an ordinance which requires that new construction and substantial improvements on property within that flood hazard area be built so as to prevent or minimize this flood damage is "reasonably necessary" to fur-

ther the public goal of preventing or reducing flood damage. Indeed, it can be argued that an ordinance requiring, among other things, the floodproofing of new structures is the only feasible manner in which flood damage can be prevented or minimized in a flood hazard area. Having thus determined that the enactment of the ordinance is "reasonably necessary" for the public health, safety and welfare, we turn now to the thrust of plaintiffs' arguments.

Plaintiffs' contentions, in essence, focus on the question of whether the interference with their right to use their property is "reasonable in degree," the second prong of the reasonable means inquiry. Specifically, plaintiffs claim that the enactment of the ordinance is an invalid exercise of the police power because it is unreasonable; it goes so far as to effect a "taking" of their property in violation of their constitutional right to just compensation.[3]

This Court has not previously determined at what point a land-use regulation becomes an invalid exercise of the police power, as applied, because the interference with the property owner's rights is unreasonable, and, in effect constitutes a "taking" of the owner's land. However, this Court has alluded to the "taking" issue in connection with the exercise of the police power in an analogous situation. In *Helms v. City of Charlotte*, 255 N.C. 647, 122 S.E. 2d 817 (1961), a case involving the validity of a zoning ordinance, this Court wrote:

> 'It is a general rule that zoning cannot render private property valueless. The burdens of government must be equal. In other words, if the application of a zoning ordinance has the effect of completely depriving an owner of the beneficial use of his property *by precluding all practical uses or the only use to which it is reasonably adapted*, the ordinance is invalid . . . . A zoning of land for residential purposes is *unreasonable and confiscatory and therefore illegal where it is practically impossible to use the land in question* for residential purposes.' McQuillin: Municipal Corporations, Vol. 8, s. 25-45, pp. 104, 105.

3. Although it is not clear whether plaintiffs are attacking the validity of this land-use ordinance as being unconstitutional on its face or as applied to plaintiffs, we will deal with the issue as being the constitutionality of the ordinance as applied to plaintiffs. We note that in so doing we have impliedly determined that the ordinance is constitutional on its face.

255 N.C. at 653, 122 S.E. 2d at 822 (emphasis added).

The Court in *Helms* remanded the case with directions to the trial court to determine whether the zoned use for the land was "under all the circumstances, practical and of any reasonable value." 255 N.C. at 657, 122 S.E. 2d at 825. In so doing, this Court seemed to indicate that *a zoning ordinance* would be deemed "unreasonable and confiscatory," as applied to a particular piece of property, if the owner of the affected property was deprived of all "practical" use of the property and the property was rendered of no "reasonable value."

In the case at bar, plaintiffs claim that their property has been "taken" because the effect of the ordinance is to deprive them of the reasonable use of their property and to diminish its fair market value. As noted above, the majority of these contested provisions require that new construction and substantial improvements on property located in the flood hazard districts be built so as to prevent or minimize flood damage. These requirements can be characterized as conditional affirmative duties placed on the landowner's use of his property.[4] The requirements are conditional because they apply only to "new construction and substantial improvements." The regulations do not affect in any way the current use of each plaintiff's property; each plaintiff thus continues to have a "practical" use for his property of "reasonable value." *See Helms v. City of Charlotte*, 255 N.C. 647, 122 S.E. 2d 817. Furthermore, plaintiffs are not prohibited from

4. We note that Article 7, Section B, Subsection 1, provides that "all fill, encroachments, new construction or substantial improvement shall be prohibited, *except as otherwise provided* herein as a Permitted use or Conditional use." (Emphasis added). Although this provision would appear to be a prohibition on many uses of the properties with few exceptions rather than a conditional affirmative duty (as are the other provisions), this is not the case. Under Section D of that same article we find the following: "New construction or substantial improvements . . . may be permitted provided that approval of said use or construction is approved by the Board of Adjustment . . . and provided an acceptable certification by a registered professional engineer is provided proving that the anticipated encroachment(s) shall not result in any increase of the regulatory flood during occurrence of the base flood discharge." This language indicates that "new construction or substantial improvements" made under Article 7 must, as under the other articles, be built so as to prevent or minimize flood damage. In addition, we note several provisions relating to mobile homes and mobile home parks. These provisions will not be discussed because plaintiffs here are unaffected by those provisions—they all own non-residential properties.

engaging in new construction or substantial improvements on their properties. They are only required to do so in a manner that prevents or minimizes flood damage, that is, in conformance with the land-use regulations.

Plaintiffs argue, however, that the cost of complying with these regulations, should they wish to make improvements upon their properties, is prohibitive. In essence, they contend that their properties have been "taken" because for all practical purposes they cannot add to or change the uses to which they currently put their properties. In addition, plaintiffs claim that the ordinance has diminished the market value of their properties. Even assuming that the cost of complying with the land-use regulations is prohibitive (and we do not decide that it is) and recognizing that the market value of plaintiffs' properties has diminished (a fact found by the trial court), these factors are of no consequence here. As this Court noted in *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444, "the mere fact that an ordinance results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he deems appropriate is not sufficient reason to render the ordinance invalid." *Id.* at 218, 258 S.E. 2d at 451, *citing Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E. 2d 325 (1968); and *Helms v. City of Charlotte*, 255 N.C. 647, 122 S.E. 2d 817.

In sum, therefore, we hold that the enactment of this flood plain ordinance is a valid exercise of the police power and does not effect a "taking" of plaintiffs' properties in violation of the North Carolina Constitution. Our holding today is in accord with a federal court decision determining that the National Flood Insurance Act, 42 U.S.C. §§ 4001-4128 (1976)—which requires community adoption of flood plain regulations like the ones at issue here before federal flood insurance is made available in a community—was a constitutional exercise of congressional power and did not constitute a "taking" of the private property affected. *Texas Landowners Rights Ass'n v. Harris*, 453 F. Supp. 1025 (D.D.C. 1978), *aff'd*, 598 F. 2d 311 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 927, 100 S.Ct. 267, 62 L.Ed. 2d 184 (1979). Our decision is also in accord with several other state jurisdictions that have addressed this same or a similar issue. *E.g., Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 284 N.E. 2d 891 (1972), *cert. denied*, 409 U.S. 1108, 93 S.Ct. 908, 34 L.Ed. 2d 689 (1975) (enact-

ment of flood plain zoning bylaw similar to the land-use ordinance at issue here was held a constitutional exercise of police power and not a "taking"); *Cappture Realty Corp. v. Bd. of Adjustment of Elmwood Park*, 126 N.J. Super. 200, 313 A. 2d 624 (1973), *aff'd*, 133 N.J. Super. 216, 336 A. 2d 30 (1975) (ordinance declaring a moratorium on construction on flood-prone lands was held a valid exercise of police power and thus no "taking" occurred); *Dur-Bar Realty Co. v. City of Utica*, 57 A.D. 2d 51, 394 N.Y.S. 2d 913 (1977), *aff'd*, 44 N.Y. 2d 1002, 380 N.E. 2d 328, 408 N.Y.S. 2d 502 (1978) (city zoning ordinance restricting certain uses of property within "Land Conservation Districts" to protect properties against flooding was held a constitutional exercise of police power); *Maple Leaf Investors, Inc. v. State of Washington*, 88 Wash. 2d 726, 565 P. 2d 1162 (1977) (prohibition against construction for human habitation within floodway was held a valid exercise of state police power and was not a "taking" or "damaging" of private property for public use).

B.

We turn now to plaintiffs' challenge that the enactment of the flood plain ordinance is an invalid exercise of the police power because it constitutes a "taking" without just compensation in violation of the Fifth Amendment to the United States Constitution as applied to the states through the Fourteenth Amendment.

In *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 2d 631 (1978), a leading United States Supreme Court decision in this area, the Supreme Court held that the New York City Landmarks Preservation Law, as applied to plaintiffs, did not constitute a "taking" of plaintiffs' property in violation of the federal constitution. Under the ordinance, the purpose of which is to preserve New York City historic landmarks, the Landmarks Preservation Commission had rejected plaintiffs' plans to construct a multi-story office building over the Penn Central Terminal because the proposed building would be destructive of the terminal's historic and aesthetic features. The landmarks law, which requires a landowner to secure commission approval before exterior alterations can be made to his or her historic buildings, is analogous to the ordinance at issue here which requires that certain standards be met when engaging in new construction or substantial improvements on property located in a

flood hazard area. Both ordinances place conditional affirmative duties on the landowner to meet certain requirements if he or she wishes to engage in new construction or alterations. Indeed, we find no feature of the *Penn Central* case which substantially distinguishes it from the case at bar—at least to the extent that would render the exercise of police power invalid or justify a different conclusion on the "taking" issue. To further support our conclusion, we note the observation the Supreme Court made in *Penn Central* on the broad scope of the police power:

> More importantly for the present case, in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests.

438 U.S. at 125, 98 S.Ct. at 2659, 57 L.Ed. 2d at 649 (citations omitted).

We hold that enactment of the flood plain ordinance here is valid under the United States Constitution and that no "taking" has occurred here in violation of plaintiffs' federal right to just compensation.

III.

[2] Plaintiffs also claim the flood plain ordinance violates the equal protection provisions of the federal and state constitutions. Specifically, they argue the ordinance is unconstitutional because it imposes burdens only on those citizens with property in the flood hazard area strictly for the benefit of those citizens with property outside the flood hazard area. We hold, however, that this classification is reasonable and that plaintiffs are not impermissibly burdened under either constitution.

In *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E. 2d 193 (1971), *cert. denied*, 406 U.S. 920, 92 S.Ct. 1774, 32 L.Ed. 2d 119 (1972), this Court articulated the rule to be applied in determining whether a legislative classification violates the equal protection guarantees:

> Neither the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution nor the similar

> language in Art. I, § 19, of the Constitution of North Carolina takes from the State the power to classify persons or activities when there is reasonable basis for such classification and for the consequent difference in treatment under the law.

Id. at 713, 185 S.E. 2d at 201 (citations omitted); *A-S-P Associates v. City of Raleigh*, 298 N.C. at 226, 258 S.E. 2d at 456 (quoting the above standard). *See also Village of Belle Terre v. Boraas*, 416 U.S. 1, 8, 94 S.Ct. 1536, 1540, 39 L.Ed. 2d 797, 803 (1974) (zoning ordinance upheld against charge that it violated the equal protection guarantee where the classification was reasonable, not arbitrary, and bore a rational relationship to a permissible state objective).

The Court in *Guthrie* then stated, "[t]he test is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation." 279 N.C. at 714, 185 S.E. 2d at 201 (citations omitted). As noted previously, the city of Asheville set out in the first article of its flood plain ordinance two findings of fact which defined the situation they were attempting to address: the damage caused by periodic flooding. The city then stated in another section of its first article that "[i]t is the purpose of this Ordinance to promote the public health, safety and general welfare and to minimize public and private losses due to flood conditions in specific areas . . . ."

In enacting the flood plain ordinance, the city of Asheville was attempting to prevent or minimize losses caused by periodic floods. In so doing, it placed on property within the flood hazard districts land-use regulations aimed at preventing or reducing flood damage. It is clear that an ordinance which regulates only the use of land in a hazardous area and does not regulate the use of property outside the hazardous area is a reasonable classification. Indeed, to do otherwise would be unreasonable. Plaintiffs claim, however, that the burdens imposed upon them benefit other citizens in the same community at their expense. We agree that plaintiffs, by virtue of the locations of their properties, shoulder the burden of these regulations while those with property outside the flood hazard districts are not so burdened. A difference in treatment exists in all such legislative classifications, however. As we have noted above, the only requirement

necessary to comply with the equal protection provisions of both the federal and state constitutions is that the classification be reasonable and bear a rational relationship to a permissible state objective. Moreover, we find that plaintiffs here are benefited because of the enactment of these regulations. Besides the protection from flood damage which the land-use regulations provide, plaintiffs also are helped in a less direct way by the ordinance: they are eligible for federal flood insurance and federal financial assistance for acquisition and construction purposes *only if* the ordinance is enacted.

In his fifth conclusion of law, Judge Burroughs stated that: "[s]hould a community decide not to participate in the National Flood Insurance Program, Federal financial assistance for acquisition or construction of structures may not be provided in the flood hazard area and flood insurance is not made available within that community." We further note that under the National Flood Insurance Act of 1968, as amended, 42 U.S.C. §§ 4001-4128 (1976), "No new flood insurance coverage shall be provided under this chapter in any area (or subdivision thereof) unless an appropriate public body shall have adopted adequate land use and control measures" like the land-use regulations at issue here. 42 U.S.C. § 4022 (1976). We also note that 42 U.S.C. § 4012a(a) (1976) prohibits a federal officer from approving "any financial assistance for acquisition or construction purposes" in flood hazard areas if the property is not adequately covered by flood insurance. That statute provides as follows:

> After the expiration of sixty days following December 31, 1973, no Federal officer or agency shall approve any financial assistance for acquisition or construction purposes for use in any area that has been identified by the Secretary as an area having special flood hazards and in which the sale of flood insurance has been made available under the National Flood Insurance Act of 1968 [42 U.S.C. 4001 et seq.], unless the building or mobile home and any personal property to which such financial assistance relates is, during the anticipated economic or useful life of the project, covered by flood insurance in an amount at least equal to its development or project cost (less estimated land cost) or to the maximum limit of coverage made available with respect to the

particular type of property under the National Flood Insurance Act of 1968, whichever is less . . . .

We conclude, therefore, that the classification created by the ordinance is reasonable, and, indeed, the ordinance benefits plaintiffs not only directly, but indirectly as well by making available federal flood insurance and financial assistance for acquisition and construction purposes. We hold that the ordinance does not violate the equal protection guarantees under either the federal or state constitution.

IV.

[3] Plaintiffs also claim that the trial court erred in not admitting into evidence the testimony of three property owners concerning the ordinance's damaging effect on the value of their property. We agree that the trial court erred; however, we hold that the error was not prejudicial.

In *State Highway Comm'n v. Helderman*, 285 N.C. 645, 207 S.E. 2d 720 (1974), Justice Sharp (later Chief Justice) set forth the majority rule that the owner of property is competent to testify as to the value of his own property even though his knowledge on the subject would not qualify him as a witness were he not the owner. Justice Sharp explained the rule and the reason for it this way:

> Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value even though his knowledge on the subject would not qualify him as a witness were he not the owner. 'He is deemed to have sufficient knowledge of the price paid, the rents or other income received, and the possibilities of the land for use, to have a reasonably good idea of what it is worth. The weight of his testimony is for the jury, and it is generally understood that the opinion of the owner is so far affected by bias that it amounts to little more than a definite statement of the maximum figure of his contention . . . .' 5 Nichols, Law of Eminent Domain, § 18.4(2) (3rd ed., 1969), wherein the decisions pro and con are collected. *Accord*, 32 C.J.S., *Evidence* § 546 (116) (1964); 32 C.J.S., *Evidence* § 545(d)(3) (pp. 305-306) (1942); Jahr, Law of Eminent Domain § 133 (1953); 3 Wigmore on

Evidence, §§ 714, 716 (Chadbourn rev. 1970). *See Light Co. v. Rogers*, 207 N.C. 751, 753, 178 S.E. 575, 576 (1935).

Id. at 652, 207 S.E. 2d at 725. *See also Harrelson v. Gooden*, 229 N.C. 654, 50 S.E. 2d 901 (1948). *See generally* 1 H. Brandis, *Brandis on North Carolina Evidence* § 128, at 493-94 (1982).

In *Helderman* the Court noted that the owner was asked if he was familiar with the fair market value of real estate in the vicinity of his property and if he had an opinion satisfactory to himself as to the fair market value of his property on or after the critical point in time. The owner stated, "Yes sir I think so."

In the case at bar, however, none of the three property owners—Andrew Gennett, Benson Slosman, or Clay Chandley—were asked the above two questions concerning their qualifications. We hold, nevertheless, that under the general rule articulated above that an owner is entitled to testify to the value of his own property "unless it affirmatively appears" that the owner does not know the value, the exclusion of each owner's testimony was error. However, the erroneous rulings in this case were not prejudicial. The burden is on the appellant not only to show error, but to show *prejudicial* error, *i.e.*, that a different result would have likely ensued had the error not occurred. *Board of Education v. Lamm*, 276 N.C. 487, 173 S.E. 2d 281 (1970); *Burgess v. Construction Co.*, 264 N.C. 82, 140 S.E. 2d 766 (1965); *In Re Will of Thompson*, 248 N.C. 588, 104 S.E. 2d 280 (1958); *Johnson v. Heath*, 240 N.C. 255, 81 S.E. 2d 657 (1954); *Collins v. Lamb*, 215 N.C. 719, 2 S.E. 2d 863 (1939); G.S. § 1A-1, Rule 61 (1969). This the appellant has failed to demonstrate. We note that Judge Burroughs stated in his sixth conclusion of law that "the mere fact that [the ordinance] *seriously depreciates* the value of properties in said areas does not establish its invalidity." (Emphasis added.) It is clear that Judge Burroughs found from the other evidence that the value of the land was "seriously depreciate[d]." However, as we noted above, a mere diminution in value is not sufficient to render the enactment of land-use regulations invalid. *See A-S-P Associates v. City of Raleigh*, 298 N.C. at 218, 258 S.E. 2d at 451.

V.

Finally, plaintiffs claim that the trial court failed to find certain facts "as a matter of law." Specifically, plaintiffs claim that

the trial court erred in not finding that: (1) essentially all of the property is used exclusively for industrial and commercial purposes; (2) the property values have been adversely affected by the ordinance; (3) the cost of complying with the land-use regulations is prohibitive; and (4) modifications and improvements made to structures in the flood fringe district must conform to the ordinance. Suffice it to say that even if the trial court had found these facts (and indeed it did find that the property values had substantially depreciated) these facts would not have affected the legal conclusions reached at trial or on appeal here.

We hold, therefore, that the Asheville flood plain ordinance is valid. The judgment of the trial court is affirmed.

Affirmed.

Justices MARTIN and FRYE took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JAMES JUNIOR LADD

No. 164A81

(Filed 3 May 1983)

1. **Searches and Seizures § 44— motion to suppress evidence—findings of fact not necessary**

The necessary factual findings were implied by the trial judge's ruling denying defendant's motion to suppress a jacket and money seized by officers from defendant's trailer at the time of his arrest where the uncontradicted evidence showed that the officers observed the coat with money sticking out of it in plain view, and the only conflict in the evidence concerned the immaterial fact as to whether this occurred in the living room or a nearby bedroom. Therefore, the trial court did not err in failing to make findings of fact in denying the motion to suppress.

2. **Criminal Law § 75.7— statement by deputy—no custodial interrogation**

A deputy's reply to defendant's inquiry as to why he was being arrested that defendant knew why did not constitute "interrogation" within the purview of the *Miranda* decision, since the deputy had no reason to anticipate that defendant would suddenly be moved to make an incriminating response. Therefore, defendant's subsequent statement that he did know why the police were there was properly admitted although defendant was in custody and had

not been given the *Miranda* warnings at the time he made the statement. G.S. 15A-401(c)(2)c.

3. **Criminal Law §§ 75.4, 75.12— custodial interrogation—statement invoking right to counsel—inadmissibility**

Defendant's statement during custodial interrogation after being given the *Miranda* warnings that "I don't want to say where the rest of the money is now, but I will tell you where the rest of the money is after I talk to my lawyer," invoked defendant's right to counsel, and the trial court properly ruled that statements made by defendant after that point and evidence seized as a result of such statements were inadmissible. However, the trial court erred in admitting testimony concerning defendant's statement that he would reveal the location of the rest of the money after consulting with counsel, since it is constitutionally impermissible to admit testimony relating to defendant's exercise of his right to counsel during custodial interrogation, but such error was harmless beyond a reasonable doubt in the light of the overwhelming evidence of defendant's guilt of the crimes charged.

4. **Criminal Law § 75.7— informational questions during booking—no custodial interrogation**

Routine informational questions asked a defendant during the booking process which are not reasonably likely to elicit an incriminating response do not constitute interrogation within the purview of the *Miranda* decision.

5. **Criminal Law § 75.7— question during booking—custodial interrogation**

An officer's question to defendant during the booking process as to the location of his driver's license constituted continued custodial interrogation after a request for counsel, and defendant's reply that he had lost his license should have been suppressed, where the officer knew that defendant's wallet containing his driver's license had been found at the crime scene and was in police custody, and the only logical reason for the question was the hope of eliciting an incriminating reply from defendant.

6. **Criminal Law § 135.4— constitutionality of death penalty statute**

The procedure set out in G.S. 15A-2000(a)(2) for death qualifying a jury prior to the guilt phase of a trial and permitting the same jury to hear both the guilt and penalty phases of the trial is constitutional.

APPEAL by defendant from *Davis, Judge*, at the 17 August 1981 Criminal Session of SURRY County Superior Court.

Defendant was arrested on 27 November 1980 pursuant to warrants charging the murders of Johnny Parks Henderson and David Edward. He was indicted for these crimes by the Yadkin County grand jury in January 1981. On 21 April 1981, he was also indicted for the armed robbery of Johnny Parks Henderson.

Prior to trial, defendant moved for a change of venue, citing pretrial publicity as the reason for his request. On 30 April 1981,

Judge Long granted this motion and the cases were transferred to Surry County for trial. The trial came on to be heard before Davis, J., and a jury at the 17 August 1981 Special Session of Surry County Superior Criminal Court. Upon motion of the State, the three offenses were consolidated for trial.

Defendant made a motion to suppress all statements given and evidence seized during the arrest and booking procedure. The trial judge ruled that all of the statements and evidence could be introduced with the exception of $1,400 taken from defendant's home. The trial court ruled that this evidence must be suppressed because it was obtained by the police in response to questions posited to defendant after he had requested an attorney. In so ruling, the trial court failed to make any written findings of fact and conclusions of law regarding the evidence sought to be suppressed.

The State's evidence presented during the guilt phase of the trial tended to show that on election day in early November, 1980, defendant was at the Windsor's Crossroads Community Building, a polling site for the regularly scheduled election. The deceased's father, Parks Henderson, was standing on the lawn nearby. Mark Hardy, a friend of defendant, testified that defendant turned to him and said that "he didn't have no use for Parks or Johnny Henderson and some day they would just run into the wrong person."

Several weeks later, on 25 November, defendant went to work on his brother-in-law's farm. The arrangement between the two was that defendant would do some chores and the brother-in-law, James (Sammy) Hall, would give him dinner and a small amount of money for cigarettes and other personal items. Sammy testified that other than this small sum, defendant had no money that day. When defendant finished his chores, Sammy drove him to the home of defendant's parents, Mr. and Mrs. Ladd. Sammy testified that on the way to the Ladds', defendant confided that he and Ricky Williams "was thinking about knocking Johnny in the head and getting some money off of him." Sammy warned him not to go near the Henderson farm and to stay at home. Sammy also stated that about a week or so earlier, he had loaned his 30/30 Winchester rifle to defendant's father to go deer hunting.

Defendant and his wife resided with her stepparents. Ben Cass, defendant's stepfather-in-law, testified that defendant spent the night of 25 November at home. He further testified that on the morning of the 26th, he overheard defendant and his wife discussing the fact that defendant had no money. Defendant reassured her that he would get some that day. He then told the family that he was going to work and left the Cass residence around 8:00 a.m. riding his bicycle. Sammy Hall said that defendant did not report for work.

About two hours later, Theodore Wallace saw defendant at Wallace's store. Ricky Williams, an acquaintance of defendant, pulled into the parking lot of the store and asked defendant if he wanted a ride. Defendant said yes, and directed Ricky to take him to his mother's home. The two then loaded the bicycle in the trunk and drove to the Ladd home. Defendant went inside and returned a few minutes later carrying a rifle. Ricky testified that as defendant climbed back into the car, he told Ricky that "he knew somebody he could knock off." At the time, Ricky thought he was kidding and took it as a joke.

Defendant then asked Ricky to take him by a friend's house. Following defendant's directions, Ricky took several turns and then stopped not far from the driveway to the Henderson farm. Ricky testified that defendant took a pair of gloves from under the seat of the car and said that he was going hunting. Defendant then left the automobile carrying the rifle.

Miles Johnson, a mailman, testified that he rode by and saw the two men seated in Williams' car on the shoulder of the road. At about 11:30 a.m., the Williams' car passed him, with only the driver in the car.

On the same morning, Johnny Henderson was at work doing the chores at the Henderson farm. He planned to attend a cattle sale in a nearby town that afternoon. His friend, David Edward, was to go along. Johnny contemplated purchasing cattle at the sale and he was carrying approximately $9,000 for that purpose. He met David around 11:00 a.m. and, shortly thereafter, the two started to the barn to load cattle. Parks Henderson, Johnny's father, last saw the two around 12:30 p.m. as they were going toward the barn.

Around 1:00 p.m., as Parks was helping his wife unload some groceries, he heard two shots from a high-powered rifle. He remarked to his wife at the time that it was unusual for Johnny to be shooting around the barn while he was loading cattle. His wife then asked him to take some bread to a neighbor's house. As he was leaving on the errand, he noticed someone walking near the barn. He testified that the person was short, five feet or less, and wore a "dull" colored coat. Parks thought the individual might have been David Edward. Other testimony indicated that defendant was five feet, five inches tall.

When Parks returned to the Henderson farm, he became alarmed when he learned his son had not yet returned from the barn. He ran to the barn and there discovered the bodies of his son and David Edward lying on the floor. Both had been shot in the neck with a rifle. Johnny's money was gone.

Parks Henderson returned to the house and phoned his son, Jack Henderson, the Sheriff of Yadkin County. After officers arrived at the scene, they conducted a search of the area. About five and one-half inches from Johnny Henderson's body, a copper jacket was found lodged in a piece of wood. By use of a metal detector, the officers located a piece of lead on the floor of the barn. The copper jacket and lead fragment were later submitted to the State Bureau of Investigation for analysis, along with a 30/30 Winchester rifle recovered from the Ladd residence. Stephen Carpenter, a firearms expert, testified that the lead fragment was consistent with the lead core of metal-jacketed 30 caliber bullets. After test firing the 30/30 Winchester, Carpenter was of the opinion that the copper jacket found in the barn had been fired from the Winchester rifle.

Another item recovered from the area near the Henderson barn was a wallet containing defendant's driver's license and social security card.

Anne Hardy, a neighbor of the Henderson's testified that at approximately 12:30 p.m. she also heard two gunshots which sounded like they were from a high-powered rifle. Shortly afterward, she saw someone walking along the edge of the woods, coming from the direction of the Henderson farm. She recalled that the person was ducking in and out of the woods, as if he was trying to hide. She noticed that the individual carried a rifle and

remembered that he held his hand over his jacket pocket. Mrs. Hardy first testified that she did not recognize the person, although she did say that he was about the same height and weight as defendant. Several days after she testifed at trial, however, Mrs. Hardy notified the prosecutor that she had more to say. She was then recalled and testified that she was sure the person in the woods was defendant. She stated that she came to realize it was defendant when she saw his picture in the newspaper two days after the crimes were committed. She was afraid to admit this when she first testified. She conceded that she did not see the face of the man in the woods, but she was sure it was defendant for she had known him all her life.

Harold Sparks remembered that defendant came to his house on a bicycle at about 2:00 p.m. on the afternoon of 26 November. Defendant told Sparks that he had come to return five dollars that he had borrowed several months before. He also offered Sparks an extra dollar if he would take him home. Sparks agreed, and after loading the bicycle into the trunk of the car, drove defendant to the Cass residence.

When defendant arrived home, he remarked to his wife, "I told you I was going to get that money." He explained that his cousin, J. Roy, had given him some cash. Later that afternoon, the Cass family went into Statesville to go shopping. Defendant bought a $200 stereo and a large teddy bear. He gave his wife money to buy Christmas presents and offered to buy Mr. Cass anything he wanted. He also treated the family to dinner and paid for some groceries. J. Roy later testified that he had not given defendant any money.

Defendant offered no evidence.

The jury found defendant guilty of the first-degree murder and armed robbery of Johnny Parks Henderson and the second-degree murder of David Edward. Thereafter, a sentencing hearing was conducted for the first-degree murder verdict. The jury could not unanimously agree on the sentence to be imposed. The trial court therefore imposed a life sentence for the first-degree murder as required by G.S. 15A-2000(b). Defendant also received sentences of life imprisonment for both the second-degree murder and armed robbery crimes. All three sentences were to run con-

secutively. Defendant appealed directly to this Court as a matter of right pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Elizabeth C. Bunting, Assistant Attorney General, for the State.

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

BRANCH, Chief Justice.

[1] We first consider defendant's contention that he is entitled to a new trial because of the trial judge's failure to make findings of fact to support his ruling denying defendant's motion to suppress.

The legal principles governing this issue are well settled. At the close of the *voir dire* hearing, it is incumbent upon the trial judge to make findings of fact to support his ruling regarding admissibility of the evidence sought to be suppressed. *See, e.g., State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980); *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976). If there is a material conflict in the *voir dire* evidence, the trial judge *must* make such factual findings to resolve the conflict and to reflect the bases for his ruling. If, however, any conflicts in the evidence are *immaterial* and have no effect on admissibility, it is not error to omit factual findings, although it is the better practice to find all facts upon which the admissibility of the evidence depends. *State v. Phillips* at 685, 268 S.E. 2d at 457; *State v. Riddick* at 409, 230 S.E. 2d at 512-13. When the only conflicts in the evidence are immaterial, the necessary findings may be implied from the admission of the challenged evidence. *Id.*

In instant case, each of the officers and detectives testified as to the events occurring on the night of defendant's arrest. The only discrepancy in their testimony cited by defendant related to the *location* of a jacket seized by the officers from defendant's trailer.

Two officers, Haynes and Davis, were in the trailer when the jacket was seized and both testified on *voir dire*. Davis remembered the jacket as being on a table to the left of the front door, while Haynes' recollection was that it was lying across a dresser in a bedroom to the right.

The exact location of the jacket does not affect the admissibility of this evidence. The critical testimony, elicited from both officers, was that defendant picked up the coat and hastily dropped it. As he did so, the police noticed money sticking out of one of the pockets. This plain view observation, regardless of whether it took place in the living room or a nearby bedroom, clearly supported the admission of these items into evidence.

We hold that this conflict in evidence was immaterial and therefore the necessary factual findings were implied by the trial judge's ruling. We find no error in the admission of the coat and the money retrieved from the trailer.

We next consider defendant's contention that the trial court erred by admitting into evidence three statements he made to the police during the course of his arrest. Defendant's contentions with respect to the admissibility of each statement will be considered separately.

[2] The first statement was made by defendant when he was initially apprehended and before he had been advised of his *Miranda* rights. The testimony given by the arresting officers on *voir dire* indicated that at about 2:00 a.m. on 27 November 1980, defendant answered the officers' knock at the door of his trailer and was informed that he was under arrest. As the police began a search of his person for weapons, defendant asked, "What for?" Deputy Haynes responded, "You know why." Defendant then offered the following comment: "Yeah, just don't wake up my family. I don't want them to know." Defendant maintains that this reply was in response to interrogation by Deputy Haynes and should have been excluded because defendant was in custody and had not yet abeen advised of his *Miranda* rights.

Initially, we note that the officer's indirect response to defendant's query as to why he was being arrested was in violation of G.S. 15A-401(c)(2)c. That statute provides that an arresting officer must *"as promptly as is reasonable under the circumstances,* inform the arrested person of the cause of the arrest, unless the cause appears to be evident." (Emphasis added.) Although defendant was thereafter advised of the reason for his detention, Deputy Haynes should have directly and truthfully answered defendant's question at the time it was asked. The officer's "quip" does not, however, amount to interrogation simply

because the statute requires a more forthright answer than the one given.

In *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), the United States Supreme Court concluded that in the context of "custodial interrogation" certain procedural safeguards are necessary to protect a defendant's constitutional privilege to be free from compulsory self-incrimination. Generally, a suspect must be advised of his rights to remain silent, to have a lawyer present during interrogation, and to stop police questioning at any time he chooses. *Id.* at 479, 16 L.Ed. 2d at 726, 86 S.Ct. at 1630. *See also State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976).

In the case before us, all parties agree that defendant was in custody at the time he made this statement to the police. He had been arrested and was being physically searched for weapons when he admitted that he knew why the police were there. It is also apparent that defendant had not been given *Miranda* warnings before this exchange took place.

Miranda warnings are not required, however, when a defendant is simply taken into custody. *State v. Holcomb*, 295 N.C. 608, 247 S.E. 2d 888 (1978); *State v. Blackmon*, 284 N.C. 1, 199 S.E. 2d 431 (1973); *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971). The defendant in custody must also be subjected to *interrogation*. " 'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Rhode Island v. Innis*, 446 U.S. 291, 300, 64 L.Ed. 2d 297, 307, 100 S.Ct. 1682, 1689 (1980). We must determine, then, whether the deputy's reply to defendant's question amounted to interrogation, for only then would the *Miranda* proscriptions apply.

We begin with the recognition that interrogation is not limited to express questioning by the police.[1] *See Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed. 2d 297, 100 S.Ct. 1682 (1980); *Brewer v. Williams*, 430 U.S. 387, 51 L.Ed. 2d 424, 97 S. Ct. 1232 (1977).

1. "To limit the ambit of *Miranda* to express questioning would 'place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda*.' " *Rhode Island v. Innis*, 446 U.S. at 299 n. 3, 64 L.Ed. 2d at 307 n. 3, 100 S.Ct. at 1689 n. 3 (quoting *Commonwealth v. Hamilton*, 445 Pa. 292, 297, 285 A. 2d 172, 175 (1971)).

Thus, Deputy Haynes' comment is not definitionally something other than interrogation simply because it is not punctuated by a question mark. The term "interrogation" under *Miranda* also refers to "any words or actions on the part of the police (other than those normally attendant to arrest and custody) *that the police should know are reasonably likely to elicit an incriminating response from the suspect.*" *Rhode Island v. Innis*, 446 U.S. at 301, 64 L.Ed. 2d at 308, 100 S.Ct. at 1689-90 (emphasis added).

Defendant argues that Haynes' statement was an accusation that defendant committed the crime for which he was being arrested. He attempts to characterize his exchange with the police as equivalent to that which occurred in *United States v. Jordan*, 557 F. 2d 1081 (5th Cir. 1977). In that case, the Fifth Circuit held that an officer's accusation that the defendant was in possession of a sawed-off shotgun constituted interrogation. *Id.* at 1083.

We are of the opinion that the situation presented in instant case is factually distinguishable from *Jordan*. Deputy Haynes' statement to defendant was certainly not a direct accusation that defendant had murdered Johnny Henderson. In *Jordan*, the officer's accusatory statement clearly was intended to elicit an incriminating response. In contrast, Deputy Haynes' statement to defendant was not particularly evocative. The deputy's short response to defendant's inquiry was, in our estimation, a relatively innocuous comment that does not constitute "interrogation" as envisioned by *Miranda*. The *Innis* Court recognized that "the police surely cannot be held accountable for the unforeseeable results of their words or actions, ..." *Rhode Island v. Innis*, 446 U.S. at 301-02, 64 L.Ed. 2d at 308, 100 S.Ct. at 1690.

We conclude that in making this off-hand remark, the deputy had no reason to anticipate that defendant would suddenly be moved to make a self-incriminating response. We hold that defendant's statement was not made in response to interrogation by Deputy Haynes and was therefore properly admitted into evidence.

[3] We next consider defendant's objections to the admission into evidence of a second statement made to the police on the evening of his arrest.

Shortly after he was taken into custody, defendant was advised of his *Miranda* rights and stated that he understood them.

When asked whether he would talk with the officers, defendant replied, "Yeah, but not here." Defendant was then placed in a patrol car where S.B.I. Agent Foster stated that he wanted to talk to defendant about the warrant. Defendant answered, "Okay." Agent Foster then began questioning defendant about the events of the previous day. He asked defendant about the rest of the money,[2] to which defendant replied that there was no more money. When further questioned, defendant stated, "I don't want to say where the rest of the money is now, but I will tell you where the rest of the money is after I talk to my lawyer." Foster stopped questioning defendant and got out of the car. Detective Davis continued the interrogation, urging defendant to do something right for once in his life and tell where the rest of the money was. Finally, defendant relented and led the police to $1,400 tucked under a mattress in the Cass's bedroom.

The trial judge ruled that defendant's statement regarding consultation with an attorney was an invocation of his right to counsel. All evidence obtained pursuant to continued interrogation after defendant's exercise of this privilege was therefore ruled inadmissible. The officers were permitted to testify, however, as to defendant's statement that he was willing to reveal the location of the money after speaking with an attorney.

We agree with the trial court's conclusion that defendant invoked his right to counsel when he asked to postpone further discussion about the money until he spoke with his lawyer. In *Edwards v. Arizona*, 451 U.S. 477, 479, 68 L.Ed. 2d 378, 382, 101 S.Ct. 1880, 1882 (1981), the defendant said he wanted an attorney before making a deal. Similarly, in *Brewer v. Williams*, 430 U.S. 387, 392, 51 L.Ed. 2d 424, 432, 97 S.Ct. 1232, 1236, the defendant said several times that he would tell the whole story after he spoke with his attorney. In both instances, the Supreme Court recognized these statements to be an expression of the defendant's right to counsel. We conclude that in this case, defendant's desire to speak with counsel before further interrogation was as clearly expressed as in *Edwards* and *Brewer*. Judge Davis's rul-

2. Moments earlier, the police had obtained a jacket belonging to defendant with $600 in the pocket when they accompanied defendant inside to get a hat and shoes.

ing that all statements made and evidence seized after that point were inadmissible was therefore clearly correct.

We must disagree, however, with the trial court's decision to admit defendant's statement that he would reveal the location of the rest of the money after consulting counsel.

We have consistently held that the State may not introduce evidence that a defendant exercised his fifth amendment right to remain silent. *See State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975); *State v. Castor*, 285 N.C. 286, 204 S.E. 2d 848 (1974). We must now determine whether it is also constitutionally impermissible to permit testimony relating to the defendant's exercise of his right to counsel during custodial interrogation.

In *Baker v. United States*, 357 F. 2d 11 (5th Cir. 1966), the Fifth Circuit Court of Appeals held that the trial court committed reversible error in permitting an F.B.I. agent to testify that the defendant declined to give a statement in the absence of counsel. The court observed that the defendant had exercised a constitutional right by declining to speak until after consulting an attorney. *Id.* at 13. Proof that he refused to make a statement upon being questioned by the F.B.I., the court said, was as objectionable as it would have been to comment on a defendant exercising his constitutional right not to testify at trial. *Id.* at 13-14.

The defendant in *United States v. Faulkenbery*, 472 F. 2d 879 (9th Cir.), *cert. denied*, 411 U.S. 970, 36 L.Ed. 2d 692, 93 S.Ct. 2161 (1973) raised a similar argument. In that case, the defendant contended that his fifth amendment privilege was violated when an officer was permitted to testify that defendant had asserted his right to counsel during interrogation. The Ninth Circuit agreed with defendant's contention and held that the officer's comment was constitutionally impermissible.[3]

We acknowledge that the right to counsel under the fifth amendment is afforded a defendant "to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." *Miranda*, 384 U.S. at 469, 16 L.Ed. 2d at 721, 86 S.Ct. at 1625. Therefore, a

3. Because the evidence presented against the defendant was overwhelming, the court concluded that the illegally admitted evidence did not contribute to the verdict and was not, therefore, reversible error. 472 F. 2d at 881.

defendant *must* be permitted to invoke this right with the assurance that he will not later suffer adverse consequences for having done so. We agree with Justice Black's statement that there are "no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *Grunewald v. United States*, 353 U.S. 391, 425, 1 L.Ed. 2d 931, 955, 77 S.Ct. 963, 984-85 (1956) (Black, J., concurring).

Accordingly, we hold that the trial court erred in admitting into evidence defendant's statement that he would tell where the rest of the money was after he talked to his lawyer. By giving the *Miranda* warnings, the police officers indicated to defendant that they were prepared to recognize his right to the presence of an attorney should he choose to exercise it. Therefore, we conclude that the words chosen by defendant to invoke this constitutional privilege should not have been admitted into evidence against him.

Because this statement was introduced in violation of defendant's constitutional rights under the fifth and fourteenth amendments, he is entitled to a new trial unless we determine that the erroneous admission of this evidence was harmless beyond a reasonable doubt. G.S. 15A-1443(b). *See Chapman v. California*, 386 U.S. 18, 24, 17 L.Ed. 2d 705, 710-11, 87 S.Ct. 824, 828 (1967). To find harmless error beyond a reasonable doubt, we must be convinced that there is no reasonable possibility that the admission of this evidence might have contributed to the conviction. *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 11 L.Ed. 2d 171, 173, 84 S.Ct. 229, 230 (1963). *See also State v. Castor*, 285 N.C. 286, 292, 204 S.E. 2d 848, 853 (1974).

Upon the facts presented in instant case, we are satisfied that the erroneous admission of this evidence was harmless beyond a reasonable doubt.

The evidence of defendant's guilt was overwhelming. There was direct testimony that defendant had previously threatened the Hendersons and that he was badly in need of money. Ricky Williams testified that on the morning of November 26th, he drove defendant to the Henderson farm. Defendant alighted from Williams' vehicle carrying a 30/30 Winchester rifle. Ballistics tests

revealed that the victims were killed with bullets that were probably fired from that rifle. The police testified that when searching the area around the barn shortly after the crimes occurred, they recovered a wallet containing defendant's driver's license and social security card. Equally critical was the testimony of the Henderson's neighbor who spotted defendant trying to hide in the underbrush while making his way from the direction of the barn.

Perhaps the most damaging circumstance was defendant's mysterious acquisition of a large sum of money, evidenced by his extravagant shopping spree and the $600 found in his coat pocket on the night of the arrest. This evidence was even more damning when coupled with the fact that defendant lied to his family about how he had acquired this small fortune. Finally, defendant also exhibited guilty knowledge when he admitted to the police that he knew why they had come to arrest him.

We hold that the erroneous admission of this evidence was harmless error beyond a reasonable doubt.

The third and final statement challenged by defendant was made as he was being "booked" at the Surry County jail. Agent Perry asked defendant routine questions in an effort to elicit information necessary to the booking process, including his name, address and age. The officer then routinely asked defendant for his driver's license number. Defendant replied that he did not have it. The officer then asked defendant where his driver's license was and defendant told Perry that he had lost it.

Defendant claims that this last statement was inadmissible because it was made in response to continued interrogation after he had requested the presence of an attorney. The State concedes that once an accused requests the presence of counsel, he may not be subjected to further interrogation by the police until counsel has been made available to him, unless the accused himself initiates further communication with the officers. *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378, 101 S.Ct. 1880 (1981). The State's argument here is that the statement complained of was made in response to questions posited to defendant during routine booking and thus did not constitute interrogation within the meaning of *Miranda*.

[4] We have never considered the exact question here presented, that is, whether routine questions posited to a defendant during

booking constitute interrogation implicating the fifth amendment protections enunciated in *Miranda*.

An overwhelming number of courts that have considered this question have held that *Miranda* does not apply to the gathering of biographical data necessary to complete booking. *See, e.g., United States ex rel. Hines v. LaVallee*, 521 F. 2d 1109 (2d Cir. 1975), *cert. denied*, 423 U.S. 1090, 47 L.Ed. 2d 101, 96 S.Ct. 884 (1976); *United States v. Prewitt*, 553 F. 2d 1082 (7th Cir.), *cert. denied*, 434 U.S. 840, 54 L.Ed. 2d 104, 98 S.Ct. 135 (1977); *United States v. LaMonica*, 472 F. 2d 580 (9th Cir. 1972); *State v. Cozad*, 113 Ariz. 437, 556 P. 2d 312 (1976) (en banc); *Pulliam v. State*, 264 Ind. 381, 345 N.E. 2d 229 (1976); *People v. Rivera*, 26 N.Y. 2d 304, 310 N.Y.S. 2d 287, 258 N.E. 2d 699 (1970); *State v. Rassmussen*, 92 Idaho 731, 449 P. 2d 837 (1969); *Clarke v. State*, 3 Md. App. 447, 240 A. 2d 291 (1968). *But see, Proctor v. United States*, 404 F. 2d 819 (D.C. Cir. 1968).

The Second Circuit offered the following explanation for its decision that *Miranda* is inapplicable to routine informational questions asked during the booking process:

> Despite the breadth of the language used in *Miranda*, the Supreme Court was concerned with protecting the suspect against interrogation of an investigative nature rather than the obtaining of basic identifying data required for booking and arraignment.

United States ex rel. Hines v. LaVallee, 521 F. 2d 1109, 1112-13 (2d Cir. 1975), *cert. denied*, 423 U.S. 1090, 47 L.Ed. 2d 101, 96 S.Ct. 884 (1976).

We agree with this analysis of the *Miranda* decision and therefore hold that interrogation does not encompass routine informational questions posited to a defendant during the booking process. This result is consistent with the definition of interrogation advanced by Justice Stewart in *Rhode Island v. Innis, supra*. "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (*other than those normally attendant to arrest and custody*) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 301, 64 L.Ed. 2d at 308, 100 S.Ct. at 1689-90 (1980) (emphasis added).

We wish to emphasize, however, that we do not construe this limited exception to include any and all questions asked during the booking process. Such a rule would totally emasculate the *Miranda* protections and render meaningless the defendant's rights to remain silent and to have the presence of counsel. If all questions asked during booking were free from *Miranda* proscriptions, police officials could quiz the defendant about any subject so long as they timed their queries to coincide with the incidence of booking, regardless of whether the defendant had been given the *Miranda* warnings, whether he had invoked his right to remain silent or whether he had previously asked for an attorney. We therefore limit this exception to *routine informational* questions necessary to complete the booking process that are *not* "reasonably likely to elicit an incriminating response" from the accused.

[5] In this case, Agent Perry first asked defendant for his driver's license number. Perry testified that this was a routine question that was usually asked of all defendants at some point during the booking process. It is, of course, the question regarding the *location* of defendant's driver's license that is at issue here.

Under the facts presented, we agree with defendant that this question constituted interrogation under the *Innis* definition for it was "reasonably likely to elicit an incriminating response." Agent Foster knew precisely the location of defendant's driver's license for he himself participated in the discovery of the wallet and helped take photographs when and where it was discovered. As noted in *Innis*, the prior knowledge of the police and the intent of the officer in questioning the defendant is highly relevant to whether the police should have known a response would be incriminating. 446 U.S. at 301-02 n. 7, 64 L.Ed. 2d at 308 n. 7, 100 S.Ct. at 1690 n. 7. Since Agent Perry undoubtedly knew defendant's license was in police custody, the only logical reason for the question was the hope of eliciting an incriminating reply from defendant.

Although we agree with defendant that his response to Agent Perry's question should have been suppressed since it was the product of interrogation conducted after a request for counsel, we simply cannot agree with defendant's contention that

this error is sufficient to warrant a new trial. The jury was aware that a wallet containing defendant's driver's license and social security card had been found at the scene of the crime. Defendant's statement that he lost his driver's license does not, in our opinion, heighten the credibility or impact of this evidence to any significant degree. Certainly considering the overwhelming evidence presented implicating defendant, this rather innocuous statement that he had lost his driver's license could not possibly have affected the jury's verdict. The trial court's error in admitting this statement was clearly harmless beyond a reasonable doubt.

[6] Finally, defendant contends that the procedure set forth in G.S. 15A-2000(a)(2) for death qualifying a jury prior to the guilt phase of a trial and permitting the same jury to hear both the guilt and penalty phases of a trial is unconstitutional. It is defendant's position that by death qualifying the jury and excusing for cause those who expressed opposition to the death penalty, he was denied a fair trial as guaranteed by the sixth and fourteenth amendments to the United States Constitution and article I, § 19 of the North Carolina Constitution. We have recently considered and rejected these contentions in *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981); and *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980). This assignment of error is without merit and is overruled.

Defendant received a full and fair trial and has had the benefit of adequate appellate advocacy before this Court. His trial was free of prejudicial error, and we find

No error.

STATE OF NORTH CAROLINA v. DONALD WAYNE DELLINGER

No. 430A82

(Filed 3 May 1983)

1. Criminal Law § 158— record on appeal—duty of appellant—conclusiveness

It is the duty of the appellant to see that the record on appeal is properly made up and transmitted. Moreover, the record imports verity and the court is bound on appeal by the record as certified.

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

The period of time between the filing of defendant's motion for a change of venue and its determination 115 days later was properly excluded in computing the statutory speedy trial period. G.S. 15A-701(a1) and (b).

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

The trial court did not abuse its discretion in the denial of defendant's motion for a change of venue because of pretrial publicity where defendant relied on two newspaper articles and one television newscast which occurred some six months prior to the trial and which were substantially factual and not inflammatory, and where there was no showing that any juror had even read the newspaper articles or heard the broadcast. G.S. 15A-957.

4. Criminal Law § 42.6— rifle bolt—no necessity to show chain of custody

A rifle bolt found near a murder victim's body was not inadmissible because the State failed to show a proper chain of custody where the bolt's significance was its location near the victim's body, not characteristics intrinsic to the bolt itself; the bolt's location had already been well established, without objection by defendant, by an officer's description of its location illustrated by photographs taken at the crime scene; and the bolt was sufficiently identified by the officer as being the one he observed at the scene so that a chain of custody foundation was not in any event required for its admission.

5. Grand Jury § 2; Indictment and Warrant § 4— testimony about appearance before grand jury—mistrial properly denied

The trial court did not err in failing to declare a mistrial because of an officer's testimony with respect to his appearance before the grand jury where the sole purpose of the testimony was to establish the date thereof and to show that a State's witness was the first person arrested for the murder in question, and the officer said nothing about his testimony before or any other "proceedings" of the grand jury which must under G.S. 15A-236(e) be kept secret.

6. Criminal Law § 89— credibility of witness—absence of criminal record—direct examination

The party calling a witness may enhance the credibility of the witness by showing on direct examination of the witness that he has no criminal record or that his criminal record is relatively insignificant.

7. Criminal Law § 169— failure to object to evidence—similar evidence admitted without objection

Defendant cannot complain of a witness's negative response to a question as to whether he had ever been convicted of any crimes of violence where he did not object to the question, and where any objection would have been waived by defendant's own extensive cross-examination of the witness about his prior criminal record and other specific acts of misconduct. App. R. 10(b)(1).

8. Criminal Law § 87.1— leading question on voir dire—absence of prejudice

Defendant was not prejudiced by a leading question asked a witness on voir dire as to whether the reason he could not pick defendant out from

photographs was because defendant had long hair and a beard in the photographs where the witness had previously stated on cross-examination that he could not identify defendant from the photographs because "he had the long hair and beard."

9. Criminal Law § 34.7— commission of other offense—admissibility to show intent

Testimony by a witness in a first degree murder case that while she and defendant were facing a mirror in a motel room on the day after the crime, defendant said, "I done killed one damn man and I will blow your damn head off," and that defendant then shot the mirror and "blew it all to pieces" was admissible to show defendant's *quo animo*, *i.e.*, that defendant intentionally and with malice killed the victim, even though it tended to show defendant's commission of another offense.

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

BEFORE *Judge Clifton E. Johnson*, presiding at the 15 February 1982 Criminal Session of CATAWBA Superior Court, and a jury, defendant was found guilty of first degree murder. He was sentenced to life imprisonment[1] and appeals of right pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Charles M. Hensey, Assistant Attorney General, for the state.

Rudisill & Brackett, P.A., by J. Steven Brackett, for defendant appellant.

EXUM, Justice.

In this appeal defendant's assignments of error relate to the Speedy Trial Act, a motion for change of venue, admission of evidence and sufficiency of the evidence. We find no merit in any of the assignments and uphold the judgment of the trial court.

The state's evidence tends to show:

1. The murder for which defendant was indicted and convicted occurred in January 1970. North Carolina's capital punishment statute applicable at that time was thereafter rendered constitutionally suspect by the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), and declared inapplicable to offenses committed before 18 January 1973 in *State v. Waddell*, 282 N.C. 431, 446-47, 194 S.E. 2d 19, 29-30 (1973). Thus, defendant was not subject to the death penalty in this case.

On 22 January 1970 the victim, John LaFayette Marlowe, age 69, was living alone in a house in a rural section of Catawba County. In the early evening of that day he left a friend's garage, intending to go to his home several hundred feet away. Early the next morning, Marlowe's dead body was found in a cornfield near his house. Multiple head injuries caused his death.

On 17 August 1981, Fred Clifford Sigmon, who had been charged with Marlowe's murder, entered into a plea bargain with the state and agreed to testify with respect to the murder. Defendant was thereafter indicted, and at his trial Sigmon testified as follows: He became acquainted with defendant two or three weeks before 22 January 1970. They began drinking together. Sigmon heard that Marlowe had a large sum of money. Sigmon and defendant decided to rob Marlowe, but defendant promised there would be no violence. Soon after dark on 22 January 1970 they went to Marlowe's home. No one was there. They entered the house but could not find any money. Defendant left the house before Sigmon. When Sigmon left the house defendant "had that man [Marlowe] on the ground beating the hell out of him." Defendant struck Marlowe on his head a number of times with a gun. When Sigmon asked defendant to stop beating Marlowe, defendant threatened to kill Sigmon. After defendant stopped beating Marlowe, defendant and Sigmon went to Hickory. Defendant gave Sigmon $250 or $260 of the $600 defendant said he took from Marlowe.

Defendant offered no evidence.

I.

Defendant's assignments of error one, two, five and six relate to defendant's contentions that the state failed to comply with the Speedy Trial Act, codified in article 35 of Chapter 15A of the General Statutes. G.S. 15A-701(a1) provides in pertinent part:

> (T)he trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 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 . . . .

G.S. 15A-701(b) provides in pertinent part:

> The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from:
>
> . . . .
>
> d. Hearings on any pretrial motions or the granting or denial of such motions.
>
> The period of delay under this subdivision must include all delay from the time a motion or other event occurs that begins the delay until the time a judge makes a final ruling on the motion or the event causing the delay is finally resolved. . . .

Defendant was indicted on 31 August 1981. On the same day defendant, then an inmate at the Federal Correctional Center in Butner, N. C.,[2] pursuant to the Interstate Agreement on Detainers Act, G.S. 15A-761 to -767, filed a written request for final disposition of the charges against him relating to Marlowe's murder. According to Judge Johnson's 11 January 1982 order, discussed below, on 2 September 1981 the district attorney began proceedings to have defendant delivered temporarily to this state's custody for trial.[3] Defendant invoked his thirty-day waiting period under the detainer statutes, and on 18 September 1981 he began to file numerous motions. He made motions for a writ of coram nobis, for a change of venue, to dismiss the indictment on various grounds, and for discovery. He filed his motion for change of venue, based on allegations of prejudicial pretrial publicity, on 18 September 1981.

On 22 October 1981 federal authorities offered temporary custody of defendant to the state, and on 15 December 1981 the

2. Defendant was serving a twenty-year sentence following his conviction in United States District Court in 1970 of bank robbery.

3. The record does not indicate what these proceedings were. Perhaps the district attorney used the procedure prescribed by G.S. 15A-771, a statute captioned, "Securing attendance of defendants confined in federal prison."

Catawba County Sheriff took physical custody of him. On 16 December 1981 defendant appeared before Judge Mills in superior court and Mr. Brackett was appointed to represent him. Judge Mills considered what times might be excludable under the Speedy Trial Act, but no order by Judge Mills relating to the Speedy Trial Act appears in the record on appeal.[4] Judge Mills continued the case until 11 January 1982.

On 11 January 1982 defendant's pretrial motions and the state's motion to exclude time from the 120-day Speedy Trial Act provision came on for hearing before Judge Johnson. Judge Johnson denied defendant's motions for change of venue, to dismiss the indictment, and for coram nobis, and allowed defendant's motions to proceed as an indigent, for a bill of particulars, and for discovery. Judge Johnson allowed the state's motion to exclude, among other periods, the time between the filing of defendant's motion for change of venue on 18 September 1981 and its determination on 11 January 1982, and he continued the trial to 18 January 1982.

The case could not be reached for trial at the 18 January 1982 session due to the trial of other cases and the district attorney moved for a continuance. Judge Johnson ordered the case continued until 15 February 1982 and the trial began on that date. On 15 February 1982 defendant orally moved to dismiss the indictment for the state's failure to comply with the Speedy Trial Act.

Defendant argues: (1) Judge Mills erred in failing to enter a written order following a hearing which he conducted on 16 December 1981 and at which he determined that 104 days had then elapsed in computing the time in which defendant had to be tried pursuant to the Speedy Trial Act; and (2) Judge Johnson erred in concluding that the time between the filing of defendant's motion for change of venue and its determination was excludable from the 120-day Speedy Trial Act provision, thus effectively overruling the earlier "order" of Judge Mills. We find no merit in these arguments.

4. According to Judge Johnson's 11 January 1982 order discussed *infra* in text, Judge Mills "excluded a portion of the time from the Speedy Trial Act" but there is no indication in the record on appeal what portions of time Judge Mills excluded or for what reason.

[1] It is well established in this jurisdiction that it is the duty of the appellant to see that the record on appeal is properly made up and transmitted. *State v. Stubbs*, 265 N.C. 420, 144 S.E. 2d 262 (1965). It is also settled that the record imports verity and the court is bound on appeal by the record as certified. *State v. Williams*, 280 N.C. 132, 184 S.E. 2d 875 (1971); *State v. Fields*, 279 N.C. 460, 183 S.E. 2d 666 (1971).

A careful review of the record on appeal and the transcript of the hearings before Judge Mills and Judge Johnson does not support defendant's argument that Judge Mills actually ruled that in computing the time in which defendant had to be tried, 104 days had elapsed as of 16 December 1981. There is some indication in the hearing transcript that Judge Mills *contemplated* such a ruling, but there is nothing to indicate that he ever so ruled. Indeed a full hearing was held later before Judge Johnson on this very point. We are bound by the record and transcript as certified. This disposes of defendant's arguments that Judge Mills erred in failing to file a written order evidencing his ruling because so far as we can know, he never made the ruling. It also disposes of defendant's argument that Judge Johnson overruled Judge Mills.

[2] Judge Johnson concluded that various periods of time, including the period between the filing of defendant's motion for change of venue on 18 September 1981 and its determination on 11 January 1982 (115 days) was excludable from the 120-day Speedy Trial Act period. This ruling was correct. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981).

Thus 168 days elapsed between return of the indictment, 31 August 1981, and trial, 15 February 1982. When 115 days during which the motion for change of venue was pending, not an unreasonable time under the circumstances here, is excluded, defendant was tried well within the 120-day speedy trial period.

We deem it unnecessary to determine whether Judge Johnson erred in excluding other periods of time from the 120-day period.

II.

By his third assignment of error, defendant contends that the trial court erred in denying his *pro se* motion to dismiss the bill

of indictment on the grounds of prejudicial publicity by the sheriff's department, insufficiency of the indictment to charge a crime, and insufficiency of evidence presented to the grand jury.

In his brief, defendant's counsel concedes that an examination of the bill of indictment by him reveals no fatal defects. The brief contains no further argument with respect to the contention set forth in this assignment. Thus, the question raised by this assignment of error is deemed abandoned under Rule 28(a) of the North Carolina Rules of Appellate Procedure.

Nevertheless, we have carefully reviewed defendant's motion covered by his second assignment of error and conclude that it has no merit.

III.

[3] By his fourth assignment of error, defendant contends the trial court erred in denying his motion for a change of venue. We find no merit in this assignment.

G.S. 15A-957 provides in pertinent part:

> Motion for change of venue.—If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
>
> (1) Transfer the proceeding to another county in the judicial district or to another county in an adjoining judicial district, or
>
> (2) Order a special venire under the terms of G.S. 15A-958.

A motion for change of venue is addressed to the trial court's discretion and its ruling will not be disturbed on appeal absent an abuse of that discretion. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 918 (1980). "The burden of showing 'so great a prejudice' by reason of pretrial publicity that a defendant cannot receive a fair trial is on defendant." *State v. Oliver*, 302 N.C. at 37, 274 S.E. 2d at 190; *accord, State v. Faircloth*, 297 N.C. 100, 253 S.E. 2d 890, *cert. denied*, 444 U.S. 874 (1979).

The record indicates that defendant relied on two newspaper articles and one television newscast in support of his motion for change of venue. The newspaper articles were published in late August and early September 1981 and the television broadcast appears to have been on 18 August 1981 on the 11 p.m. news. The trial took place in mid-February 1982, six months later. The newspaper articles and the TV broadcast were substantially factual and not inflammatory. The transcript does not contain the voir dire examination of prospective jurors; hence there is no showing that any juror had even read the newspaper articles or heard the broadcast.

We hold that defendant failed in the trial court to show "so great a prejudice" created by reason of this publicity that he could not receive a fair trial in Catawba County. It follows that he has shown no abuse of discretion in the trial court's denial of his motion for change of venue.

IV.

[4] By his assignments of error numbers 7 and 8, defendant contends the trial court erred in admitting evidence relating to a rifle bolt and in denying his motion for a mistrial after the evidence was admitted. We find no merit in these assignments.

The evidence tended to show that the rifle bolt complained of was found at or near the site where Marlowe's body was found. Captain Price of the Catawba County Sheriff's Department testified that the bolt, along with certain other items, were found in the snow near the body; that the bolt was placed in an envelope, and another officer's initials were written on the envelope; that the bolt was sent to the SBI laboratory in Raleigh for examination; and that it was later returned to the sheriff's department where it was kept in a locked compartment until the date of trial. On cross-examination, Captain Price stated that he did not send or take the envelope containing the bolt to Raleigh, that he did not know what was done with it in Raleigh, that he did not personally receive the envelope when it was returned to the sheriff's department, and that he had not had continuous possession of the envelope since its return from Raleigh. Captain Price did testify that he saw the bolt at the scene, that the bolt "appears to be the same one" which he observed at the scene, and

that it "does . . . look like the same one." Over defendant's objection the court admitted the bolt into evidence.

Defendant argues that the bolt should not have been admitted for the reason that the state failed to show a proper chain of custody. We perceive no error in its admission. There was no evidence connecting the bolt with defendant or any weapon owned or possessed by him. The bolt's significance was its location near the body of the deceased, not characteristics intrinsic to the bolt itself. Its location tended to corroborate Sigmon's testimony that the fatal attack took place outside the house.

The bolt's location had already been well established, without objection by defendant, by Captain Price's description of its location illustrated by photographs of the bolt taken at the scene. Finally, the bolt was sufficiently identified by Captain Price as being the one he observed at the scene so that a chain of custody foundation was not in any event required for its admissibility. *State v. Hunt*, 305 N.C. 238, 247, 287 S.E. 2d 818, 824 (1982); *State v. Silhan*, 302 N.C. 223, 250, 275 S.E. 2d 450, 471 (1981); *State v. Moore*, 301 N.C. 262, 272, 271 S.E. 2d 242, 248 (1980); 1 Brandis on N.C. Evidence § 117 n.2 (2d rev. ed. of Stansbury's N.C. Evidence 1982) (hereinafter "Brandis").

Since the court did not commit error in admitting evidence relating to the bolt, there was no error in denying defendant's motion for a mistrial based on the admission of that evidence.

V.

[5] Defendant argues that he was also entitled to have his motion for a mistrial allowed for the reason that the court erroneously allowed Captain Price to testify with respect to his appearance before the Grand Jury. He further argues that since G.S. 15A-623(e) provides that "Grand Jury proceedings are secret and . . . all persons present during its sessions shall keep its secrets and refrain from disclosing anything which transpires during any of its sessions," the court violated the public policy of this state in allowing Captain Price's testimony.

The witness testified that he went before the Grand Jury on or about 31 August 1981 in connection with the case at hand, that he could identify state's exhibit 16 as an indictment for first degree murder returned by the Grand Jury on 31 August 1981,

and that he served the indictment on defendant on 15 December 1981.

We find no merit in defendant's argument. It appears that the sole purpose in asking Captain Price about his Grand Jury appearance and his service of the indictment was to establish the dates thereof and to show that Fred Sigmon was the first person arrested for the murder in question. Captain Price said nothing about his testimony before or any other "proceedings" of the Grand Jury which must under the statute be kept secret. Except for the exact date of his appearance before the Grand Jury, Captain Price's testimony at trial involved matters of public record.

VI.

By his ninth assignment of error, defendant contends the trial court erred in allowing the district attorney "to examine the State's principal witness concerning his prior record and lack of record for crimes of violence."

Fred Sigmon, defendant's partner in the planned robbery, was the state's principal witness. At the close of his direct examination the following questions and answers appear:

Q. Now, Mr. Sigmon, what have you ever been convicted for?

MR. BRACKETT: Objection.

COURT: Overruled. [EXCEPTION NO. 14]

A. I have been convicted of back a long time ago of breaking and entering.

Q. You recall what year that was.

A. No, I do not. Back in the early 60s.

Q. What else?

A. Well, I was, that was one incident and then I was arrested and don't know how long ago, it has been for participating in a safe robbery but since 1969, I have not been into any matters or things at all.

Q. Were you convicted of participating in the safe robbery?

A. Yes.

Q. What year was that.

A. No, I was not convicted for it. I am sorry.

Q. Have you been convicted of anything other than the breaking and entering that you mentioned?

A. No, except public drunk, that is all.

Q. You ever been convicted of any crimes of violence?

A. No, sir.

Defendant now complains of the admission of all of this testimony.

[6] Defendant objected to the question, "Now Mr. Sigmon, what have you been convicted for?" His objection raises the evidentiary question of whether the state may enhance the credibility of its witnesses by showing on their direct examination that they have no criminal record, or that their criminal record is relatively insignificant. We think it is permissible for the state, or for that matter the defendant, to do so. "In whatever way the credit of the witness may be impaired, it may be restored or strengthened by . . . evidence tending to insure confidence in his veracity and in the truthfulness of his testimony." *Jones v. Jones*, 80 N.C. 246, 250 (1879), *quoted in* 1 Brandis § 50, at 188. *See generally*, 1 Brandis § 50. Since a witness may be impeached by cross-examination about prior criminal convictions, 1 Brandis §§ 111-12, we think it is permissible for the party calling the witness to examine him on the absence of such convictions in order to enhance his credibility. The trial judge, therefore, properly overruled defendant's objection.

[7] Defendant raises a second evidentiary question when he argues that Sigmon's lack of convictions for crimes of violence was impermissibly offered to prove that it was more likely that defendant, and not Sigmon, murdered Marlowe, as Sigmon testified. Defendant specifically asserts "that evidence of the character of a person who is not a party cannot be introduced to prove that he did or did not do a particular thing, even if he is a witness." 1 Brandis § 105. Defendant did not object, however, to the question about Sigmon's prior convictions for crimes of violence. Thus, he may not complain of the elicited response on

appeal. "When there is no objection to the admission of evidence, the question of its competency is foreclosed on appeal." *State v. Stepney*, 280 N.C. 306, 316, 185 S.E. 2d 844, 851 (1972); N.C.R. App. P. 10(b)(1); 1 Brandis § 27. Had defendant objected to the question, his objection would have been waived in any event by defendant's own extensive cross-examination of Sigmon on his prior criminal record and other specific acts of misconduct. *See State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10, *cert. denied*, 429 U.S. 932 (1976).

VII.

[8] By his tenth assignment, defendant contends the trial court erred in permitting the district attorney to ask a leading question "on the crucial element of identification." There is no merit in this assignment.

This assignment relates to the testimony of John Rudisill, a neighbor of the victim. Rudisill testified: He lived about one-half mile from Marlowe. Late in the day in question he saw an automobile parked near a small road a short distance from his house. Sometime later he heard Marlowe call out, "Oh, Lordy, Oh, Lordy, don't do that." Soon thereafter he saw two men running through the woods to the parked car. Rudisill blocked the road with his truck. The two men who had entered the parked car rode up to where he had the road blocked. One of the men, whom Rudisill identified as defendant, told Rudisill to "move that damn truck." As Rudisill was moving his truck, defendant stood on the fender, pointed a pistol at Rudisill's ear and snapped it two or three times. Defendant took the keys to Rudisill's truck from him and drove away with them.

On cross-examination, defense counsel questioned Rudisill about defendant's appearance on the night in question—how he was dressed and whether he was clean-shaven or had a beard. Rudisill testified that defendant was clean-shaven "like he is today." He then testified that the police showed him some pictures of defendant with long hair and a beard but he "could not identify him then. He had the long hair and beard." On redirect examination by the district attorney, the witness was asked:

> The reason you could not pick Mr. Dellinger out sometime ago was when you were shown the pictures, he had a beard and long hair, is that not right.

Over objection, the witness answered "yes."

Of course the question is a leading one, but we can perceive no prejudice to defendant for the reason that just before he answered this question Rudisill had stated positively on cross-examination that he could not identify defendant from the photographs because "[h]e had the long hair and beard." It is incumbent upon an appellant to show not only error but that the error prejudiced him. *State v. Brown*, 271 N.C. 250, 156 S.E. 2d 272 (1967).

VIII.

[9] By his eleventh assignment of error defendant contends the trial court erred in admitting testimony of Faye Swink about a trip she allegedly made with defendant to Shelby, North Carolina. This assignment has no merit.

Defendant complains that the court, over his objection, permitted Faye Swink to testify that after 23 January she accompanied defendant to Shelby, North Carolina, where they checked in at a motel. Defendant had a gun with him. While the two of them were facing a mirror, defendant said "I done killed one damn man and I will blow your damn head off." Defendant then shot the mirror and "blew it all to pieces." He argues the evidence was irrelevant because the witness did not say in what year the event occurred and the evidence insofar as it showed he committed other criminal offenses was an attack on his character, impermissible because he did not take the stand or otherwise put his character in issue.

We reject both of defendant's arguments. The transcript discloses that before giving the testimony summarized above, Ms. Swink testified that she met defendant in the late sixties. She was "living with or staying with" defendant on 22 January 1970. On this night Fred Sigmon was with defendant when he picked her up at a grill. While defendant was at the grill she saw him wash his hands. Defendant said "he had to get the damn blood off of his hands." Thereafter she accompanied defendant to a drive-in where defendant stated that "I killed the damn man." Defendant had a handful of money "all wadded up" with him. She and defendant spent the remainder of that night together. It was then, after the date 22 January 1970 had been referred to several

times, that the witness was asked about a trip to Shelby after "the 23rd of January." Considered in the context of the testimony of Ms. Swink that preceded the challenged testimony, we think it clear that she was referring to January 1970.

As to the argument that the testimony reflected adversely on defendant's character in that it tended to show the commission of another offense, such as assault or destruction of property, we think the evidence was admissible to show defendant's *quo animo*. *See State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 434 U.S. 928 (1977). "Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused." [Citations omitted.] *State v. McClain*, 240 N.C. 171, 175, 81 S.E. 2d 364, 366 (1954). Here the state had the burden of showing that defendant intentionally and with malice killed Marlowe. This evidence was probative and admissible on the issue of the existence of these elements.

IX.

Defendant's final assignment of error is that the trial court erred in denying his motion to dismiss the case at the close of all evidence for insufficient evidence. Defendant's counsel concedes that there is no merit in this assignment and we agree. The evidence was more than sufficient to show every element of the offense with which defendant was charged and for which he was tried and convicted.

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

No error.

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

STATE OF NORTH CAROLINA v. JIMMY GRIFFIN

No. 413A82

(Filed 3 May 1983)

1. **Homicide §§ 5, 21.7— second degree murder in perpetration of felony—no such offense—sufficient evidence of second degree murder**

The jury's verdict of guilty of murder in the second degree in the perpetration of a felony must be set aside since there is no offense of felony murder in the second degree in North Carolina. However, the jury's verdict also finding defendant guilty of murder in the second degree was supported by evidence tending to show that the victim was shot by defendant while chasing defendant after defendant had stolen a purse from a car.

2. **Homicide § 31.7— remand for proper sentence for second degree murder**

Where the jury found defendant guilty of murder in the second degree and guilty of second degree murder in the perpetration of a felony, the trial court indicated on its judgment and commitment sheet that defendant was found guilty of two separate offenses, the verdict of guilty of second degree murder in the perpetration of a felony must be set aside since no such offense is recognized in North Carolina, and where it is unclear whether for sentencing purposes the trial court treated defendant's conviction of murder in the second degree as a single conviction under two theories or as two separate convictions, the case must be remanded to the superior court for resentencing on the valid second degree murder conviction.

3. **Criminal Law § 111.1— initial instruction to prospective jurors—failure to mention not guilty verdict**

The trial court did not express an opinion in violation of G.S. 15A-1222 or G.S. 15A-1213 in its initial statement to prospective jurors that it was their duty to determine "whether the defendant is guilty of the crime charged, or any lesser included offense, about which you are instructed" and in failing to mention that they could find defendant not guilty, although it would be the better practice to state explicitly to prospective jurors that it is their duty to determine whether defendant is guilty or not guilty.

4. **Criminal Law § 102.5— improper questions by prosecutor—cure of impropriety**

Impropriety in the prosecutor's reference to the subject as the defendant on three occasions when the subject had not been identified as the defendant by the witness was cured when the court sustained defendant's objection on all three occasions and on the third occasion admonished the prosecutor in the absence of the jury.

5. **Criminal Law § 99.7— ordering hostile witness to testify**

The trial court did not err in ordering a hostile witness to answer a question within his knowledge.

6. **Homicide § 28.1— self-defense—no duty to instruct**

The trial court in a homicide case did not err in failing to instruct the jury on self-defense where the only evidence remotely connected to the issue of

self-defense was evidence that the victim had grabbed defendant's arm in trying to apprehend him for having snatched a purse and that the defendant had made a broad statement while in prison to the effect that he had to kill the victim or else the victim would have killed him, and where there was no evidence that the 53-year-old victim was armed or had threatened defendant in any way.

7. Criminal Law § 70— tape recording—deletion of incompetent portion

The trial court did not err in the deletion of an incompetent portion of a prosecution witness's tape recorded statement which was admitted for corroborative purposes.

8. Homicide § 32.1— submission of first degree murder—error cured by second degree verdict

Any error in the trial court's submission of an issue as to defendant's guilt of first degree murder because the evidence was insufficient to show premeditation and deliberation was not prejudicial where the jury convicted defendant of second degree murder, thereby impliedly finding that the killing was without premeditation and deliberation, and where there was no showing that the verdict of second degree murder was affected by such error.

9. Criminal Law § 102.6— jury argument—last argument by defense counsel—uncontradicted evidence

The prosecutor's statements in his closing jury argument that defense counsel "will have the last argument because they did not put on any evidence" and that particular pieces of evidence had not been contradicted were not improper.

10. Criminal Law § 111.1— propriety of certain instructions

The trial court in a homicide case did not err in suggesting that the jurors "start at the top of the verdict sheet and move down" in their deliberations or in telling the jurors before their sequestration that "It is best not even to think about this case between now and in the morning." G.S. 15A-1236(a)(1)-(5).

11. Criminal Law § 122.2— sending jury back to jury room for 10 minutes—no coercion of verdict

The trial court did not coerce a verdict in stating to the jury after over 10 hours of deliberation, "All right, I'm going to leave you in there for 10 minutes. Let the jury go back to the jury room for 10 minutes," where the statement was made after the jury foreman was unable to tell the court whether she felt the jury would be able to reach a unanimous verdict, it appears that the court was sending the jurors back to the jury room for 10 minutes so that they could decide if they felt that at some point they could reach a unanimous verdict, and instead of determining if they would be able to reach a verdict, the jurors reached a verdict within such time.

12. Criminal Law § 138— sentence for second degree murder—pecuniary gain aggravating factor

In imposing a sentence for second degree murder, the evidence was sufficient to support the trial court's finding as an aggravating factor that the murder was committed for pecuniary gain where it tended to show that

defendant snatched a purse and was running away when he shot the victim, although defendant had dropped the purse before he shot the victim. G.S. 15A-1340.4(a)(1)(c).

DEFENDANT was convicted during the 15 March 1982 criminal session of Superior Court, COLUMBUS County, of murder in the second degree and murder in the second degree while in the perpetration of a felony. *Judge Edwin S. Preston, Jr.* ordered that defendant be imprisoned for life for the two convictions. Defendant appeals to this Court as a matter of right under G.S. 7A-27(a) (1981).

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

William J. Williamson of Whiteville for defendant-appellant.

FRYE, Justice.

The defendant was charged with the first-degree murder of Elbert "Red" Strickland. The State's evidence tended to show the following:

About 11 a.m. on 21 December 1981 Linda Jacobs, the victim's sister-in-law, left her car parked at the back door of the furniture store where her brother-in-law worked. Upon returning to her car with Mr. Strickland, Ms. Jacobs saw defendant coming out of the car with her purse. Defendant ran and Strickland chased him. While defendant was running away, the strap on the pocketbook broke and the purse fell to the ground. Defendant shot and killed Strickland during the chase.

Defendant did not testify or present any witnesses at trial.

Defendant was found guilty of murder in the second degree and murder in the second degree while in the perpetration of a felony.

I.

[1] We note at the outset that defendant contends in his thirteenth assignment of error that the trial court erred in denying his motion to set aside the verdict of murder in the second degree while in the perpetration of a felony "as being contrary to the weight of the evidence in that the felony had been completed

prior to the homicide." We agree that it was error for the trial court to fail to set aside the verdict, but not for the reason advanced by defense counsel. Instead, we hold that the verdict should have been set aside because there is no offense of felony murder in the second degree in North Carolina. *State v. Chamberlain*, 307 N.C. 130, 149, 297 S.E. 2d 540, 552 (1982); *State v. Davis*, 305 N.C. 400, 422, 290 S.E. 2d 574, 588 (1982). The doctrine of felony murder is only applicable to murder in the first degree. N.C.G.S. 14-17 (1981). We must, therefore, arrest judgment on the conviction of felony murder in the second degree. *See State v. McGaha*, 306 N.C. 699, 702, 295 S.E. 2d 449, 451 (1982) (judgment is arrested where fatal defect appears on the face of the record).

Defendant is not entitled to a new trial, however. In addition to the erroneous verdict as to "felony murder in the second degree," the jury returned a verdict of guilty of murder in the second degree. The conviction of murder in the second degree was proper. The trial court correctly instructed the jury as to the elements of that offense and there is sufficient evidence to support the verdict as will be shown below.

Murder in the second degree is the unlawful killing of a person with malice. *State v. Jones*, 287 N.C. 84, 100, 214 S.E. 2d 24, 35 (1975). In his charge to the jury on murder in the second degree, the trial judge correctly stated:

> Second-degree murder differs from first degree murder in that neither specific intent to kill, premeditation, nor deliberation are necessary elements. In order for you to find the defendant guilty of second degree murder, the State must prove beyond a reasonable doubt that the defendant intentionally and with malice shot Red Strickland with a deadly weapon thereby proximately causing his death.

As this Court noted in *State v. Jones*, 287 N.C. 84, 214 S.E. 2d 24 (1975):

> If the State satisfies the jury beyond a reasonable doubt or if it is admitted that a defendant intentionally assaulted another with a deadly weapon, thereby proximately causing his death, two presumptions arise: (1) that the killing was unlawful and (2) that it was done with malice. Nothing else

> appearing, the person who perpetrated such assault would be guilty of murder in the second degree.

Id. at 100, 214 S.E. 2d at 35 (citation omitted).

In the case at bar, Ms. Jacobs testified that she saw defendant take her purse and flee and while her brother-in-law was chasing defendant he was shot. When she ran to her brother-in-law's aid he said to her, "Linda, he's got me." Another witness, Ricky Grady, testified that he saw defendant shooting a man during that chase. There is, therefore, sufficient evidence of murder in the second degree. *E.g., State v. Hodges*, 296 N.C. 66, 249 S.E. 2d 371 (1978); *State v. Alston*, 295 N.C. 629, 247 S.E. 2d 898 (1978).

[2] Although the conviction of murder in the second degree is valid, we find, nevertheless, that we must remand the case for resentencing. In its instructions to the jury, the trial court stated that defendant could be found guilty of murder under two theories—murder in the second degree while in the perpetration of a felony "and/or" murder in the second degree. The jury indicated on its verdict sheet that defendant was guilty of murder in the second degree *and* guilty of second-degree murder while in the perpetration of a felony. The trial court then indicated on its felony judgment and commitment sheet that defendant was found guilty of two separate offenses—"Second-degree murder" and "Second-degree murder while in the perpetration of the felony of breaking or entering a motor vehicle with the intent to commit larceny." The trial court also indicated that the maximum prison term allowed for *each* offense was life imprisonment. Because it is unclear whether for sentencing purposes the trial court treated defendant's conviction of murder in the second degree as a single conviction under two theories or as two separate convictions, we must remand the case to Superior Court, Columbus County, for resentencing on the valid second degree murder conviction. *Cf., State v. Chamberlain*, 307 N.C. 130, 297 S.E. 2d 540 (1982). In *Chamberlain*, the defendant was convicted of only one offense—murder in the second degree—under two theories, one of which was invalid (second-degree felony-murder theory). Resentencing was unnecessary since it was clear that the trial court sentenced the defendant for only one conviction. *Id.*

II.

We turn now to defendant's thirteen other assignments of error, all of which are overruled for the reasons given below.

[3] Defendant claims in his first assignment of error that the trial court erred in failing to mention to the prospective jurors during its initial statement to them that they could find defendant not guilty. The trial court stated to the prospective jurors, "at this time your only duty is to concern yourselves with the determination of whether the defendant is guilty of the crime charged, or any lesser included offense, about which you are instructed." Defendant contends that the trial court should have either explicitly stated to the prospective jurors that they could find defendant not guilty or rephrased its initial statement to them by saying that their duty was to determine whether "or not" defendant was guilty. In failing to do so, defendant contends that this initial statement amounted to an expression of opinion as to defendant's guilt on the part of the judge in violation of N.C.G.S. 15A-1222 (1978) and N.C.G.S. 15A-1213 (1978). We disagree. Although the better practice would be to explicitly state to prospective jurors that their duty is to determine whether defendant was guilty *or not guilty,* we do not feel that a failure to do so at this stage of the proceedings was error. In any event, the judge explicitly stated several times in his final instructions to the jury that they could find defendant not guilty, thereby clearing up any possible misunderstanding he may have created in his statements to the jurors before they were impaneled. *See State v. Woods,* 307 N.C. 213, 222, 297 S.E. 2d 574, 579-80 (1982); *State v. Reynolds,* 307 N.C. 184, 194, 297 S.E. 2d 532, 538 (1982).

[4] Defendant next contends that the trial court erred in failing to grant a motion for mistrial on grounds the prosecutor referred to Griffin in the presence of the jury three times as the defendant before Griffin was identified as such. We cannot agree that a motion for mistrial should have been granted here. In the first two instances in which the prosecutor referred to Griffin as the defendant, defense counsel objected, the trial court sustained the objection, and the prosecutor rephrased his question. When it happened a third time, Judge Preston asked the jurors to leave the courtroom after sustaining defense counsel's objection and then admonished the prosecutor at length about referring to Grif-

fin as the defendant before he had been identified as such. We hold that the trial court's scrupulous handling of the prosecutor's inappropriate references to Griffin as the defendant cured the improprieties. *See, e.g., State v. Robbins*, 287 N.C. 483, 487-88, 214 S.E. 2d 756, 760 (1975), *death penalty vacated*, 428 U.S. 903, 96 S.Ct. 3208, 49 L.Ed. 2d 1208-09 (1976); *State v. Jarrette*, 284 N.C. 625, 645-46, 202 S.E. 2d 721, 734-35 (1974), *death penalty vacated*, 428 U.S. 903, 96 S.Ct. 3205, 49 L.Ed. 2d 1206-07 (1976). There is, therefore, no error here.

[5] In his third assignment of error defendant contends that the trial court erred "in ordering a State's witness to testify against the defendant." We have reviewed the transcript and find no error here. After being called to testify, William Vereen repeatedly claimed, while under oath, to have nothing to say about the case. In the course of questioning Vereen out of the presence of the jury about a statement he had made to the District Attorney's office concerning the Strickland murder, the prosecutor asked, "Well you were in jail at the time [you made the statement] weren't you?" At that point the trial judge stated, "All right Mr. Witness, I order you to answer the question. I specifically order you to answer the question." Vereen then stated, "Yes, I was in jail at the time." We find no error in a trial court ordering a hostile witness to answer a question within his knowledge. The trial judge's conduct here was entirely proper; indeed, we note that a trial court has the power to hold a witness in criminal contempt for willfully refusing to answer a proper question. N.C.G.S. 5A-11(a)(4) (1981); *In re Williams*, 269 N.C. 68, 74-76, 152 S.E. 2d 317, 322-23 (1967), *cert. denied*, 388 U.S. 918, 87 S.Ct. 2137, 18 L.Ed. 2d 1362 (1967). In any event, since this exchange occurred out of the presence of the jury, it could not have prejudiced defendant.

[6] Fourth, defendant contends that the trial court erred in not charging the jury on the issue of self-defense. We note, first that defendant did not adhere 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)), because he failed to object to the jury charge, as it stood, before the jury retired to consider its verdict. Rule 10(b)(2) requires such an objection before a party may assign as error any portion of the jury charge or omission

therefrom. Nevertheless, we have determined that this assignment of error is without merit for the reasons discussed below.

In *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982), this Court articulated the elements of imperfect and perfect self-defense and held that before a defendant is entitled to an instruction on self-defense, the trial court must answer two questions 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.

Id. at 160, 297 S.E. 2d at 569. The Court stated that if "the evidence requires a negative response to either question, a self-defense instruction should not be given." *Id.* at 160-61, 297 S.E. 2d at 569.

In applying the foregoing rule, the Court in *Bush* reasoned as follows:

> 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 [the victim], 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 defendant 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.

Id. at 159-60, 297 S.E. 2d at 568-69 (emphasis added).

In the case at bar, the only evidence remotely connected to the issue of self-defense is evidence that: (1) the defendant made a broad statement while in prison to the effect that he had to kill the victim or else the victim would have killed him, and (2) the victim had grabbed defendant's arm in trying to apprehend him for having snatched Ms. Jacob's purse. There is no evidence that the fifty-three year old victim was armed or had threatened defendant in any way. The evidence in this case, therefore, is not sufficient to justify an instruction to the jury on the issue of self-defense because it does not amount to "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," *State v. Bush*, 307 N.C. at 160, 297 S.E. 2d at 569.

[7] Fifth, defendant contends that the trial court erred "in permitting the prosecution to play before the jury only portions of a tape recorded statement of the defendant in that this amounts to a deletion contrary to case law." Defendant cites only two cases in support of his argument: *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971); and *State v. Harmon*, 31 N.C. App. 368, 229 S.E. 2d 233 (1976). Both of these cases set forth the requirements which must be met before a defendant's tape recorded statement is admitted into evidence. In *Lynch* this Court held:

> To lay a proper foundation for the admission of a defendant's recorded confession or incriminating statement, courts are in general agreement that the State must show to the trial court's satisfaction (1) that the recorded testimony was legally obtained and otherwise competent; (2) that the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded; (3) that the operator was competent and operated the machine properly; (4) the identity of the recorded voices; (5) the accuracy and authenticity of the recording; (6) that defendant's entire statement was recorded and no changes, additions, or deletions have since been made; and (7) the custody and manner in which the recording has been preserved since it was made. Annot., 58 A.L.R. 2d 1024 §§ 4 and 8 and cases therein cited; 29 Am. Jur. 2d Evidence § 436 (1967).

279 N.C. at 17, 181 S.E. 2d at 571.

We have examined the trial transcript and determined that the trial court found that a proper foundation had been laid in this case. *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971).

Although defendant's brief refers to the tape recorded statement as "a tape recorded statement of the defendant," the transcript shows that this recorded statement was not from defendant, but rather from one of the prosecution's witnesses. The State wanted the tape recording admitted into evidence for corroborative purposes. The trial court determined that most of the statement was corroborative but ordered that an end portion of the tape not be played to the jury because it was not corroborative. Defendant has not shown, and we did not find, any evidence that the deleted portion was relevant to the case. Clearly, the exclusion of an incompetent portion of a statement is not erroneous and does not amount to an improper "deletion" of a recorded statement. To hold otherwise would mean that either an entire statement must be admitted even though it contains incompetent material or that an entire statement must be excluded if it contains any incompetent material. The assignment of error is overruled.

[8] Sixth, defendant contends that the trial court erred in denying his motion "to dismiss first-degree murder charges against

him at the close of the State's evidence and at the close of all of the evidence," because there was not sufficient evidence of premeditation and deliberation.

In *State v. DeMai*, 227 N.C. 657, 44 S.E. 2d 218 (1947), this Court held that a defendant convicted of murder in the second degree is not entitled to a new trial for any errors committed in the trial court's instructions to the jury on murder in the first degree *"in the absence of showing that the verdict of second degree murder was thereby affected." Id.* at 662, 44 S.E. 2d at 221 (emphasis added). In relying on *DeMai*, this Court reached a similar result in *State v. Casper*, 256 N.C. 99, 102, 122 S.E. 2d 805, 807 (1961), *cert. denied*, 376 U.S. 927, 84 S.Ct. 691, 11 L.Ed. 2d 622 (1964) where a defendant contended it was error for the trial court to refuse to instruct the jury that in no event could it return a verdict of guilty of murder in the first degree. The Court held that because the jury convicted the defendant of murder in the second degree, the conviction on the lesser offense "rendered harmless any error with respect to a higher offense." *Id., citing State v. DeMai*, 227 N.C. 657, 44 S.E. 2d 218 (1947). The Court also applied the *DeMai* reasoning in *State v. Mangum*, 245 N.C. 323, 330-31, 96 S.E. 2d 39, 45 (1957), in holding that the trial court's denial of defendant's motion to instruct the jury to disregard the charge of murder in the second degree was "immaterial" when defendant was convicted of the lesser offense of manslaughter.

In the case at bar, defendant contends that there was not sufficient evidence of premeditation and deliberation. We note that the difference between murder in the first degree and murder in the second degree is that premeditation and deliberation are essential elements of only murder in the first degree. *See, e.g., State v. Meadows*, 272 N.C. 327, 331, 158 S.E. 2d 638, 641 (1968). Because the jury convicted defendant of murder in the second degree, thereby impliedly finding that the killing was without premeditation and deliberation, and in the absence of any showing that the verdict of murder in the second degree was thereby affected, we hold that any error the trial court *may* have committed in submitting the charge of murder in the first degree to the jury was not prejudicial. *State v. Williams*, 288 N.C. 680, 699, 220 S.E. 2d 558, 571 (1975); *State v. Casper*, 256 N.C. 99, 102, 122 S.E. 2d 805, 807 (1961), *cert. denied*, 376 U.S. 927, 84 S.Ct. 691, 11 L.Ed. 2d

622 (1964); *State v. Mangum*, 245 N.C. 323, 96 S.E. 2d 39, 45 (1957); *State v. DeMai*, 227 N.C. 657, 44 S.E. 2d 218 (1947).

[9] Seventh, defendant contends that the prosecutor's statements to the jury in his closing argument constitute reversible error. We hold that they do not. At one point the prosecutor remarked that defense counsel "will have the last argument because they did not put on any evidence. . . ." We agree with the Court of Appeals' decision in *State v. Miller*, 32 N.C. App. 770, 233 S.E. 2d 662, *cert. denied*, 292 N.C. 733, 235 S.E. 2d 787 (1977), that such a remark is not prejudicial error. Defendant also complains about the following: in his closing argument the prosecutor discussed portions of the evidence and noted that particular pieces of evidence had not been contradicted. We held in *State v. Smith*, 290 N.C. 148, 165-68, 226 S.E. 2d 10, 20-22, *cert. denied*, 429 U.S. 932, 97 S.Ct. 339, 50 L.Ed. 2d 301-02 (1976), that this was not improper.

Eighth, defendant contends that the trial court erred in failing to instruct the jury that they could find defendant not guilty. We note that the trial court *did* instruct the jury that they could find defendant not guilty. The trial court stated, "at this time your only concern is to determine whether the defendant is guilty of the crime charged or any lesser included offense about which you are instructed." Immediately thereafter he stated at least four times in various portions of the jury instructions themselves that one of the possible verdicts the jury could return was not guilty. Indeed, we note that the verdict of "not guilty" was an option printed on the verdict sheet submitted to the jury. As this Court has stated many times before, jury instructions must be construed contextually in determining whether prejudicial error has been committed. *E.g.*, *State v. Jones*, 294 N.C. 642, 653, 243 S.E. 2d 118, 125 (1978); *State v. Cook*, 263 N.C. 730, 734, 140 S.E. 2d 305, 309 (1965). We find no error here.

[10] Defendant contends in his next three assignments of error that the following statements which the trial court made to the jury were erroneous: (1) after defining the first element of "second degree murder while in the perpetration of a felony" the trial court said, ". . . and so you've got that verdict" before explaining the second element; (2) suggesting that the jurors "start at the top of the verdict sheet and move down" in their delibera-

tions; and (3) telling the jurors before their sequestration that "It is best not even to think about this case between now and in the morning." It suffices to say that we have examined the transcript and find that the first statement is not erroneous when read in context. *E.g., State v. Jones*, 294 N.C. 642, 653, 243 S.E. 2d 118, 125 (1978). The second statement suggesting that the jurors "start at the top of the verdict sheet and move down" was entirely appropriate. The third statement admonishing the jurors not to think about the case was entirely appropriate under N.C.G.S. 15A-1236(a)(1)-(5) (Cum. Supp. 1981). The trial court is required, at appropriate times, to admonish jurors that they are not allowed, among other things, to discuss the case with others or form an opinion as to defendant's guilt or innocence prior to retiring to deliberate on their verdict.

[11] Defendant also contends that the trial court erred in stating to the jury after over ten hours of deliberation, "All right, I'm going to leave you in there for ten minutes. Let the jury go back to the jury room for ten minutes." Defendant claims this statement amounted to coercion of a jury verdict. We cannot agree. We note the trial court's statement was made after the jury foreman was unable to tell the judge whether she felt the jury would be able to reach a unanimous verdict. The colloquy was as follows:

> COURT: O.K. Madame Foreman, will you please rise. I want to ask you a series of questions again, and I want a yes or no answer, if you would please. First, are you making any progress? Yes or no, to the best you know.
>
> FOREMAN: Yes.
>
> COURT: Second, has the verdict changed in any way in the last hour and a half?
>
> FOREMAN: No.
>
> COURT: So, you're (sic) answer is no?
>
> FOREMAN: Since we got that paper, no, not since we got that paper.
>
> COURT: So I take it your vote count is the same?
>
> FOREMAN: Yes.

COURT: Now you have been deliberating for almost eleven hours. Do you feel that you will be able to reach a unanimous verdict? Or, it's hard to say?

FOREMAN: Hard to say.

COURT: I sort of put you on the spot and for that I apologize. I sorta (sic) need to know.

FOREMAN: Pardon?

COURT: I sort of need to know the answer.

FOREMAN: Yes.

COURT: All right, I'm going to leave you in there for ten minutes. Let the jury go back to the jury room for ten minutes.

When the trial judge's statement is read in context, it appears that he was sending the jurors back to the jury room for ten minutes so that they could decide if they felt that at some point they could reach a unanimous verdict. Instead of determining *if* they would be able to reach a verdict, the jurors reached a verdict. There is no error here.

[12] Finally, defendant contends that the trial court erred in considering as an aggravating factor, under N.C.G.S. 15A-1340.4(a)(1)(c) (Cum. Supp. 1981), that the murder was committed "for pecuniary gain" because there is no evidence to support this finding. This argument is without merit. There is ample evidence that defendant snatched a purse and was running away when he shot the victim. Although defendant dropped the purse before he shot the victim, his entire course of conduct clearly was "for pecuniary gain." In addition, defendant complains that this aggravating factor cannot be used for a second reason: it is an essential element of the "second-degree felony-murder" conviction. We need not address this argument because we are arresting judgment on that conviction.

In conclusion, therefore, we find no error in the determination of guilt on the charge of murder in the second degree. We must, however, vacate defendant's sentence and remand the case to the Superior Court of Columbus County for resentencing.

The result is:

(1) The guilty verdict of felony murder in the second degree is set aside and the judgment thereon is

Arrested.

(2) No error in the guilt phase on the charge of murder in the second degree.

(3) Sentence vacated and case

Remanded for new sentencing hearing upon the conviction of murder in the second degree.

IN THE MATTER OF: JOHN WILLIAM ELKINS, APPLICANT TO THE FEBRUARY 1981 NORTH CAROLINA BAR EXAMINATION

No. 601A82

(Filed 3 May 1983)

1. **Attorneys at Law § 2— judicial review of decision of Board of Law Examiners**

The findings and conclusions of the Board of Law Examiners are judicially reviewed under a "whole record" test to determine if they are supported by "substantial evidence."

2. **Attorneys at Law § 2— admission to practice—good character—burden of proof**

An applicant for admission to the practice of law has the initial burden of proving his good character, and if the Board of Law Examiners relies on specific acts of misconduct to rebut a *prima facie* showing of good character, and such acts are denied by the applicant, then the Board must establish the specific acts by the greater weight of the evidence.

3. **Attorneys at Law § 2— criminal convictions—evidence of lack of good moral character**

The Board of Law Examiners could properly consider an applicant's criminal convictions as evidence of the applicant's lack of good moral character.

4. **Attorneys at Law § 2— denial of application to take Bar Examination—lack of good moral character—sufficiency of evidence and findings**

There was substantial evidence to support findings by the Board of Law Examiners that an applicant to take the N.C. Bar Examination entered the at-

tic above his apartment and the adjoining apartment of three women and drilled holes from the attic through the ceiling of the women's apartment for the purpose of secretly peeping into the bathroom and a bedroom of the adjoining apartment, that he took his camera into the attic with the specific intent of photographing the female occupants of the adjoining apartment, and that specific statements in the applicant's answers to interrogatories in a prior civil suit instituted by the females against defendant and in his testimony under oath before the Board were untrue and given by him with intent to deceive the court in the prior action and the Board. Such findings were sufficient to rebut the applicant's *prima facie* showing of good moral character and to support the Board's conclusion that the applicant presently lacks such good moral character as to be entitled to take the N.C. Bar Examination.

APPEAL as a matter of right, pursuant to Section .1405 of the Rules Governing Admission to the Practice of Law, from the Judgment of *Battle, Judge,* Superior Court, WAKE County, entered 26 May 1982, ordering the North Carolina Board of Law Examiners [hereinafter "Board"] to issue John William Elkins a license to practice law if he made a passing grade on the February 1981 Bar Examination.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Harry H. Harkins, Jr., for Board of Law Examiners appellant.

Sapp & Mast, by Robert H. Sapp for applicant appellee.

MITCHELL, Justice.

The issues presented by the Board's appeal are whether there is substantial evidence to support the Board's findings of fact and whether the findings that the applicant was guilty of misconduct and false testimony are sufficient to deny the applicant's admission to the Bar. We hold that the Board's findings were supported by substantial evidence and the findings support the Board's conclusion that the applicant presently lacks the requisite good moral character for admission to the Bar.

John William Elkins is an applicant for admission to the North Carolina Bar. His application to take the February 1981 North Carolina Bar Examination was denied by the Board on the basis that he had failed to demonstrate his good moral character. The applicant filed his written application to take the Bar examination in November 1980. On 29 January 1981, a panel of the

Board, after notifying Elkins, held a hearing concerning his character and subsequently denied his application.

Elkins requested a *de novo* hearing before the full Board. He was allowed to take the Bar examination but was advised that the results would be sealed until the Board determined whether he was of good moral character. The applicant appeared with counsel at a formal hearing which was held before the full Board on 15 May 1981. On 21 August 1981, the Board made findings of fact and conclusions of law and issued an order denying Elkins' application to take the February 1981 Bar Examination and permanently sealing his results on the examination. This decision was based on the Board's conclusion that Elkins failed to satisfy the Board that he was of good moral character.

The applicant appealed the Board's decision to the Superior Court. Judge Battle ruled that the Board's findings of fact were not supported by substantial evidence and, even if they were supported by substantial evidence, they would be insufficient to rebut Elkins' *prima facie* showing of good moral character. Judge Battle ordered that Elkins be granted a law license if he passed the Bar examination. From this Judgment, the Board appeals to this Court pursuant to Section .1405 of the Rules Governing Admission to the Practice of Law promulgated under the authority granted in G.S. 84-24.

The focal point of the controversy in this case is an incident that occurred in Chapel Hill on 14 July 1975. The undisputed facts are as follows: Elkins was a student at the University of North Carolina at Chapel Hill and was working on an undergraduate honors thesis in sociology. He had lived in the same apartment for three years and, at the time of the incident, he shared the apartment with three roommates. During the afternoon of 14 July 1975, he arrived at his apartment from his parents' home in Winston-Salem. After his roommates left that evening he began to study, but after a short time he decided to enter the attic in his apartment. In order to do this he moved a dresser from one of the bedrooms into the hallway and stood on the dresser in order to lift himself through the hatch in the ceiling. The attic did not have a floor and there was blown insulation between the joists. The attic was not air-conditioned and the only light was a dim light from a side vent. The attic was undivided and covered both

Elkins' apartment and the apartment next to his which was rented to three females. The only entrance to the attic was from Elkins' apartment.

After viewing the attic Elkins went back into his apartment and then returned to the attic with his study materials, a flashlight, a 35 millimeter camera, a camera tripod and a brace with a quarter-inch bit. After a short time in the attic, he returned to his apartment and, using an electric drill and a keyhole saw, he created another entrance to the attic in the ceiling of the bathroom that adjoined his bedroom. He covered this opening with a piece of plywood and returned to the attic.

Elkins had been in the attic for several hours when he heard someone attempting to enter the attic. He turned off his flashlight and hid behind a duct. At this point the attic was completely dark. He saw someone look in and search the attic with a flashlight. Elkins then drilled several holes from the attic through the ceiling of the women's apartment. Through these holes and through an exhaust fan vent from the bathroom, it was possible to see from the attic into the bathrooms and bedroom of the apartment rented to the three women.

The Chapel Hill police were called by the women who occupied the apartment and Elkins was arrested and charged with illegal entry and secretly peeping into a room occupied by a female person. He was tried on these charges upon his plea of not guilty and was convicted in Orange County District Court. The court entered a prayer for judgment continued and a fine of $50.00. A subsequent civil suit for invasion of privacy brought against Elkins by two of the women who lived in the apartment ended in a directed verdict for Elkins at the close of the plaintiffs' evidence.

The remainder of the evidence brought out in the hearing related to matters which were disputed. Elkins maintained that he entered the attic for the purpose of studying and that he took the camera, tripod, brace and bit into the attic as diversions during his studying. He testified that he intended to clean the camera because it had sand in the mechanism from an earlier trip to the beach. He planned to drill holes in the leg of the tripod in order to attach a carrying strap. He testified that he had no intent to secretly peep on the women in the adjoining apartment

and that he did not know that the attic covered both apartments. He hid in the attic when he heard someone attempting to enter the apartment because he thought it was either a prowler or one of his roommates who would ridicule him for studying in the attic. He drilled the holes because he was dazed and confused and thought the holes would provide ventilation and an opportunity to see if there was a prowler in the apartment below. He believed that he was drilling through the ceiling over his own apartment.

The Board found that Elkins entered the attic and drilled the holes for the purpose of secretly peeping into the bathrooms and a bedroom of the adjoining apartment and that he took his camera into the attic with the specific intent of photographing the female occupants of the adjoining apartment. The Board also found that Elkins' answers to the interrogatories in the prior civil suit and his testimony under oath before the Board were untrue and given by him with the intent to deceive the court in that prior action and the Board. The Board then concluded that Elkins' actions on 14 July 1975 and his subsequent false testimony before the Board and untrue statements in his answer to the interrogatories in the civil suit rebutted his *prima facie* showing of good moral character. The Board further concluded that, even if Elkins' prior acts of misconduct were not dispositive of his character determination, the false statements and testimony before the Board demonstrated the applicant's present lack of good moral character.

[1, 2] We have previously outlined the procedure used by this Court in reviewing decisions of the Board. *In re Moore*, 301 N.C. 634, 272 S.E. 2d 826 (1981); *In re Rogers*, 297 N.C. 48, 253 S.E. 2d 912 (1979). The findings and conclusions of the Board are judicially reviewed under a "whole record" test to determine if they are supported by "substantial evidence." The applicant has the initial burden of proving his good character. If the Board relies on specific acts of misconduct to rebut this *prima facie* showing, and such acts are denied by the applicant, then the Board must establish the specific acts by the greater weight of the evidence.

It is the function of the Board to resolve factual disputes. *In re Rogers*, 297 N.C. 48, 253 S.E. 2d 912 (1979). The reviewing court must take into account whatever evidence in the record detracts from the Board's decision as well as that which supports

the decision, but the reviewing court is not allowed "to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo.*" *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977); *see also Baker v. Varser*, 240 N.C. 260, 82 S.E. 2d 90 (1954).

In the present case, the Board made findings of fact as required by this Court in the case of *In re Rogers*, 297 N.C. 48, 253 S.E. 2d 912 (1979). The basis for the Board's denial of Elkins' application is, in some ways, similar to the rationale used by the Board in the case of *In re Moore*, 301 N.C. 634, 272 S.E. 2d 826 (1981). Specifically, in both cases the Board found that the applicant made false statements under oath. In reversing the Superior Court's affirmation of the Board's order, we held in *Moore* that the findings of fact were not complete as they did not include a finding that the applicant's omissions were purposeful and done with the intent to mislead the Board. We also held that the Board had made judicial review impossible in that case by failing to specifically identify the statements which it concluded were false. Finally, we stated that,

> [t]he Board should not conduct a hearing to consider applicant's alleged commission of specific acts of misconduct and *without a finding that he committed the prior acts* use his denial that he committed them as substantive evidence of his lack of moral character. The Board should first determine whether in fact the applicant committed the prior acts of misconduct.

Id. at 641, 272 S.E. 2d at 831 (emphasis in original).

The Board in the present case followed the directive of *Moore* and specified which statements made by Elkins it considered to be false, found that Elkins made the statements with the intent to deceive the Board and also made findings that Elkins committed the prior acts of misconduct. These findings were used, in addition to the Board's use of his denial that he committed the acts, as substantive evidence of his lack of good moral character.

The Board's findings were primarily based on Elkins' testimony, testimony of his character witnesses, his answers to inter-

rogatories in the prior civil suit and his related convictions in Orange County District Court. The applicant first contends that the Board erred by using evidence of his criminal convictions in this civil matter. We disagree.

[3] We note the general rule that in a civil action for damages evidence of a criminal conviction is not admissible. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976). However, the rules of evidence before an administrative board permit more latitude than is allowed in court proceedings. *Campbell v. Board of Alcoholic Control*, 263 N.C. 224, 139 S.E. 2d 197 (1964). A detailed exploration of the reasons for the differences between hearings before an administrative board and court proceedings is unnecessary. It suffices to say that evidence of criminal convictions has long been properly admitted and considered in hearings before boards of law examiners in this and other jurisdictions to determine an applicant's moral character. *In re Moore*, 301 N.C. 634, 272 S.E. 2d 826 (1981); *In re Applicants for License*, 191 N.C. 235, 131 S.E. 661 (1926); *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924); 7 Am. Jur. 2d, *Attorneys at Law* § 16 (1980); Annot., 88 A.L.R. 3d 192 (1978). Evidence of a criminal conviction is not conclusive evidence of the applicant's lack of good moral character, but it is some evidence that can be considered by the Board. The Board's use of the applicant's criminal convictions as evidence in the present case was not error.

[4] We next consider whether the Board's findings were supported by substantial competent evidence. We are satisfied from the record before us that they were. Elkins' testimony was internally inconsistent in many respects. Also, there were numerous contradictions and inconsistencies between Elkins' testimony and the other evidence presented from which the Board could conclude that Elkins was testifying falsely with the intent to deceive the Board.

Elkins testified that he entered the attic to study and because he was interested in attics and in the construction of the roof of the apartment. He testified that he was familiar with attics and building construction and that he initially looked in the attic to learn more about its construction. Yet he also testified that, although he was in the attic at least four hours, it never occurred to him that the attic was undivided and covered the apart-

ment next door as well as his own apartment. In other words, despite the fact that he was acquainted with attics and was specifically observing the attic construction, he did not realize that the attic was twice as large as his apartment.

Elkins testified that he entered the attic for the first time in the three years that he had been living in the apartment because he was bored and was having difficulty maintaining his concentration while studying. He had never studied by a flashlight or in an attic before nor has he done so since. He wanted a change of scenery from his bedroom, despite the fact that he had just returned from spending ten days in Winston-Salem. He stated that there was no comfortable way to study in the living room or dining room of his apartment. Therefore, in the middle of July, he climbed from an air-conditioned apartment into an attic that had very little ventilation. Even though he was wearing only shorts and a tee shirt, he decided to study by flashlight while sitting on boards in an attic without a floor and with blown insulation between the joists.

Although Elkins testified that he entered the attic because he was having problems concentrating on his studying, he brought certain "diversions" with him. These included an aluminum tripod in which he planned to drill holes for a carrying strap. This was a project he had failed to begin for weeks but one he thought he would finally accomplish in July in a dark attic by flashlight. He decided not to use the electric drill in the apartment to accomplish this task in part because he "sometimes [does] things the hard way."

In addition to the tripod and brace, he brought his camera with him into the attic. He testified that, although the camera was loaded with film, he planned to work on it in the attic because he had taken it to the beach three weeks earlier and it had sand in the lens and winding mechanism. He was afraid the sand would "freeze" the camera movement. Therefore, he thought that a proper diversion from his studies would be to attempt to remove the fine particles of sand from the delicate mechanism of the camera by the light of a flashlight while sitting on a board in a dark attic and surrounded by blown insulation.

One of the significant acts by Elkins on 14 July 1975 was the cutting of the hole in the ceiling of his bathroom. The apartment

had two bathrooms and one entered only into Elkins' bedroom. Elkins testified that he initially entered the attic through the hatch in the ceiling of the hallway. He did this by pulling a dresser from one of the bedrooms into the hallway and climbing from the dresser through the hatch in the ceiling. Despite his intention to study and his several "diversions," he became bored after fifteen to twenty minutes and decided to create a new opening into the attic. He stated that at the time he cut the hole he did not necessarily plan to use the new opening or to study in the attic at any time in the future. After he cut the new entrance from his bathroom he covered the hole with a makeshift hatch. He testified that he never used this opening to enter the attic.

Certain facts cast doubt upon Elkins' claim that he did not use the newly created entrance and the Board found that his testimony in this regard was untrue and was given by him with the intent to deceive the Board. While Elkins was in the attic, the original opening was found covered and the dresser in the hallway was pushed back against the wall away from the opening. Evidence produced at the hearing also tended to show that the door to his bathroom containing the newly constructed entrance to the attic was found locked from the inside. Elkins testified that he did not lock the door.

One of the most significant acts by Elkins was the drilling of the holes. Elkins maintained that the holes were randomly drilled through the ceiling of the women's apartment while he was in a dazed state from being in the attic for several hours in July. Elkins' testimony was that while he was in the attic he heard someone attempting to enter the attic and he hid. His first thought was that the person was one of his roommates and he did not want to be discovered. He moved further away from the attic entrance as the person returned several times and scanned the attic with a flashlight. Elkins testified that he drilled the holes because he was hot and the air was stuffy. He thought the holes would provide some ventilation. He also thought that he might be able to tell if the person below was an intruder rather than one of his roommates. He testified that he drilled the holes slowly with the brace so as not to alert the person below. When questioned by the Board as to whether the droppings from the holes would be detectable and therefore alert the intruder to his presence, Elkins testified that, since the person had been looking in the at-

tic, he assumed the person was already aware of his presence and could not find him in the attic.

Elkins' fear that a prowler might have been in the apartment was omitted from his answers to the interrogatories in the civil suit. He explained this by pointing out that he hastily wrote those answers in three days, at least six months after the incident, and he did not include every detail.

His concern about the presence of an intruder was also omitted from the account he gave to his good friend and character witness, Grayson L. Reaves, Jr. Reaves testified that he talked for "quite some time . . . in detail" to Elkins about the events of 14 July 1975. He asked Elkins "some pretty serious questions and embarrassing questions" and felt as though he had "cross-examined" Elkins as to the incident, yet he was unaware that Elkins ever suspected that there was a prowler in the apartment.

One of the more striking aspects of the events of 14 July 1975 was the placement of the holes in the ceiling of the women's apartment. Elkins testified that the holes were drilled "randomly," although he moved once to a better hiding place after he had drilled the first hole. The evidence before the Board showed that the "random" holes were all located in the ceiling of the apartment of the women. In each of the two bathrooms in the women's apartment, holes were drilled over the shower and commode. There were also two holes drilled in the ceiling of one of the women's bedroom. The arresting officer testified that he could see from the attic into the rooms through the holes if he pushed back the insulation. He also stated that he did not think that a photograph could be taken through the holes, but that a photograph could be taken through the vent from the exhaust fan in each bathroom. The view through the vent was fairly clear and encompassed a large area of the bathroom including the shower and the commode.

From the foregoing it is clear that Elkins' testimony was replete with contradictions and inconsistencies. His actions as he described them were, in his own words, not "entirely reasonable." His account of the events of 14 July 1975 was inherently incredible. *See In re Gould*, 4 App. Div. 2d 174, 164 N.Y.S. 2d 48 (1957).

The applicant challenges the Board's ability to find that he gave false testimony. We have previously recognized the possibil-

ity that the Board, in some instances, may find that an applicant's testimony before it was false. In the recent case of *In re Moore*, 301 N.C. 634, 641 n. 3, 272 S.E. 2d 826, 831 n. 3 (1981), we noted:

> There may, however, be instances where the prior acts are not dispositive of the character determination; applicant's false statements about the acts then take on added significance. In either event the Board must prove the commission of the prior act and should first make a finding in regard thereto. It may then find, if it is so convinced, that the applicant testified falsely under oath.

The Board established by the greater weight of the evidence that Elkins committed the prior act. It then made findings of fact that Elkins testified falsely with the intent to deceive the Board. We hold that these findings were supported by the evidence previously summarized herein which was substantial evidence.

Having determined that the Board's findings were proper, we must determine if the findings are sufficient to rebut Elkins' *prima facie* showing of good moral character. The Board found that specific statements made by Elkins during his testimony under oath before the Board as well as his sworn responses to interrogatories in the civil suit were "untrue and were given by him with the intent to deceive the Court . . . [and] the Board." We have previously stated that: "[m]isrepresentations and evasive or misleading responses, which could obstruct full investigation into the moral character of a Bar applicant, are inconsistent with the truthfulness and candor required of a practicing attorney." *In re Willis*, 288 N.C. 1, 18, 215 S.E. 2d 771, 781, *appeal dismissed*, 423 U.S. 976, 46 L.Ed. 2d 300, 96 S.Ct. 389 (1975). Material false statements can be sufficient to show the applicant lacks the requisite character and general fitness for admission to the Bar. *In re Beasley*, 243 Ga. 134, 252 S.E. 2d 615 (1979); *Application of Walker*, 112 Ariz. 134, 539 P. 2d 891 (1975), *cert. denied*, 424 U.S. 956, 47 L.Ed. 2d 363, 96 S.Ct. 1433 (1976); *Greene v. Committee of Bar Examiners*, 93 Cal. Rptr. 24, 4 Cal. 3d 189, 480 P. 2d 976 (1971); *Petition of Bowen*, 84 Nev. 681, 447 P. 2d 658 (1968). We hold that the Board's findings of fact supported its conclusion that Elkins presently lacks such good moral character as to be entitled to take the February 1981 North Carolina Bar Examination.

In reaching this determination, it is unnecessary to decide "whether the Board should rely on a finding that an applicant lied under oath when the finding is based on *nothing more* than the applicant's denial of accusations against him." *In re Moore*, 301 N.C. 634, 641, 272 S.E. 2d 826, 830 (1981) (emphasis added). We emphasize that the present case involves much more than an applicant's mere protestation of his innocence of the act which he is accused of committing. The Board was presented with testimony that was internally inconsistent, intrinsically implausible and repeatedly contradicted by substantial evidence.

For the foregoing reasons, Judgment of the Superior Court is reversed and the case is remanded to the Superior Court, Wake County, with instructions to that Court to enter judgment affirming the order of the Board of Law Examiners.

Reversed and remanded.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 74 J. WILTON HUNT, SR., RESPONDENT

No. 62A83

(Filed 3 May 1983)

1. **Judges § 7— jurisdiction over misconduct charges—subsequent resignation of judge**

The Judicial Standards Commission and the Supreme Court acquired jurisdiction over a district court judge and the charges against him when the Commission filed its complaint against the judge, and such jurisdiction was not divested by the judge's resignation after the complaint was filed.

2. **Judges § 7— action to remove judge—other sanctions—resignation of judge—mootness**

A proceeding before the Judicial Standards Commission to remove a district court judge from office was not rendered moot by the judge's resignation from office since the remedies against a judge who engages in serious misconduct justifying his removal include not only loss of present office but also disqualification from future judicial office and loss of retirement benefits.

3. **Judges § 7— willful misconduct in office—accepting bribes—removal from office**

Each act of a district court judge in accepting cash bribes in exchange for his promise to use his judicial office to protect criminal activities constituted a

separate act of willful misconduct in office, and the persistent and repeated nature of these acts by the judge also represented a course of conduct prejudicial to the administration of justice to such an extreme degree as to comprise a separate act of willful misconduct in office. Since such acts of willful misconduct involved personal financial gain, moral turpitude and corruption, they required that the judge be removed from judicial office and that he be disqualified from receiving retirement benefits and holding further judicial office. G.S. 7A-376.

PROCEEDING before the Supreme Court upon the recommendation of the North Carolina Judicial Standards Commission that the respondent, J. Wilton Hunt, Sr., a judge of the General Court of Justice, District Court Division, Thirteenth Judicial District, be removed from office as provided in G.S. 7A-376.

Special Deputy Attorney General Lester V. Chalmers, Jr., for Judicial Standards Commission.

Frink, Foy and Gainey, by A. H. Gainey, Jr., for respondent.

MITCHELL, Justice.

The issues raised before the Supreme Court by the recommendation of the North Carolina Judicial Standards Commission [hereinafter "Commission"] concern whether certain conduct by the respondent, Judge J. Wilton Hunt, Sr., is willful misconduct in office under the terms of G.S. 7A-376 which justifies his removal from office and the resulting statutory disqualification from receiving retirement benefits and holding further judicial office. By this opinion, we adjudge that the respondent's conduct constitutes willful misconduct in office and order his removal from office as a judge together with the resulting statutorily mandated disqualifications.

On 17 September 1982 the Commission, in accordance with its Rule 7 (J.S.C. Rule 7) notified the respondent that on its own motion it had ordered a preliminary investigation to determine whether formal proceedings should be instituted against him under J.S.C. Rule 8. The notice informed Judge Hunt that the scope of the investigation would include *inter alia* allegations that he had accepted money on several occasions in exchange for his assistance in protecting illegal gambling and drug smuggling activities. On 22 September 1982, Special Deputy Attorney General Lester V. Chalmers, Jr., acting as Special Counsel to the Commis-

sion, filed a complaint against the respondent with the Commission which alleged *inter alia* the following:

> 3. That the respondent received as bribes the amounts of money on or about the dates and from the persons specified and designated below:
>
> (a) $1,000.00 on or about 3 December 1980 from Federal Bureau of Investigation special agent William Redden;
>
> (b) $1,500.00 on or about 26 January 1981 from Federal Bureau of Investigation special agent William Redden;
>
> (c) $1,000.00 on or about 24 February 1981 from Federal Bureau of Investigation special agent Robert Joseph Drdak;
>
> (d) $2,000.00 on or about 22 June 1981 from Federal Bureau of Investigation special agent Robert Joseph Drdak; and
>
> (e) $1,500.00 on or about 22 September 1981 from Federal Bureau of Investigation special agent Robert Joseph Drdak.

The Commission notified Judge Hunt on 22 September 1982 that it had concluded that formal proceedings should be instituted against him, upon evidence developed by the preliminary investigation, for willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. A copy of the complaint filed by Special Counsel Chalmers was attached to this notice which was hand delivered to the respondent on 22 September 1982 by Cale K. Burgess, Jr., an investigator for the Commission. The respondent filed an answer on 8 October 1982 denying the substantive allegations of the complaint.

After proper notice to all parties, the Commission convened a hearing on 4 January 1983 concerning the charges alleged in the complaint. The respondent was present and represented by counsel at the hearing. During the hearing before the Commission, evidence was offered against the respondent in the form of the testimony of witnesses and the introduction of exhibits including video tapes made by federal law enforcement officers in which it was contended Judge Hunt was portrayed in the act of receiving some of the bribes alleged in the complaint. The re-

spondent offered no evidence and, upon advice of counsel, elected to stand mute for purposes of the hearing.

On 25 January 1983, after reciting the jurisdictional facts and chronology of proceedings prior to the hearing, the Commission found facts and made conclusions of law and a recommendation to this Court as follows:

> 9. At the hearing evidence was presented by Special Counsel for the Commission but no evidence was presented by Counsel for the respondent, and having heard the evidence presented by Special Counsel for the Commission and having observed the demeanor and determined the credibility of the witnesses, the Judicial Standards Commission found, upon clear and convincing evidence, the following facts:
>
> During the period of time from 23 October 1980 to and including 20 November 1980, the respondent conversed with one James E. Carroll, operator of the Roxann Lounge in Whiteville, North Carolina, concerning the interest of a group of investors represented by William L. Redden, Jr., a Federal Bureau of Investigation special agent known to respondent and Carroll only as Bill Leonard, in purchasing the Roxann Lounge. During these conversations, Carroll advised the respondent of Redden's interest in purchasing the Roxann Lounge and his need to have protection for the operation of the lounge because the activities of the lounge would include running a private poker game. Carroll also advised the respondent that money for assistance in protecting the operation would be no problem. The respondent indicated to Carroll that he would assist in protecting the operation.
>
> On 20 November 1980 the respondent met Redden in Whiteville at which time Redden told the respondent of his clients' interest in purchasing the Roxann Lounge and their interest in running a private poker game on the premises.
>
> On 3 December 1980 the respondent met with Redden and Carroll outside the Hide-Away Grill in Whiteville. During this meeting, respondent agreed to do whatever he could to help Redden to protect the operation of the Roxann Lounge, and the payment of $1,500 a month to the respondent for his

assistance in protecting the operation was discussed. On this occasion the respondent received $1,000 from Redden through Carroll as a show of good faith by Redden who indicated that the amount would be increased to $1,500 once the operation was in place.

On 22 December 1980 the respondent accepted $500 from Carroll who had been given the money by Redden for delivery to the respondent.

On 26 January 1981 the respondent invited Redden and Carroll to his residence at which time the respondent received $1,500 from Redden and assured Redden that he would take care of Redden's people.

On 19 February 1981 Joseph Thomas Moody, an informant for the Federal Bureau of Investigation, received two citations to appear in District Court in Whiteville on 25 March 1981 on charges of driving under the influence of intoxicating liquor, speeding 68 m.p.h. in a 55 m.p.h. zone, and driving while his chauffeur's license was revoked.

On 24 February 1981 the respondent met Robert Joseph Drdak, a Federal Bureau of Investigation special agent known to the respondent only as an associate of Redden named Thomas "Doc" Ryan, Carroll, and Moody, known to the respondent as an associate of Drdak and not as an informant, at his residence. During this meeting, the drug operation in which the respondent believed Drdak to be involved was discussed as well as the respondent's willingness to assist Drdak and others involved in such an operation with court matters such as bond hearings by setting low bonds or reducing bonds. The respondent specifically discussed Moody's upcoming cases, and the respondent indicated that he could and would give Moody favorable consideration in court perhaps by granting Moody a prayer for judgment continued. On this occasion the respondent accepted $1,000 from Drdak as a partial payment for the respondent's assistance with Moody's cases and other such things.

The respondent presided over the 25 March 1981 session of Columbus County District Criminal Court in Whiteville at which the cases of *State of North Carolina v. Joseph Thomas*

Moody, Columbus County file numbers 81CR1695 and 81CR1696, were calendared for trial. Upon defendant Moody's pleas of not guilty to speeding 68 m.p.h. in a 55 m.p.h. zone and driving while his chauffeur's license was revoked, the respondent found defendant Moody not guilty of those charges and guilty of exceeding safe speed and no operator's license. The respondent consolidated the two cases for judgment and signed a judgment granting defendant Moody a prayer for judgment continued on payment of costs of court.

On 30 March 1981 the respondent met Drdak and Jerry A. King, a Federal Bureau of Investigation special agent known to the respondent only as an associate of Drdak named Jerry Richardson, at his residence at which time the respondent accepted $1,500 from Drdak and acknowledged that his action in the Moody cases was his job. During this meeting, the respondent was advised of Drdak's desire to open a precious metals business and his concern about any delay in obtaining a business license from the Columbus County Board of Commissioners. Prior to the conclusion of the meeting, the respondent offered to and did telephone Ed Walton Williamson, Chairman of the Columbus County Board of Commissioners, and Jim Hill, Columbus County Attorney, and requested their assistance in expediting Drdak's application for a business license. Upon completion of the telephone calls, the respondent advised Drdak to meet Williamson the following day at Williamson's office.

On 31 March 1981 Drdak went to the office of the Chairman of the Columbus County Board of Commissioners at which time he met Ed Walton Williamson and received his license to operate a precious metals business.

On 22 June 1981 the respondent met Drdak at Drdak's apartment at 24 Jamestown Square in Whiteville at which time the drug operation in which the respondent believed Drdak to be involved was discussed and at which time the respondent accepted $2,000 from Drdak to help make up for any arrearages in the $1,500 a month payment amount.

On 14 September 1981 Bradley D. Hoferkamp, a Federal Bureau of Investigation special agent known to the respondent only as an associate of Drdak named Bradley David

Henderson, was cited to appear in District Court in Whiteville on 13 October 1981 on a charge of speeding 71 m.p.h. in a 55 m.p.h. zone.

On 22 September 1981 the respondent met Drdak at 24 Jamestown Square in Whiteville at which time the respondent accepted $1,500 from Drdak and was advised of the speeding ticket received by Hoferkamp. During the conversation, the respondent requested and received information from Drdak regarding Hoferkamp's ticket and indicated he would have the matter continued until he could handle it.

On several occasions during the period of time from 22 September 1981 to and including 9 November 1981, the respondent discussed Hoferkamp's ticket with both Drdak and Hoferkamp and repeatedly assured them that he would take care of the case.

On 9 November 1981 the respondent discussed Hoferkamp's ticket with Drdak by telephone and indicated to Drdak during the conversation that he would take care of Hoferkamp's case the following day, that Hoferkamp would be found guilty of having improper equipment rather than speeding 71 m.p.h. in a 55 m.p.h. zone, and that Hoferkamp need not be in court.

The respondent presided over the 10 November 1981 session of Columbus County District Criminal Court in Whiteville at which the case of *State of North Carolina v. Bradley David Henderson*, Columbus County file number 81CR8889, was calendared for trial after having been continued from 13 October 1981 to 27 October 1981 and from 27 October 1981 to 10 November 1981. Notwithstanding defendant Hoferkamp's absence from the courtroom on 10 November 1981, the respondent found defendant Hoferkamp not guilty of speeding 71 m.p.h. in a 55 m.p.h. zone and guilty of improper equipment, and the respondent signed a judgment imposing costs of court which were remitted.

During the period of time from 20 November 1980 to and including 10 November 1981, the respondent accepted a total of $9,000 from Redden, either directly or through Carroll, and Drdak. The respondent never refused to accept such money

when offered to him and never returned or attempted to return such money once he had accepted it.

10. The findings hereinbefore stated and the conclusion of law and recommendation which follow were concurred in by five (5) or more members of the Judicial Standards Commission.

CONCLUSION OF LAW

11. As to the facts set forth in paragraph 9, the Judicial Standards Commission concludes on the basis of clear and convincing evidence that the actions of the respondent constitute willful abuse of the power and prestige of his judicial office by consenting to receive and receiving sums of money not in payment of a legal salary, fee, or perquisite of his office as a district court judge with the corrupt intent and understanding that said sums were to influence his action in the performance of or the omission to perform his duties as an officer of the court and a public official in violation of the laws of the State and his oath of office; and the Commission further concludes that his actions constitute willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute and his actions violate Canons 1, 2, and 3 of the North Carolina Code of Judicial Conduct.

RECOMMENDATION

12. The Judicial Standards Commission recommends on the basis of the findings of fact in paragraph 9 and the conclusion of law relating thereto that the Supreme Court of North Carolina remove the respondent from judicial office.

By Order of the Commission, this the 25th day of January, 1983.

s/Gerald Arnold
Gerald Arnold
Chairman
Judicial Standards Commission

(SEAL)

The Commission's findings, conclusions and recommendation were personally served upon the respondent on 25 January 1983. The findings of fact, conclusions of law and recommendation of the Commission were filed with this Court on 7 February 1983.

On 21 February 1983, the respondent filed a petition in the Supreme Court for a hearing upon the Commission's recommendation that he be removed from office. The matter was duly docketed with both the Commission and the respondent being given the opportunity to file briefs and present oral arguments. On 3 March 1983, Judge Hunt tendered his resignation from office as a District Court Judge to the Governor with the resignation to be effective immediately. On 4 March 1983, His Excellency, Governor James Baxter Hunt, Jr., accepted the resignation effective 3 March 1983.

Counsel for the respondent indicated to this Court by letter dated 4 March 1983 that the respondent no longer wished to pursue his petition for hearing by the presentation of briefs or oral arguments. In view of this decision by the respondent, the Special Counsel for the Commission declined the opportunity to present an oral argument or brief. Therefore, we now proceed pursuant to applicable law to determine the issues before us.

[1] We first note that the resignation of Judge Hunt from his office as a judge did not deprive the Commission or this Court of jurisdiction. Prior to Judge Hunt's resignation, the Commission had notified him that formal proceedings had been instituted against him and advised him of his rights. The respondent was personally served with that notice together with a copy of the verified complaint which specified the charges against him. Therefore, the Commission and this Court had jurisdiction over the respondent and the charges against him prior to his resignation. *In re Peoples*, 296 N.C. 109, 250 S.E. 2d 890 (1978), *cert. denied*, 442 U.S. 929, 61 L.Ed. 2d 297, 99 S.Ct. 2859 (1979). As we have previously stated: "Under G.S. 7A-376 there is but one disciplinary proceeding. It began when the Commission filed its complaint, and it will end with this Court's final order." *Id.*, at 146-47, 250 S.E. 2d at 912. The Commission and this Court having acquired jurisdiction over the respondent and the charges against him before he left office, such jurisdiction was not and could not be divested by reason of the respondent's resignation from his

judicial office. Both the Commission and this Court retained jurisdiction.

[2] We additionally note that the issues raised in this disciplinary proceeding have not become moot by reason of Judge Hunt's resignation.

> If G.S. 7A-376 limited the sanctions for wilful misconduct in office to censure or removal, Respondent's resignation would have rendered the proceedings moot. The statute, however, envisions not one but three remedies against a judge who engages in serious misconduct justifying his removal: loss of present office, disqualification from future judicial office, and a loss of retirement benefits. Only the first of these was rendered moot by Respondent's resignation.

In re Peoples, 296 N.C. at 150, 250 S.E. 2d at 914. We are still required to decide whether Judge Hunt's conduct merited his removal from office in order to determine whether these additional sanctions are to be imposed. Our duty to resolve this issue is in no way affected by his resignation. *Id.*

[3] We now turn to the question of whether the evidence introduced before the Commission with regard to Judge Hunt's conduct establishes his willful misconduct in office, conduct prejudicial to the administration of justice, or both, and if so, whether he should be removed or censured. In addressing this question, we must, of course, review the record and exhibits filed with this Court as a part of this proceeding.

We conclude that the Commission's findings of fact are supported by the "clear and convincing evidence" required to sustain them. *In re Peoples*, 296 N.C. at 151, 250 S.E. 2d at 914; *In re Nowell*, 293 N.C. 235, 237 S.E. 2d 246 (1977). This evidence included the testimony of various witnesses as well as video tapes tending to corroborate certain of the witnesses and purporting to show Judge Hunt actually accepting money in exchange for his agreement to use his judicial office to protect criminal activities. We accept the Commission's findings and adopt them as our own.

We have previously attempted to draw a distinction between "willful misconduct in office" and "conduct prejudicial to the administration of justice." In so doing, we stated that: "A judge should be removed from office and disqualified from holding fur-

ther judicial office only for the more serious offense of wilful misconduct in office." *In re Peoples*, 296 N.C. at 158, 250 S.E. 2d at 918. We have also indicated, however, that conduct prejudicial to the administration of justice, if knowingly and persistently repeated, would itself rise to the level of willful misconduct in office, which is a constitutional ground for impeachment and disqualification for public office. *See In re Peoples*, 296 N.C. at 157-58, 250 S.E. 2d at 918. No close analysis is required for us to determine that each of Judge Hunt's acts of accepting cash bribes in exchange for his promise to use his judicial office to protect criminal activities is a separate act of willful misconduct in office. Further, the persistent and repeated nature of these acts by Judge Hunt also represents a course of conduct prejudicial to the administration of justice to such an extreme degree as to comprise a separate act of willful misconduct in office.

Having determined that the acts we have found Judge Hunt committed constitute willful misconduct in office, we must decide whether this Court should remove or censure him. We have previously stated that: "Certainly where a judge's misconduct involves personal financial gain, moral turpitude or corruption, he should be removed from office." *In re Martin*, 295 N.C. 291, 305, 245 S.E. 2d 766, 775 (1978). Judge Hunt's acts in accepting cash bribes in exchange for his promises to use his judicial office to protect criminal activities obviously was exactly such judicial misconduct. We therefore conclude that Judge Hunt's willful misconduct in his judicial office requires that we officially remove him from that office.

For the reasons set forth in this opinion, it is adjudged that the respondent, J. Wilton Hunt, Sr., is guilty of willful misconduct in office. It is ordered by the Supreme Court of North Carolina, in conference, that the respondent, J. Wilton Hunt, Sr. be, and he is hereby, officially removed from office as a judge of the General Court of Justice, District Court Division, Thirteenth Judicial District, for his willful misconduct in office specified in the findings of fact made by the North Carolina Judicial Standards Commission, which findings the Court has adopted as its own. As a consequence of his removal from office, the respondent, J. Wilton Hunt, Sr., is disqualified by statute (G.S. 7A-376) from holding further judicial office and is ineligible for retirement benefits.

STATE OF NORTH CAROLINA v. RONALD EUGENE WILLIAMS

No. 656A82

(Filed 3 May 1983)

1. **Criminal Law § 66.9— pretrial photographic identification—no unnecessary suggestiveness**

The evidence supported the trial court's ruling that a pretrial photographic identification of defendant by a rape victim was not so unnecessarily suggestive and conducive to irreparable mistaken identity as to constitute a denial of due process, and the trial court properly admitted both the pretrial and in-court identifications of defendant by the victim.

2. **Criminal Law §§ 92.4, 92.5— consolidation of charges for trial—denial of motion for severance**

The trial court did not abuse its discretion in the consolidation for trial of charges against defendant for kidnapping, first degree burglary and second degree rape on 2 October and charges for second degree burglary and second degree rape on 29 October where the crimes were all committed against the same victim in the same apartment at approximately the same time of night; defendant gained entry to the apartment each time through an open window and committed a single act of intercourse with the victim; on both occasions the defendant effectuated his assault without the use of a weapon and allowed the victim to take contraceptive measures; and defendant told the victim that he had watched her from outside the house on several nights between the two assaults. Nor did the trial court err in the denial of defendant's motion for severance of the charges against him on grounds that presenting so many charges against him at one trial tended to make the jury infer to him a criminal disposition and that the proof of one crime might have been used to convict him of another crime. G.S. 15A-926(a) and G.S. 15A-927(b).

3. **Bills of Discovery § 6; Constitutional Law § 30— disclosure of witness' statements not required**

The State was not required by G.S. 15A-903 and G.S. 15A-904 to disclose a witness's statements prior to trial, and defendant was not denied his constitutional right of confrontation by the State's failure to disclose the victim's statements where the trial court allowed defense counsel's motion for a recess prior to the cross-examination of the victim so that defense could review the victim's statements, and as a result thereof, defense counsel conducted an extensive cross-examination of the victim.

4. **Burglary and Unlawful Breakings § 5.2— first degree burglary—time of offense—occupancy of apartment—sufficiency of evidence**

The State's evidence was sufficient to establish that the victim's apartment was entered during the nighttime and while the apartment was occupied where it tended to show that the victim arrived home around 11:30 p.m. and noticed a bedroom window had been opened; a search of her residence by the victim revealed the presence of no one other than herself; and defendant entered her apartment shortly after her arrival.

5. **Kidnapping § 1.2— restraint separate from crime of rape—sufficiency of evidence**

There was sufficient evidence of restraint separate and apart from the restraint inherent in the crime of rape to support conviction of defendant of kidnapping where the evidence tended to show that defendant restrained the victim for a period of several hours in her home before he raped her, and that during such time defendant forced the victim to sit in the living room and to accompany him to the kitchen so that defendant could get something to drink.

6. **Burglary and Unlawful Breakings § 5.2— second degree burglary—time of offense**

The State's evidence was sufficient for the jury to find that defendant entered the victim's apartment after dark so as to support defendant's conviction of second degree burglary where the victim testified that she left her apartment between 6:30 p.m. and 7:30 p.m. on the date in question and thought it was dark at that time, and when she returned home around 11:00 p.m. defendant was present in her bedroom and told her he had entered the apartment about 7:30 p.m.

APPEAL by defendant from the judgments of *Martin, J.*, entered at the 21 June 1982 Criminal Session, Superior Court, ORANGE County. Defendant appeals as a matter of right pursuant to G.S. 7A-27(a). Defendant was charged in separate bills of indictment with kidnapping, two counts of second degree rape, first degree burglary, second degree burglary and larceny. The jury found the defendant guilty of second degree burglary, two counts of second degree rape, first degree burglary and kidnapping. Judge Martin entered judgments against the defendant imposing a life sentence for kidnapping, a life sentence for first degree burglary and a life sentence for the second degree rape which occurred on 3 October 1976. These sentences were ordered to run concurrently. Judge Martin also imposed a life sentence for the second degree rape occurring on 29 October 1976 and a sentence for a term of not less than twenty-five years nor more than life for second degree burglary. These final two judgments were ordered to run concurrently commencing at the expiration of the life sentences previously imposed.

In pertinent part, the State's evidence tended to show that the victim was living alone on Hayes Street in Chapel Hill, N.C. on 2 October 1976. On this date the victim arrived at her residence at approximately 11:30 p.m. at which time she noticed that a bedroom window in her apartment had been opened during her absence. However, she found nothing else unusual upon her

arrival. Soon after entering her apartment the victim heard a crash and went into the living room to investigate. At that time she was grabbed from behind by a man she later identified as the defendant. After a short struggle the assailant forced the victim to remain in the living room with him for approximately one and one-half hours during which time they talked and the defendant attempted to rape the victim. Although a light was on in the living room, the defendant forced the victim to look straight ahead and away from him. The defendant finally was able to complete the rape at which time he covered the victim's face with a towel and left.

The victim called the Rape Crisis Center and was taken to the hospital for a medical examination. She also contacted Lindy Pendergrass of the Chapel Hill Police Department and reported the incident. The victim was interviewed by the Chapel Hill Police and she described her assailant as a man about five feet, ten inches tall, weighing 130 pounds, with a lean appearance, pale skin, dark eyes and dark wavy hair. She was shown numerous photographs but failed to identify her assailant from any of them.

On 28 October 1976, the victim arrived at her residence around 11:00 p.m. A man whom she identified as the defendant was in her bedroom when she arrived and he raped her. Since the first rape on 2 October 1976, all the windows in the apartment had been nailed closed, except for a kitchen window. Apparently it was through the open kitchen window that the defendant was able to gain his entrance to the apartment. While inside the apartment on 28 October 1976, the defendant threatened to steal various items from the victim, he threatened to hit her and he threatened to set fire to the apartment. After the defendant left the apartment, the victim called the police and reported the rape assault.

Dr. Mary Fulghum gave testimony which corroborated the victim's testimony concerning the details of the assault on 28 October 1976. In addition, Dr. Fulghum testified that the results of a medical examination of the victim on 29 October 1976 were consistent with the victim having had sexual intercourse shortly before the examination.

Over the course of several years, beginning in October 1976, the victim was shown photographs by the Chapel Hill Police

Department on at least ten separate occasions. Each time the victim was unable to identify her assailant. Finally, on 4 January 1982, the victim was shown a photographic line-up consisting of seven individuals. From this photographic line-up the victim identified the defendant as her assailant on both 2 October 1976 and 28 October 1976. In addition to the photographic identification, the State presented expert testimony that a fingerprint lifted from a can in the victim's apartment was made by the middle finger on the defendant's right hand.

The defendant did not present any evidence at trial.

At the close of all the evidence, the jury found the defendant guilty of first degree burglary, kidnapping, two counts of second degree rape and second degree burglary. The sentences were ordered as previously indicated.

Other facts pertinent to the defendant's assignments of error will be incorporated into the opinion.

Rufus L. Edmisten, Attorney General, by Assistant Attorney General W. Dale Talbert for the State.

Donald R. Dickerson, for the defendant.

COPELAND, Justice.

[1] Defendant combined his first two assignments of error and contends that the pre-trial identification of him by the victim was impermissibly suggestive giving rise to a substantial likelihood of an irreparable misidentification. As a result, the defendant argues that both the pre-trial identification and the in-court identification of him by the victim should have been excluded at trial. We do not agree.

The defendant maintains that the pre-trial photographic line-up was unnecessarily suggestive because; (1) he was available for a live line-up; (2) only the defendant's photograph resembled the description of the assailant provided by the victim; (3) the police made comments to the victim suggesting that a photograph of her assailant was in the line-up; and (4) because the circumstances surrounding the victim's observation of her assailant during the course of the crimes made any identification unreliable. Justice Branch (now Chief Justice) in *State v. Henderson*, 285 N.C. 1, 203

S.E. 2d 10 (1974), *death penalty vacated*, 428 U.S. 902, 49 L.Ed. 2d 1205, 96 S.Ct. 3202 (1976) said that, "(t)he test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice." 285 N.C. at 9, 203 S.E. 2d at 16.

The trial court found that the out-of-court identification procedures were not so unnecessarily suggestive and conducive to irreparable mistaken identity as to constitute a denial of due process. We have carefully examined the record, the briefs, the transcript and the pre-trial photographic array viewed by the victim and find that the trial court's ruling is supported by overwhelming competent evidence. We are bound by the trial court's ruling. *State v. Lake*, 305 N.C. 143, 286 S.E. 2d 541 (1982). As a result defendant's assignments of error numbers one and two challenging the admission of the victim's pre-trial and in-court identification is overruled.

[2] In his third assignment of error the defendant maintains that the trial judge abused his discretion by allowing all the indictments against him to be joined for trial and by failing to allow his motions for severance. The joinder of all the indictments against the defendant was allowed by the trial court pursuant to G.S. 15A-926(a) which provides:

> Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies, misdemeanors or both, are based on the same act or transaction or *on a series of acts or transactions* connected together or *constituting parts of a single scheme or plan.* (Emphasis added.)

In reviewing the propriety of the joinder of these charges for trial we must look to see if the trial judge abused his discretion. *State v. Silva*, 304 N.C. 122, 282 S.E. 2d 449 (1981). In the case *sub judice*, the charges were consolidated for trial on the grounds that each crime was a part of a series of transactions constituting a single scheme. In *State v. Silva*, *supra*, we held that in order for "offenses to be joined, there must be a 'transactional connection' common to all." 304 N.C. at 126, 282 S.E. 2d at 452. See also *State v. Powell*, 297 N.C. 419, 255 S.E. 2d 154 (1979).

The record in this case reveals an obvious "transactional connection" between the October 2 offenses and the October 28 offenses. On both occasions the crimes were committed against the same victim, in the same apartment at approximately the same time of night. The defendant gained entry to the apartment each time through an open window and committed a single act of intercourse with the victim. On both occasions the defendant effectuated his assault without the use of a weapon and he allowed the victim to take contraceptive measures on both occasions. In addition, the victim testified that the defendant told her he had watched her from outside the house on several nights between the two assaults. We, therefore, hold that the trial court properly joined all charges for one trial.

The defendant moved for a severance before and during the trial. G.S. 15A-927(b) provides:

> The court, . . . on motion of the defendant, must grant a severance of offenses whenever:
>
> (1) If before trial, it is found necessary to promote a fair determination of the defendant's guilt or innocence of each offense; or
>
> (2) If during trial, . . . it is found necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. . . .

The defendant contends the trial judge should have allowed his motions for severance because the consolidation of these charges prejudiced him. He argues that presenting so many charges against him at one trial tended to make the jury infer to him a criminal disposition and that the proof of one crime might have been used to convict him of another crime. These contentions are meritless.

The general rule in North Carolina is that proof of another distinct crime is not admissible against a defendant at trial even though it is of the same nature as the crime for which he is being tried. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed. 2d 1137 (1980). "However, such evidence is competent to show 'the *quo animo*, intent, design, guilty knowledge, or scienter. . . .' " *State v. Humphrey*, 283 N.C. 570, 572, 196 S.E. 2d 516, 518 (1973). If the

charges in this case had not been consolidated, the evidence of defendant's presence in the victim's apartment on 2 October 1976 would have been relevant and admissible in a trial on the charges arising from defendant's presence in her apartment on 28 October 1976, and vice versa. Such evidence would be admissible to show intent or design, *State v. Humphrey, supra*, and to show a common plan or scheme. *State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). The defendant has failed to show any prejudice to him as a result of the trial judge's decision to consolidate all charges for trial and to deny his motion for severance. This assignment of error is overruled.

[3] The defendant next contends that we should overrule our holding in *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977) where we held that G.S. 15A-903 and G.S. 15A-904 do not require the State to disclose its witnesses' statements prior to trial. Defendant argues that he was denied his constitutional right to confront those witnesses against him as provided by the Sixth and Fourteenth Amendments to the United States Constitution because without the victim's statement he was unable to "confront" his accuser. The record indicates that the trial court allowed defense counsel's motion for a recess prior to the cross-examination of the victim so that the defense counsel could review the victim's statement. As a result, defense counsel conducted an extensive cross-examination of the victim. We refuse to overrule our decision in *State v. Hardy, supra*, and find that the defendant was provided sufficient opportunity to confront the witness. This assignment of error is overruled.

In his fifth assignment of error the defendant argues that the trial court abused its discretion by admitting testimony by the victim as to when the defendant entered her apartment on 2 October 1976. The basis of this contention is that since the victim stated on cross-examination that she was not sure when the defendant entered her apartment, she should not have been permitted to testify on re-direct examination that she knew, within a few minutes, when he entered the apartment because that testimony was mere speculation and conjecture. We note that the cross-examination of the victim was leading and did not reveal an inability by her to testify to the approximate time of the defendant's entry into her apartment. On re-direct examination the vic-

tim indicated that she knew, within a few minutes, when the defendant entered her apartment. As a result, we do not find that the victim's testimony on re-direct examination was based on speculation and conjecture. We, therefore, overrule this assignment of error.

[4] The defendant next maintains that the trial court erred by denying his motion to dismiss the first degree burglary indictment because the State failed to establish that the apartment was entered during the nighttime while occupied by the victim. In order to withstand a motion to dismiss the State must present substantial evidence of each essential element of the crime charged. However, "(t)he 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. . . ." *State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1979).

The State's evidence tended to show that the victim arrived home on 2 October 1976 around 11:30 p.m. and that she noticed a bedroom window had been opened. She also testified that a search of her residence revealed the presence of no one other than herself but that the defendant entered her apartment shortly after her arrival. We take judicial notice that 11:30 p.m. is after dark in North Carolina. In addition, the victim testified the defendant entered her apartment on 2 October 1976 while she was present. There is substantial evidence both that the entry was effectuated after dark and while the apartment was occupied. This assignment of error is overruled.

[5] The defendant, in his next assignment of error, maintains that the trial court should have dismissed the kidnapping indictment because the acts which form the basis of the kidnapping charge were also a necessary and integral part of the 2 October 1976 rape charge. In *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978) we recognized that a kidnapping charge cannot be sustained if based upon restraint which is an inherent feature of another felony. However, "there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate which such restraint was committed, *provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart*

from the felony." State v. Fulcher, 294 at 524, 243 S.E. 2d at 352. (Emphasis added.)

Defendant argues that the time which he restrained the victim was necessary for him to *prepare* for the sex act. The test established in *Fulcher* does not look at the restraint necessary to commit an offense, rather the restraint that is inherent in the actual commission of the offense. The evidence in this case reveals that the defendant restrained the victim for a period of several hours in her home. During that time the defendant forced the victim to sit in the living room and to accompany him to the kitchen so that the defendant could get something to drink. Neither of these restraints is inherent in the crime of rape. As a result, there was substantial evidence of restraint to support the conviction of kidnapping separate and apart from the restraint inherent in the crime of rape. This assignment of error is overruled.

The defendant feebly argues that the trial court should have dismissed all charges against him because the State failed to produce substantial evidence that he was the perpetrator of the crimes. The record indicates that there was overwhelming evidence to support the State's contention that the defendant perpetrated the crimes. This assignment of error is summarily overruled.

[6] In his final assignment of error the defendant argues that the trial court erred by denying his motions for a directed verdict of not guilty and for dismissal of the second degree burglary charge. The basis of this contention is that the State failed to produce substantial evidence that the defendant entered the apartment on 28 October 1976 after dark. This argument lacks merit. The victim testified that she left her apartment between 6:30 p.m. and 7:30 p.m. and she thought it was dark at that time. She further testified that when she returned home around 11:00 p.m. the defendant was present in her bedroom and he told her he had entered the apartment about 7:30 p.m. In viewing the evidence in the light most favorable to the State and allowing every reasonable inference to be drawn from that evidence, *State v. Powell,* 299 N.C. 99, 261 S.E. 2d 114 (1979), we hold that there was substantial evidence to support the State's contention that the

defendant entered the apartment after dark on 28 October 1976. This assignment of error is overruled.

No error.

STATE OF NORTH CAROLINA v. LEO DWITT WATERS

No. 340A82

(Filed 3 May 1983)

1. **Constitutional Law § 30; Bills of Discovery § 6— police records and statements of witnesses—discovery during trial not allowed**

The trial court did not commit prejudicial error in refusing to permit defendant to discover during trial the contents of certain police records and statements of prospective witnesses where the information contained therein would have added nothing to the evidence produced at trial and would have been of no assistance to the defendant at trial.

2. **Criminal Law § 66.9— pretrial showup—no taint of in-court identification**

A victim's in-court identification of defendant could not have been tainted by a pretrial showup in which the victim was shown a single photograph of a white male matching her assailant's description where the victim unequivocally stated that the person in the photograph was not defendant.

3. **Criminal Law § 66.12— confrontation in courtroom—no unnecessary suggestiveness—no taint of in-court identification**

The evidence on voir dire supported the trial court's determination that a courtroom confrontation between the victim and defendant was not suggestive and that the victim's in-court identification of defendant was not tainted by the courtroom confrontation where it tended to show that, when the victim confronted defendant in a district courtroom, there were at least 14 white males in the courtroom similar in appearance to defendant, the victim made an immediate and positive identification, and the victim had ample opportunity to view the defendant at the time of the crime under well-lighted conditions.

4. **Criminal Law § 66.1— in-court identification—witness hypnotized prior to trial**

A rape victim's in-court identification of defendant was not tainted because the victim was hypnotized several months before the trial in an attempt to aid the victim to recall additional details of the crimes and her assailant.

5. **Criminal Law § 97.1— additional testimony on redirect—no abuse of discretion**

In a prosecution for armed robbery, rape and sexual offense, the trial court did not abuse its discretion in permitting the State to question the victim on redirect examination about items missing from her home after the district attorney had failed to establish during the direct examination of the

victim that any property had been taken from the home, person or presence of the victim as required for a conviction of armed robbery. If defendant was surprised by such additional evidence, he should have moved for a continuance or a recess. G.S. 15A-1226(b).

6. **Criminal Law § 73.2; Rape and Allied Offenses § 4— testimony not hearsay—use of word "rape" not prejudicial**

An officer's testimony that "He (the husband) got a call saying she had been raped," was not inadmissible hearsay since it did not refer to what the husband said to the officer; nor was use of the word "raped" prejudicial since the victim had already given a detailed account of the crime during her testimony.

7. **Robbery § 4.3— armed robbery—use of weapon—sufficiency of evidence**

The State's evidence was sufficient to show that a gun possessed by defendant was used to commit a robbery so as to support his conviction for armed robbery where it tended to show that defendant used the gun to compel the victim's cooperation and enable him to bind, blindfold and gag her, and that while the victim was bound and gagged the defendant took several items of jewelry, including three rings, from her hands.

8. **Rape and Allied Offenses § 4.3— rape victim shield statute—constitutionality**

The rape victim shield statute, G.S. 8-58.6, which prohibits a defendant from cross-examining a rape victim about prior acts of sexual misconduct, does not violate a defendant's rights to equal protection and due process.

9. **Criminal Law § 83.1— competency of wife to testify against husband**

The trial court properly permitted defendant's wife to testify for the State in a criminal prosecution where the wife's testimony did not concern confidential communications. G.S. 8-57.

ON appeal as a matter of right from judgments of *Bruce, J.*, entered at the 11 January 1982 Criminal Session of Superior Court, ONSLOW County. Defendant was indicted, and after entering pleas of not guilty to each count, was tried and found guilty of (1) armed robbery, (2) kidnapping, (3) first degree rape and (4) first degree sexual offense. The trial judge arrested judgment on the kidnapping conviction and imposed upon defendant a sentence of twenty years to life for the armed robbery conviction, a consecutive life sentence for the first degree rape conviction and a consecutive life sentence for the first degree sexual offense conviction.

The State's evidence tended to show that on 31 March 1981, the victim, Mary Patricia Reep, received a telephone call in response to a classified advertisement placed by her in the Jacksonville Daily News in an attempt to sell a waterbed. Upon

request Ms. Reep gave the caller, a male, directions to her home where the waterbed was located. The defendant arrived at the Reep residence approximately one hour after the telephone inquiry and identified himself as the person interested in buying the waterbed. Ms. Reep then allowed the defendant to enter her home for the purpose of viewing the waterbed. The headboard was located downstairs, in the living room and the remaining parts of the bed were located in an upstairs bedroom. After going to the bedroom where the waterbed was located the defendant pointed a gun at the victim's head and ordered her to turn around and cooperate or he would kill her and her eight months old child who was asleep in the room.

Defendant proceeded to tape the victim's hands together and her eyes closed. After demanding to be told where any valuables were located in the house, the defendant gagged the victim with tape and tied her feet together with a scarf. After rummaging throughout the house, defendant returned to the bedroom where the victim had been bound and gagged and forced her to have sexual intercourse with him against her will. Prior to the sexual intercourse defendant attempted an act of sodomy against the victim and had placed his finger into her rectum. After completing these sexual acts defendant removed several rings from the victim's hands and left, threatening her not to call the police. The victim immediately freed herself and called her husband who in turn called the police. Ms. Reep gave a detailed description of her assailant to the police and indicated that various items of jewelry were missing from the home.

One week after the alleged crimes the victim underwent hypnosis in an attempt to recall additional details of the crimes and her assailant. During the following few months the police, on three separate occasions, showed Ms. Reep photographs of various white males matching the description of her assailant that she had given the police. On each occasion Ms. Reep unequivocally stated that her assailant was not present in any of the photographs. However, on 12 August 1981 while viewing a photographic line-up consisting of six photographs the victim made a tentative identification of the defendant as her assailant. Upon a request to view the defendant fully, the victim was summoned to a District Courtroom in Onslow County where the defendant and thirteen persons similar in appearance to de-

fendant were present. Upon entering the courtroom Ms. Reep identified the defendant as her assailant. At the time of the identification the defendant was before the court in a case concerning obscene telephone calls.

The defendant presented evidence of an alibi defense that he was home in bed at the time of the alleged incidents.

At the close of all the evidence the jury found the defendant guilty of first degree rape, first degree sexual offense, armed robbery and kidnapping. The sentences were ordered as previously indicated with Judge Bruce arresting judgment on the kidnapping conviction.

Other facts pertinent to the defendant's assignments of error will be incorporated into the opinion.

Rufus L. Edmisten, Attorney General, by Assistant Attorney General Alfred N. Salley, for the State.

Samuel S. Popkin, for the defendant.

COPELAND, Justice.

Defendant brings before this Court eight assignments of error for review in which he contends he is entitled to a new trial. For the reasons stated below, we disagree with each of defendant's assignments of error and find that he received a fair trial, free from prejudicial error.

[1] Under assignment of error number one, the defendant asks the Court to determine whether defendant's exhibits 19-30 were discoverable by him at trial. Defendant is unaware of the contents of these exhibits which were part of a police officer's file. Under G.S. 15A-903 the State must disclose to defendant, upon proper request, information concerning statements made by the defendant, his prior criminal record or tangible objects material to the preparation of a defense. However, G.S. 15A-904 protects from disclosure reports, memoranda or other internal documents made by persons acting on behalf of the State's investigation and those statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State. In *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977), we stated that G.S. 15A-903 and G.S. 15A-904 must be construed jointly. In *Hardy*, we estab-

lished procedures for trial courts to follow when, as in this case, the defendant makes at trial a request for discovery of information within the State's possession which may, as a result of 15A-903 and the State's case in chief, be relevant, competent and not privileged. The procedure in *Hardy* calls for an *in camera* inspection of the information and appropriate findings of fact to be made with any excluded evidence sealed and placed in the record for appellate review. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977).

In the case *sub judice* the trial court conducted an *in camera* inspection of thirty exhibits. As a result of this inspection defendant's exhibits 19-30 were found to be non-discoverable. Although Judge Bruce failed to make specific findings of fact concerning each excluded exhibit, he did seal in an envelope the excluded material and preserved it in the record.

We have reviewed each of the excluded exhibits consisting primarily of police records and statements of prospective witnesses. The information in these excluded exhibits would have added nothing to the evidence produced at trial and would have been of no assistance to the defendant at trial. As a result we find no prejudicial error resulted from the failure of the trial court to allow discovery of the defendant's exhibits 19-30 and this assignment of error is overruled.

In his second assignment of error the defendant contends that the trial court erred by permitting the victim, Ms. Reep, to make an in-court identification of the defendant as her assailant. The defendant attacks the in-court identification on three grounds.

[2] (A) Defendant first contends that any in-court identification was irreparably tainted when the police conducted a photographic "show-up" by showing the victim a single photograph of a white male matching the description of her assailant. Although such a procedure may, under some circumstances, be suggestive there is no evidence that this photograph was of the defendant. In fact, the victim unequivocally stated that the person in the photograph was not her assailant. We fail to see how this specific photographic "show-up" could in any way lead to a possible misidentification of the defendant in court.

[3] (B) Secondly, defendant attacks the court's refusal to suppress the victim's in-court identification on the grounds that the trial court's determination that a courtroom confrontation between the victim and the defendant was not suggestive is not supported by the evidence presented at the *voir dire* hearing. In determining whether such a confrontation is unconstitutionally suggestive, the trial court must consider the totality of the circumstances. *State v. Thomas*, 292 N.C. 527, 234 S.E. 2d 615 (1977). Judge Bruce, prior to making his ruling, conducted a thorough *voir dire* hearing and found that on 18 August 1981, when the victim confronted the defendant in District Court of Onslow County, there were at least fourteen white males in the courtroom similar in appearance to the defendant. Judge Bruce also found that the victim made an immediate and positive identification. In addition, the victim had ample opportunity to view the defendant at the time of the crime under well-lighted conditions. The trial court's findings of fact, considering the totality of circumstances, *State v. Thomas*, 292 N.C. 527, 234 S.E. 2d 615 (1977), support the conclusion that the in-court identification of the defendant was not irreparably tainted by the courtroom confrontation. We note that at no time prior to trial or at trial did the victim make an incorrect identification of her assailant.

[4] (C) Thirdly, defendant contends the in-court identification was irreparably tainted when the victim was hypnotized prior to trial. Defendant argues that such a procedure is inherently suggestive. A review of the record discloses nothing which might remotely suggest that the victim's identification of the defendant was affected by the hypnosis. The hypnosis occurred months before the defendant was identified and there is no evidence that any suggestive remarks were made to the victim during her hypnosis. As stated by Justice Lake in *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978), "[t]he circumstance that this witness was hypnotized prior to trial would bear upon the credibility of her testimony . . ., but would not render her testimony incompetent." 295 N.C. 119, 244 S.E. 2d 427. As a result this assignment of error is overruled.

[5] In his third assignment of error defendant argues that Judge Bruce committed prejudicial error when he allowed the State to question the victim, on re-direct examination, about items missing from her home after the defendant left when no mention of these

missing items had been made on direct examination. The record indicates that the district attorney had failed to establish during the direct examination of Ms. Reep that any property had been taken from the home, person or presence of the victim as required for a conviction of robbery with a dangerous weapon as defined in G.S. 14-87. However, G.S. 15A-1226(b) provides, "[t]he Judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict."

Defendant concedes that the trial judge had within his discretion the authority to permit the State to introduce new evidence on re-direct examination. However, he contends he was surprised by the additional evidence and was thereby prejudiced. In *State v. Carson*, 296 N.C. 31, 249 S.E. 2d 417 (1978), we held that the defendant, in situations like the one present in this case, should move for a continuance or a recess if he is surprised by the additional evidence. The defendant did not make such a motion in this case. We feel that the trial court properly acted within its discretionary power and overrule this assignment of error.

[6] Defendant maintains in his fourth assignment of error that the trial court erred by allowing police officer Matthews to testify that, "He (the husband) got a call saying she had been raped." Defendant contends the statement was improper opinion testimony invading the province of the jury and was not offered for corroborative purposes. The contested statement made by Officer Matthews is not inadmissible hearsay because it does not refer to what the husband said to the officer. Instead, the statement was in part an explanation of why the husband was home with his wife. In addition, we fail to see how the word "raped" was prejudicial since the victim had already given a detailed account of the crime during her testimony. The defendant has failed to show how the verdict in this case was influenced by this statement. G.S. 15A-1443(a); *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966). As a result we overrule this assignment of error.

[7] Defendant argues in his fifth assignment of error that the trial judge erred by refusing to dismiss the charge of armed robbery at the close of the State's evidence. Defendant contends the deadly weapons he possessed at the time of the crimes were not used to commit the robbery. This contention is ludicrous. The

defendant used the weapons to compel the victim's cooperation and enable him to bind, blindfold and gag her. While Ms. Reep was bound and gagged the defendant took several items of jewelry including three rings from her hand. There is no doubt that the deadly weapons were used in the commission of the robbery. This assignment of error is overruled.

[8] Defendant advances in his sixth assignment of error the argument that G.S. 8-58.6, which prohibits a defendant from cross-examining a rape victim about prior acts of misconduct, violates his right to equal protection and due process under the law. Neither the Constitution of the United States nor the Constitution of North Carolina requires "that the same rules apply to incompatible classes." *State v. Stafford*, 274 N.C. 519, 535, 164 S.E. 2d 371, 383 (1968). In other words there is no violation of one's right to equal protection under the law when a discrepancy in treatment exists between classifications. The defendant in a criminal case, as a witness, has never been viewed as belonging to the class of witnesses to which a prosecuting witness in a rape case belongs. In any event the State Legislature has the power to make distinctions within classifications when there is a reasonable purpose for such distinctions. *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E. 2d 193 (1971), *cert. denied*, 406 U.S. 920, 32 L.Ed. 2d 119, 92 S.Ct. 1774 (1972). Our legislature had a reasonable basis for placing rape victims into a class of witnesses different from other witnesses, to-wit, to avoid undue prejudice in the minds of the jury which is caused by questions concerning irrelevant sexual conduct.

Defendant also asserts that G.S. 8-58.6 violates his right to due process under the law. We recently upheld the constitutionality of G.S. 8-58.6 in *State v. Fortney*, 301 N.C. 31, 269 S.E. 2d 110 (1980). In addition the constitutionality of a statute may only be contested by a litigant who is adversely affected by the statute. *State v. Mems*, 281 N.C. 658, 190 S.E. 2d 164 (1972). The defendant in this case has failed to show how he was adversely affected by G.S. 8-58.6. As a result he has no standing to challenge G.S. 8-58.6 as a violation of his right to due process under the law. This assignment of error is overruled.

[9] Defendant next assigns as error the trial court's refusal to prevent his wife from testifying for the State over his objection.

Although G.S. 8-57 makes a spouse competent to testify as a witness for the defense, it does not make a spouse competent to testify in a criminal case for the State. In effect G.S. 8-57 left intact the common law rule that a spouse is incompetent to testify against the other spouse in a criminal case. However, in *State v. Freeman*, 302 N.C. 591, 276 S.E. 2d 450 (1981) we modified the common law rule and held that, "spouses shall be incompetent to testify against one another in a criminal proceeding *only if* the substance of the testimony concerns a 'confidential communication'. . . ." 302 N.C. 596, 276 S.E. 2d 453. (Emphasis added.) In reviewing the transcript we find that the defendant's wife's testimony concerned no "confidential communications" and is therefore competent.

In his brief defendant suggests that Ms. Waters was compelled to testify on behalf of the State against her husband. A review of the record discloses no subpoena commanding Ms. Waters' appearance or testimony. Likewise, a review of the transcript, including a *voir dire* hearing concerning the defendant's objection to Ms. Waters' testimony, fails to produce any evidence that Ms. Waters was being compelled to testify. As a result we review Ms. Waters' testimony only on the issue of competency and do not consider the merits of whether a wife may be compelled to testify against her husband. This assignment of error is overruled.

Defendant finally argues that the trial court erred in summarizing the contentions of the State in regard to certain circumstantial evidence presented at trial. Specifically defendant argues that the court misstated facts concerning the victim's identification of the vehicle driven by her assailant and facts concerning the defendant's access to and knowledge of the use of adhesive tape.

Upon review of Judge Bruce's charge to the jury and the transcript we believe the judge gave a fair and accurate summary of the circumstantial evidence presented by the State. We also note that the defendant made neither an objection to the judge's summary of the evidence nor a request for further instructions. If there was a slight misstatement of any kind concerning circumstantial evidence, it was harmless beyond a reasonable doubt.

We believe that the defendant received a fair and impartial trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. RONALD EUGENE WILLIAMS

No. 376A82

(Filed 3 May 1983)

1. **Criminal Law §§ 34.5, 34.8— evidence of another crime—competency to show identity and common plan or scheme**

In a prosecution for burglary, kidnapping and rape, evidence that defendant was arrested for secretly peeping into the window of a home occupied by a female a block from the crime scene three days after the crimes charged was admissible to establish the identity of defendant as the perpetrator of the crimes charged and to establish a common plan or scheme where there was evidence that the crimes charged and the offense of secretly peeping were committed by the same person in that defendant's fingerprints were taken after his arrest and were determined to match prints found on certain items in the victim's apartment; two packages of Winston Lights cigarettes were found in defendant's pocket after his arrest, and the victim's assailant had left a package of Winston Lights in the victim's apartment; and the victim had informed investigating officers that her assailant threatened her with a long screwdriver, and a long screwdriver was found at the scene of defendant's arrest.

2. **Criminal Law § 66.9— photographic identification—victim told suspect arrested**

The mere fact that a rape victim was told that the police had arrested a suspect will not vitiate an otherwise legally valid photographic identification procedure at which the victim identified defendant as her assailant.

3. **Criminal Law § 66.7— photographic identification—defendant in custody and available for lineup**

A pretrial photographic identification procedure was not improper because defendant was in custody and available for a lineup absent a showing of prejudice, and no prejudice was shown where a rape victim had had ample opportunity to observe her assailant, had provided a detailed and accurate description of her assailant, and readily identified defendant as her assailant from an array of photographs closely resembling defendant.

4. **Constitutional Law § 30; Bills of Discovery § 6— victim's statements to law officers—pretrial discovery prohibited**

The provisions of G.S. 15A-903 and G.S. 15A-904(a), when read together, prohibited pretrial discovery of a rape victim's oral and written statements to

law officers notwithstanding defendant's contention that the statements were needed for cross-examination of the victim at a voir dire hearing prior to trial to determine the admissibility of the victim's photographic identification of defendant.

5. Burglary and Unlawful Breakings § 5— first degree burglary—sufficient evidence of constructive breaking

There was sufficient evidence of a constructive breaking to support defendant's conviction of first degree burglary where the evidence tended to show that the victim saw the face of a man peering through her bedroom window; the victim later discovered that the screen and one pane of glass had been removed; when the victim attempted to leave through the front door, defendant met her at the door, grabbed her and threw her back into the house and then entered the victim's house; and defendant kept the victim confined in her home for approximately four hours and forcibly raped her.

6. Kidnapping § 1.2— restraint unconnected with rape—sufficiency of evidence

There was ample evidence of restraint unconnected with the rape of the victim to support defendant's conviction of kidnapping where the evidence tended to show that defendant remained in the victim's home for approximately four hours; during this entire time, he forcibly confined her; and he forcibly removed her from one room to another by pinning her arms down and pushing her.

BEFORE *Martin, J.*, at the 15 March 1982 Criminal Session of Superior Court, ORANGE County, defendant was sentenced to life imprisonment upon his conviction for first degree burglary; to be followed by a life sentence upon his conviction for second degree kidnapping, being an habitual felon; to run concurrently with a life sentence upon his conviction of second degree rape, being an habitual felon. Defendant appealed to this Court as of right.

Rufus L. Edmisten, Attorney General, by Guy A. Hamlin, Assistant Attorney General, for the State.

Donald R. Dickerson, Attorney for defendant-appellant.

MEYER, Justice.

The prosecuting witness, Melissa Eddinger, testified that on the night of 28 December 1981, a man whom she later identified as the defendant pushed his way through her front door, kept her confined in her home for approximately four hours, and forcibly raped her. Defendant challenges (1) the admission of testimony tending to implicate him in a separate crime; (2) evidence of pre-trial photographic identification; (3) denial of a pre-trial discovery

motion for the victim's statement; and (4) the denial of his motion to dismiss the burglary and kidnapping charges. We find no error.

(1)

[1] Defendant assigns as error the admission of testimony concerning the events surrounding his arrest in that it tended to implicate him in a separate misdemeanor offense of secretly peeping.

Defendant was arrested on 31 December 1981. Following the incident on 28 December, Ms. Eddinger had given the Chapel Hill police department an accurate description of her assailant from which a composite drawing had been made. Officers were dispatched to the neighborhood to conduct a surveillance. In response to a call, the officers proceeded to Stinson Street, one block from Ms. Eddinger's home, where they discovered a man peeping into the window of a dwelling occupied by a Ms. Radcliff. The man, later identified as the defendant, attempted to flee. He was apprehended, arrested, and booked. As part of the booking process, defendant was fingerprinted. Shortly thereafter it was determined that his prints matched those found on certain items in Ms. Eddinger's apartment. Upon searching the defendant, the officers discovered two packages of Winston Lights cigarettes in his pocket. The investigating officers had found an empty package of Winston Lights in Ms. Eddinger's apartment, left there by her assailant. On the night of his arrest, after being read his rights, the defendant requested that an officer return to the scene and find his new cap. The officer complied, found the cap and close by found a long screwdriver. Ms. Eddinger had informed the investigating officers that her assailant threatened her with a long screwdriver. Initially, defendant challenged the admissibility of the evidence of the cigarette package and the screwdriver on the ground that these items were discovered as incident to an unlawful arrest and in violation of his *Miranda* rights. Defendant further contended that the circumstances surrounding his arrest were irrelevant and highly prejudicial.

As a general rule, the State cannot introduce evidence tending to show that an accused has committed an offense other than the one for which he is being tried. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). If, however, there is evidence that the crime charged and another offense were committed by the same person, and identity is an issue, evidence of the other offense is

admissible for the purposes of establishing the identity of the defendant as the perpetrator of the crime charged. *Id. See State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982). This Court also stated in *McClain*, that "[e]vidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission." *Id.* at 176, 81 S.E. 2d at 367.

In light of these well-recognized exceptions to the general rule, as they apply to the facts of this case, we hold that the testimony was properly admitted.

(2)

Defendant next contends that the trial court erred in admitting evidence of the victim's pre-trial photographic identification of the defendant. He argues first that the photographic identification procedure was impermissibly suggestive because prior to the viewing, Ms. Eddinger was told that the police had a suspect. Defendant also contends that he was entitled to a pre-trial line-up because at the time Ms. Eddinger viewed the photographs, the defendant was in custody and available. This assignment of error has no merit.

[2] Ms. Eddinger was never told that her alleged assailant had been arrested or that the photographs which she was being shown included the suspect in her case. The mere fact that she was told that the police had arrested a suspect will not vitiate an otherwise legally valid photographic identification procedure. *State v. Dunlap*, 298 N.C. 725, 259 S.E. 2d 893 (1979). Furthermore, upon being shown the photographs, all of which resembled the defendant in uncanny detail, Ms. Eddinger immediately selected that of the defendant as her assailant. It is clear that her identification was based upon what she had observed at the time of the assault. *See State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982); *State v. Dobbins*, 306 N.C. 342, 293 S.E. 2d 162 (1982).

[3] Defendant argues that because identification from a still photograph is less reliable than identification of an individual seen in person, he was entitled to a line-up procedure in that he was in custody and available. We do not agree. There are many

factors involved in the decision as to which identification procedure to employ. Certainly, when the victim has had ample opportunity to observe the assailant, has provided a detailed and accurate description, and has readily identified the assailant from an array of photographs as closely resembling the defendant as these do, a defendant can show no prejudice. We therefore hold that absent a showing of prejudice, the identification procedure employed will be deemed appropriate under the circumstances.

(3)

[4] Defendant assigns as error the trial court's denial of his pretrial motion seeking discovery of oral and written statements made by the victim to law enforcement authorities. In *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977), this Court interpreted G.S. §§ 15A-903 and -904(a) and held that these provisions, when read together, explicitly prohibit pre-trial discovery of the statements to which defendant now contends he was entitled. Defendant, however, argues that these statements were critical to his cross-examination of Ms. Eddinger at the voir dire hearing conducted prior to trial to determine the admissibility of Ms. Eddinger's photographic identification of the defendant. We decline to extend the rule enunciated in *Hardy*.

The victim's statement was made available to the defendant for impeachment purposes during the trial. *See State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828. Whatever impeachment value there was in the victim's statements went to the weight of the victim's identification of the defendant rather than to its admissibility.

(4)

Finally, defendant contends that the trial court erred in denying his motion to dismiss the charges of burglary and kidnapping. We do not agree.

[5] As to the burglary charge defendant contends that there was insufficient evidence of a breaking. Ms. Eddinger testified that on the night in question she saw the face of a man peering through her bedroom window. It was later discovered that the screen and one pane of glass had been removed. Ms. Eddinger panicked and attempted to leave through the front door. The defendant met her at the door. Ms. Eddinger testified that she "didn't have a chance to even step out. He pushed me back in and shut the

door." He "grabbed" her and "threw" her back into the house. Defendant's actions constituted a constructive breaking; that is, entrance obtained "in consequence of violence commenced or threatened by defendant." *State v. Jolly*, 297 N.C. 121, 128, 254 S.E. 2d 1, 6 (1979); *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976).

[6] We also find that there was sufficient evidence to sustain defendant's conviction of kidnapping. On this issue defendant argues that the only restraint employed was that necessary to effectuate the rape and thus there was no evidence of any additional restraint to support the kidnapping conviction. *See State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). We find ample evidence of restraint unconnected with the actual rape of Ms. Eddinger. Defendant remained in Ms. Eddinger's home for approximately four hours. During this entire time, he forcibly confined her. He forcibly removed her from one room to another by pinning her arms down and pushing her. We do not agree that defendant's actions were an inherent, inevitable feature of the felony of rape. *Id. See State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981). The trial court properly denied defendant's motion to dismiss. *See State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982).

Defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JOSEPH THOMAS EDMONDS

No. 653PA82

(Filed 3 May 1983)

Appeal and Error § 45; Criminal Law § 166— stenographic transcript of trial—reproduction of relevant portions in brief or appendix

Whenever a stenographic transcript is used in lieu of narrating the evidence into the record, Appellate Rule 28(b)(4) does not require that all verbatim reproductions of segments of the transcript be placed in an appendix to the brief. Rather, Rule 28(b)(4) requires that all relevant portions of the transcript be reproduced in either the brief or its appendix, and the appendix method should be employed when the question presented requires long verbatim reproductions of the transcript. App. Rule 9(c).

ON defendant's petition for discretionary review of the decision of the Court of Appeals, 59 N.C. App. 359, 296 S.E. 2d 802 (1982) (opinion by *Whichard, J.*, with *Vaughn, J.* (now Chief Judge) and *Wells, J.*, concurring), dismissing defendant's appeal for failure to observe the requirements of Rule 9(c)(1) and Rule 28(b)(4) of the Rules of Appellate Procedure.

Defendant seeks to vacate the decision of the Court of Appeals dismissing his appeal and have his appeal determined on the merits. In addition, defendant requests a review of his assignments of error be made by this Court. We agree with the defendant's contention that his appeal before the Court of Appeals should not have been dismissed. However, we do not review the merits of his appeal but only vacate the dismissal of defendant's appeal and remand this case to the Court of Appeals for a determination on the merits.

The State presented evidence at trial that tended to show that Phillip Lockhart, the victim, was driving through Weldon, North Carolina, around eleven o'clock on the night of 29 October 1979, when he stopped to get some gasoline at an automatic gasoline pump. At that time Lockhart was approached by two men who needed a ride to the park in Weldon. One of the men, Lonnie Clanton, was an acquaintance of the victim while the other man, the defendant, was unknown to the victim. Lockhart agreed to give the men a ride but became lost on the way to the park. At some point the defendant asked Lockhart to stop the car, at which time defendant pulled a sawed-off shotgun from under his coat and pointed it at Lockhart. The defendant told Lockhart that it was a "stick-up" and he directed Lonnie Clanton, who was in the back seat, to take Lockhart's watch, gloves and bracelet. This was done and the defendant then took Lockhart's wallet from the victim's back pocket. Defendant then told Clanton to get the keys to the car, which he did.

After the robbery a scuffle ensued between Lockhart and the defendant, who was aided by Clanton. After the defendant threatened to kill Lockhart, he escaped by throwing his coat at the defendant and fleeing into the bushes. Lockhart went to a nearby house and was subsequently taken to the police. He returned to the scene of the robbery with a state trooper and found his car in a ditch.

On the evening of 30 October 1979, the day after the robbery, Officer Green of the Halifax Sheriff's Department went to a residence near Weldon and found the defendant and Clanton in a bedroom, behind the door, and he arrested both men. A subsequent search of that residence resulted in the recovery of a sawed-off shotgun and some shells. The officer also recovered a bracelet and a set of car keys at the defendant's cousin's residence. In addition, a pair of driving gloves was recovered from the possession of the defendant in response to interrogation. At trial, Mr. Lockhart testified that the gloves recovered belonged to him. Mr. Lockhart further testified that the watch, the bracelet and the car keys offered into evidence at trial were the same items taken from him during the robbery. He also identified the shotgun recovered by Officer Green as the weapon used during the robbery.

The defendant presented evidence that he was a resident of New Jersey and that he came to North Carolina to visit relatives. His evidence tended to show the following: That he accompanied Lonnie Clanton on the evening of 29 October 1979 for the purpose of selling a sawed-off shotgun to a friend at the park in Weldon. While walking to the park, Clanton and the defendant stopped at a convenience store to buy some wine. After buying some wine the defendant and Clanton met Lockhart who agreed to drive them to the park and back to the store for two dollars ($2.00). Lockhart then offered to give the two men a free ride if they would share a marijuana cigarette with him. The defendant testified that at some point Lockhart exchanged his watch for two marijuana cigarettes.

After the three men had drunk some wine and liquor and had smoked some marijuana, a dispute arose. Lockhart grabbed the shotgun and a scuffle ensued resulting in the car being driven into a ditch. Lockhart then fled the scene after which the defendant took the car keys and bracelet from the car. Defendant testified that he did not need any money because he had over three hundred dollars in his pocket at the time of the incident. He further testified that he intended to return the gloves to Lockhart and he thought Clanton intended to return the keys and bracelet.

At the end of all the evidence the defendant was convicted by a jury of armed robbery. On 4 June 1980, Tillery, J., entered

judgment imprisoning defendant for thirty years. On 16 November 1981 the Court of Appeals allowed defendant's petition for Writ of Certiorari. On 2 November 1982 the Court of Appeals dismissed defendant's appeal for failure to comply with Rule 9(c)(1) and Rule 28(b)(4) of the Rules of Appellate Procedure. We granted defendant's petition for discretionary review on 11 January 1983.

Rufus L. Edmisten, Attorney General, by Elizabeth C. Bunting, Assistant Attorney General, for the State.

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

COPELAND, Justice.

Defendant contends he is entitled to have his appeal heard on the merits and that the Court of Appeals misconstrued the requirements of Rule 28(b)(4) of the Rules of Appellate Procedure. Specifically, the defendant appellant argues that Rule 28(b)(4) does not require that all verbatim reproductions of segments of the transcript be placed in an appendix to the brief. We agree with the defendant's contention and reverse the decision of the Court of Appeals.

Rule 28(b)(4) provides:

> If pursuant to Rule 9(c)(1) appellant utilizes the stenographic transcript of the evidence in lieu of narrating the evidence as part of the record on appeal, and if there are portions of the transcript which must be reproduced verbatim in order to understand a question presented in the brief *and if, because of length, a verbatim reproduction is not contained in the body of the brief itself,* such verbatim portions of the transcript shall be attached as appendixes to the brief. Reference may then be made in the argument of the question presented to the relevant appendix. It is not intended that an appendix be compiled to show the general nature of evidence relating to a particular question presented in the brief. (Emphasis added.)

Those portions of the above cited rule which are emphasized indicate that an appendix is not contemplated for each question that requires a verbatim reproduction of a part of the transcript

in order to understand that question. Instead, Rule 28(b)(4) is designed to ensure that verbatim reproductions appear either in the brief itself or in an appendix to the brief. The appendix method should be employed when the question presented requires long verbatim reproductions of the transcript. Placing such reproductions in an appendix serves the dual purpose of providing the reviewing court with all the information necessary in order to make an informed determination while preserving the clarity and directness of the argument.

Under Rule 9(b)(3) of the Rules of Appellate Procedure, the record on appeal in a criminal action "shall contain: (v) So much of the evidence . . . as is necessary for understanding of all errors assigned. . . ." Rule 9(c) provides for an alternative to narrating the evidence into the record; that is, the filing of a complete stenographic transcript with the Clerk of the Court in which the appeal is docketed. Whichever method is chosen, the result must be the same: to-wit, to provide the reviewing court with all the information necessary to understand each question presented. Although a complete stenographic transcript contains all the evidence in a case, it is too time consuming and too burdensome a task to expect each member of the reviewing court to search through pages of the transcript in order to find those passages necessary to the understanding of each question presented. Therefore it is imperative that whenever a stenographic transcript is used in lieu of narrating the evidence into the record, all relevant portions of the transcript must be reproduced in either the brief or its appendix.

In 306 North Carolina Reports we repealed the Appendix of Tables and Forms to the North Carolina Rules of Appellate Procedure and adopted a new series of appendixes. Under newly adopted Appendix E: Content of Briefs; Appendix to the Brief under the Transcript Option, we state, "counsel is encouraged to cite, narrate, and quote freely within the body of the brief. However, if because of length a verbatim quotation is not included in the body of the brief, that portion of the transcript and others like it shall be gathered into an appendix to the brief. . . ." It must be kept in mind by every appellate advocate that *all* information necessary to a clear understanding of the questions presented should appear in the brief or in its appendix.

We have carefully reviewed the record and the briefs in the case *sub judice* and we find that the defendant has complied with the minimum requirements of Rule 28(b)(4) of the Rules of Appellate Procedure. However, we recommend that all appellate advocates strive to exceed the minimum standards of Rule 28(b)(4). If the reproduced portions of a transcript, wherever located, do not provide information sufficient in order to understand the question presented, the appeal on that question must be dismissed.

We therefore vacate the decision of the Court of Appeals and remand this case to that Court for a determination on the merits.

Vacated and remanded.

DEPARTMENT OF TRANSPORTATION v. FRANK BRAGG AND WIFE, JO ANNE BRAGG, ORVILLE D. COWARD, TRUSTEE, AND DON D. COGDILL AND WIFE, CLEM H. COGDILL

No. 670PA82

(Filed 3 May 1983)

1. **Eminent Domain § 6.3— highway construction—condemnation of portion of tract—damages to remaining land resulting from construction**

When the Department of Transportation condemns only a part of a tract of land for highway construction, the owners may introduce at the jury trial on the issue of compensation any evidence of damage to the remaining property caused by the Department of Transportation before the opening of the jury trial. Therefore, defendant owners were entitled to show any damage to their remaining property caused by plaintiff condemnor's diversion of water from a spring during the construction of the highway project prior to trial. G.S. 136-112(1).

2. **Eminent Domain § 14.1— diversion of water by highway construction project—damages to remaining property—interest acquired by condemnor**

If the jury finds that the diversion of water by plaintiff condemnor's highway construction project caused permanent injury to defendant landowners' remaining property, plaintiff would acquire a permanent drainage easement over the property of defendants, but if the jury finds that the injury is not permanent, defendants would be entitled to compensation for the taking of a temporary drainage easement. G.S. 136-111 and G.S. 136-103.

3. Eminent Domain § 6.3— condemnation for highway construction—damages from water diversion—evidence of cost to cure diversion

In determining the amount of damages which defendant landowners may be entitled to recover for an alleged water diversion as a part of just compensation, evidence of the "cost to cure" the water diversion would be competent.

ON discretionary review of the decision of the Court of Appeals, 59 N.C. App. 344, 296 S.E. 2d 657 (1982), affirming an order entered by *Sitton, J.*, at the 22 June 1981 Session of Superior Court, JACKSON County.

Defendants are owners of a motel and parcel of land bounded on the west by U.S. Highway 441 and on the east and south by Shoal Creek. Until the commencement of the highway construction involved in this suit, a natural spring was located west of Highway 441 across from defendants' property. Water from the spring passed under the highway through a pipe six or eight inches in diameter and drained across the southern part of defendants' land into Shoal Creek.

On 28 March 1978, the Department of Transportation filed a complaint pursuant to N.C.G.S. 136-103 to acquire various easements and to condemn a strip of defendants' land east of Highway 441 in order to widen the road. During the resulting highway construction, the Department of Transportation excavated the area in which the spring to the west of defendants' property was located and disconnected the drainage pipe that ran under the road. The area atop the spring was compacted with rocks and earth, but no provision was made for the drainage of the spring. As a result, the spring began draining across defendants' property by a course running under defendants' motel. This new drainage pattern, which was located outside the property acquired by the Department in its 28 March 1978 complaint, caused water to seep into the motel and surrounding land, particularly when heavy vehicles travelled the highway in front of the motel.

During pretrial proceedings pursuant to N.C.G.S. 136-108, the trial court granted the Department's motion in limine to exclude from the jury trial on the issue of damages evidence with respect to injury caused by the spring, and defendants appealed the ruling to the Court of Appeals. The Court of Appeals affirmed the trial court, and we granted defendants' petition for discretionary review.

Rufus L. Edmisten, Attorney General, by Eugene A. Smith, Senior Deputy Attorney General, and Frank P. Graham, Assistant Attorney General, for plaintiff appellee.

Coward, Coward & Dillard and Brown, Ward, Haynes & Griffin, by H. S. Ward, Jr., for defendant appellants.

MARTIN, Justice.

The sole question presented for review is whether Judge Sitton erred in granting plaintiff's pretrial motion to exclude from trial evidence of injury and damage to the remainder of defendants' property which occurred after the Department of Transportation condemned part of the tract. This question concerns the elements of damages which should be considered in determining the amount of compensation to be paid the landowners. We hold that it was error to grant the motion and thus reverse the decision of the Court of Appeals and remand for further proceedings not inconsistent with this opinion.

On 28 March 1978, the Department of Transportation filed a complaint condemning part of defendants' property for the purpose of widening U.S. Highway 441. By N.C.G.S. 136-104 this filing had the effect of immediately vesting title to and right of possession of the property in the Department of Transportation. After 28 March 1978, the Department began widening and improving a section of Highway 441 adjacent to defendants' land. In the process the Department caused surface and subsurface water from a spring formerly originating to the west of the highway to drain in a new course running under defendants' motel and then into Shoal Creek. In a motion in limine, plaintiff sought to prevent the introduction at trial of evidence of the new drainage pattern and the injury it caused to defendants' remaining property. The trial court ruled that this evidence was inadmissible. We hold that this ruling was error.

Evidence of damage caused by the alleged water diversion is relevant to a determination of the amount of just compensation due for the taking of the property described in the 28 March 1978 complaint. When the Department of Transportation condemns only part of a tract of land, the owners of the land are entitled to receive the difference between the fair market value of the entire tract immediately before the taking and the fair market value of

the remaining property after the taking, less any general and special benefits. N.C. Gen. Stat. § 136-112(1) (1981). *See also, e.g., Charlotte v. Recreation Comm.*, 278 N.C. 26, 178 S.E. 2d 601 (1971); *Gallimore v. Highway Comm.*, 241 N.C. 350, 85 S.E. 2d 392 (1955); *Power Co. v. Hayes*, 193 N.C. 104, 136 S.E. 353 (1927). *See generally Power Co. v. Winebarger*, 300 N.C. 57, 265 S.E. 2d 227 (1980); Nichols, 4A *Eminent Domain* §§ 14.01-.02 (1981). In determining the fair market value of the remaining property, the owner is entitled to recover compensation for any damage caused to the remainder as a result of the condemnor's use of the appropriated portion. *Board of Transportation v. Warehouse Corp.*, 300 N.C. 700, 268 S.E. 2d 180 (1980); *Light Company v. Creasman*, 262 N.C. 390, 137 S.E. 2d 497 (1964); *Highway Commission v. Black*, 239 N.C. 198, 79 S.E. 2d 778 (1954); *Board of Transportation v. Brown*, 34 N.C. App. 266, 237 S.E. 2d 854 (1977), *aff'd per curiam*, 296 N.C. 250, 249 S.E. 2d 803 (1978). That is, "[t]he fair market value of the remainder immediately after the taking contemplates the project *in its completed state* and any damage to the remainder due to the user [*sic*] to which the part appropriated may, or probably will, be put." *Board of Transportation v. Brown, supra*, 34 N.C. App. at 268, 237 S.E. 2d at 855 (emphasis ours).

[1] In *Board of Transportation v. Warehouse Corp., supra*, this Court was concerned with what elements of damages could be considered by the jury in determining just compensation to be paid the landowner. One such element was water damage to the landowner's remaining property caused by the diversion of Gashes Creek after the date of taking. Although the Court was principally deciding whether the reasonable use rule of surface water drainage, adopted in *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E. 2d 787 (1977), was applicable to condemnation proceedings, it held:

> It follows, therefore, "that a body possessing the right to exercise the power of eminent domain is required to make compensation for damages to land not taken resulting from the obstruction or diversion of, or other interference with, the natural flow of surface water, by a public improvement, *although a private landowner would not be liable in damages under the same circumstances*, upon the ground that such obstruction, diversion, or interference is a taking or damaging of such land within the meaning of a constitutional pro-

> vision requiring compensation to be made on the taking or damaging of private property for public use."

300 N.C. at 706, 268 S.E. 2d at 184 (citations omitted). In *Warehouse Corp.*, the jury was allowed to consider as an element of just compensation damage to the landowner's remaining property caused by the diversion of water occurring after the taking. Therefore, we hold that when the Department of Transportation takes only a part of a tract of land, the owners may introduce at the jury trial on the issue of compensation any evidence of damage to the remaining property caused by the Department of Transportation before the opening of the jury trial. Here, defendants were entitled to show any damage to their remaining property caused by plaintiff's diversion of water during the construction of the highway project prior to trial. *Id.*

[2, 3] If the jury finds that the injury is permanent in nature, plaintiff would acquire a permanent drainage easement over the property of defendants.[1] If the jury finds that the injury is not permanent, defendants would be entitled to be compensated for the taking of a temporary drainage easement. In determining the amount of damages which defendants may be entitled to recover for the alleged water diversion as a part of just compensation, evidence of the "cost to cure" the water diversion would be competent. *Cf.* Nichols, 4A *Eminent Domain* § 14.04 (1981); 27 Am. Jur. 2d *Eminent Domain* § 314 (1966).

For reasons stated above, the decision of the Court of Appeals is reversed and the case is remanded to the superior court for further proceedings.

Reversed and remanded.

1. In this respect the evidence disallowed below would have been competent to show that, in effect, the Department of Transportation had inversely condemned a permanent drainage easement not listed in its original complaint. *See* N.C. Gen. Stat. § 136-111 (1981). *Cf. Board of Transportation v. Warehouse Corp.*, 300 N.C. 700, 268 S.E. 2d 180 (1980); *City of Kings Mountain v. Goforth*, 283 N.C. 316, 196 S.E. 2d 231 (1973). A property owner may initiate a proceeding to receive just compensation for inverse condemnation of his property by the Department of Transportation. N.C. Gen. Stat. § 136-111 (1981). However, when, as here, the Department has initiated a partial taking under N.C.G.S. 136-103 and trial on the issue of damages has not yet occurred, principles of judicial economy dictate that the owners of the taken land may allege a further taking by inverse condemnation in the ongoing proceedings.

STATE OF NORTH CAROLINA v. KENNETH ALLEN DOVER

No. 42A83

(Filed 3 May 1983)

1. **Kidnapping § 1.2; Rape and Allied Offenses § 5— first degree sex offense—kidnapping—sufficiency of evidence**

The State's evidence was sufficient to support verdicts finding defendant guilty of first degree sex offense and kidnapping where it tended to show that the victim was working as a clerk in a convenience store; defendant entered the store, put his hand over the victim's mouth, and held a knife near her eyes; defendant walked the victim to the front of the store where he forced her to lock the doors; defendant then walked the victim into a storeroom and shut the door; defendant forced the victim to disrobe and placed his fingers into her vagina; defendant then tried to rape the victim but was physically unable to do so; the victim thought she might be able to escape if she could convince defendant to go to her house where it was more comfortable; defendant allowed the victim to put on her clothes and forced her into her car; as the victim drove toward her home, defendant allowed her to pull into the parking lot of a convenience store to buy a soft drink; and the victim escaped defendant by running into the store and locking the doors behind her.

2. **Robbery § 4.4— attempted armed robbery—sufficiency of evidence**

The State's evidence was sufficient to support conviction of defendant for attempted armed robbery where it tended to show that the victim was working as a clerk in a convenience store; defendant entered the store and pulled a knife on the victim; defendant grabbed the victim by the shoulder, put the knife to her left side and then moved it to the center of her stomach and asked her several times if she wanted to die; defendant demanded the keys to the victim's car, punching the victim as he spoke; when defendant noticed a car pulling into the intersection where the store was located, he threw the victim lose cutting two of her fingers and breaking another one in the process; the victim picked up a knife with which she had been cutting cheese and defendant then backed out of the store; and the victim locked the doors of the store and called the police.

3. **Criminal Law § 101.4— permitting jury to reexamine photographs—no abuse of discretion**

The trial court did not abuse its discretion in permitting the jury to reexamine a photographic array previously admitted into evidence after the jury stated that it was deadlocked. G.S. 15A-1233(a).

ON appeal by defendant from judgments entered by *Albright, J.*, during the 23 August 1982 Session of Superior Court, ROWAN County.

Defendant was charged in indictments proper in form with sex offense in the first degree and kidnapping of Laura Price and

attempted robbery with a dangerous weapon of Dorothy Karriker. Defendant was convicted of each charge.

Rufus L. Edmisten, Attorney General, by Guy A. Hamlin, Assistant Attorney General, for the State.

Davis & Corriher, by James A. Corriher, for defendant.

MARTIN, Justice.

Defendant brings forth several assignments of error which he claims entitle him to a new trial. Upon careful review of the record and briefs before us, we have determined that defendant received a fair trial, free of prejudicial error. Accordingly, we affirm the judgments entered by the trial court.

Defendant first argues that the trial court erred by denying his motions to dismiss the charges against him at the close of the state's case and at the close of all of the evidence on grounds that there was insufficient evidence to submit the charges to the jury. He also contends that the court erred in denying his motion to set aside the jury's verdicts of guilt for the same reason. Defendant presents no argument in his brief for these assertions. Nevertheless, we have reviewed the record and transcript of defendant's trial and hold that the trial court did not err in its rulings on defendant's motions.

> Upon a motion to dismiss in a criminal action,
>
> all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom.

State v. Witherspoon, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977); *See also, e.g., State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982).

[1] In the present case, evidence for the state tended to show that about midnight of 28 March 1982, Ms. Laura Price was working as a clerk at a Fast Fare store on West C Street in Kannapolis. At that time defendant entered the store, walked through it, and then suddenly put his hand over Ms. Price's mouth and

held a knife near her eyes. Defendant walked Ms. Price to the front of the store, where he forced her to lock the doors to the Fast Fare. He then walked her into a storeroom and shut the door. Defendant told Ms. Price that "the world had done him wrong" and that he was going to punish her. He forced her to disrobe and placed his fingers into her vagina. Defendant then tried to rape Ms. Price but was physically unable to do so. Ms. Price testified that she thought she might be able to escape from defendant if she could convince him to go to her house where it was more comfortable. Defendant allowed Ms. Price to put on her clothes and forced her into her car. As Ms. Price drove toward her home, she deliberately sped through a red light in order to attract attention. Although she was stopped by a police patrolman, Ms. Price was unable to communicate her plight because defendant held a knife against her side. Ms. Price and the defendant drove on. Ms. Price told defendant she wanted to buy a soft drink, and he allowed her to pull into the parking lot of the Fast Fare on North Ridge Street. There, Ms. Price escaped defendant by running into the store, locking the doors behind her. She then called the sheriff's department.

[2] The state's evidence further tended to show that about 2:00 a.m. on 29 March 1982, Ms. Dorothy Karriker was working as a clerk at a Fast Fare located at the intersection of West C Street and Enochville Avenue in Kannapolis. At that time defendant entered the store and pulled a knife on Ms. Karriker. At trial Ms. Karriker testified that defendant then "grabbed me by the shoulder, turned me back around, put the knife to my left side. He . . . moved it over to the center of my stomach, and he asked me several times if I wanted to die." He demanded the keys to her car, punching Ms. Karriker as he spoke. When defendant noticed a car pulling into the intersection where the Fast Fare was located, he threw Ms. Karriker loose, cutting two of her fingers and breaking another one in the process. Defendant moved down an aisle of the store. Ms. Karriker picked up a knife with which she had been cutting cheese, and defendant then backed out of the store. Ms. Karriker locked the doors of the Fast Fare and called the police.

We hold that this evidence is sufficient to support the jury's verdicts of guilty of sex offense in the first degree and kidnap-

ping of Laura Price and attempted robbery with a dangerous weapon of Dorothy Karriker.

[3] Defendant next contends that the trial court erred by allowing the jury to reexamine the photographs that had been shown to Laura Price after her assaults. After deliberating for some time, the jury was called back into the courtroom in order to be released for its evening recess. At this time, the trial court ascertained that the jury was deadlocked and released it after giving the usual cautionary instructions. Upon its return the next morning, the jury was further instructed and retired to the jury room to deliberate. Eventually the jury returned and requested to see the photographic array which had previously been admitted into evidence. The trial court permitted the jury to examine the photographs in open court. The jury then retired for further deliberations.

N.C.G.S. 15A-1233(a) permits a trial judge to allow the jury to reexamine evidence previously admitted at trial:

> § 15A-1233. Review of testimony; use of evidence by the jury.—(a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. 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. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

Defendant contends that the trial court abused its discretion in permitting the jury to reexamine the photographs because the jury had stated that it was deadlocked. Defendant claims that by allowing the jury to see this identification evidence, the court impermissibly placed its imprimatur upon the jury's estimation of the importance of this evidence. Defendant also argues that the trial court abused its discretion by failing to require the jury to reexamine all of the evidence relevant to the issue of the identity of the perpetrator of the crimes, despite the fact that at the time no one requested that the jury do so. Defendant argues that all of

this prejudiced him because after reviewing the identification evidence the jury returned its verdicts of guilt.

Whether to allow the jury in a criminal trial to reexamine evidence previously admitted lies within the discretion of the trial court. N.C. Gen. Stat. § 15A-1233(a) (1978). *See State v. Lang*, 301 N.C. 508, 272 S.E. 2d 123 (1980). We hold that defendant has failed to show that the trial court abused its discretion in permitting the jury to reexamine the photographic array. In allowing the jury to review the photographs, the trial court complied with the statute. The fact that the jury at one point indicated that it was deadlocked did not make its reexamination of the photographic evidence prejudicial error.

Defendant received a fair trial, free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. HERMAN NICKERSON

No. 615PA82

(Filed 3 May 1983)

1. **Appeal and Error § 45; Criminal Law § 166— stenographic transcript in lieu of narration—necessity for appendix to brief**

Whenever a stenographic transcript is used pursuant to Appellate Rule 9(c)(1) in lieu of narrating the evidence, Appellate Rule 28(b)(4) only requires setting out in an appendix to the brief the verbatim portions of the transcript necessary for an understanding of each question presented and does not require the appellant to include all of the evidence necessary for a determination of the questions presented. Furthermore, Appellate Rule 28(b)(4) only pertains to testimonial evidence given at trial, and other items such as jury instructions should be contained in the record on appeal.

2. **Appeal and Error § 45; Criminal Law § 166— stenographic transcript in lieu of narration—assignment of error to the charge—no necessity for appendix to brief**

Where appellant's only assignment of error pertained to the instructions, the material from the transcript necessary for an understanding of the question presented was included in the body of the brief, and the jury instructions were reproduced verbatim in the printed record on appeal, it was not necessary for appellant to include more in an appendix to the brief.

ON review of the decision of the Court of Appeals, 59 N.C. App. 236, 296 S.E. 2d 298 (1982), dismissing the defendant's appeal. The Court of Appeals held that the defendant violated Rule 9(c)(1) and Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure [hereinafter "Rules"]. The defendant's petition for discretionary review was allowed by this Court on 7 December 1982.

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

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

MITCHELL, Justice.

The defendant presents two assignments of error to this Court. In addition to reviewing the Court of Appeals' dismissal of his appeal, the defendant requests that we reach the merits of the assignment of error he sought to present to the Court of Appeals. For the reasons stated below, we hold that the Court of Appeals improperly dismissed the defendant's appeal. Since the issue raised by the defendant in the Court of Appeals was never reached by that Court, we remand defendant's appeal for a determination on the merits of the case. Therefore, we find it unnecessary to review the merits of the defendant's second assignment of error.

A statement of the facts of this case, other than the procedural history, is unnecessary for the purposes of this opinion. The defendant was convicted of murder in the second degree at the 20 April 1981 Criminal Session of Superior Court, Franklin County. On 16 December 1981, the Court of Appeals allowed the defendant's petition for a Writ of Certiorari. The defendant's appeal was docketed in the Court of Appeals on 8 March 1982. The defendant's only assignment of error was that the trial court erred by failing to instruct the jury that they need not be unanimous on the theory of manslaughter in order to return a verdict of guilty of manslaughter. On 19 October 1982, the Court of Appeals dismissed the defendant's appeal for failure to comply with Rules 9(c)(1) and 28(b)(4).

On appeal, the defendant filed the complete stenographic transcript of the evidence in the trial pursuant to Rule 9(c)(1).

When this alternative is selected on appeal, the parties are required to comply with Rule 28(b)(4). As effective at the time this case was docketed in the Court of Appeals,* Rule 28(b)(4) was as follows:

> If pursuant to Rule 9(c)(1) appellant utilizes the stenographic transcript of the evidence in lieu of narrating the evidence as part of the record on appeal, the appellant's brief must contain an appendix which sets out verbatim those portions of the certified stenographic transcript which form the basis for and are *necessary to understand* each question presented in the brief. (Emphasis added.)

The defendant included in the body of the brief the challenged portion of the jury instructions verbatim. The entire instructions were set out in the record and were referred to by page number by the defendant and the State in their briefs. In lieu of an appendix, the defendant stated: "The defendant has determined that an appendix is unnecessary due to the fact that the only issue raised on appeal is the inadequacy of the instruction on unanimity and the instruction given is quoted in the body of the brief in its entirety."

[1] Rule 28(b)(4) only requires setting out the verbatim portions of the transcript necessary for an *understanding* of each question presented. The rule does not require the appellant to include all of the evidence necessary for a *determination* of the questions presented. It is apparent that a review of the entire jury instructions would be necessary for a final decision of the present case, but the challenged portion of the instruction that was included verbatim in the body of the brief was sufficient to provide an understanding of the question presented by the assignment of error.

From the Court of Appeals' opinion, it is unclear what the appellant should have included in the appendix in order to comply with that Court's interpretation of the Rules. The Court noted that the assignment of error "requires a careful examination of the trial record including the trial court's instructions to the jury." The Rule only pertains to testimonial evidence given at

* Rule 28(b)(4) was amended on 12 January 1981 effective for all appeals docketed after 15 March 1982.

trial; other items such as jury instructions should be contained in the record on appeal. *See* Commentaries following Rules 9 and 28, N.C. Rules App. Pro. The Rule only requires the inclusion of the portions of the transcript necessary to understand, not decide, the question. Any other interpretation would require many appellants, especially those who question the sufficiency of the evidence, to include a verbatim copy of the entire transcript in the appendix to the brief.

By this opinion we do not mean to encourage appellants to use less than due diligence in following the Rules. Indeed, it is usually the safer and wiser course to do more than meet the minimum requirements.

[2] In the case *sub judice*, the material from the transcript necessary for an understanding of the questions presented was included in the body of the brief. The jury instructions were reproduced verbatim in the printed record on appeal. To include more in the appendix would have been unnecessary and redundant and is not required by the Rules.

For the foregoing reasons, the decision of the Court of Appeals is reversed and the case is remanded to that Court with instructions that it reinstate the defendant's appeal and proceed to a determination on the merits.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JOHN LEE ABEE, AND DARRELL RAY JONES

No. 38A83

(Filed 3 May 1983)

Criminal Law § 138— sexual offense—aggravating factors—repeated acts of fellatio—insertion of object in victim's rectum

Where defendants pled guilty to only one act of fellatio (second degree sexual offense) and all other charges against them were dismissed, no proof of any other act of fellatio or insertion of any object into the victim's rectum was necessary to prove any element of the sexual offense to which defendants pled guilty, and repeated acts of fellatio and insertion of a finger into the victim's rectum were properly considered as aggravating factors in imposing sentence upon defendants.

State v. Abee

APPEAL from a decision of the Court of Appeals finding no error in judgments entered by *Ferrell, J.*, at the 30 November 1981 Criminal Term of Superior Court, BURKE County (judgment entered 15 December 1981). The defendants' cases were consolidated for trial and for appeal. The Court of Appeals' opinion, one judge dissenting, is reported at 60 N.C. App. 99, 298 S.E. 2d 184 (1982). Each defendant filed notice of appeal with this Court. The matter is before this Court pursuant to G.S. § 7A-30(2) by reason of the dissent.

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

John R. Mull, Attorney for defendant John Lee Abee.

Ellis L. Aycock, Attorney for defendant Darrell Ray Jones.

PER CURIAM.

The defendant Abee was charged in three felony indictments with: #9016 first degree sexual offense (fellatio); #9017 first degree sexual offense (inserting an object into the victim's anus); #9018 kidnapping. Pursuant to a plea bargain, defendant Abee pled guilty to second degree sexual offense (fellatio) in violation of G.S. § 14-27.5 in #9016 and all other charges against him, including the first degree sexual offense in #9016, were dismissed.

The defendant Jones was charged in three felony indictments with: #9019 first degree sexual offense (fellatio); #9020 first degree sexual offense (inserting an object into the victim's anus); #9021 kidnapping. Pursuant to a plea bargain, defendant Jones pled guilty to second degree sexual offense (fellatio) in violation of G.S. § 14-27.5 in #9019 and all other charges against him, including the first degree sexual offense charge in #9019, were dismissed.

Other pertinent facts are set forth in the opinion of the Court of Appeals. As the assignments of error which have merit are common to both defendants, we will discuss only those relating to the defendant Abee.

The Court of Appeals found that it was error for the trial judge to consider and include among the aggravating factors found that there were repeated acts of fellatio and that Abee had

inserted his finger into the victim's rectum because evidence of these acts was "evidence necessary to prove an element of the offense." That court reasoned that "the very evidence required to prove the offense that Abee pled guilty to was also considered as a factor in aggravation, as prohibited by [G.S. § 15A-1340.4]." Nor did the Court of Appeals "find it important that more than one act of fellatio occurred while G.S. 14-27.5(a) only requires one 'sexual act'." *State v. Abee*, 60 N.C. App. at 103, 298 S.E. 2d at 186. We cannot agree.

It is clear from the record on appeal that although there were repeated acts of fellatio by both defendants, both defendants pled guilty to only one act of fellatio and all other charges against them were dismissed. No proof of any other act of fellatio or insertion of any object into the victim's rectum was necessary to prove any element of the offense to which either defendant entered a plea of guilty. Thus the two factors in question, *i.e.*, repeated acts of fellatio and insertion of a finger into the victim's rectum, were properly considered as aggravating circumstances. Contrary to the statement in the opinion of the Court of Appeals, it was indeed important that more than one act of fellatio occurred.

Although finding error in the consideration of the foregoing aggravating circumstances, applicable to both defendants, the Court of Appeals found that neither defendant had demonstrated that he was actually prejudiced by such error, relying upon its decision in *State v. Ahearn*,[1] which has subsequently been reversed by this Court.

In *Ahearn* this Court held that:

> [I]t 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

1. *State v. Ahearn*, 59 N.C. App. 44, 295 S.E. 2d 621 (1982), *reversed* 307 N.C. 584, 300 S.E. 2d 689 (1983).

a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing.

State v. Ahearn, 307 N.C. at 602, 300 S.E. 2d at 701 (1983). The statements in the opinion of the Court of Appeals with respect to the necessity of demonstrating actual prejudice are in error.

Had the Court of Appeals been correct in its conclusion that consideration by the trial judge of the foregoing aggravating factors was error, the failure to find error based upon *Ahearn* would have required this Court to reach a different result from that reached by the Court of Appeals. As the Court of Appeals' first error relating to the consideration of the two aggravating factors effectively cancels the second error relating to the necessity of demonstrating actual prejudice, the result reached by this Court is the same as that reached by the Court of Appeals. We have considered defendants' other assignments of error and find them to be without merit.

The decision of the Court of Appeals, except as herein modified, is affirmed.

Modified and affirmed.

STATE OF NORTH CAROLINA v. BLAND JULIUS HILL, JR.

No. 447A82

(Filed 3 May 1983)

Criminal Law § 135.4; Jury § 7.11— death qualification of jury prior to guilt phase —same jury for penalty phase—constitutionality

The procedure set out in G.S. 15A-2000(a)(2) for death qualifying a jury prior to the guilt phase and the requirement of the statute that the same jury hear both the guilt and penalty phases of the trial are constitutional.

APPEAL by the defendant from judgments of *Farmer, J.*, entered at the 16 October 1978 Criminal Session of Superior Court, WAKE County.

The defendant was charged in separate indictments, proper in form, with murder in the first degree, four counts of armed

robbery, three counts of kidnapping and two counts of conspiracy to commit armed robbery. The jury found the defendant guilty as charged on all counts. Following the sentencing phase of the murder case against the defendant, the jury recommended a sentence of life imprisonment. The defendant having been found guilty of murder in the first degree upon the theory that the murder was committed in the perpetration of a felony, the convictions for one count of armed robbery and one count of kidnapping were merged with the conviction for murder. As to the remaining charges, the defendant received three sentences of life imprisonment and a maximum-minimum sentence of ten years imprisonment. The judgments in their totality provide that three of the life sentences are to be served consecutively. The remaining sentences are to be served concurrently with one of the life sentences.

The defendant appeals directly to the Supreme Court in those cases in which he received a sentence of life imprisonment. The Supreme Court allowed his motion to bypass the Court of Appeals as to all other convictions on 3 November 1982.

Attorney General Rufus L. Edmisten, by Assistant Attorney General J. Michael Carpenter, for the State.

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

PER CURIAM.

By his single assignment of error, the defendant appellant contends that the trial court erred in "death qualifying" the jury prior to the guilt phase in the trial of the murder charge against him, which charge was joined for trial with the other charges. The defendant appellant further contends in this regard that "death qualifying" a jury prior to the guilt phase of a capital trial and the procedure set forth in G.S. 15A-2000(a)(2) permitting the same jury to hear both the guilt phase and the sentencing phase of the trial violates the Constitution of the United States and the Constitution of North Carolina. The defendant appellant quite candidly recognizes that this Court has previously decided these issues contrary to the position he takes in his assignment and contentions. *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 622, 103 S.Ct. 474 (1982); *State v.*

Williams, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 622, 103 S.Ct. 474 (1982); *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982); *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980). Nevertheless, the defendant appellant requests that this Court reexamine its holdings in those cases. Having done so, we determine that the prior decisions of this Court previously referred to are sound and should be viewed as binding precedent controlling on the issues raised by the defendant appellant.

No error.

BEN J. THREATTE, SR., INDIVIDUALLY AND BEN J. THREATTE, SR., AS ADMINISTRATOR OF THE ESTATE OF RANCE K. THREATTE, DECEASED v. BEVERLY ANN THREATTE

No. 665PA82

(Filed 3 May 1983)

JUDGE Collier on 2 September 1981 in IREDELL Superior Court entered summary judgment for plaintiff. The Court of Appeals affirmed in an opinion by *Chief Judge Morris* in which *Judges Martin* and *Becton* concurred. 59 N.C. App. 292, 296 S.E. 2d 521 (1982). We allowed defendant's petition for discretionary review on 28 January 1983.

Raymer, Lewis, Eisele, Patterson & Ashburn by Douglas G. Eisele, for plaintiff appellee.

Pope, McMillan, Gourley & Kutteh by Robert H. Gourley, for defendant appellant.

PER CURIAM.

This is an action for a declaratory judgment to determine the appropriate disposition of proceeds of a money market savings certificate. The trial court determined plaintiff was the owner of the account at First Savings and Loan Association of Statesville and the Court of Appeals affirmed. After reviewing the record and briefs, and hearing oral arguments on the question presented, we conclude the petition for further review was improvidently

granted. Our order granting further review is vacated. The decision of the Court of Appeals affirming the judgment of Iredell Superior Court remains undisturbed and in full force and effect.

Discretionary review improvidently granted.

CHEM-SECURITY SYSTEMS v. MORROW

No. 169P83.

Case below: 61 N.C. App. 147.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 May 1983. Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 3 May 1983.

DIAZ v. UNITED STATES TEXTILE CORP.

No. 146P83.

Case below: 60 N.C. App. 712.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 May 1983.

IN RE CHAPEL HILL RESIDENTIAL RETIREMENT CENTER

No. 101P83.

Case below: 60 N.C. App. 294.

Petition by Residential Center for discretionary review under G.S. 7A-31 denied 3 May 1983.

IN RE DAILEY v. BOARD OF DENTAL EXAMINERS

No. 134P83.

Case below: 60 N.C. App. 441.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1983.

LOWDER v. ALL STAR MILLS, INC.

No. 89PA83.

Case below: 60 N.C. App. 275.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals allowed 3 May 1983. Petitions by defendants for discretionary review under G.S. 7A-31 and by intervening defendants for writ of certiorari to North Carolina Court of Appeals denied 3 May 1983. Notices of appeal by defendants and by intervening defendants dismissed 3 May 1983.

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

LOWDER v. ALL STAR MILLS, INC.

No. 143P83.

Case below: 60 N.C. App. 699.

Petition by several defendants for discretionary review under G.S. 7A-31 denied 3 May 1983.

LUMBEE RIVER ELECTRIC CORP. v. CITY OF FAYETTEVILLE

No. 126PA83.

Case below: 60 N.C. App. 534.

Petition by several defendants for discretionary review under G.S. 7A-31 allowed 3 May 1983.

PAYNE v. CONE MILLS CORP.

No. 160P83.

Case below: 60 N.C. App. 692.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 May 1983.

PINNER v. SOUTHERN BELL

No. 74P83.

Case below: 60 N.C. App. 257.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 May 1983.

RIGGAN v. HIGHWAY PATROL

No. 167P83.

Case below: 61 N.C. App. 69.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 May 1983.

SANDERS v. WHITE

No. 139P83.

Case below: 61 N.C. App. 168.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1983.

STATE v. DAUGHTRY

No. 179P83.

Case below: 61 N.C. App. 320.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 May 1983.

STATE v. GLEN & MILLER

No. 88P83.

Case below: 60 N.C. App. 602.

Petitions by defendants for discretionary review under G.S. 7A-31 denied 3 May 1983.

STATE v. GOODE

No. 194PA83.

Case below: 61 N.C. App. 168.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 3 May 1983, decision of the Court of Appeals is vacated, and the cause is ordered to be remanded to the Superior Court with directions to vacate the order of Judge Griffin and release defendant from the sentence therein imposed.

STATE v. GRAHAM

No. 201PA83.

Case below: 61 N.C. App. 271.

Petition by Attorney General for writ of certiorari to North Carolina Court of Appeals allowed 3 May 1983.

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

STATE v. HEFLER

No. 138PA83.

Case below: 60 N.C. App. 466.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 3 May 1983.

STATE v. LINKER

No. 156PA83.

Case below: 61 N.C. App. 348.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 3 May 1983. Motion of Attorney General to dismiss appeal for lack of significant public interest denied 3 May 1983.

STATE v. MARLOW

No. 199PA83.

Case below: 61 N.C. App. 300.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 19 April 1983.

STATE v. NEAL

No. 94P83.

Case below: 60 N.C. App. 350.

Petition by defendant for discretionary review under G.S. 7A-31 denied. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 May 1983.

STATE v. NOWELL

No. 204P83.

Case below: 61 N.C. App. 568.

Petition by defendant for discretionary review under G.S. 7A-31 denied 26 April 1983.

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

STATE v. PREVETTE

No. 203P83.

Case below: 61 N.C. App. 349.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1983.

STATE v. ROGERS

No. 28P83.

Case below: 60 N.C. App. 217.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 May 1983.

STATE v. SAMPLEY

No. 107P83.

Case below: 60 N.C. App. 493.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 May 1983.

STATE v. SUGG

No. 172P83.

Case below: 61 N.C. App. 106.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1983.

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

STATE v. TART

No. 178P83.

Case below: 61 N.C. App. 349.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 May 1983.

STATE v. THOMPSON

No. 150PA83.

Case below: 60 N.C. App. 679.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 3 May 1983.

STATE v. WILLIS

No. 163PA83.

Case below: 61 N.C. App. 244.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 3 May 1983.

STATE ex rel. COMMISSIONER OF INSURANCE
v. RATE BUREAU

No. 184P83.

Case below: 61 N.C. App. 506.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 18 April 1983.

WATERS v. PHOSPHATE CORP.

No. 182P83.

Case below: 61 N.C. App. 79.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 3 May 1983.

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

WOOTEN v. NATIONWIDE MUTUAL INS. CO.

No. 91P83.

Case below: 60 N.C. App. 268.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 May 1983.

A.E.P. INDUSTRIES, INC. v. R. BRUCE McCLURE

No. 445A82

(Filed 31 May 1983)

1. **Appeal and Error § 6.2— denial of preliminary injunction—immediate appeal**

The denial of plaintiff's motion for a preliminary injunction to restrain defendant from breaching a covenant not to compete deprived plaintiff of a substantial right and was immediately appealable. G.S. 1-277; G.S. 7A-27.

2. **Courts § 21.8; Contracts § 7.1— covenants not to compete—applicable law—validity**

Covenants not to compete in employment agreements were governed by the substantive law of New Jersey where the agreements contained a provision that they would be "governed by the laws of the State of New Jersey," and the covenants in question appear to be valid and enforceable under New Jersey law where they are in writing, are reasonable as to time and territory, were made a part of the contracts of employment, were based on reasonable consideration, and are designed to protect a legitimate business interest of plaintiff employer.

3. **Injunctions § 13.1— preliminary injunction—protection of plaintiff's rights**

In determining whether a preliminary injunction should issue, the trial court's second inquiry is not limited to the question of irreparable injury. Rather, the injunction will issue if, in the opinion of the court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

4. **Injunctions § 6; Contracts § 7.1; Master and Servant § 11.1— restraining breach of covenant not to compete—right to preliminary injunction**

The trial court should have allowed plaintiff's motion for a preliminary injunction to restrain defendant from breaching a covenant not to compete in an employment agreement where there was a reasonable likelihood that the covenant was valid and that plaintiff would likely prevail on the merits; the ultimate relief plaintiff sought was a permanent injunction to enforce the covenant not to compete; the decision made at the preliminary injunction stage of the proceedings became, in effect, a determination on the merits because of the brief duration of the time limitation of the covenant; plaintiff's principal relief was necessarily equitable in nature; and the denial of a preliminary injunction would serve effectively to foreclose adequate relief to plaintiff.

5. **Injunctions § 13— right to preliminary injunction**

Where the primary ultimate remedy sought is an injunction; where the denial of a preliminary injunction would serve effectively to foreclose adequate relief to plaintiff; where no "legal" (as opposed to equitable) remedy will suffice; and where the decision to grant or deny a preliminary injunction in effect results in a determination on the merits, plaintiff has made a showing that the issuance of a preliminary injunction is necessary for the protection of its rights during the course of litigation.

Justice MARTIN dissenting.

Justices COPELAND and EXUM join in this dissenting opinion.

PLAINTIFF appeals from a decision of the Court of Appeals, 58 N.C. App. 155, 293 S.E. 2d 232 (1982), affirming the denial of plaintiff's motion for a preliminary injunction entered by *Snepp, J.*, by order filed 2 December 1981 in Superior Court, MECKLENBURG County. Plaintiff appeals the decision of the Court of Appeals pursuant to G.S. § 7A-30(2).

The sole issue before us is whether the Court of Appeals erred in affirming the Superior Court's denial of plaintiff's motion for a preliminary injunction to restrain the defendant from breaching a covenant not to compete in an employment agreement. For the reasons set forth below, we hold that the plaintiff satisfied its burden pursuant to G.S. § 1-485 and is therefore entitled to the relief sought pending final determination on the merits.

The Record discloses the following facts:

Plaintiff is engaged in the manufacture and distribution of various polyethylene products throughout the United States. On 4 October 1976, the plaintiff hired the defendant as a sales representative to work out of plaintiff's North Carolina office. As a condition of this employment, and consistent with plaintiff's practice of protecting its confidential and proprietary information, defendant was required to execute a written agreement which provided, *inter alia*, that:

> In consideration of a) your continued employment of me; b) your payment to me of a salesman's bonus which you are not obligated to pay; c) the further development of my skills and an anticipated increase in my earnings potential while employed by your firm, ...
>
> . . . .
>
> 5. I hereby acknowledge that a) A.E.P. Industries, Inc. manufactures and processes products and sells them throughout the continental United States; b) A.E.P. Industries, Inc. salesmen employ personal mail and telephone solicitations extensively in the course of marketing products and developing

new customers for A.E.P. Industries, Inc.; and c) the names of A.E.P. Industries, Inc.'s customers and prospects are not generally known in the trade. As a consequence of the confidential nature of the customer and prospect lists, and other product, prices, sales and financial information which has been and will be made available to me in my employment by your firm, I will not, during the term of my employment and for a period of 18 months thereafter (regardless of the reason for the termination of my employment).

A. Directly or indirectly, as a sole proprietor, or as a principal, partner, stockholder, director, officer, employee, agent or other representative, engage, participate or become interested in, affiliated or connected with, be employed by or render service to, any corporation, firm, association, or other enterprise which shall market or sell the same or substantially similar products as those marketed or sold by A.E.P. Industries, Inc. at the time of the termination of my employment or within the 6 month period immediately preceding such termination.

B. Solicit for orders, accept orders from or service any customer of A.E.P. Industries, Inc. whom or which I contact personally, by mail or by telegraph, or serviced while employed by A.E.P. Industries, Inc.

C. Solicit for orders, accept orders from, or service any person, firm or other enterprise whom or which was a customer of A.E.P. Industries, Inc. during the term of my employment, whether or not such customer was personally solicited or serviced by me.

D. Solicit for orders, accept orders from, or service any prospects of A.E.P. Industries, Inc. whom or which I contacted personally, or whose names I learned of, during the term of my employment of A.E.P. Industries, Inc.

E. Disclose to any individual, firm, association, corporation or other enterprise, nor use for my own benefit, any business, trade, financial, customer, product or sales information which shall become known to me in the course of my employment by A.E.P. Industries, Inc. such information being deemed confidential to the extent not known generally in the trade.

F. I acknowledge that the remedies at law for the breach of any of the restrictive covenants contained in the immediately preceding paragraph shall be deemed to be inadequate and that A.E.P. Industries, Inc. shall be entitled to injunctive relief for any such breach.

After having worked for the plaintiff for approximately eight months, defendant was promoted to the position of sales manager. In this capacity defendant was responsible for the employment, training, and supervision of all of plaintiff's sales personnel in twelve southeastern states. Defendant had access to information concerning the manufacturing requirements of plaintiff's customers.

On 23 August 1979, defendant entered into a second written employment agreement with the plaintiff, the terms of which were substantially similar to the first agreement. The recited consideration in the 23 August agreement was $100.00. Furthermore, the second agreement expressly limited defendant's activities to "the area of the continental United States located east of the Mississippi River."

On 21 August 1981, plaintiff and defendant entered into an Agreement on Termination which provided, *inter alia*, that:

WHEREAS, A.E.P. is, in fact, engaged in the manufacture, production and distribution of various polyethylene plastic products throughout the United States, either directly or through one or more of its subsidiaries or affiliated companies; and

WHEREAS, the Employee has been employed for A.E.P. primarily in its plant location at Matthews, North Carolina for a significant period of time; and

WHEREAS, the employment by A.E.P. of the Employee will terminate as of the date hereof; and

WHEREAS, the Employee will be hired by an affiliated company, i.e., Design Poly Bag Corp., a New Jersey corporation; and

WHEREAS, the Employee acknowledges that in his capacity as an employee of A.E.P., he was necessarily provided with a great deal of confidential and proprietory informa-

tion of A.E.P., including names and addresses of customers of A.E.P. and product needs and pricing for same as well as all the other type of confidential and proprietory information described in a certain agreement entered into between the Employee and A.E.P. at the inception of his employment by A.E.P.; and

WHEREAS, the Employee has previously agreed and received consideration for such agreement not to engage in certain activities for a period of time subsequent to the termination of his relationship with A.E.P.; and

WHEREAS, the parties wish to enter into an additional and further agreement to return for the consideration herein expressed and the hiring by Design Poly Bag Corp. (an affiliated corporation with A.E.P.) of the Employee.

NOW, THEREFORE, the parties hereto do acknowledge, understand and agree as follows:

1. The Employee acknowledges previous employment by A.E.P. and his receipt and acquisition as Employee of vital, confidential and proprietory information from A.E.P. as described in the Agreement between the Employee and A.E.P. which commenced at the beginning of his employment. The Employee reacknowledges the receipt of good and valuable consideration for said earlier Agreement and reacknowledges and reaffirms the efficacy and continuing viability of same.

2. In consideration of the receipt of $20,000.00 in hand to be paid to the Employee by A.E.P. over such period of time as the parties may agree, or in consideration of the receipt of any portion of same, the Employee, Bruce McClure, agrees that he will not at any time hereafter use or disclose any proprietory information of A.E.P. which has been acquired by him directly and solely as a result of his previous employment by A.E.P. The Employee agrees that customer lists and prospective lists of customers together with addresses of same, products acquired by same, price information on customers and sales and financial information of A.E.P. and all items of confidential and proprietory information are included within this Agreement. Not by way of limitation, but

by way of example, attached hereto is a list of customers of A.E.P. Industries, Inc. whose names have been disclosed to Employee. Except for the business of Design Poly Bag Corp. (an affiliated corporation of A.E.P.) the Employee will not, under any circumstances, contact or communicate with any representative, officer, principal, agent or employee of the customers of A.E.P. whose names have been made known to the Employee and some of those names are set forth on the attached list.

3. The Employee reaffirms and reacknowledges all of the representations and acknowledgements previously set forth in an earlier agreement between A.E.P. and the Employee.

This third agreement included a covenant not to compete similar to that in the two earlier agreements, the geographic limitation encompassing areas "within a radius of 300 miles of the location at which any of A.E.P.'s offices, regional or otherwise, may be located."

With respect to defendant's subsequent employment with Design Poly Bag Corp., the Record includes a memo indicating that defendant was to receive compensation as follows:

Subject: Compensation Agreement

I. 1st year commencing 8/21/81 for 52 wks.
Compensation—$42,500 total

A) A.E.P.—$20,000 to be paid in 52 equal installments in consideration for the attached contract—no payroll deduction.

B) Design—$22,500 draw to be paid weekly for the 1st yr.—no payroll deduction.

Other compensation 1st yr. only:

C) A.E.P. to provide the continued use of company car.

D) Design telephone expense to be billed directly to Design.

E) $100.00 to be paid once in consideration of Design employment agreement.

F) Office space to be provided and paid for by Design at $250.00 per month.

Commissions: To be paid at a rate of 5% of total net sales after $850,000 in sales commencing 8/21/81 and the subsequent 52 wks. to be paid monthly.

II. 2nd year

A) Commission to be based on a straight 5% of sales and to be paid monthly subject to change based on increases and decreases in selling price. (Draw against commissions may be arranged on a mutually agreeable basis.)

B) Design—to provide office space.

C) All other expenses to be salesman's responsibility.

Defendant, however, alleges by affidavit that upon his termination with plaintiff, he was offered six months "severance" pay of one-half of his annual salary of $42,000.00, in addition to a one year contract with Design Poly Bag at the same salary he was earning with the plaintiff. He denied ever having seen the memo concerning his new employment until after he had executed the 21 August 1981 Agreement on Termination.

Defendant resigned from Design Poly Bag on 18 September 1981. In violation of the 23 August 1979 and the 21 August 1981 agreements, defendant immediately began contacting several of the companies with which he had formerly been dealing as a salesman and sales manager for plaintiff. At least two of these (Chatham Manufacturing in Elkin, N. C., and Reeves Bros. Inc. of Cornelius, N. C.) appeared on the list of customers attached to the 21 August Agreement on Termination.

Plaintiff brought suit against defendant on grounds that defendant was breaching covenants contained in the agreements of 23 August 1979 and 21 August 1981. In conjunction with this suit, plaintiff's motion for a temporary restraining order to stop defendant from breaching the covenants was granted 22 October 1981. By consent of the parties, this order remained in effect until 17 November 1981. On 20 November 1981, Judge Snepp entered an order continuing the restraining order. The court ruled on

plaintiff's motion for a preliminary injunction pending the outcome of the litigation on 30 November 1981. Judge Snepp denied plaintiff's motion and dissolved the temporary restraining order first entered 22 October 1981, conceding that there was "probable cause to believe that the plaintiff may prevail at the hearing," but that plaintiff had "failed to establish through its evidence the reasonable likelihood of any substantial monetary damage." Plaintiff appealed the denial of its motion for a preliminary injunction to the Court of Appeals, which affirmed in an opinion to which Judge Webb dissented.

Bell, Seltzer, Park & Gibson, by James D. Myers and Ronald T. Lindsay, for plaintiff-appellant.

Elam, Seaford, McGinnis & Stroud, by Keith M. Stroud, for defendant-appellee.

MEYER, Justice.

[1] A preliminary injunction is interlocutory in nature, issued after notice and hearing, which restrains a party pending final determination on the merits. G.S. § 1A-1, Rule 65. Pursuant to G.S. § 1-277 and G.S. § 7A-27, no appeal lies to an appellate court from an interlocutory order or ruling of a trial judge unless such order or ruling deprives the appellant of a substantial right which he would lose absent a review prior to final determination. As we recently stated in *State v. School*, 299 N.C. 351, 357-58, 261 S.E. 2d 908, 913, *appeal dismissed*, 449 U.S. 807 (1980):

> The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. Its impact is temporary and lasts no longer than the pendency of the action. Its decree bears no precedent to guide the final determination of the rights of the parties. In form, purpose, and effect, it is purely interlocutory. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment. If no such right is endangered, the appeal cannot be maintained. (Citations omitted.)

See Waters v. Personnel, Inc., 294 N.C. 200, 240 S.E. 2d 338 (1978); *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348 (1975).

The Court of Appeals did not consider the appealability of this interlocutory order. There is little doubt that the denial of the motion for a preliminary injunction in this case deprived plaintiff of a substantial right. In fact, as of the filing of this opinion, plaintiff has essentially lost its case because the eighteen month time limitation under the employment agreements expired in March of 1983. Likewise, as the trial judge noted in his order, had the preliminary injunction been granted, "the plaintiff would in effect have prevailed in the action no matter what the final determination might be." Thus, it appears that in a case such as the one now under consideration, although involving a substantive right of the appealing party, where time is of the essence, the appellate process is not the procedural mechanism best suited for resolving the dispute. The parties would be better advised to seek a final determination on the merits at the earliest possible time. Nevertheless, because this case presents an important question affecting the respective rights of employers and employees who choose to execute agreements involving covenants not to compete, we have determined to address the issues.

As a general rule, a preliminary injunction

> is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. *Waff Bros., Inc. v. Bank*, 289 N.C. 198, 221 S.E. 2d 273; *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348; *Conference v. Creech*, 256 N.C. 128, 123 S.E. 2d 619.

Investors, Inc. v. Berry, 293 N.C. 688, 701, 239 S.E. 2d 566, 574 (1977).

The first stage of the inquiry is, therefore, whether plaintiff is able to show likelihood of success on the merits. In the present case, the trial judge conceded "that there is probable cause to believe the plaintiff may prevail at the hearing" and that "plain-

tiff makes out an apparent case for issuance of a temporary injunction by showing some recognized equity." Thus the trial court found that there was a reasonable likelihood that the agreements were reasonable and valid and that plaintiff would likely prevail on the merits.

[2] We note that on appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself. *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348; *Telephone Co. v. Plastics, Inc.*, 287 N.C. 232, 214 S.E. 2d 49 (1975); *Huskins v. Hospital*, 238 N.C. 357, 78 S.E. 2d 116 (1953). Plaintiff questioned before the trial court and before the Court of Appeals the effect of a provision in the employment agreements that the agreements would be "governed by the laws of the State of New Jersey." Thus, we must first consider 1) whether the agreements, are, in fact, governed by New Jersey law, and 2) if so, whether there is a likelihood that plaintiff will prevail on the merits in light of New Jersey law.

As to the first question, we stated in *Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E. 2d 655, 656 (1980), that "where parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect." We note that plaintiff is a New Jersey corporation with headquarters in New Jersey and that during his employment, the defendant had numerous contacts with the New Jersey office. We therefore hold that the substantive law of New Jersey is applicable to the interpretation of the agreements.

Our review of New Jersey law in the area of the validity and enforceability of covenants not to compete indicates that the governing principles are similar to those in North Carolina. In this State a covenant not to compete is valid and enforceable upon a showing that it is:

1. In writing.

2. Made part of a contract of employment.

3. Based on reasonable consideration.

4. Reasonable both as to time and territory.

5. Not against public policy.

U-Haul Co. v. Jones, 269 N.C. 284, 152 S.E. 2d 65 (1967); *Exterminating Co. v. Griffin and Exterminating Co. v. Jones*, 258 N.C. 179, 128 S.E. 2d 139 (1962); *Asheville Associates v. Miller and Asheville Associates v. Berman*, 255 N.C. 400, 121 S.E. 2d 593 (1961); *Scott v. Gillis*, 197 N.C. 223, 148 S.E. 315 (1929).

The seminal case in New Jersey recognizing the validity and enforceability of noncompetitive clauses in employment agreements is *Solari Industries, Inc. v. Malady*, 55 N.J. 571, 264 A. 2d 53 (1970), where that court stated that:

> . . . while a covenant by an employee not to compete after the termination of his employment is not, because of the countervailing policy considerations, as freely enforceable, it will nonetheless be given effect if it is reasonable in view of all the circumstances of the particular case. It will generally be found to be reasonable where it simply protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public . . . .

Id. at 576, 264 A. 2d at 56.

As in North Carolina, the New Jersey courts have considered, as a prerequisite to the enforceability of noncompetitive employment agreements:

> 1. Whether the covenant is reasonable as to time and territory. *Mailman, Ross, etc. v. Edelson*, 183 N.J. Super. 434, 444 A. 2d 75 (1982).
>
> 2. Whether it is made a part of a contract of employment and based on reasonable consideration. *Hogan v. Bergen Brunswig Corp.*, 153 N.J. Super. 37, 378 A. 2d 1164 (1977).
>
> 3. Whether the covenant is against public policy or unreasonable. *Ellis v. Lionikis*, 162 N.J. Super. 579, 394 A. 2d 116 (1978) (invalid where the sole purpose is to prevent competition rather than protect a legitimate interest of the employer).

4. Whether the employee has, in fact, violated the terms of the covenant. *Mailman, Ross, etc. v. Edelson*, 183 N.J. Super. 434, 444 A. 2d 75.

For North Carolina cases *see Enterprises, Inc. v. Heim*, 276 N.C. 475, 173 S.E. 2d 316 (1970); *Jewel Box Stores v. Morrow*, 272 N.C. 659, 158 S.E. 2d 840 (1968); *Moskin Bros. v. Swartzberg*, 199 N.C. 539, 155 S.E. 154 (1930); *Schultz and Assoc. v. Ingram*, 38 N.C. App. 422, 248 S.E. 2d 345 (1978); *Amdar, Inc. v. Satterwhite*, 37 N.C. App. 410, 246 S.E. 2d 165, *disc. rev. den.* 295 N.C. 645 (1978).

On the Record before us, we agree that there is a reasonable likelihood that the plaintiff will prevail at the hearing on the merits. The covenant appears to be valid and enforceable. It is in writing, reasonable as to time and territory, was made a part of the contracts of employment, was based on reasonable consideration, and is designed to protect a legitimate business interest of the plaintiff. As a general rule, courts have denied the primary relief of enforcement where the agreement itself is found to be harsh, unjust, unreasonable or void; that is, where the agreement fails to satisfy one or more of the criteria insuring its validity. *See* 43A C.J.S. Injunctions § 95 (1978). In every case where the covenant not to compete is found to be reasonable and valid, however, the plaintiff is entitled to a remedy; either the agreement must be enforced or the court must find that plaintiff has an adequate remedy at law for money damages.

The trial court, having determined that the plaintiff would likely prevail on the merits, nonetheless found that:

> In this case the plaintiff's evidence does not establish prima facie a case of irreparable damage. All of the statements contained in the complaint and affidavit are conclusory and the only inference which can be drawn is that the damages, if any, which will be sustained by the plaintiff are speculative and conjectural. In view of the evidence as to the manner in which the sales of polyethylene are carried out, I cannot find that the plaintiff would as the result of defendant's activity sustain any damage, reparable or irreparable.
>
> However, even though a plaintiff makes out an apparent case for issuance of a temporary injunction by showing some recognized equity, a Court must nevertheless exercise its

sound discretion in determining whether the writ should issue, and to this end weigh the conflicting affidavits relative to the conveniences and inconveniences which would result from the issuance of the writ and the Court should refuse to grant the writ when to do so would cause great injury to the defendant and confer little benefit in comparison upon the plaintiff. *Huskins v. Hospital*, 238 N.C. 357.

In light of this I find that balancing the equities, the defendant would be caused tremendous injury by issuance of the injunction.

The Court of Appeals agreed with the trial court, holding that "the trial court did not abuse its discretion in denying the injunction based on inadequate showing of irreparable harm to plaintiff . . . ." *A.E.P. Industries v. McClure*, 58 N.C. App. at 158, 293 S.E. 2d at 234.

[3] We first emphasize that in determining whether a preliminary injunction should issue, the trial court's second inquiry is not limited to the question of irreparable injury. The injunction will issue "if, in the opinion of the Court, issuance is necessary *for the protection of a plaintiff's rights during the course of litigation.*" *Investors, Inc. v. Berry*, 293 N.C. at 701, 239 S.E. 2d at 574 (emphasis added).

We further note that there are two important aspects of this case which distinguish it substantively and procedurally from the more usual case in which a preliminary injunction is sought. The first is that the ultimate relief plaintiff seeks is *enforcement* of a covenant not to compete. The promised performance by the employee is forbearance to act and the remedy is one for specific performance of the contract in the nature of an injunction prohibiting any further violation of it. *See U-Haul Co. v. Jones*, 269 N.C. 284, 152 S.E. 2d 65; 5A Corbin on Contracts § 1138 (1964).

The second distinguishing feature of this case is that the decision made at the preliminary injunction stage of the proceedings becomes, in effect, a determination on the merits. This is so because the validity of the covenant depends, among other things, on the duration of the time limitation which, in order to be reasonable, must be brief. The case is clothed with immediacy. Frequently the time limitation will have expired prior to final

determination. Moreover, because the primary relief sought by the plaintiff is a permanent injunction, many of the considerations involved in the decision to grant or deny the preliminary injunction parallel those involved in a final determination on the merits. Specifically, the court must decide whether the remedy sought by the plaintiff is the most appropriate for preserving and protecting its rights or whether there is an adequate remedy at law.

We recognize that injunctive relief is equitable in nature and that some courts, in weighing the equities, have determined that because plaintiff can obtain full and complete justice by a judgment for money damages, and because hardship to the defendant outweighs any hardship to the plaintiff, plaintiff has not met his burden of showing that it has or is likely to sustain irreparable injury. 43A C.J.S. Injunctions § 95. The focus in cases such as the one now under consideration, however, is not only whether plaintiff has sustained irreparable injury, but, more important, whether the issuance of the injunction is necessary for the protection of plaintiff's rights during the course of litigation; that is, whether plaintiff has an adequate remedy at law.

Plaintiff argues persuasively, and there is authority to support the argument, that in a "noncompetition agreement, breach is the controlling factor and injunctive relief follows almost as a matter of course; damage from the breach is presumed to be irreparable and the remedy at law is considered inadequate. It is not necessary to show actual damage by instances of successful competition, but it is sufficient if such competition, in violation of the covenant, may result in injury." 43A C.J.S. Injunctions § 95. In fact, the agreements which defendant signed each contain the following language, which has been recognized as evidence of the inadequacy of money damages. *See Amdar, Inc. v. Satterwhite*, 37 N.C. App. 410, 246 S.E. 2d 165, *disc. rev. den.* 295 N.C. 645 (1978).

> I acknowledge that the remedies at law for the breach of any of the restrictive covenants contained in the immediately preceding paragraph shall be deemed to be inadequate and that A.E.P. Industries, Inc. shall be entitled to injunctive relief for any such breach.

It is a basic principle of contract law that one factor used in determining the adequacy of a remedy at law for money damages is the difficulty and uncertainty in determining the amount of

damages to be awarded for defendant's breach. *See* 5A Corbin on Contracts § 1142. Thus, "injury is irreparable where the damages are estimable only by conjecture, and not by any accurate standard." 42 Am. Jur. 2d *Injunctions* § 49 (1969). In fact, in holding that a plaintiff was entitled to injunctive relief for breach of a covenant not to compete, this Court characterized as "untenable" the argument that a contract provision for liquidated damages provided an adequate remedy at law. *U-Haul Co. v. Jones*, 269 N.C. at 287, 152 S.E. 2d at 67. This Court has further held that "[t]o constitute irreparable injury it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one *to which the complainant should not be required to submit or the other party permitted to inflict*, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *Barrier v. Troutman*, 231 N.C. 47, 50, 55 S.E. 2d 923, 925 (1949) (emphasis added).

We cannot agree with the implication of the decisions below that although plaintiff is legally entitled to some measure of relief, it nevertheless has no remedy in law or in equity. Those decisions seem to imply that plaintiff, unable to assign a determinable value to defendant's competitive practices, has no adequate remedy at law. And because it has sustained no "damage, reparable or irreparable," equitable relief, too, is foreclosed. Yet plaintiff has been given a legally recognizable right to reasonable protection against competition:

> 'Courts scrutinize carefully all contracts limiting a man's natural right to follow any trade or profession anywhere he pleases and in any lawful manner. But it is just as important to protect the enjoyment of an establishment in trade or profession, which its possessor has built up by his own honest application to every-day duty and the faithful performance of the tasks which every day imposes upon the ordinary man. What one creates by his own labor is his. Public policy does not intend that another than the producer shall reap the fruits of labor. Rather it gives to him who labors the right by every legitimate means to protect the fruits of his labor and secure the enjoyment of them to himself. Freedom to contract must not be unreasonably abridged. Neither must the

> right to protect by reasonable restrictions that which a man by industry, skill and good judgment has built up, be denied.'

Scott v. Gillis, 197 N.C. 223, 228, 148 S.E. 315, 317-318 (1929). *See Enterprises, Inc. v. Heim*, 276 N.C. 475, 173 S.E. 2d 316; *Jewel Box Stores v. Morrow*, 272 N.C. 659, 158 S.E. 2d 840. Plaintiff was clearly entitled to ultimate equitable relief—the enforcement of the covenant prohibiting defendant from engaging in competitive practices within the time and territory specified, assuming that the agreement was found to be valid and legally binding:

> The general rule with respect to enforceable restrictions is stated in 9 A.L.R. 1468: 'It is clear that if the nature of the employment is such as will bring the employee in personal contact with patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge of or acquaintance with the patrons and customers of his former employer, and thereby gain an unfair advantage, equity will interpose in behalf of the employer and restrain the breach . . . providing the covenant does not offend against the rule that as to time . . . or as to the territory it embraces it shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer.'

Asheville Associates v. Miller and Asheville Associates v. Berman, 255 N.C. at 403-404, 121 S.E. 2d at 595. *See Enterprises, Inc. v. Heim*, 276 N.C. 475, 480, 173 S.E. 2d 316, 320; *Moskin Bros. v. Swartzberg*, 199 N.C. 539, 155 S.E. 154.

[4] Having thus determined that plaintiff's principal relief was properly and necessarily equitable in nature in the form of an injunction to enforce the covenant, we hold that plaintiff was entitled to a preliminary injunction. Beginning with *Cobb v. Clegg*, 137 N.C. 153, 49 S.E. 80 (1904), this Court has consistently adhered to the proposition that where the principal relief sought is a permanent injunction, it is particularly necessary that the preliminary injunction issue. In speaking of the distinction between the old forms of common injunctions and special injunctions, this Court wrote:

> The former was granted in aid of or as secondary to another equity, as in the case of an injunction to restrain proceedings at law in order to protect and enforce an equity which could not be pleaded, and is issued, of course, upon the coming in of the bill, without notice. As soon as the defendant answered he could move to dissolve the injunction, and it was then for the court, in the exercise of its sound discretion, to say whether, on the facts disclosed by the answer, or, as it is technically termed, upon the equity confessed, the injunction should be dissolved or continued to the hearing. If the facts constituting the equity were fully and fairly denied, the injunction was dissolved unless there was some special reason for continuing it. Not so with a special injunction, which is granted for the prevention of irreparable injury, when the preventive aid of the court of equity is the ultimate and only relief sought and is the primary equity involved in the suit. In the case of special injunctions the rule is not to dissolve upon the coming in of the answer, even though it may deny the equity but to continue the injunction to the hearing if there is probable cause for supposing that the plaintiff will be able to maintain his primary equity and there is a reasonable apprehension of irreparable loss unless it remains in force, or if in the opinion of the court it appears reasonably necessary to protect the plaintiff's right until the controversy between him and the defendant can be determined. It is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right *in statu quo* until the determination of the controversy, and *especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case upon its merits and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case.*

Id. at 158-59, 49 S.E. at 82-83 (emphasis added). *Pleaters, Inc. v. Kostakes*, 259 N.C. 131, 129 S.E. 2d 881 (1963); *Finance Company v. Jordan*, 259 N.C. 127, 129 S.E. 2d 882 (1963); *Church v. College*, 254 N.C. 717, 119 S.E. 2d 867 (1961); *Coach Lines v. Brotherhood*, 254 N.C. 60, 118 S.E. 2d 37 (1961); *Studios v. Goldston*, 249 N.C.

117, 105 S.E. 2d 277 (1958) (plaintiff was entitled to have a temporary restraining order continued as a matter of law); *Boone v. Boone*, 217 N.C. 722, 9 S.E. 2d 383 (1940).

[5] Because of the need for immediacy of appropriate relief in cases dealing with covenants not to compete, as for example in the present case where defendant contracted not to engage in a competitive business for only eighteen months, the law as stated above is particularly applicable. We hold that where the primary ultimate remedy sought is an injunction; where the denial of a preliminary injunction would serve effectively to foreclose adequate relief to plaintiff; where no "legal" (as opposed to equitable) remedy will suffice; and where the decision to grant or deny a preliminary injunction in effect results in a determination on the merits, plaintiff has made a showing that the issuance of a preliminary injunction is necessary for the protection of its rights during the course of litigation.

Finally, we believe that our holding is in accordance with the policy of our State to encourage growth in new "high tech" industry. "The rapid technological advances accompanying North Carolina's industrial growth and increased employment opportunities, especially for technical and professional occupations, gives added significance and immediacy to the problem of the enforceability of covenants not to compete contained in employment contracts." H. Constangy, Employment Contract Covenants Not to Compete: Enforceability Under North Carolina Law, 10 Wake Forest L. Rev. 217 (1974).

While plaintiff here has been denied the effective equitable relief to which it was entitled (the preliminary injunction), since the eighteen month restriction has now completely elapsed, there still remains the plaintiff's other claims for relief including a claim for substantial money damages.

The decision of the Court of Appeals is reversed and the case is remanded to that court for remand to the Superior Court, Mecklenburg County, for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Justice MARTIN dissenting.

The questions raised by this appeal are now moot and the appeal should be dismissed. *Fulton v. Morganton*, 260 N.C. 345, 132 S.E. 2d 687 (1963). "It is quite obvious that a court cannot restrain the doing of that which has been already consummated." *Austin v. Dare County*, 240 N.C. 662, 663, 83 S.E. 2d 702, 703 (1954). The contract sued upon specified that the defendant would not compete with plaintiff for a period of eighteen months after the date on which he ceased to be employed by plaintiff. A.E.P. Industries, Inc. summarily fired defendant on 4 August 1981. The non-competitive eighteen-month period expired at the latest on 18 March 1983.[1] Even if plaintiff were entitled to an injunction, which I maintain it is not, it would be an abuse of discretion for any court to issue a preliminary injunction restraining defendant after the expiration of the period specified in the agreement. The eighteen-month period of the covenant not to compete is now *fait accompli*. This being so, there is nothing to support the issuance of an injunction at this time. *Highway Com. v. Brown*, 238 N.C. 293, 77 S.E. 2d 780 (1953). A similar case is *Herff Jones Co. v. Allegood*, 35 N.C. App. 475, 241 S.E. 2d 700 (1978), in which Judge Morris, with Judge (now Justice) Mitchell concurring, held for the court that when a covenant not to compete for twelve months expired while the case was on appeal, the issue became moot and was no longer before the court for decision:

> The covenant not to compete which is the subject of this action was expressly limited in duration to one year following the termination of the employment relationship between plaintiff and defendants. Plaintiff's evidence shows that notice of termination of representation was mailed to defendants and dated 28 July 1976. Defendant Allegood testified that he began working for Hunter Publishing Company, a competitor of plaintiff, as early as April 1976. Thus, assuming that defendants' employment ended no later than 28 July 1976, the latest date through which defendants could be restrained from competing with plaintiff would have been 28

1. Defendant left the employment of Design Poly-Bag Corp., an affiliated company of plaintiff, on 18 September 1981. Assuming for the sake of argument that defendant's termination agreement with A.E.P. applied to his employment with Design Poly-Bag, the eighteen-month period would have expired 18 March 1983.

July 1977. That date having passed pending consideration of this appeal by this Court, the questions relating to the propriety of the injunctive relief granted below are not before us. As stated by the Supreme Court in *Parent-Teacher Assoc. v. Bd. of Education*, 275 N.C. 675, 679, 170 S.E. 2d 473, 476 (1969):

> "When, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court."

Thus, the questions raised by defendants regarding the injunctive relief granted by the trial court have been rendered moot by the passage of time. *See Enterprises, Inc. v. Heim*, 276 N.C. 475, 173 S.E. 2d 316 (1970).

Id. at 478-79, 241 S.E. 2d at 702. *See also* 42 Am. Jur. 2d *Injunctions* §§ 6, 7 (1969). The appeal should be dismissed.

However, the majority has seen fit to examine the moot issue, which is whether the Court of Appeals erred in affirming the superior court's denial of A.E.P.'s motion for a preliminary injunction restraining Bruce McClure from breaching certain covenants contained in agreements between the two parties. For the following reasons, I dissent from the majority's resolution of the issue.

As stated in *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E. 2d 566, 574 (1977):

> A preliminary injunction, the relief here sought, is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. *Waff Bros., Inc. v. Bank*, 289 N.C. 198, 221 S.E. 2d 273; *Pruitt v. Williams*, 288

N.C. 368, 218 S.E. 2d 348; *Conference v. Creech*, 256 N.C. 128, 123 S.E. 2d 619.

A preliminary injunction may not issue unless the movant carries the burden of persuasion as to each of these prerequisites. *E.g., Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348 (1975). Once this burden in carried, it still remains in the trial court's discretion whether to grant the motion for a preliminary injunction. *Id. Cf.* N.C. Gen. Stat. § 1-485 (Cum. Supp. 1981). As Justice Ervin stated in *Huskins v. Hospital*, 238 N.C. 357, 360, 78 S.E. 2d 116, 119-20 (1953):

> The hearing judge does not issue an interlocutory injunction as a matter of course merely because the plaintiff avowedly bases his application for the writ on a recognized equitable ground. While equity does not permit the judge who hears the application to decide the cause on the merits, it does require him to exercise a sound discretion in determining whether an interlocutory injunction should be granted or refused.

I emphasize at the outset that a motion for a preliminary injunction is not to be confused with a request for specific enforcement of a provision in a contract which has been proven valid and enforceable. The former is a request for *extraordinary equitable relief* pending resolution of the controversy between the litigants. The latter arises after a contract has been either stipulated or proven valid and enforceable and the movant has established his right to have the contract enforced. Although defendant has not yet filed answer in this suit, the record suggests that the validity and enforceability of these contracts is a matter of dispute between the parties and will ultimately be resolved at trial on the merits. In the present appeal, of course, this Court is concerned only with plaintiff's motion for a preliminary injunction, that is, whether the trial court abused its discretion in denying the motion for equitable relief.

Although it conceded that there may be probable cause that plaintiff would prevail on the merits of the controversy, the trial court determined that A.E.P. had not carried its burden of persuasion as to irreparable damage. In its order denying plaintiff's motion for a preliminary injunction, the court stated:

> In this case the plaintiff's evidence does not establish prima facie a case of irreparable damage. All of the statements contained in the complaint and affidavit are conclusory and the only inference which can be drawn is that the damages, if any, which will be sustained by the plaintiff are speculative and conjectural. In view of the evidence as to the manner in which the sales of polyethylene are carried out, I cannot find that the plaintiff would as the result of defendant's activity sustain any damage, reparable or irreparable.

Thus, because plaintiff failed to carry its burden of persuasion as to irreparable loss, a fortiori it failed to establish a reasonable apprehension of irreparable loss unless interlocutory relief was granted. Although in reviewing the denial of a preliminary injunction this Court is not bound by the findings of the lower court, *Waff Bros. v. Bank*, 289 N.C. 198, 221 S.E. 2d 273 (1976); *Telephone Co. v. Plastics, Inc.*, 287 N.C. 232, 214 S.E. 2d 49 (1975), there is a presumption that the lower court's decision was correct, and the burden is on the appellant to show error. *Conference v. Creech*, 256 N.C. 128, 123 S.E. 2d 619 (1962). For the following reasons, I agree with the lower court's finding that plaintiff failed to establish a reasonable apprehension of irreparable loss unless its motion was granted.

An applicant for a preliminary injunction must do more than allege that he is apprehensive that irreparable loss will occur. He is required to set out with particularity the facts supporting his allegations so that the court can decide for itself whether there is reasonable apprehension of irreparable injury unless interlocutory relief is granted. *Telephone Co. v. Plastics, Inc., supra; Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E. 2d 18 (1960). A prohibitory preliminary injunction, such as the one sought in the instant case, will be granted only when irreparable injury is real and immediate. *Telephone Co. v. Plastics, Inc., supra; Membership Corp. v. Light Co.*, 256 N.C. 56, 122 S.E. 2d 761 (1961).

In its motion for a preliminary injunction, plaintiff stated that its customer lists and order specifications were confidential and proprietary information; that defendant was using this information in breach of contractual covenants; that defendant has contacted a number of plaintiff's customers, which customers accounted for ten to fifteen percent of A.E.P.'s annual sales within

the southeastern region; and that defendant had solicited sales and orders of products not produced by A.E.P. which were directly competitive with A.E.P.'s products, thus breaching contractual covenants not to compete. Plaintiff's sole affiant also stated:

> It is my honest belief that the defendant is utilizing confidential information of the plaintiff by and in contacting such major customers of the plaintiff. Such activities of the defendant are highly damaging to the plaintiff's sales program, which was established through the expenditure of great effort and finances, and are also leading to damaging confusion by these customers in that the defendant was employed by the plaintiff until August 21 of this year, so that such customers contacted no doubt consider him to still represent the plaintiff.
>
> . . . If the defendant continues such activities, not only will the sales program of the plaintiff suffer irreparable damage, but also the confidential nature of the information which the defendant is utilizing will be seriously jeopardized.

In reply, in addition to his own affidavit, defendant submitted the affidavits of sales or managerial employees associated with six of A.E.P.'s customers that defendant had contacted after leaving plaintiff's employment. These employees generally concurred in stating that Mr. McClure had contacted them after he left Design Poly-Bag; that he had informed them that he had ceased working for A.E.P. and was in business for himself; that neither lists of product specifications nor customer lists were secret or confidential in the sales and manufacturing market for polyethylene products; and that the market operated on a competitive bid or quote system in which, after the submission of bids from salesmen who had studied product specifications, the decision of with whom to place an order was based on a number of factors, including reliability, service, quality, and price. Several of these employees stated that they had placed trial orders with McClure after receiving bids from him; others stated that McClure had merely expressed an interest in doing business with their companies.

I agree with the superior court that while defendant's conduct may or may not have been in breach of contract, plaintiff has failed to set forth with enough particularity facts allowing the conclusion that there is reasonable apprehension of *irreparable* in-

jury unless a preliminary injunction is granted. To demonstrate a reasonable apprehension of irreparable injury, one must show that irreparable injury is very likely to occur if injunctive relief is not granted. In this context an injury is irreparable if it cannot be adequately compensated in money damages. *E.g., Frink v. Board of Transportation*, 27 N.C. App. 207, 218 S.E. 2d 713 (1975). An injury which has an adequate remedy at law is not irreparable and therefore equitable relief pending outcome of litigation between the parties is not required. *Gause v. Perkins*, 56 N.C. 177 (1857); *Light and Water Comrs. v. Sanitary District*, 49 N.C. App. 421, 271 S.E. 2d 402 (1980), *disc. rev. denied*, 301 N.C. 721 (1981). In the present case plaintiff has not shown that any injury it might suffer by virtue of defendant's activities cannot be compensated by an award of money damages. In fact, the record fails to disclose evidence of any actual damage to plaintiff. Mere contact of A.E.P.'s customers and solicitation of orders from them by defendant does not show that plaintiff has suffered or will suffer an injury that is not compensable in money damages. No injury is shown, much less irreparable injury, until plaintiff demonstrates that defendant's contact and solicitation in fact diverted orders for polyethylene products away from A.E.P. This has not been established in the record before us.

Further, there has been no credible demonstration that defendant exploited confidential information of plaintiff in contacting various customers of plaintiff. Several of defendant's affiants, sales employees of these customers, stated that product specifications were readily available to anyone in the industry requesting them and that lists of potential polyethylene customers were published periodically. Further, defendant had worked as a salesman of polyethylene products in the Southeast for eleven years before becoming employed by plaintiff, and he stated that before he joined A.E.P. he was aware of the identity of the great majority of the industrial users of polyethylene upon whom he has called since leaving Design Poly-Bag. Finally, there is no evidence that defendant's contacts with A.E.P. customers has damaged A.E.P. because such customers "no doubt consider [defendant] to represent the plaintiff." On the contrary, defendant's affiants stated that when he contacted them, defendant had clearly stated to each that he was no longer working for A.E.P. and that he was in business for himself.

The majority states:

> We hold that where the primary ultimate remedy sought is an injunction; where the denial of a preliminary injunction would serve effectively to foreclose adequate relief to plaintiff; where no "legal" (as opposed to equitable) remedy will suffice; and where the decision to grant or deny a preliminary injunction in effect results in a determination on the merits, plaintiff has made a showing that the issuance of a preliminary injunction is necessary for the protection of its rights during the course of litigation.

The statement is without citation of authority, and well it should be, as there is no legal basis for it in the laws of our state. This "holding" removes the requirement of a showing of real and immediate irreparable injury before preliminary injunctive relief can be allowed. It is a well established rule in North Carolina that injunctive relief will be granted only when irreparable injury is both real and immediate. *Telephone Co. v. Plastics, Inc., supra*, 287 N.C. 232, 214 S.E. 2d 49 (1975); *Membership Corp. v. Light Co., supra*, 256 N.C. 56, 122 S.E. 2d 761 (1961) (and cases cited therein). The ultimate decision whether to grant injunctive relief remains within the discretion of the trial judge after a party establishes a prima facie showing to support such relief. *Huskins v. Hospital, supra*, 238 N.C. 357, 78 S.E. 2d 116 (1953). In the absence of a showing of abuse of discretion, such decision is binding upon us. *Harmon v. Harmon*, 245 N.C. 83, 95 S.E. 2d 355 (1956).

The majority's "holding" is an abstract statement not applicable to this case. Here, plaintiff's complaint requests over a million dollars in money damages. Again, where money can compensate for the injury, it is not irreparable. *Gause v. Perkins, supra*, 56 N.C. 177 (1857); *Light and Water Comrs. v. Sanitary District, supra*, 49 N.C. App. 421, 271 S.E. 2d 402 (1980), *disc. rev. denied*, 301 N.C. 721 (1981). Surely, the denial of the preliminary injunction did not serve to effectively deny all relief to plaintiff. The majority itself states that the case is to be remanded for consideration of "plaintiff's other claims for relief including a claim for substantial money damages." Under these facts, how can it be seriously argued that plaintiff does not have an adequate remedy at law?

In addition to determining that plaintiff had not carried its burden of proving reasonable apprehension of irreparable injury, the trial court implicitly held that in its opinion the issuance of a preliminary injunction was not necessary to protect plaintiff's rights during the course of the litigation. When weighing the equities between the parties, the court found:

> Since 1965 [defendant] has earned his livelihood and supported himself and his family through employment as a salesman of polyethylene products. He was skilled in the field long before he went to work for the plaintiff. He used in the employment of plaintiff the knowledge he had theretofore acquired and any names and addresses of customers of the plaintiff gained during the performance of his duties for them is not a trade secret, nor is general information concerning the methods of business of the plaintiff. *Kadis v. Britt, supra* [224 N.C. 154, 29 S.E. 2d 543 (1954)].
>
> If the [defendant] is restrained from engaging in this business for a period of eighteen months the injury to him will be real and immediate, and he could not be made whole even though he ultimately prevails upon a determination of the merits.
>
> On the other hand, the plaintiff has failed to establish through its evidence the reasonable likelihood of any substantial monetary damage. If the injunction is granted the plaintiff would in effect have prevailed in the action no matter what the final determination might be.
>
> Therefore in the exercise of the Court's discretion based upon the foregoing analysis, I decline to issue in this case a temporary injunction pending the determination of the matter.

Whereas the majority would rely upon its statement that "the denial of a preliminary injunction would serve effectively to foreclose adequate relief to plaintiff" in determining whether injunctive relief should issue, the trial judge must also consider the opposite side of that coin in exercising his discretion. That is, the trial judge must also consider that the granting of injunctive relief may effectively foreclose defendant's defense to the validity of the contract and in effect decide the case adversely to him

before he has an opportunity to be heard upon the merits. This is one of the reasons that the ultimate decision whether to grant equitable relief is left to the sound discretion of the trial judge. In a case such as this, no matter how the judge rules with respect to the request for injunctive relief, he is effectively deciding the issue with respect to the enforcement of the covenant not to compete. This is as it should be; the trial judge is in the best position to exercise this discretion. He hears the evidence, observes the witnesses, considers the arguments of counsel, and weighs and balances the equities. After so doing, his determination should not be disturbed in the absence of abuse of discretion.

Plaintiff has failed to show that the court abused its discretion in denying the motion for a preliminary injunction. *Huskins v. Hospital, supra*, 238 N.C. 357, 78 S.E. 2d 116 (1953).

If the appeal is not dismissed, the decision of the Court of Appeals should be affirmed.

Justices COPELAND and EXUM join in this dissenting opinion.

GWENDOLYN HOFFMAN LAMB, EXECUTRIX OF THE ESTATE OF THOMAS WADE LAMB v. WEDGEWOOD SOUTH CORPORATION, STATLER HILTON, INC., HILTON INNS, INC., W. H. WEAVER, W. H. WEAVER CONSTRUCTION COMPANY, INC., HARRY R. DUDLEY, JR., INDIVIDUALLY, LOUIS RIGHTMIER, INDIVIDUALLY, THOMAS H. B. MORRISETTE, INDIVIDUALLY, DUDLEY, RIGHTMIER, MORRISETTE AND ASSOCIATES, A PROFESSIONAL ASSOCIATION, DARRELL TEAGUE, W. E. GRIFFIN AND TED CRADDOCK

No. 156A82

(Filed 31 May 1983)

1. Appeal and Error § 20— discretionary review of denial of motions for summary judgment error

The Court of Appeals erred in reviewing the trial court's denial of some of the defendants' motions for summary judgment since plaintiff's claims against the defendants rest on their allegedly negligent acts as well as their responsibility under agency principles, and negligence claims are rarely susceptible of summary adjudication and should ordinarily be resolved by trial of the issues.

2. Appeal and Error § 20— exercise of discretion in reviewing denial of summary judgment motion proper

Where defendants' motion for summary judgment was based solely on their contention that G.S. 1-50(5) barred a crossclaim as a matter of law, it was appropriate for the Court of Appeals to treat the defendants' purported appeal from denial of the motion as a petition for certiorari and, in its discretion, to review the trial court's order.

3. Architects § 3; Limitation of Actions § 4.2— actions against contractor or architect—statute of limitations

G.S. 1-50(5), the statute of limitations which limits the potential liability of architects, contractors, and perhaps others in the construction industry for improvements made to real property, barred plaintiff's claim against the architects since it was brought more than six years after the architects performed and furnished their services.

4. Architects § 3; Limitation of Actions § 4.2— action against architect—crossclaim by possessor of property—statute of limitations applicable

Through G.S. 1-50(5), the legislature intended to prohibit all claims and crossclaims against designers and builders filed beyond the six-year period even if these claims or crossclaims are filed by persons in possession and control. The second sentence is meant to preserve claims brought *against* persons in possession and control of an improvement to real property who might also have designed or built the improvement.

5. Architects § 3; Limitation of Actions § 4.2— actions against contractor or architect—statute of limitations—constitutionality

G.S. 1-50(5), which protects persons who perform certain services in the construction of improvements to real property, does not violate the equal protection provisions of either our state or the federal constitutions since there is a reasonable basis for the legislative classification in the statute.

6. Architects § 3; Limitation of Actions § 4.2— actions against contractor or architect—statute of limitations—no special emolument or privilege

G.S. 1-50(5) does not create a special emolument or privilege within the meaning of the constitutional prohibition since the legislature could reasonably adjudge that the public welfare would best be served by the classification the statute makes. Art. I, § 32 of the N.C. Constitution.

7. Architects § 3; Courts § 1; Limitation of Actions § 4.2— actions against contractor or architect—statute of limitations—constitutionality—barring death claim before it occurred

G.S. 1-50(5) does not violate Art. I, § 18 of our state's constitution by barring a claim before the injury giving rise to the claim occurs since the statute's effect is that, unless the injury occurs within the six-year period, there is no cognizable claim.

Justices MARTIN and FRYE did not participate in the consideration or decision of this case.

ON appeal from decision of the Court of Appeals, one judge dissenting, 55 N.C. App. 686, 286 S.E. 2d 876 (1982), affirming in part and reversing in part orders entered by *Judge Bailey* on 16 September 1980 and by *Judge Cornelius* on 3 November 1980 in ORANGE Superior Court.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, by James G. Billings, for plaintiff appellant.

Spears, Barnes, Baker and Hoof, by Alexander H. Barnes, for defendant appellants Wedgewood South Corporation and Hilton Inns, Inc.

Emanuel and Emanuel, by Robert L. Emanuel and George W. Kane III, for defendant appellees Harry R. Dudley, Jr., Louis Rightmier and Thomas H. B. Morrisette, individually, and Dudley, Rightmier, Morrisette and Associates, P.A.

EXUM, Justice.

The principal questions presented in this appeal involve the interpretation of General Statute 1-50(5)[1] and whether the statute is constitutional. We conclude that the statute bars all claims asserted in this case against defendant architects and that the statute is constitutional. We also conclude that the Court of Appeals should not have considered certain denials of motions for summary judgment made by some defendants.

Plaintiff is the widow of Thomas Wade Lamb, M.D. and the duly appointed executor of his estate. Dr. Lamb was a registered guest at the Hilton Inn in Greensboro, North Carolina, on 25 August 1977. In the early morning of 25 August Dr. Lamb apparently became involved in an altercation on the sixth floor of the motel. Dr. Lamb either fell or was pushed through a panel glass window near the elevator on the sixth floor. He fell to the ground and died from injuries suffered in the fall.

1. The statute, set out in full in the text of the opinion, essentially provides that claims for injury, property damage or wrongful death arising out of defective conditions of improvements to real property must be brought against defendants who design, plan or construct the improvements no later than six years from the "furnishing of such services." The statute directs that this limitation "shall not apply" to persons in possession and control of the improvements.

In 1965-66 W. H. Weaver Construction Company, Inc., of which W. H. Weaver is the principal stockholder, both of which will be hereinafter referred to as Weaver, constructed the building housing the hotel. Dudley, Rightmier, Morrisette and Associates, an architectural firm in Virginia, designed the building. Wedgewood South Corporation (Wedgewood) purchased the building on 23 December 1966 and as a franchisee of Statler Hilton Inns, Inc., and later Hilton Inns, Inc. (Hilton Inns), operated the hotel at the time of Dr. Lamb's death.

Plaintiff filed this action for wrongful death on 20 June 1978 against Wedgewood, alleging negligent maintenance of the glass window and negligent failure to provide protective devices. After answering the complaint, Wedgewood on 25 August 1978 filed a third party complaint seeking either contribution or indemnification from Weaver, and the architects, Harry R. Dudley, Jr. and Louis Rightmier, individually. Wedgewood alleged that if it were negligent, then these additional defendants were primarily negligent in, respectively, constructing and designing the building. On 13 December 1978 Weaver answered Wedgewood's third party complaint and asserted crossclaims seeking either contribution or indemnification from the architects on the ground of negligent design. On 3 May 1979 Judge McKinnon in Orange Superior Court, allowed the architects' motion to dismiss all claims against them for lack of personal jurisdiction.

On 11 July 1979 plaintiff filed an amended complaint which incorporated by reference plaintiff's original claim against Wedgewood and asserted claims against: (1) architects Dudley, Rightmier, and Morrisette, individually, and "Dudley, Rightmier, Morrisette and Associate," for negligent design; (2) Weaver, for negligent construction; (3) Darrell Teague, a bartender in the hotel lounge and allegedly an agent of Wedgewood, Hilton Inns, and the operator of the hotel lounge, W. E. Griffin, for assaulting Dr. Lamb and negligently pushing him through the window; (4) Ted Craddock, the hotel's night manager, for negligently failing to intervene adequately in the altercation between Teague and Dr. Lamb; (5) W. E. Griffin, as Teague's principal under the respondeat superior doctrine; (6) Wedgewood as Craddock's and Teague's principal under the respondeat superior doctrine; and (7) Hilton Inns as franchisor of Wedgewood for negligent mainte-

nance and on the theory that it was "estopped to deny" liability for the negligence of Teague and Craddock.

On 6 September 1979 Hilton Inns answered and crossclaimed against Weaver and the architects[2] for indemnity or contribution. The architects moved to dismiss all claims against them, asserting lack of personal jurisdiction, insufficiency of process, and *res judicata*. Judge Brewer denied these motions to dismiss on 3 June 1980. Wedgewood, Hilton Inns, Craddock, Griffin and Teague moved for summary judgment; Judge Bailey denied these motions on 16 September 1980. On 22 September 1980 the architects moved for summary judgment on all claims against them. Judge Cornelius granted this motion on 3 November 1980 only as to plaintiff's claim on the ground that G.S. 1-50(5) barred her claim. Judge Cornelius denied, however, the motion as to Hilton Inns' crossclaim on the ground the crossclaim was not barred by the statute.

Plaintiff appealed to the Court of Appeals from the entry of summary judgment for the architects. The architects sought to appeal the denial of their motion for summary judgment as to Hilton Inns' crossclaim. Hilton Inns, Wedgewood, and Craddock excepted to Judge Bailey's denials of their motions for summary judgment, and cross-assigned this ruling as error.

The Court of Appeals reviewed not only Judge Cornelius' entry of summary judgment against plaintiff on her claim against the architects, but all denials of summary judgment as well. A majority of the Court of Appeals concluded: (1) The architects' motion for summary judgment on plaintiff's claim was properly granted and their motion on Hilton Inns' crossclaim should have been allowed on the ground that both claims were barred by G.S. 1-50(5); therefore, Judge Cornelius' denial of this motion as to the crossclaim was reversed and his allowance of the motion as to plaintiff's claim was affirmed. (2) Craddock's motion for summary judgment should have been allowed since the forecast of evidence failed to show any negligence on his part; therefore, Judge Bailey's denial of this motion was reversed. (3) Wedgewood's and Hilton Inns' motions for summary judgment on plaintiff's claims

2. Hilton Inns actually crossclaimed only against Dudley and Rightmier as individuals and against the architectural firm as an entity.

were correctly denied by Judge Bailey on the ground that the forecast of evidence indicated plaintiff could make a *prima facie* case against these defendants; therefore, these rulings were affirmed. Judge Wells dissented from conclusions (1) and (2) on the grounds, respectively, that G.S. 1-50(5) was unconstitutional and the evidentiary forecast indicated plaintiff could make a *prima facie* case against Craddock.

I.

[1] We first conclude that the Court of Appeals erred in reviewing the trial court's denials of the Craddock, Wedgewood, and Hilton Inns motions for summary judgment. "[T]he *denial* of a motion for summary judgment is not appealable." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E. 2d 338, 344 (1978) (emphasis original); *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E. 2d 858 (1970). Further, "if an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E. 2d 431, 433 (1980).

Apparently the Court of Appeals believed it should exercise its discretion in favor of reviewing these denials of summary judgment. We think this exercise of discretion was inappropriate for the same reason we declined to exercise our supervisory powers to review the trial court's order setting aside a summary judgment for the defendant in *Waters v. Qualified Personnel, Inc., supra*, 294 N.C. at 209, 240 S.E. 2d at 344:

> [The reason] is that the trial court and the parties will be given an opportunity to develop more fully the facts in this dispute and to put the merits of the claim in bolder relief than they now are. Even if defendant should ultimately lose at trial, an appeal at that point would give the reviewing court a more complete picture, factually and legally, of the entire controversy between the parties. . . . [A] fuller development of the facts in this case . . . may well . . . shed more light than we now have in this record . . . .

Plaintiff's claim against Craddock rests on his allegedly negligent acts. Her claims against Wedgewood and Hilton Inns rest on their allegedly negligent acts as well as their responsibility, under

agency principles, for the acts of Craddock and Teague. Negligence claims are rarely susceptible of summary adjudication, and should ordinarily be resolved by trial of the issues. *Vassey v. Burch*, 301 N.C. 68, 73, 269 S.E. 2d 137, 140 (1980). The disputed agency relationships here, particularly the relationship between Hilton Inns, as franchisor, and Wedgewood, as franchisee, are complex and need fuller factual development than we have in this record.

The Court of Appeals, insofar as the parties purported to appeal from the trial court's denials of the Craddock, Wedgewood and Hilton Inns motions for summary judgment, should have dismissed the appeals, and it should have declined to exercise its discretionary authority to review them. We vacate, consequently, the rulings of the Court of Appeals on these motions, without expressing any opinion on their merits.

[2] The Court of Appeals correctly exercised its discretion to consider the denial of the architects' summary judgment motion as to the Hilton Inns' crossclaims. Although the trial court made the finding required under Rule 54(b) of the North Carolina Rules of Civil Procedure before a final judgment can be entered, *i.e.*, "that there is no just reason for delay of the entry of a final judgment," this finding does not make the denial of summary judgment immediately appealable because it is not a final judgment. *Tridyn Industries, Inc. v. American Mutual Ins. Co.*, 296 N.C. 486, 491, 251 S.E. 2d 443, 447 (1979). But the architects' motion is based solely on their contention that G.S. 1-50(5) bars the crossclaim as a matter of law. The issue is strictly a legal one and its resolution is not dependent on further factual development. *Cf. Tridyn Industries, Inc. v. American Mutual Ins. Co., supra* (certiorari denied because further factual development on extent and nature of damages needed to determine extent of coverage, if any, provided by insurance policy). Furthermore, the issue of the applicability and interpretation of this statute is squarely presented by plaintiff's appeal from the part of the order awarding summary judgment to the architects. Thus, it was appropriate for the Court of Appeals to treat the architects' purported appeal as a petition for certiorari and, in its discretion, to review the trial court's order. We consider, therefore, in Part III, the correctness of the Court of Appeals' determination of this issue.

II.

[3] The statute, G.S. 1-50(5), as applicable to this case,[3] was enacted in 1963. Act of June 19, 1963, ch. 1030, § 1, 1963 N.C. Sess. Laws 1300, 1300-01. It provides:

> No action to recover damages for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than six (6) years after the performance or furnishing of such services and construction. This limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action.

This statute, like many others enacted throughout the nation, is a "statute of repose," which this Court has recognized constitutes a substantive definition of, rather than a procedural limitation on, rights. *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E. 2d 415 (1982). The Court of Appeals noted the substantive quality of G.S. 1-50(5) in *Smith v. American Radiator & Standard Sanitary Corp.*, 38 N.C. App. 457, 461-64, 248 S.E. 2d 462, 465-67 (1978), *disc. rev. denied*, 296 N.C. 586, 254 S.E. 2d 33 (1979), *overruled on other grounds, Love v. Moore*, 305 N.C. 575, 581, 291 S.E. 2d 141, 146 (1982):

Statutes similar to, and in many cases identical with, our statute G.S. 1-50(5) have been adopted in a large number of jurisdictions. *See*, Comment, *Limitation of Action Statutes for Architects and Builders—Blueprint for Non-action*, 18 Cath. U.L. Rev. 361 (1969). Because of their unique manner of limiting ac-

3. General Statute 1-50(5) was substantially rewritten in 1981. Act of June 22, 1981, ch. 644, § 1, 1981 N.C. Sess. Laws 924, 924-25. The amended version became effective on 1 October 1981, but was made inapplicable to litigation pending at that time. *Id.* at § 2.

> tions, these statutes have been referred to as 'hybrid' statutes of limitations, having potentially both a substantive and a procedural effect. On the one hand, the date of injury is not a factor used in computing the running of the time limitation. The statute thus acquires its substantive quality by barring a right of action even before injury has occurred if the injury occurs subsequent to the prescribed time period. On the other hand, the statute's operation is similar to that of an ordinary statute of limitations as to events occurring before the expiration of the prescribed time period. Whether in such case the statute is to be interpreted as replacing entirely the statute of limitation which would otherwise be applicable or is to be interpreted as operating in conjunction with such other statute, is the principal question presented by this appeal. Courts of other States which have confronted this problem have held that the two statutes should be interpreted as operating in conjunction with each other.
>
> . . . .
>
> Following the interpretation placed upon the statute by the Supreme Courts of New Jersey and Virginia, we hold that G.S. 1-50(5) is to be interpreted in conjuntion with G.S. 1-52(5) [a three-year statute of limitations for personal injuries running from the time the action accrued] so that both statutes may be given effect. So interpreted, G.S. 1-50(5) provides an outside limit of six years 'after the performance or furnishing of such services and construction' of improvements to real property for the bringing of an action coming within the terms of that statute. Within that outside limit, G.S. 1-52(5) continues to operate and G.S. 1-50(5) does not serve to extend the time for bringing an action otherwise barred by the three year statute. In the present case, plaintiff's action against the appellant, Industrial Maintenance and Mechanical Service, Inc., was commenced more than three years after his action accrued, and the action as against this defendant is barred by G.S. 1-52(5).

We agree with this analysis.

General Statute 1-50(5), like its counterparts in other states, is designed to limit the potential liability of architects, contrac-

tors, and perhaps others in the construction industry for improvements made to real property. As commentators have noted:

> In the late 1950's and early 1960's, many architects and contractors felt threatened by the abolition of the privity requirement and the advent of 'discovery' provisions in tort statutes of limitation. In response, various architects' and contractors' trade associations sponsored legislation to curtail the time period during which an architect or contractor might be held liable for a negligent act. A total of forty-four architects' and contractors' statutes of repose have been passed by various state legislatures.

McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U.L. Rev. 579, 587 (1981) (footnotes omitted); *see also* Sission and Kelley, *Statutes of Limitations for the Design and Building Professions—Will They Survive Constitutional Attack*, 49 Ins. Counsel J. 243, 243 (1982); Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-Action*, 18 Cath. U.L. Rev. 361, 362-64 (1969); Comment, *Recent Statutory Developments Concerning the Limitations of Actions Against Architects, Engineers, and Builders*, 60 Ky. L.J. 462, 464-65 (1972); Annot., *Validity and Construction, as to Claim Alleging Design Defects, of Statute Imposing Time Limitations Upon Action Against Architect or Engineer for Injury or Death Arising Out of Defective or Unsafe Condition of Improvement to Real Property*, 93 ALR 3d 1242 (1979). Although these statutes vary in their specific time limitations and wording, they all set an outside time limit, generally running from the date of substantial completion of the service or improvement, after which actions may not be brought for personal injuries or property damage allegedly caused by deficiencies in the improvements to real property.[4]

4. The specific outside time limits vary from as few as four years to as many as fifteen years. *See, e.g.*, Ark. Stat. Ann. §§ 37-237 to -244 (Cum. Supp. 1981) (4 years but if injury or death occurs in third year have one year from injury to file action) (5 years to bring action for property damage); Colo. Rev. Stat. § 13-80-127 (Supp. 1982) (10 years with 2 years from injury to bring action if injury in ninth or tenth year); D.C. Code Ann. § 12-310 (1981) (10 years); Fla. Stat. Ann. § 95.11(3)(c) (West 1982) (15 years); Mass. Gen. Laws Ann. ch. 260, § 2B (West 1983) (6 years for tort action); Miss. Code Ann. § 15-1-41 (Supp. 1982) (10 years); Va. Code § 8.01-250 (1977) (5 years).

Since plaintiff's claim was brought more than six years after the architects performed and furnished their services, the statute by its terms clearly bars the plaintiff's claim against the architects. We conclude the statute by its terms also bars Hilton Inns' crossclaim against the architects for contribution or indemnity. The parties in their briefs to this Court do not seem to take a contrary position.[5]

[4] Both the trial court and the Court of Appeals, however, took the position that if Hilton Inns was in actual possession and control of the premises at the time of Dr. Lamb's death, then the six-year period of limitation would have no application to its crossclaim against the architects. Presumably these courts relied for this position on the second sentence of G.S. 1-50(5), which states: "This limitation shall not apply to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action." The trial court apparently believed that evidence at trial might demonstrate that Hilton Inns was in possession and control; it, therefore, denied the architects' motion for summary judgment on the crossclaim. The Court of Appeals, on the other hand, found "no evidence that Hilton Inns . . . was in actual possession." 55 N.C. App. 686, 696, 286 S.E. 2d 876, 883. The Court of Appeals therefore concluded that Hilton Inns was not excluded from the application of the six-year period and was barred from asserting its crossclaim by the statute.

Sellers v. Friedrich Refrigerators, Inc., 283 N.C. 79, 194 S.E. 2d 817 (1973), can be read to support the proposition that the second sentence in the statute refers to owners *as plaintiffs*. Because of the facts and the issue in *Sellers*, it should not be so read, and we reject such an interpretation of the statute.

The plaintiffs in *Sellers*, owners in possession and control of their home, brought action against both the installer and design-

5. Hilton Inns' primary position is that it was not in possession and control of the premises. But *it could have* argued that if it should be found, contrary to its contentions, to have been in possession and control, then the statute's second sentence excludes its crossclaim from the six-year limitation. It makes no such argument before us, although it did so in its brief to the Court of Appeals.

er-builder of a heating system for fire damage to their home allegedly caused by the system. The plaintiffs alleged negligent design, construction and installation of the system. The installation was completed in the summer of 1965. The home was destroyed by fire in January 1967 and the action was instituted on 8 October 1968, more than three years from the date of installation. The question addressed by the Court was whether plaintiffs' claim was governed by G.S. 1-52(5), the three-year statute of limitations, or by G.S. 1-50(5), the six-year statute. Plaintiffs argued that G.S. 1-50(5) gave them six years from the date of installation to bring their claim and the more restrictive three-year provision did not govern the case. Defendant argued to the contrary. The Court concluded that the three-year statute of limitations applied to bar plaintiffs' claim since, under the law as it then existed, plaintiffs' claim was said to have accrued at the time the heating system was installed rather than at the time the damage occurred. *See Matthieu v. Piedmont Natural Gas Co.*, 269 N.C. 212, 152 S.E. 2d 336 (1967). In concluding that G.S. 1-50(5) did not apply to plaintiffs' claim, the Court relied on the second sentence of the statute. The Court construed the sentence as meaning that the six-year period of limitation had no application to claims brought by plaintiffs in actual possession and control of the improvement.

It is apparent that the Court in *Sellers* construed G.S. 1-50(5) in an entirely different manner than is currently considered its appropriate interpretation. It viewed G.S. 1-50(5) as a statute intended to benefit claimants suing designers and builders. Instead of recognizing that the six-year limit was a substantive limitation defining the right to sue, the Court viewed it as an expansion of the applicable procedural limitation period from three to six years. The Court defined the issue before it as whether the plaintiffs, who were owners in possession and control, could invoke the benefit of what it saw as a more favorable six-year period of limitations. The Court reasoned that persons in possession and control were in the best position to discover defective improvements to the property, thus the legislature must have intended to deny them what it saw as the benefit of the statute. 283 N.C. at 86, 194 S.E. 2d at 821-22.

Since *Sellers* both this Court in *Bolick v. American Barmag Corp.*, *supra*, 306 N.C. 364, 293 S.E. 2d 415, and the Court of Ap-

peals in *Smith v. American Radiator and Sanitary Corp.*, *supra*, 38 N.C. App. 457, 248 S.E. 2d 462, have approved an analysis which recognizes that statutes such as G.S. 1-50(5) have a substantive as well as a procedural effect. If this analysis of the relationship between G.S. 1-50(5), the substantive statute of repose, and the ordinary procedural limitation had been applied in *Sellers*, the plaintiffs' claim would have been barred by G.S. 1-52(5), the applicable three-year procedural limitation under the law governing accrual of claims as it then was. The result would have been the same, and there would have been no need to consider whether the second sentence of G.S. 1-50(5) applied to plaintiffs' claim. It would be anomalous to use the *Sellers* holding as authority for the proposition that the six-year period in the statute is not a barrier to a claim brought by persons in possession and control against designers and builders when it is a bar to actions by third parties.

The result would be wrong for two reasons. First, it would have the effect of giving owners in possession a more favorable position than third parties who are less able to discover defects. This is a result the *Sellers* Court clearly intended to avoid.

Second, to hold that the six-year limitation affords no protection to designers and builders from claims brought by those in actual possession and control of realty would emasculate the statute and destroy the "repose" that the legislature intended to give. Third parties injured by defects in improvements cannot claim against architects, for example, beyond the six-year period under the statute. They can and in all cases probably would, however, sue persons in possession and control at the time of the injury. But if persons in possession and control are excluded from the ambit of the statute, they could crossclaim against the architects for contribution or indemnity. Yet the first sentence of the statute expressly prohibits "any action for contribution or indemnity" beyond the six-year period. We think it clear that the legislature intended to prohibit all claims and crossclaims against designers and builders filed beyond the six-year period even if these claims or crossclaims are filed by persons in possession and control. The second sentence is meant to preserve claims brought *against* persons in possession and control of an improvement to real property who might also have designed or built the improvement. If, of course, persons in possession and control neither designed nor built the improvement, then the first sentence would by its own terms have no application.

Two cases from other jurisdictions that have considered the meaning of exclusionary sentences like the second sentence of our statute have construed them to preserve claims brought *against* persons in possession and control, not to preserve claims brought *by* such persons. *See Salesian Society v. Formigli Corp.*, 120 N.J. Super. 493, 295 A. 2d 19 (1972), *aff'd* 124 N.J. Super. 270, 306 A. 2d 466 (1973); *Good v. Christensen*, 527 P. 2d 223 (Utah 1974). Only *Deschamps v. Camp Dresser & McKee, Inc.*, 113 N.H. 344, 306 A. 2d 771 (1973), of the cases we have found or been referred to, holds that an exclusionary sentence like ours preserves claims brought *by* persons in possession and control. The New Hampshire Court reasoned:

> The statute by its very terms is a limitation on the bringing of actions against the persons who designed, planned, supervised or constructed the facility. When it says that 'this limitation shall not apply' it clearly is referring to the limitation on plaintiffs as they are the ones who bring 'action to recover damages.' The exception would be meaningless if it were read to apply to actions against owners, tenants and others in possession and control, as defendants, because they are not included in the class against whom actions are barred by the six-year limitation, namely persons 'performing or furnishing the design, planning, supervision of construction or construction of the improvement. . . .' There would be no need to exclude those in possession from a class in which they were never included in the first place. On the other hand those in possession and control would be included in the class of persons who would be barred from bringing suit if it were not for the exception, which was intended to remove them from that class.

Id. at 346-47, 306 A. 2d at 773. We think this reasoning is fallacious. If those in possession and control also happen to have designed or built the improvement, a not uncommon occurrence, then claims against them brought beyond the limiting period would be barred were it not for the exclusionary sentence. The purpose of the sentence is to preserve these kinds of claims by exempting them from the limiting period.

III.

The real argument on whether plaintiff's claim and Hilton Inns' crossclaim are barred rests on plaintiff's contention that the statute is unconstitutional. Thus we reach the most significant issue in this appeal—the constitutionality of G.S. 1-50(5). Specifically, plaintiff contends the statute is unconstitutional because it violates the Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and article I, section 19 of the North Carolina Constitution; the prohibition against "exclusive or separate emoluments or privileges" in article I, section 32 of the North Carolina Constitution; and the guarantee of article I, section 18 of the North Carolina Constitution that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." These questions are of first impression for this Court, although they have been much litigated in a substantial majority of the other states with statutes and constitutions similar, if not identical, to ours. Because these jurisdictions have reached different conclusions, there is authority for both plaintiff's and the architects' positions. Our own principles of statutory construction and the most persuasive precedents from other jurisdictions lead us to conclude that General Statute 1-50(5) is a constitutional exercise of legislative authority.

In addition to considering the context in which G.S. 1-50(5) was enacted, we draw on several well-established principles for determining the constitutionality of any enactment. First, there is a presumption in favor of constitutionality; reasonable doubts must be resolved in favor of sustaining the act. *Mitchell v. North Carolina Industrial Development Financing Authority,* 273 N.C. 137, 144, 159 S.E. 2d 745, 750 (1968); 3 N.C. Index 3d, Constitutional Law § 10.2 (1976). Second, "[t]he State's Constitution is a restriction of powers; those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly. Therefore, so long as an act is not forbidden, the wisdom of the enactment is exclusively a legislative decision." *Mitchell v. North Carolina Industrial Development Financing Authority, supra,* 273 N.C. at 133, 159 S.E. 2d at 750.

A.

[5] Plaintiff's first constitutional challenge to G.S. 1-50(5) is that it violates the equal protection clauses of both our state and federal constitutions. Plaintiff argues the statute impermissibly distinguishes between architects, engineers, and contractors, who are protected from liability beyond the six-year period, and materialmen, suppliers, manufacturers and persons in actual possession and control of the property, who are not.

The statute, as we have noted, does protect persons who perform certain services in the construction of improvements to real property. Without attempting to determine definitively all classes of persons whom it may protect, we think the statute was aimed primarily at those who design and build real property improvements and who are not in actual possession and control of the improvement when an injury to person or property is caused by some defect in the improvement. The statute does not protect any person who at the time of injury is in actual possession and control of the improvement. We assume for purposes of addressing the constitutional argument, without deciding, that the statute offers no protection to materialmen, suppliers or manufacturers of goods used in the improvement.[6]

This kind of legislative classification does no violence to either our state or federal equal protection guarantees so long as it is reasonable. The equal protection clauses do not take "from the state the power to classify persons or activities when there is

6. Defendant architects contend the 1981 revision of G.S. 1-50(5) rendered moot the question whether materialmen, manufacturers, and suppliers were within the groups protected by the original statute. *See* G.S. 1-50(5)b.9. (1981). This argument is without merit since the subsequent revision does not obviate the necessity of interpreting the legislature's intent in and the constitutionality of the original act, which is the version applicable to plaintiff. Furthermore, in light of this Court's decision in *Raftery v. W. C. Vick Construction Co.*, 291 N.C. 180, 230 S.E. 2d 405 (1976), in which we held that an action for personal injuries brought by a person not in privity with the manufacturer of the product causing the injury does not accrue until the injury is sustained, it appears there was a significant period when manufacturers of materials for construction did not enjoy the same protection against claims as did designers and builders. At least until G.S. 1-50(6) was enacted, Products Liability Act, ch. 654, §§ 2, 7, 8, 1979 N.C. Sess. Laws 687, 689, 690, or the amendment to G.S. 1-50(5) became effective, Act of June 22, 1981, ch. 644, § 2, 1981 N.C. Sess. Laws 924, 925, there was not a specific statute of repose enacted for the benefit of manufacturers.

a reasonable basis for such classification and for the consequent difference in treatment under the law." *Guthrie v. Taylor*, 279 N.C. 703, 713-14, 185 S.E. 2d 193, 201 (1971), *cert. denied*, 406 U.S. 920 (1972). Although the reasonableness of a particular classification is a question for the court, there is a presumption that the classification is valid because such classifications are largely matters of legislative judgment. *ASP Associates v. City of Raleigh*, 298 N.C. 207, 226, 258 S.E. 2d 444, 456 (1979). Therefore, "a court may not substitute its judgment of what is reasonable for that of the legislative body, particularly when the reasonableness of a particular classification is fairly debatable." *Id.* "The equal protection clauses do not require perfection in respect of classifications. In borderline cases, the legislative determination is entitled to great weight." *State v. Greenwood*, 280 N.C. 651, 658, 187 S.E. 2d 8, 13 (1972).

Several recent, well-considered decisions in other jurisdictions have noted differences between the work of designers and builders, on one hand, and suppliers, materialmen, and manufacturers, on the other. The decisions conclude that these differences form a reasonable basis for legislative classification. The difference between "builders" and "suppliers" was well stated by the Pennsylvania Supreme Court in *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 277, 382 A. 2d 715, 719 (1978):

> Suppliers, who typically produce items by the thousands, can easily maintain high quality-control standards in the controlled environment of the factory. A builder, on the other hand, can pre-test his designs and construction only in limited ways—actual use in the years following construction is their only real test. Further, every building is unique and far more complex than any of its component parts. Even in the most uniform-looking suburban subdivision, each house stands on a separate plot of land; each lot may have slightly different soil conditions; one may be near an underground stream; and so forth. The Legislature can rationally conclude that the conditions under which builders work are sufficiently difficult that limitations should be placed on their liabilities, but not on the liabilities of suppliers.
>
> This Act of 1965 draws the sort of rational distinction, based on real differences in the business world, which our cases have consistently upheld.

Freezer Storage also pointed out the differences between "builders" and "owners," 476 Pa. at 276, 382 A. 2d at 718 (footnote omitted):

> It is manifestly rational to adjust time periods for liability for acts performed according to the substantive scope of the liability involved. The scope of liability of the class of builders differs significantly from that of the class of owners. First, the class of persons to whom builders may be liable is larger than the class to which owners may be liable. Landowners may be liable to others who come onto their land. Builders, however, may be liable both to the landowners and to others who use the land. Second, a builder may be liable for construction defects under various legal theories—contract, warranty, negligence, and perhaps strict liability in tort. Landowner liability for such defects, on the other hand, typically lies only in tort, unless the landowner is a lessor, in which case he is liable only for events occurring while the tenant is in possession. See generally, Restatement (Second) of Property, Landlord & Tenant, Chapters 10 & 17-19 (1977). Third, landowners can ordinarily avoid liability by taking adequate care of their land and structures and by regulating the number and type of persons entering the land and regulating the conditions of entry. The builder has no such control over his product after relinquishing it to the landowner. Landowner's liability is also controlled by the myriad of common law rules limiting liability to such classes as 'undiscovered trespassers,' 'mere licensees' and so forth. Builder's insurance and owner's insurance structures and pricing are also different. For any of these reasons the Legislature might rationally conclude that builders should remain liable for their mistakes for only 12 years after they complete construction, but that a landowner should remain liable for injuries caused on his land for as long as he is in possession. See 12 P.S. § 65.1.

Other recent decisions have relied on these or similar differences to justify the statutory classification now before us. *See, e.g., Yarbro v. Hilton Hotels Corp.*, 655 P. 2d 822 (Colo. 1982); *Burmaster v. Gravity Drainage District No. 2 of the Parish of St. Charles*, 366 So. 2d 1381 (La. 1978); *Klein v. Catalano*, 386 Mass. 701, 437 N.E. 2d 514 (1982); *McMacken v. State*, 320 N.W. 2d 131,

aff'd on rehearing, 325 N.W. 2d 60 (S.D. 1982); *Anderson v. Fred Wagner and Roy Anderson, Jr., Inc.*, 402 So. 2d 320 (Miss. 1981). The Louisiana Supreme Court in *Burmaster, supra*, 366 So. 2d at 1386, noted:

> Suppliers and manufacturers, who typically supply and produce components in large quantities, make standard goods and develop standard processes. They can thus maintain high quality control standards in the controlled environment of the factory. On the other hand, the architect or contractor can pre-test and standardize construction designs and plans only in a limited fashion. In addition, the inspection, supervision and observation of construction by architects and contractors involves individual expertise not susceptible of the quality control standards of the factory.

The Michigan Supreme Court in *O'Brien v. Hazelet & Erdal*, 410 Mich. 1, 17-18, 299 N.W. 2d 336, 342 (1980), correctly justified the statutory distinction in part on the following basis:

> The Legislature may also have thought it necessary to reduce the potential liability of architects and engineers in order to encourage experimentation with new designs and materials. Innovations are usually accompanied by some unavoidable risk. Design creativity might be stifled if architects and engineers labored under the fear that every untried configuration might have unsuspected flaws that could lead to liability decades later.

We recognize that there are a number of decisions in which similar statutory classifications have been struck down as being arbitrary, unreasonable and constitutionally impermissible. Perhaps the leading and most well-considered case for this position is *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E. 2d 588 (1967). *See also, Fujioka v. Kam*, 55 Hawaii 7, 514 P. 2d 568 (1973); *Loyal Order of Moose, Lodge 1785 v. Cavaness*, 563 P. 2d 143 (Okla. 1977); *Broome v. Truluck*, 270 S.C. 227, 241 S.E. 2d 739 (1978); *Kallas Millwork v. Square D Co.*, 66 Wis. 2d 382, 225 N.W. 2d 454 (1975).

The overwhelming majority of the most recent cases, however, which considered the constitutional equal protection challenge to statutes like ours have sustained the statutes. *See,*

e.g., Adair v. Koppers Co., Inc., 541 F. Supp. 1120 (N.D. Ohio 1982); *Barnhouse v. City of Pinole*, 133 Cal. App. 3d 171, 183 Cal. Rptr. 881 (1982); *Mullis v. Southern Co. Services, Inc.*, 250 Ga. 90, 296 S.E. 2d 579 (1982); *Twin Falls Clinic and Hospital Building Corp. v. Hamill*, 103 Idaho 19, 644 P. 2d 341 (1982); *Terry v. New Mexico State Highway Comm.*, 98 N.M. 119, 645 P. 2d 1375 (1982). *But see, Henderson Clay Products, Inc. v. Edgar Wood & Associates*, 122 N.H. 800, 451 A. 2d 174 (1982).

In essence we think the better reasoned decisions are those which have sustained the statutory classification against an equal protection constitutional attack. We conclude there is a reasonable basis for the legislative classification in the statute. Therefore, the classification does not violate the equal protection provisions of either our state or the federal constitutions.

B.

[6] Closely related to plaintiff's equal protection argument is her claim that G.S. 1-50(5) grants "exclusive or separate emoluments or privileges" to the persons it protects in violation of article I, section 32 of the North Carolina Constitution, which provides: "*Exclusive Emoluments.* No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

In *State v. Knight*, 269 N.C. 100, 152 S.E. 2d 179 (1967), this Court considered whether a statute which exempted individuals engaged in certain occupations from jury duty violated our constitutional prohibition against separate emoluments or privileges. Concluding that the statutory exemptions did not violate the provision, the Court said, *id.* at 107-08, 152 S.E. 2d at 183-84:

> Obviously, this provision does not forbid all classifications of persons with reference to the imposition of legal duties and obligations.
>
> . . . .
>
> Therefore, the limitation . . . does not apply to an exemption from a duty imposed upon citizens generally if the purpose of the exemption is the promotion of the general welfare, as distinguished from the benefit of the individual, and if there is a reasonable basis for the Legislature to conclude

that the granting of the exemption would be in the public interest. Here, as in questions arising under the exercise of the police power pursuant to the requirement of due process of law, the principle to be applied is that declared by Moore, J., for the Court, in *State v. Warren*, 252 N.C. 690, 114 S.E. 2d 660 [1960], where it is said:

> 'The presumption is that an act passed by the Legislature is constitutional, and it must be so held by the courts unless it appears to be in conflict with some constitutional provision. [Citations omitted.] The legislative department is the judge, within reasonable limits, of what the public welfare requires, and the wisdom of its enactments is not the concern of the courts. As to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts—it is a political question. The mere expediency of legislation is a matter for the Legislature, when it is acting entirely within constitutional limitations, but whether it is so acting is a matter for the courts. [Citations omitted.]'

As we have already demonstrated, the classifications in G.S. 1-50(5) are based on what the legislature could reasonably determine were valid distinctions between the groups protected by the statute and those not protected. The legislature could reasonably adjudge that the public welfare would be best served by the classification it chose to make. Therefore, the classification does not create a special emolument or privilege within the meaning of the constitutional prohibition.

A substantial majority of jurisdictions with constitutional provisions similar to our article I, section 32, have concluded that statutes similar to G.S. 1-50(5) do not violate their "special emoluments" prohibition. *Yarbro v. Hilton Hotels Corp., supra*, 655 P. 2d 822; *Twin Falls Clinic and Hospital Building Corp. v. Hamill, supra*, 103 Idaho 19, 644 P. 2d 341; *Burmaster v. Drainage Dist. No. 2 of the Parish of St. Charles, supra*, 366 So. 2d 1381; *Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., supra*, 402 So. 2d 320; *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 293 A. 2d 662 (1972); *Freezer Storage, Inc. v. Armstrong Cork Co., supra*, 476 Pa. 270, 382 A. 2d 715; *but see, Skinner v. Anderson, supra*, 38 Ill. 2d 455, 231 N.E. 2d 588; *Pacific Indemnity Co. v. Thompson-Yeager, Inc.*, 260 N.W. 2d 548 (Minn. 1977).

We agree with the majority position on this question.

C.

[7] Plaintiff's final argument on constitutionality is that G.S. 1-50(5) violates article I, section 18 of the North Carolina Constitution which states:

> *Courts shall be open.* All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

The building containing the allegedly defective window through which Dr. Lamb fell to his death in August 1977 was completed in 1966. The six-year statutory period thus expired several years before Dr. Lamb's death. Plaintiff argues, "The effect of the statutory scheme therefore would be to bar a death claim before the death ever occurred." Therefore, plaintiff says, the effect of the statute is to deny her a remedy "for an injury done" in violation of our Constitution.

We do not believe it correct to say that the statute bars a claim before the injury giving rise to the claim occurs. The statute's effect is that unless the injury occurs within the six-year period, there is no cognizable claim. It is as the Supreme Court of New Jersey stated in *Rosenberg v. Town of North Bergen, supra*, 61 N.J. at 199-200, 293 A. 2d at 667, with reference to a similar New Jersey statute:

> It does not bar a cause of action; its effect, rather, is to prevent what might otherwise be a cause of action, from ever arising. . . . The injured party literally has *no* cause of action. The harm that has been done is *damnum absque injuria*—a wrong for which the law affords no redress. The function of the statute is thus rather to define substantive rights than to alter or modify a remedy. The Legislature is entirely at liberty to create new rights or abolish old ones as long as no vested right is disturbed.

A number of courts in other jurisdictions with a constitutional provision practically identical to ours have sustained statutes practically identical to ours against the challenge that the statute abolished a claim that would have been otherwise cognizable at common law. In Pennsylvania, for example, a provision of the state constitution, Pa. Const. art. 1, § 11, provides:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

The Pennsylvania Supreme Court concluded that the Pennsylvania statute which precluded claims against designers and builders of real property improvements brought more than twelve years after the improvement was completed did not violate its constitution. *Freezer Storage, Inc. v. Armstrong Cork Co., supra*, 476 Pa. at 279-80, 382 A. 2d at 720. The Court said:

> We have in the past upheld against an Article 1, Section 11 challenge a statute which abolished a common law cause of action without providing a substitute. In *Sherwood v. Elgart*, 383 Pa. 110, 117 A. 2d 899 (1955), a statute which excuses innkeepers from liability to guests for certain losses for which they would have been liable at common law was challenged because it destroyed a common law cause of action without providing a substitute. We rejected this contention.
>
> In interpreting this constitutional provision, we should remember that no one 'has a vested right in the continued existence of an immutable body of negligence . . . . [T]he practical result of a [contrary] conclusion would be the stagnation of the law in the face of changing societal conditions.' *Singer v. Sheppard*, 464 Pa. 387, 399, 346 A. 2d 897, 903 (1975) (upholding statute which substituted mandatory 'no fault' auto insurance for certain causes of action in tort). Indeed we have long explicitly recognized that societal conditions occasionally require the law to change in a way that denies a plaintiff a cause of action available in an earlier day:
>
> > '[W]hat today is a trespass, may, by development of law, not be so tomorrow. Therefore, it will not do to say . . ., since, once upon a time, at common law, [an event] would

> have been a tort, giving rise to a claim for damages, that at the present day such an act has all the attributes of a common-law trespass . . . .'

Jackman v. Rosenbaum Co., 263 Pa. 158, 175, 106 A. 238, 244 (1919), aff'd, 260 U.S. 22, 43 S.Ct. 9, 67 L.Ed. 107 (1922) (upholding the power of both the Legislature and the courts to modify remedies available to landowners involved in party-wall disputes). In *Fadgen v. Lenkner*, 469 Pa. 272, 365 A. 2d 147 (1976), we abolished the time-honored cause of action for criminal conversation, without explicit mention of this constitutional provision.

Section 22 of article 1 of the Louisiana Constitution contains this provision:

> All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.

Yet the Louisiana Supreme Court found no constitutional infirmity in its statute which barred claims against designers, planners, and supervisors of construction of real property improvements more than ten years after acceptance of the work by the owner. *Burmaster v. Gravity Drainage District No. 2, supra*, 366 So. 2d 1381. The Louisiana Court said, *id.* at 1387-88:

> Where an injury has occurred for which the injured party has a cause of action, such cause of action is a vested property right which is protected by the guarantee of due process. *See Gibbes v. Zimmerman*, 290 U.S. 326, 332, 54 S.Ct. 140, 78 L.Ed. 342 (1933); *Pritchard v. Norton*, 106 U.S. 124, 132, 1 S.Ct. 102, 27 L.Ed. 104 (1882). However, where the injury has not yet occurred and the cause of action has not yet vested, the guarantee of due process does not forbid the creation of new causes of action or the abolition of old ones to attain permissible legislative objectives. *See Silver v. Silver*, 280 U.S. 117, 122, 50 S.Ct. 57, 74 L.Ed. 221 (1929). Our jurisprudence has recognized the validity of legislative regulation of causes of action, including replacement and even abolition, that one person may have against another for personal injuries.

. . . .

> The application of La.R.S. 9:2772 herein does not bar plaintiff's cause of action; rather, it prevents what might otherwise be a cause of action from ever arising. Thus, injury or death occurring after the preemptive period established by the statute forms no basis for recovery against those whom the statute protects and a cause of action never vests. The harm that has been done (allegedly attributable to Fromherz) is *damnum absque injuria*—a loss which does not give rise to an action for damages against the person causing it.

The Mississippi Supreme Court has reached the same result in face of an "open courts" constitutional provision almost identical to ours. *Anderson v. Fred Wagner and Roy Anderson, Jr., Inc., supra*, 402 So. 2d 320. *See also Adair v. Koppers Co., Inc., supra*, 541 F. Supp. 1120; *Yarbro v. Hilton Hotels Corp., supra*, 655 P. 2d 822; *Klein v. Catalano, supra*, 386 Mass. 701, 437 N.E. 2d 514; *McMacken v. State, supra*, 320 N.W. 2d 1311. *But see Overland Construction Co., Inc. v. Sirmons*, 369 So. 2d 572 (Fla. 1979); *Saylor v. Hall*, 497 S.W. 2d 218 (Ky. 1973).

In *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904), the question was whether our "London Libel Law," now codified as General Statutes 99-1 and 99-2, violated the "open courts" provision of our Constitution. G.S. 99-1 to -2 (1979). This law abolished the right of a libeled plaintiff to recover punitive damages from "a newspaper or periodical" if these entities published a timely retraction and if the libel was published in good faith. The Court in *Osborn* concluded that the legislature could constitutionally abolish the common law right to recover punitive damages under these circumstances. The court stressed, however, the proposition that the statute still permitted the recovery of "actual damages." It interpreted these damages to be all ordinary, compensatory damages, including actual pecuniary loss, damages for pain, mental suffering, inconvenience, and for injury to reputation. The Court, in dictum, stated that had the legislation abolished plaintiff's right to recover these kinds of compensatory damages it would have considered the act in violation of the "open courts" provision. *Id.* at 639-40, 47 S.E. at 815.

Here we do not have to decide whether the legislature could constitutionally abolish all tort claims against builders and de-

signers arising out of improvements they built or designed. We refrain from holding, as our Court of Appeals did and as other courts have done, that the legislature may constitutionally abolish altogether a common law cause of action. Neither do we mean to say that it cannot. The question is not before us. For the legislature has not absolutely abolished all claims against builders and designers arising out of improvements they built or designed. Rather, it has established a time period beyond which such claims may not be brought even if the injury giving rise to the claim does not occur until the time period has elapsed.[7]

We are confident that this condition to the legal cognizability of a claim does not violate the constitutional guarantee that for every "injury done" there shall be a "remedy." The "remedy" constitutionally guaranteed "for an injury done" is qualified by the words "by due course of law." This means that the remedy constitutionally guaranteed must be one that is legally cognizable. The legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not. "[T]he General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter." *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E. 2d 231, 234 (1956), *quoted in Bolick v. American Barmag Corp., supra*, 306 N.C. at 370, 293 S.E. 2d at 420.

Furthermore, since plaintiff's cause of action had not accrued at the time this legislation was passed, no vested right is involved. "[N]o person has a vested right in a continuance of the common or statute law. . . ." *Pinkham v. Unborn Children of Jather Pinkham*, 227 N.C. 72, 78, 40 S.E. 2d 690, 694 (1946). " '[A]

7. We recognize the legislature might pass a statute of repose that had a time period so short it would effectively abolish all potential claims. Such is not the case with the six-year limitation at issue here. We note the following relevant statistic which was set forth in *Klein v. Catalano, supra*, 386 Mass. at ---, 437 N.E. 2d at 521, n. 13: "According to evidence presented at the Hearings on H.R. 6527, H.R. 6678, and H.R. 11544 before Subcommittee No. 1 of the House Committee on the District of Columbia, 90th Cong., 1st Sess. 28 (1967), 93% of all claims against architects are brought within six years of the substantial completion of the construction. Collins, Limitation of Action Statutes for Architects and Builders—An Examination of Constitutionality [29 Fed'n of Ins. Counsel Q. 41, 47-8 & n. 29 (1978)]."

right cannot be considered a vested right unless it is something more than such a mere expectancy as may be based upon an anticipated continuance of the present general law . . . .' " *Id.* at 79, 40 S.E. 2d at 695 (quoting Cooley's Constitutional Limitations, Vol. II, page 749); *see also, Duke Power v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88, n. 32 (1978). We conclude, therefore, that the statute does not violate Article I, section 18, of our state's constitution.

CONCLUSION

The result is: That part of the Court of Appeals' decision which affirms the denial of the Teague, Craddock and Hilton Inns motions for summary judgment against plaintiff is vacated because these rulings were not appealable and should not have been considered in the Court of Appeals' discretion. The rulings of the trial court on these motions remain in effect. So much of the Court of Appeals' decision which concludes that the architects' motion for summary judgment on plaintiff's claim was properly allowed by the trial court is affirmed. So much of the Court of Appeals' decision which concludes that the architects' motion for summary judgment on Hilton Inns' crossclaim should have been allowed is correct for the reasons we have given rather than the reasons given by the Court of Appeals; therefore this part of the decision is modified and affirmed. The decision of the Court of Appeals is, therefore,

Vacated in part; affirmed in part; modified and affirmed in part.

Justices MARTIN and FRYE did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ANDREW WEDDINGTON CRAIG

STATE OF NORTH CAROLINA v. FRANCIS MARION ANTHONY

No. 257A82

(Filed 31 May 1983)

1. Constitutional Law § 31; Criminal Law § 62— denial of motion for polygraph examination at expense of State—no error

Defendant failed to demonstrate how the trial court's denial of his motion for a polygraph examination to be conducted by the State Bureau of Investigation at the expense of the State was error since (1) defendant's credibility was never in issue at trial because he did not testify, (2) neither the record nor the brief indicated that a stipulation was entered into concerning the admissibility of polygraph test results, and (3) he failed to show that, as an indigent, he could not receive a fair trial without the requested assistance.

2. Criminal Law § 99.2— pretrial remarks to jury—lapsus linguae

The trial judge's remark during the jury selection process that one defendant had entered a plea of guilty to a charge of common law robbery was merely a *lapsus linguae* not constituting prejudicial error even though defendant had pleaded not guilty to the charge since it was part of an introductory comment by the trial judge and since both prior to and subsequent to the judge's statement he informed the jurors that both defendants had pleaded not guilty to all charges.

3. Jury § 7.12— challenge for cause of prospective juror—opposition to death penalty

The trial court properly sustained the State's challenge for cause of a prospective juror who indicated that she did not think she could vote for the death penalty.

4. Criminal Law § 96— objection to improper testimony sustained—jury instructed to strike from their recollection

Where the trial judge sustained an objection and instructed the jury to strike a statement of a witness from their recollection of the evidence, the court properly withdrew the incompetent evidence from the jury, cured any possible prejudice, and properly denied defendant's motion for a mistrial.

5. Criminal Law § 102.2— no error in State's argument

The defendant was not denied a fair trial when the prosecutor argued to the jury that they should compare a picture of the circular wounds on the victim's body and the soles of the defendant's shoes since defendant failed to object to the closing argument and since the evidence supported the inference that the defendant's shoes could have caused the circular impressions made on the neck of the deceased.

6. Criminal Law § 120— instructions on how to proceed if jury found defendant guilty

A jury was made fully aware that they could find the defendant not guilty even though the trial judge gave detailed instructions on how to proceed if they found the defendant guilty and failed to instruct on what the jury should do if they found the defendant not guilty.

7. Criminal Law § 48— implied admissions—properly admitted

The trial court did not err by allowing a State's witness to testify, in reference to defendants, that "They said: 'We ----- them white folks up.' " "And then one of them said to the other, 'yea, we sure did, man.' " The statements were at least implied admissions by the defendants.

8. Criminal Law § 102.6— argument to jury—failure to object—standard imposed

Where defendants failed to object to the closing argument of the prosecutor, the standard of review was one of "gross impropriety."

9. Criminal Law § 102.6— reference to defendants as wolves in jury argument—no "gross impropriety"

Defendants were not denied a fair trial when the district attorney referred to them as "wolves" during his closing argument since the references to wolves and wolfpack were made to illustrate by way of analogy how concert of action leads to each of the defendants' responsibility for the murder of the victim, and the prosecutor's remarks were not abusive and were not an attempt to place before the jury his personal beliefs or opinions.

10. Criminal Law § 102.6— argument to jury—reference to witness not called to testify

The trial court did not err in allowing the prosecutor to make reference in his argument to the jury to a witness who was not called to testify by either the State or the defendant since the prosecutor's remarks were intended to make the jury aware that the State had not called a witness to testify because his testimony would have added nothing to its case and that its evidence was uncontradicted.

11. Criminal Law § 102.7— jury argument—reference to witness's criminal record

The prosecutor was properly allowed to argue that there was no evidence presented at trial which would suggest that the State's principal witness had a prior record since the prosecutor was merely arguing an inference which could logically arise in light of the very thorough and lengthy cross-examination conducted by defendant.

12. Criminal Law § 135.4— sentencing phase—finding that murder especially heinous, atrocious and cruel

The trial judge properly instructed the jury that they could find from the evidence that the murder of a victim was especially heinous, atrocious and cruel as provided for by G.S. 15A-2000(e)(9) even though the victim had a blood alcohol level of .29.

13. Criminal Law § 102.10— argument to jury—discussion of mitigating circumstances

Any error caused by the prosecutor commenting on the existence of a statutory mitigating circumstance was harmless since the trial judge peremptorily instructed the jury that the mitigating circumstance existed and since the prosecutor corrected a statement and argued only the weight that such a mitigating factor should be afforded.

14. Criminal Law § 135.4— failure to submit request to take polygraph test as mitigating circumstance—no error

The mere fact that a defendant desires to take a polygraph test is not, standing alone, evidence of a mitigating circumstance since a defendant's personal desire to submit to a polygraph examination, absent a police request, does not indicate a willingness to cooperate with the police.

15. Criminal Law § 135.4— sentencing phase—referring to defendants as "human animals" and "wolfpack"

The trial court did not err in allowing the prosecutor to refer to two defendants as "human animals" and members of a "wolfpack" during his closing argument at the sentencing phase of the trial since the prosecutor was arguing how the evidence supported the aggravating factor that the murder was part of a course of conduct which included the commission of crimes of violence against other people, since he was arguing that the defendants' senseless, cold-blooded actions were especially heinous, atrocious and cruel, and since the wolfpack analogy was supported by the evidence. G.S. 15A-2000(e)(11).

Justice EXUM dissenting as to sentence.

Justice FRYE joins in this dissenting opinion.

ON appeal by both defendants as a matter of right from the judgments of *Seay, Judge*, entered at the 22 February 1982 Session of Superior Court, CABARRUS County. Both defendants were charged in indictments, proper in form, with the murder of Edith Davis Ritch, with robbery with a dangerous weapon of Edith Davis Ritch and with the common law robbery of Seab Albert Ritch. The jury returned verdicts of guilty on each charge as to each defendant and recommended the sentence of death for both defendants for their first degree murder convictions. Judge Seay imposed a forty year sentence against each defendant for robbery with a dangerous weapon, each sentence to run consecutively to the sentence imposed for the first degree murder of Edith Ritch. Judge Seay also imposed a ten year sentence against each defendant for the common law robbery of Seab Ritch with the sentences to run consecutively to the sentences imposed for the robbery with a dangerous weapon conviction. Judge Seay ordered the im-

position of the death penalty against each defendant for the first degree murder of Edith Ritch. On 24 November 1982 we granted the defendants' motions to bypass the Court of Appeals on the common law robbery and robbery with a dangerous weapon convictions.

In relevant part the State's evidence tended to show the following: Seab and Edith, husband and wife, left their home in Concord on 3 July 1981 and went to a friend's home in Charlotte for the purpose of drinking alcoholic beverages. The Ritches drank heavily from 3 July 1981 until 8 July 1981, at which time they decided to return to their home in Concord. Seab and Edith Ritch consumed large quantities of intoxicants on 8 July 1981 and on their way home decided to stop under a bridge on the Rocky River Road in order to finish drinking a bottle of vodka. After stopping at the bridge Seab Ritch left his vehicle, walked down to the river's edge where a man was fishing and offered the man a drink. At this time Edith Ritch was in the passenger's seat of the Ritch vehicle.

After awhile five persons, including the defendants, began fishing on the opposite side of the river from where Seab Ritch was located. There was some conversation across the river causing the defendants and Betty Howie to come over to where Seab Ritch was sitting for the purpose of getting a drink. After drinking Mr. Ritch's vodka the defendants attacked and beat Mr. Ritch and took from his possession a wallet, some cash and a pocket knife. When this was completed they descended upon Edith Ritch who was extremely intoxicated with a blood alcohol level of at least .29. After telling the defendants that she had no money Edith Ritch was jerked from her vehicle and thrown to the ground. The defendant Craig took the pocket knife obtained from Seab Ritch and began stabbing Edith Ritch as she begged him not to kill her. After repeatedly stabbing the victim the defendant Craig handed the knife to Betty Jean Howie, an accomplice, who testified on behalf of the State pursuant to a plea bargain. She stabbed the victim repeatedly in the abdomen. Then the defendant Anthony took the knife and stabbed Edith Ritch until death ensued. In all Edith Ritch was stabbed thirty-seven times.

Before leaving the scene the defendants removed from the Ritch vehicle Edith Ritch's pocketbook, an F.M. radio converter

and the truck's battery. The defendants left in a car driven by Betty Jean Howie's brother, Bobby Howie, who was not involved in either incident. The defendant Craig was arrested for murder on 10 July 1981 and defendant Anthony was arrested for murder on 12 July 1981.

The defendants did not present any evidence during the guilt phase of the trial.

At the end of all the evidence the jury found each defendant guilty of first degree murder, robbery with a dangerous weapon and common law robbery.

At the sentencing hearing for the first degree murder convictions the State relied on its evidence presented during the guilt determination of the trial and did not present any additional evidence. In each case the State relied on three circumstances in aggravation: (1) That the murder was committed for pecuniary gain, (2) that the murder was especially heinous, atrocious and cruel and (3) that the murder was part of a course of conduct in which other crimes of violence were committed against other persons by each defendant.

The defendant Francis Marion Anthony did not present any evidence at the sentencing phase of this trial. In his case the court in mitigation submitted to the jury: (1) That Anthony had no significant history of prior criminal activity and (2) that the jury should consider any other circumstance or circumstances arising from the evidence which is deemed to have mitigating value. The jury unanimously found the existence of all three aggravating circumstances, found the existence of at least one mitigating circumstance and found that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. Thereupon, the jury recommended and the court so ordered the imposition of the death penalty.

The defendant Andrew Weddington Craig offered the testimony of his mother during the sentencing phase of the trial in order to show that he supported his wife, attended church and was a good son. In his case the court in mitigation submitted four circumstances for the jury's consideration. The jury unanimously found the existence of all three aggravating circumstances, found the existence of at least one mitigating circumstance and found

that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. As a result the jury recommended and the court so ordered the imposition of the death penalty.

Additional facts relevant to the defendants' assignments of error will be incorporated into the opinion.

Rufus L. Edmisten, Attorney General, by Assistant Attorney General Charles M. Hensey, for the State.

W. Erwin Spainhour, for the defendant-appellant Andrew Weddington Craig.

James C. Johnson, Jr., for the defendant-appellant Francis Marion Anthony.

COPELAND, Justice.

GUILT PHASE—CRAIG

I.

[1] In his first argument the defendant, Craig, contends that the trial court erred by denying his motion for a polygraph examination to be conducted by the State Bureau of Investigation at the expense of the State. The defendant maintains that by refusing his request the trial court denied him a valuable tool which could have bolstered his credibility at trial and would have aided his attorney's preparation of his defense. The defendant has failed to demonstrate how the trial court's denial of his motion was error.

In the first instance the defendant's credibility was never in issue at trial because he did not testify. In addition the results of a polygraph test could not have been admitted into evidence for any purpose absent a stipulated agreement between the defendant and the State. *State v. Milano*, 297 N.C. 485, 256 S.E. 2d 154 (1979). Neither the record nor the briefs indicate that a stipulation was entered into concerning the admissibility of polygraph test results. Therefore the polygraph test results, even if available and helpful, would not have been admissible to bolster the defendant's credibility. Secondly, the defendant, in requesting the polygraph test results for the purpose of preparing his defense, is asserting that he, as an indigent, is entitled to state financed expert assistance. In *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905

(1977), we held that expert assistance need only be provided by the State when the defendant can show that it is probable that he will not receive a fair trial without the requested assistance. The defendant fails to explain and we do not see how the polygraph test would have aided the preparation of his defense. We, therefore, find no error. We note that the trial in this case took place prior to our decision in *State v. Grier*, --- N.C. ---, 300 S.E. 2d 351 (1983), in which we held that polygraph evidence was no longer admissible at trial in any case, and thus would be of no assistance to him upon retrial.

II.

[2] During the jury selection process after the first twelve jurors were seated the trial judge made some introductory remarks including the following:

> The defendant, Andrew Weddington had (sic) also come into Court and has entered a plea of guilty to a charge that on July 8, 1981, he did commit Common Law Robbery in that he did, with force, assault Seab Albert Ritch, put him in fear, and that he did then unlawfully and feloniously take and carry Mr. Ritch's property valued at $14.00, being a man's wallet with $4.25 in currency.

The defendant Craig contends that this statement by the trial judge was an expressed opinion as to the defendant's guilt since he had in fact pleaded not guilty to the charge of common law robbery. We find the trial court's statement to be merely a *lapsus linguae* not constituting prejudicial error. *State v. Poole*, 305 N.C. 308, 289 S.E. 2d 335 (1982). Although the above statement was part of an introductory comment by the trial judge, it should be considered within the context of all the introductory remarks. This is the method for reviewing jury charges, *State v. Poole, supra*, and should be applicable to opening remarks. In reviewing the entire statement made to the prospective jurors we find that prior to this unfortunate slip of the tongue the judge told the jurors that both defendants pleaded not guilty to all charges. In addition, at the end of his opening remarks the trial judge reminded the prospective jurors that each defendant is presumed innocent as a result of his pleas of not guilty. The reference to defendant Craig's plea of guilty was not repeated and appears from the record to be totally accidental. In fact defense counsel

did not attempt to have this remark corrected and this *lapsus linguae* might very well have gone unnoticed until counsel began preparing his record on appeal. We, therefore, find no prejudice to the defendant and overrule this assignment of error.

III.

[3] Defendant Craig next assigns as error the trial court's decision to sustain the State's challenge for cause of prospective juror Mrs. Forrester. The defendant maintains that although Mrs. Forrester unequivocally stated that she would not impose the death penalty she could not be properly challenged for cause because the prosecutor and the court led her to that conclusion. In reviewing Mrs. Forrester's responses in their entirety, it appears that her initial response that she did not think she could vote for the death penalty would have been sufficient to sustain a challenge for cause. *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243 (1982), *cert. denied*, --- U.S. ---, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982). As noted in our recent decision of *State v. Kirkley*, --- N.C. ---, --- S.E. 2d --- (filed 3 May 1983), the trial judge must view the juror's demeanor and responses in determining the degree of conviction in the prospective juror's answers. The trial judge in this case, through an abundance of caution, wanted the juror to give a clear "yes" or "no" answer. Not once throughout her examination did Mrs. Forrester indicate that she might vote for the death sentence under any circumstance. We find no violation of the rule established by the Supreme Court of the United States in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968). This assignment of error is overruled.

IV.

[4] During the State's case in chief, Betty Jean Howie testified to the facts and circumstances surrounding her involvement in and the defendants' participation in the robbing of Seab Ritch and the stabbing of his wife Edith Ritch. In corroboration of Betty Howie's testimony the State offered as evidence a statement given to Special Agent Barry M. Lea of the State Bureau of Investigation by Betty Howie on 24 August 1981, approximately six weeks after the alleged incidents. The statement was read to the jury by Mr. Lea. The defendant objected to the statement "Sonny said, 'Let's rob the mother ------' " on the grounds that it did not corroborate Betty Howie's testimony. The trial judge sustained

the objection and instructed the jury to strike that statement from their recollection of the evidence. The defendant assigns as error the trial judge's denial of his motion for a mistrial on the grounds that the statement was so prejudicial that it prevented him from receiving a fair trial. A motion for mistrial is addressed to the sound discretion of the trial judge and those rulings will not be reversed on appeal absent an abuse of discretion. G.S. 15A-1061; *State v. Smith*, 301 N.C. 695, 272 S.E. 2d 852 (1981). "[W]hen the court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured." *State v. Smith*, 301 N.C. at 697, 272 S.E. 2d at 855. The trial judge's instructions in the case *sub judice* cured any possible prejudice which could have only been slight in the light of all the testimony. This assignment of error is overruled.

V.

[5] The defendant Craig also maintains that he was denied a fair trial when the prosecutor argued to the jury that they should compare a picture of the circular wounds on the victim's body and the soles of the defendant's shoes in order to reach the conclusion that the wounds were caused by the defendant's shoes when that conclusion was not supported by expert testimony. The defendant contends that through this argument the prosecutor improperly placed before the jury incompetent and prejudicial matters based on his own beliefs not supported by the evidence. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). However, trial counsel is allowed wide latitude in his argument to the jury and "may argue the law and the facts in evidence and all reasonable inferences drawn from them. . . ." *State v. Kirkley*, --- N.C. ---, --- S.E. 2d --- (slip opinion p. 19 (1983)); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975).

The defendant failed to object to the closing argument and therefore may now only assert that the trial judge should have corrected the argument *ex mero motu*. In a case where the defendant fails to object to the State's closing argument the standard of review is one of gross impropriety. *State v. Kirkley*, --- N.C. ---, --- S.E. 2d --- (filed 3 May 1983, p. 19); *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

The defendant's basis for this assignment of error is that one of the State's own expert witnesses was unable to testify that

shoes belonging to the defendant had any relation to the murder. As a result the defendant contends that the prosecutor should not have argued to the jury that the physical evidence supported the conclusion that the defendant's shoes made a mark on the deceased victim's neck. The record reveals that the expert witness to which the defendant refers was qualified only as an expert in fingerprint identification. The fact that a fingerprint expert was unable to connect the shoes to the murder does not preclude the conclusion that the prosecutor argued to the jury. The evidence presented, including the testimony of the State Medical Examiner, supports the inference that the defendant's shoes could have caused the circular impressions left on the neck of the deceased. The fact that no expert was called to establish this connection merely goes to the weight of the evidence. We find no error in the State's argument and therefore no gross impropriety which would require the trial judge to act *ex mero motu.* This assignment of error is overruled.

VI.

[6] The defendant Craig next asserts that the trial court erred when it failed to instruct on what the jury should do if they found the defendant not guilty. The defendant contends that the error was highlighted by the fact that the judge gave detailed instructions to the jury on how to proceed if they found the defendant guilty. "It is well established in this jurisdiction that a charge is to be construed as a whole and isolated portions of a charge will not be held prejudicial where the charge as a whole is correct and free from objection." *State v. Poole,* 305 N.C. 308, 324, 289 S.E. 2d 335, 345 (1982). A review of the judge's charge to the jury makes it obvious that the jury was made fully aware that they could find the defendant not guilty. The judge's instructions as a whole did not express an opinion as to the guilt or innocence of the defendant. We find no prejudice in the trial judge's instructions and therefore overrule this assignment of error.

GUILT PHASE—ANTHONY

VII.

[7] Defendant Anthony contends that the trial court committed a prejudicial error by allowing State's witness John Howie to testify about alleged statements made by the defendants when

Mr. Howie could not identify which defendant made the statements. The defendant maintains that the statements were inadmissible hearsay denying him the right to confront the declarant. The witness, Mr. John Howie, was seated in the front seat of a car in which both defendants and Betty Jean Howie were seated in the back seat. Mr. Howie testified to and the defendants object to the following statement, "They said: 'we ----- them white folks up.'" "And then one of them said to the other, 'yea, we sure did, man.'" Mr. Howie was unable to identify who made the statements but he did testify that the statements were made by the defendants (the two males) while both were in the back seat of the car.

These statements are at least implied admissions by the defendant Anthony. *State v. Spaulding*, 288 N.C. 397, 219 S.E. 2d 178 (1975), *death sentence vacated*, 428 U.S. 904, 96 S.Ct. 3210, 49 L.Ed. 2d 1210 (1976). The test for determining whether a statement made by a co-defendant can be admitted into evidence as an implied admission was clearly stated by Justice Branch (now Chief Justice) in *State v. Spaulding, supra:*

> (I)f the statement is made in a person's presence by a person having firsthand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he was in a position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission. (Citations omitted.)

288 N.C. at 406, 219 S.E. 2d at 184. It is clear from the testimony of Mr. Howie that at least one of the two defendants made the statements objected to by defendant Anthony. It is also apparent that Anthony was able to hear the statements and did not attempt to deny his involvement. In fact, Mr. Howie's testimony indicates that the statements were made by one defendant to the other. We therefore find that the statements testified to by Mr. Howie were admissible against defendant Anthony at least as implied admissions. In addition, any error could not have been prejudicial because Mr. Bobby Howie, the driver of the car, later testified to the same conversation without objection by the defendant Anthony. As a result, any benefit from the earlier ob-

jection was waived. *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093, 51 L.Ed. 2d 539, 97 S.Ct. 1106 (1977). This assignment of error is overruled.

Although defendant Anthony raised questions by his assignments of error numbers one, three and four, those questions are deemed abandoned because they were not discussed in his brief. *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976). Rule 28(b)(5) of the Rules of Appellate Procedure states in part: "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."

GUILT PHASE—ANTHONY AND CRAIG

VIII.

[8] The defendants argue that they were denied a fair trial because the district attorney referred to them as "wolves" during his closing argument. Specifically the defendants object to the analogy employed by the State which compared them and their actions to a pack of wolves. The defendants failed to object to the closing argument of the prosecutor. "When a party fails to object to a closing argument we must decide whether the argument was so improper as to warrant the trial judge's intervention *ex mero motu*. *State v. Kirkley*, --- N.C. ---, --- S.E. 2d --- (filed 3 May 1983, p. 15). The standard of review is one of "gross impropriety." *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

The law in this jurisdiction allows counsel wide latitude in arguing to the jury. Counsel may argue the law and the facts in evidence and all reasonable inferences arising therefrom but counsel may not interject facts and personal beliefs not supported by the evidence. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). The defendants contend that the prosecutor was being abusive and interjecting his personal views and opinions when he compared them to a pack of wolves. We disagree with the defendants' argument.

[9] The prosecutor's remarks were not abusive and were not an attempt to place before the jury his personal beliefs or opinions. The references to wolves and wolfpack were made to illustrate by way of analogy how concert of action leads to each of the defend-

ants' responsibility for the murder of Edith Ritch. The analogy employed by the State is supported by the evidence presented and was phrased in a manner which was not inflammatory. As the Supreme Court of the United States has held, a prosecutor must prosecute cases in earnest and strike hard blows, although he may not strike foul ones. *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). In the case *sub judice* the prosecutor struck hard blows but they were not foul. As a result the trial court did not err by failing to intervene *ex mero motu* during the prosecutor's closing argument. This assignment of error is overruled.

IX.

[10] The defendants also contend that their right to a fair trial was denied when the prosecutor made reference to a witness who was not called to testify by either the State or the defendant. The prosecutor stated:

> Michael Moss, the ten-year-old boy didn't testify nor did we put him on the stand. Why? He was there the same as Mr. Carr and the same as Mr. Johnson. He's a ten-year-old boy. The ones best able to describe it, the adult and the man that's pushing adulthood. Four years makes a difference at that time. No, we didn't call Michael Moss. Don't you know if his statement was inconsistent you would have heard from him now.

The defendants maintain that the argument improperly placed before the jury facts, to-wit, Michael Moss' testimony, not supported by the evidence and was also an improper comment on their failure to produce witnesses. Once again the defendants have failed to object to the State's argument and therefore we look to see only if the argument was grossly improper requiring the trial judge to act *ex mero motu*. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). We do not find the State's argument to be grossly improper.

The State is allowed to draw the jury's attention to the fact that the defendant failed to produce evidence which contradicts the State's case. *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1979). "It is permissible for the prosecutor to draw the jury's attention to the failure of the defendant to produce exculpatory

testimony from witnesses available to defendant." *State v. Thompson*, 293 N.C. 713, 717, 239 S.E. 2d 465, 469 (1977). Accord: *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977). The prosecutor's remarks in the case *sub judice* were intended to make the jury aware that the State had not called Michael Moss to testify because his testimony would have added nothing to its case and that its evidence was uncontradicted. This is not error. This assignment of error is overruled.

SENTENCING PHASE—CRAIG

X.

[11] Defendant Craig contends that he was denied a fair sentencing because the prosecutor argued that Betty Jean Howie, a co-defendant who testified on behalf of the State pursuant to a plea arrangement, had no prior criminal record. The defendant maintains that the prosecutor's reference to Betty Howie's lack of a prior criminal record was not supported by the evidence and was therefore improper. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). The witness, Betty Jean Howie, was subjected to an extensive cross-examination recorded in over one hundred pages of trial transcript. The prosecutor argued that there was no evidence presented at trial which would suggest that Betty Howie had a prior criminal record. The prosecutor was merely arguing an inference which could logically arise in light of the very thorough and lengthy cross-examination conducted by the defendants. Counsel is allowed to argue all facts in evidence and all reasonable inferences which may be drawn from those facts. *State v. Kirkley*, --- N.C. ---, --- S.E. 2d ---, (filed 3 May 1983). We find no error in the prosecutor's argument and therefore overrule this assignment of error.

XI.

[12] The defendant Craig also argues that it was error for the trial judge to instruct the jury that they could find from the evidence that the murder of Edith Ritch was especially heinous, atrocious and cruel as provided for by G.S. 15A-2000(e)(9). Defendant maintains that the evidence does not support this aggravating circumstance because the victim, with a blood alcohol level of .29, was so intoxicated that she must have been practically anesthetized against the torture of the thirty-seven stab wounds inflicted

with a pocket knife by the defendants. This argument is unsupported by any authority, it is meritless and we therefore overrule this assignment of error.

SENTENCING PHASE—ANTHONY

XII.

[13] During his argument to the jury the prosecutor, in reference to the mitigating circumstances which were to be submitted, stated:

> The first circumstance alleged by each of them is that he has no significant history of prior criminal activity. It's incumbent on the Court to submit to you, as our law would require. Have you heard any evidence whatever on that?

The defendant Anthony argues that it was prejudicial for the prosecutor to state; "Have you heard any evidence whatever on that?", because it was an improper comment on the existence of a statutory mitigating circumstance. At the time this statement was made the trial judge interrupted the prosecutor and called the parties to the bench. At this point the prosecutor corrected his statement and argued only the weight that such a mitigating factor should be afforded. In *State v. Kirkley*, --- N.C. ---, --- S.E. 2d --- (filed 3 May 1983) we stated that the weight a mitigating circumstance is assigned is entirely for the jury to decide. It follows that counsel is entitled to argue what weight circumstances should ultimately be assigned. Any error is harmless since the trial judge peremptorily instructed the jury that this mitigating circumstance existed in the case of each defendant. This assignment of error is overruled.

XIII.

Defendant Anthony also maintains that he was prejudiced by the trial judge's instructions to the jury concerning the weighing of aggravating and mitigating circumstances. We find that the instructions in this case were clear, concise, and consistent with those instructions upheld by this Court in *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982), *cert. denied*, --- U.S. ---, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982) and *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243 (1982), *cert. denied*, --- U.S. ---, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982). We also note that defendant Anthony failed

to argue this assignment of error in his brief and it is deemed abandoned pursuant to Rule 28(b)(5) of the Rules of Appellate Procedure. We have nevertheless reviewed the instructions anyway and find no error. This assignment of error is overruled.

SENTENCING PHASE—CRAIG AND ANTHONY

XIV.

[14] The defendants argue that the trial court erred when it denied their motions to have the fact that they requested to take a polygraph test submitted to the jury as a mitigating circumstance. The mere fact that a defendant desires to take a polygraph test is not, standing alone, evidence of a mitigating circumstance. We have defined mitigating circumstances as:

> (A) fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first degree murder, but which may be considered as extenuating, or reducing the moral culpability of the killing or making it less deserving of the extreme punishment than other first-degree murders.

State v. Irwin, 304 N.C. 93, 104, 282 S.E. 2d 439, 446-47 (1981). The defendants contend that their own desire to take a polygraph test was some evidence from which the jury could have found as a mitigating factor their willingness to cooperate with the police. We disagree. There is no evidence that the State even suggested that the defendants take a polygraph test. A defendant's personal desire to submit to a polygraph examination, absent a police request, does not indicate a willingness to cooperate with the police. The record indicates that the request to take the polygraph test was solely self-serving. Such a request has no relevance to the question before the jury at the sentencing stage of this trial. We note that our recent decision in *State v. Grier*, --- N.C. ---, 300 S.E. 2d 351 (1983) makes polygraph test results incompetent for all purposes at trial. We therefore overrule this assignment of error.

XV.

[15] The defendants also assert that the trial court erred by allowing the prosecutor to refer to them as "human animals" and members of a "wolfpack" during his closing argument at the

sentencing phase of the trial. Although no objection was raised by either defendant, the trial judge is under a duty to act *ex mero motu* if the argument is *grossly improper. State v. Kirkley,* --- N.C. ---, --- S.E. 2d --- (filed 3 May 1983); *State v. Johnson,* 298 N.C. 355, 259 S.E. 2d 752 (1979).

In *State v. Smith,* 279 N.C. 163, 181 S.E. 2d 458 (1971), this Court held that it was error for a prosecutor to characterize the defendant as "lower than the bone belly of a cur dog." 279 N.C. at 165, 181 S.E. 2d at 459. In *Smith,* however, the prosecutor made numerous remarks totally unsupported by the evidence. Some of the remarks in *Smith* concerned what the prosecutor thought about the defendant's character, that he didn't believe a word the defendant said and that he knew when a case called for the death penalty. The types of arguments proscribed by the law of this State and found as error in *State v. Smith, supra,* are those which place before the jury the personal beliefs or knowledge of counsel which are not supported by evidence presented at trial. *State v. Kirkley,* --- N.C. ---, --- S.E. 2d --- (filed 3 May 1983); *State v. Britt,* 288 N.C. 699, 220 S.E. 2d 283 (1975).

During his argument to the jury at the sentencing phase of the trial the prosecutor made the following statements:

> The course of conduct wherein Edith Ritch was killed was part of a course of conduct wherein the defendants acting as a wolfpack, a group of human animals, descended first on Seab Ritch, beat him mercilessly, continued to Edith Ritch, and there added only the knife to what they had done to Seab Ritch.
>
> * * *
>
> The extreme, overwhelming heinous brutality of this act echoes through the facts. The defendants, by their premeditated, cold-blooded, wolfpack acts, called for their own punishment, their own penalty.

In each instance where the prosecutor referred to the defendants as animals, he did so for a legitimate purpose supported by the evidence. In the first above cited statement the prosecutor was arguing how the evidence supported the aggravating factor that the murder was part of a course of conduct which included the

commission of crimes of violence against other people. G.S. 15A-2000(e)(11). Analogizing these defendants' acts to those of a wolfpack illustrates how each defendant was involved in this course of conduct. It was not designed to place before the jury, nor did it place before the jury, personal beliefs or knowledge not supported by the evidence. The evidence in this case clearly supports the prosecutor's analogy. In the prosecutor's second statement he was arguing that the defendants' senseless, cold-blooded actions were especially heinous, atrocious and cruel. The wolfpack analogy was supported by the evidence that Edith Ritch was extremely intoxicated, defenseless and not in any condition to identify them for their crime against her husband. Perhaps the prosecutor's analogy was a bit colorful but it was not error and was certainly not so grossly improper as would require the trial judge to act *ex mero motu.* We hold that the prosecutor's closing argument during the sentencing phase of this trial did not improperly place before the jury facts, beliefs or inferences not supported by the evidence. This assignment of error is overruled.

XVI.

Pursuant to G.S. 15A-2000(d)(2) we have reviewed the record in this case in order to determine (1) whether the record supports all the aggravating circumstances upon which the jury based its sentence of death, (2) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor and (3) whether the death penalty is an excessive or disproportionate punishment in light of similar cases, considering both the defendants and the crimes. As a result of our review of the record, the transcript and the briefs in this case, we find that each aggravating circumstance found by the jury is supported by the record. We also find that the death sentence imposed against each defendant is not the product of any passion, prejudice or other arbitrary factor which would require us to overturn the sentences.

In *State v. Williams,* --- N.C. ---, 301 S.E. 2d 335 (1983), we held, speaking through Justice Mitchell, that for purposes of proportionality review the case before the Court must be compared with "*all* cases arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court. . . ." --- N.C.

at ---, 301 S.E. 2d at 355. (Original Emphasis.) We have carefully reviewed the briefs, the record and the transcript in this case and have compared this case with all similar cases which have been appealed to this Court. *State v. Williams*, --- N.C. ---, 301 S.E. 2d 335 (1983). The record before us reveals that these defendants participated in the brutal slaying of a heavily intoxicated woman who was utterly defenseless. After beating and robbing the victim's husband the defendants directed their attention to robbing the victim, Edith Ritch. When the victim told the defendants that she had no money the defendants jerked her from her vehicle and unleashed an unprovoked, cruel and brutal attack upon her. The defendants took turns stabbing the victim with a pocket knife inflicting thirty-seven wounds on her body as she begged for her life. These tortuous acts ceased only after Edith Ritch was completely and mercifully silenced by death. As the victim lay lifeless on the ground the defendants took her pocketbook and other belongings. The attack on Mrs. Ritch was carried out in an uncommonly brutal manner as the defendants willingly took turns inflicting mortal wounds. We believe that the imposition of the death penalty against each defendant is not disproportionate or excessive considering both the crime and these defendants. We therefore refuse to exercise our discretion and will not set aside the sentence of death imposed against each defendant.

In all phases of the trial below as to each defendant and as to each crime for which they were convicted we find no error.

No error.

Justice EXUM dissenting as to sentence.

Believing most strongly that it is error entitling defendants to a new sentencing hearing for the prosecutor in argument to characterize defendants as "wolves" and "human animals," I dissent from that portion of the majority opinion which finds no error in the sentencing phase of the case.

Throughout his arguments in both the guilt and sentencing phases of the case, the prosecutor repeatedly used the metaphor of a "wolfpack" in describing the actions of defendants. He argued, for example, as follows in the guilt phase:

> As a wolfpack who chases down its quarry, who is the more responsible, the wolf that grabs the flank and holds or the wolf that grabs the neck and kills?
>
> . . . .
>
> The strength of the pack is the wolf, and the strength of the wolf is the pack.
>
> . . . [C]ould a more accurate analogy be drawn than a wolfpack? . . . Edith Ritch never left there because a pack of humans acting as wolves descended on her, as they had previously descended on Seab Ritch.
>
> . . . .
>
> Like wolves of the pack they pounced on him, Betty just as much as the rest.
>
> . . . .
>
> Once the wolfpack had begun, once the beating of Seab Ritch was started, there became a frenzy.

Then in the sentencing phase the prosecutor continued with the metaphor:

> The course of conduct wherein Edith Ritch was killed was part of a course of conduct wherein the defendants acting as a wolfpack, a group of human animals, descended first on Seab Ritch, beat him mercilessly, continued to Edith Ritch, and there added only the knife to what they had done to Seab Ritch.
>
> . . . .
>
> The defendants, by their premeditated, cold-blooded, wolfpack acts, called for their own punishment, their own penalty. . . . Not by anything you, the Court, or any witness did, but by their own hands, by their own acts, by their own merciless, vicious brutality, do they call for the only just penalty in this case, that the penalty of death be imposed.

Both the prosecutor at trial and the majority here refer to this argument as an analogy, apparently in an effort to accord it some kind of logical force. To be valid as an analogy, the argu-

ment would have to rest on these premises: wolves run in packs; all human beings act like wolves; therefore these defendants ran in a pack. Since the minor premise is obviously invalid, the argument fails as an analogy. The argument is nothing more than a metaphor in which human beings are likened to wolves. It has no logical force, but serves only to diminish the status of defendants in the eyes of the jury.

Both this Court and the Court of Appeals have strongly disapproved of prosecutors likening defendants to the animal kingdom in the trial of criminal cases. *State v. Smith*, 279 N.C. 163, 181 S.E. 2d 458 (1971); *State v. Brown*, 13 N.C. App. 261, 185 S.E. 2d 471 (1971), *cert. denied*, 280 N.C. 723, 186 S.E. 2d 925 (1972). *Smith* was a capital case in which defendant was convicted of rape and received life imprisonment at trial upon the jury's recommendation. In closing argument the prosecutor argued, among other things, that a person who did what defendant did is "lower than the bone belly of a cur dog." 279 N.C. at 165, 181 S.E. 2d at 459. The prosecutor also argued that he knew "when to ask for the death penalty and when not to"; he described a sexual assault case that he refused to prosecute; he called the defendant in argument a "liar"; and he disparaged the defendant's character witnesses. *Id.* at 165-66, 181 S.E. 2d at 459-60. For all of these transgressions this Court, in an opinion by Justice Higgins, awarded defendant a new trial on the question of his guilt. The Court quoted with approval from *Berger v. United States*, 295 U.S. 78, 88 (1935), as follows:

> 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'

279 N.C. at 167, 181 S.E. 2d at 460. Although no objection was made at trial to the argument, this Court said, "The trial judge who heard the argument and failed to intervene on his own motion, was derelict in his duty." *Id.* at 167, 181 S.E. 2d at 461.

In *State v. Brown, supra*, 13 N.C. App. 261, 185 S.E. 2d 471, the Court of Appeals, in an opinion by then Chief Judge Mallard, expressly disapproved of the prosecutor's referring to defendant in closing argument as a "young animal," but did not under the circumstances of the case find the error sufficient to give defendant a new trial on the question of his guilt. *Id.* at 270, 185 S.E. 2d at 477.

Other courts have also disapproved of metaphors which liken human beings to animals. In ordering a new trial in a death case on other grounds, the Louisiana Supreme Court observed, for guidance on retrial, that "[T]he prosecutor also characterized the defendant as an 'animal,' an epithet which we have previously warned may constitute reversible error." *State v. Marshall*, 414 So. 2d 684, 688 n. 3 (La.), *cert. denied*, --- U.S. ---, 103 S.Ct. 468 (1982). The Pennsylvania Supreme Court, in a capital case in which the jury fixed life imprisonment as the punishment, gave the defendant a new trial because the prosecutor, among other things, referred to defendants as "hoodlums" and "animals." *Commonwealth v. Lipscomb*, 455 Pa. 525, 317 A. 2d 205 (1974). The Pennsylvania Court characterized such arguments as expressions of the prosecutor's personal belief in the accused's guilt which have no legitimate place in argument. *Id.* at 528, 317 A. 2d at 207.

Although I think it error, I would not award defendants a new trial on the question of their guilt because of the animal metaphor argument. The evidence of guilt is so overwhelming and uncontradicted by defendants at trial, that the result on the guilt phase would have been the same even without this argument. I strongly believe, however, that such an argument requires a new sentencing hearing.

In a capital case, the jury's decision to recommend death, a "recommendation" which is binding on the trial court under our procedure, is the most awesome decision one group of human beings can make about another human being. In the trial of a case in which this decision may be made, nothing should be permitted that dilutes the jury's terrible responsibility, or as this Court has

said through Justice, now Chief Justice, Branch, "lighten[s] [its] solemn burden." *State v. Hines*, 286 N.C. 377, 386, 211 S.E. 2d 201, 207 (1975). *See also State v. White*, 286 N.C. 395, 211 S.E. 2d 445 (1975). In *Hines* and *White* defendants who had received death sentences at trial were given new trials by this Court. In *Hines* the prosecutor during the jury selection process said to one juror, "And to ease your feelings, I might say to you that [no] one has been put to death in North Carolina since 1961." 286 N.C. at 382, 211 S.E. 2d at 204. *White* relied on *Hines* in finding similar reversible error in a prosecutor's argument that made reference to defendant's "automatic appeal to the Supreme Court of North Carolina . . . . If any error is made in this court, that Court will say." 286 N.C. at 402, 211 S.E. 2d at 449. In *White* the Court found reversible error in this argument notwithstanding the trial court's sustaining defendant's objection and instructing the jury to disregard the argument.

By the same reasoning, arguments to the jury in capital cases comparing defendants to animals subtly dilutes the jury's ultimate responsibility to say whether defendant shall live or die. Defendant after all is a human being created like the jurors themselves by God in His own image and given dominion over all other creatures. Genesis 1:26-28; 2:4-23. In making its life or death decision the jury's focus on defendant's humanity should not be blurred. If the jury recommends death, its full realization that it is a human being whom it has condemned to die must not be weakened. To suggest to the jury by animal metaphors in a capital case that a defendant is something less than human impermissibly deprives defendant of that status in the order of creation to which he or she rightfully belongs—a status of which the jury must not lose sight in making its life or death determination.

The animal metaphor argument in this capital case so tainted and diluted the jury's decision on the ultimate question of punishment that defendants, in my view, must be given new sentencing hearings. The argument is so fundamentally wrong that the trial judge should have corrected it on his own motion. *See State v. Smith*, *supra*, 279 N.C. 163, 181 S.E. 2d 458. Nor is the harm done lessened by the fact that some of this argument occurred in the guilt phase. *See State v. Hines*, *supra*, 286 N.C. 377, 211 S.E. 2d 201.

I also think the trial court committed reversible error in the sentencing phase when it refused defendants' requests to have their pretrial offer to take a polygraph examination submitted for the jury's consideration.

In considering this question, the majority has not adopted the appropriate test in determining when a proffered mitigating circumstance should be submitted. The majority quotes only a definition of a mitigating circumstance from *State v. Irwin*, 304 N.C. 93, 104, 282 S.E. 2d 439, 446-47 (1981). The very next sentence in *Irwin* gives the appropriate test for whether a particular circumstance should be submitted. The appropriate test and a corollary are set forth in *Irwin* as follows:

> The U.S. Supreme Court has held that any aspect of defendant's character, record or circumstance of the particular offense which defendant offers as a mitigating circumstance should be considered by the sentencer. *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973, 98 S.Ct. 2954 (1978). However, evidence irrelevant to these factors may be properly excluded by the trial court. *Lockett v. Ohio, supra*, p. 604, n. 12.

304 N.C. at 104, 282 S.E. 2d at 447. This Court also held in *State v. Johnson*, 298 N.C. 47, 72, 257 S.E. 2d 597, 616 (1979), that upon proper request the trial court must submit to the jury any circumstance "that the jury could reasonably deem . . . to have mitigating value . . . ."

The question is, therefore, whether defendants' offer to take a polygraph examination during the investigative stages of this case is a circumstance relating to their character which a jury might reasonably deem to have mitigating value. I think it is such a circumstance. It is in the nature of an offer of cooperation with investigators much like defendant Craig's consent to the search of his home, which *was* submitted as a mitigating circumstance in his case.

The majority's reliance on *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983), holding polygraph test results inadmissible as evidence at trial even in the presence of a stipulation of admissibility, is misplaced. *Grier* overruled earlier cases holding that the parties could stipulate the admissibility of polygraph test

results. This was the law when defendants here made their offer to take the test. Their offer, therefore, should be considered in light of the law governing such offers at the time the offer was made. Further, even in *Grier* we noted that our holding was not intended to "affect the use of the polygraph for investigatory purposes." 307 N.C. at 645, 300 S.E. 2d at 361.

In this case when defendants offered to submit to polygraph examinations they presumably were aware that under the law at that time, the test result could be stipulated into evidence at their trials. Further, the polygraph test results might have been an aid in the investigation of these crimes, particularly in the investigator's efforts to determine more precisely the roles which defendants—as opposed to their accomplice and principal state's witness, Betty Howie—played in the crimes.

Thus, each defendant's offer to submit to polygraph testing was relevant to his character in that it was some evidence of his willingness to cooperate in the investigation of the murders. The jury should have been allowed to determine in each case whether the offer did constitute a mitigating circumstance.

Justice FRYE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. CHRIS LEE RICHARDSON

No. 14A83

(Filed 31 May 1983)

1. Robbery § 4.7— armed robbery—insufficiency of evidence

The State's evidence was insufficient to support conviction of defendant for armed robbery where it tended to show that defendant threatened the victim and struck him with a stick; the victim threw his duffel bag at defendant in self-defense; upon returning to the scene to retrieve his duffel bag, the victim was again threatened by defendant and left without picking up his bag; when the victim came back two days later, some personal items from his duffel bag were missing, including $17.00 from his wallet; and defendant was the person who took the $17.00 from the victim's wallet, since there was no evidence that defendant's threats or use of violence preceded or were concomitant with the taking of the victim's property and that defendant's threats induced the victim to part with his property.

2. **Criminal Law § 15.1— motion for change of venue—pretrial publicity—inability to receive fair trial in county**

In a prosecution for second degree murder, armed robbery and assault with a deadly weapon inflicting serious injury in which various accounts of the incident in question suggested that it resulted from the perpetrator's disapproval of a group of people he thought were homosexuals who were swimming and sunning along a river, the trial court did not err in the denial of defendant's motion for a change of venue because of pretrial publicity where the vast majority of newspaper articles and radio and television news accounts of the incident were factual and noninflammatory. Nor did two newspaper editorials about the incident, the media's reports on meetings held by homosexuals and their supporters to protest the incident, or a public opinion survey showing that 87% of those surveyed were aware of the incident show that defendant could not receive a fair trial in the county so as to require a change of venue.

3. **Criminal Law § 22— arraignment—name not on arraignment calendar—harmless error**

While the trial court erred in arraigning defendant without his consent when his name failed to appear on the arraignment calendar in violation of subsection (a) of G.S. 15A-943, such error was not prejudicial where defendant was nevertheless given a week's interval between his arraignment and trial pursuant to subsection (b) of that statute, and where defense counsel had previously advised the trial court that they would be ready for trial on the date of the arraignment.

4. **Criminal Law § 101— failure to admonish jury fully before each recess**

The trial court did not err in failing to give the jury the full admonishments set forth in G.S. 15A-1236(a) prior to each recess where admonishments given to the jury prior to the recesses ranged from extensive instructions containing every caution set forth in G.S. 15A-1236(a) to a brief reminder to be aware of the instructions previously given by the court.

5. **Homicide § 16— competency of statements as dying declarations**

Statements made by deceased were properly admitted as dying declarations pursuant to G.S. 8-51.1 where the trial court determined upon supporting evidence that deceased did in fact make statements to the effect that he knew he was dying. It was unnecessary for the court to find further that deceased believed there was no hope of recovery since deceased obviously had such a belief if he believed he was going to die.

DEFENDANT was tried during the 28 September 1981 Session of Superior Court, DURHAM County, before the *Honorable John C. Martin.* A jury found defendant guilty of murder in the second degree, robbery with a dangerous weapon, and assault with a deadly weapon inflicting serious injury. Defendant was sentenced to 25 years to life for the second-degree murder conviction, a concurrent term of seven years for the armed robbery conviction,

and a concurrent five-year term for the assault with a deadly weapon inflicting serious injury conviction. The Court of Appeals, in an opinion written by *Judge Hill* and with which *Judge Webb* separately concurred, found no prejudicial error in defendant's trial. Because *Judge Hedrick* dissented in part to the Court of Appeals' decision, defendant appeals to this Court as a matter of right under N.C.G.S. § 7A-30(2) (1981).

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

Samuel Roberti, Attorney for defendant-appellant.

FRYE, Justice.

The primary issue here—the same issue over which the three reviewing judges of the Court of Appeals could not agree—is whether the trial court erred in denying defendant's motion to dismiss the charge of robbery with a dangerous weapon at the close of the State's evidence. We agree with defendant, for the reasons discussed below, that the evidence was not sufficient as a matter of law to support defendant's conviction of robbery with a dangerous weapon. In addition, we address four other issues defendant raises: 1) whether the trial court erred in denying defendant's motion for a change of venue; 2) whether the trial court erred in arraigning defendant when defendant's name did not appear on the arraignment calendar; 3) whether the trial court erred in failing to extensively admonish the jurors at every recess not to discuss the case until they were to begin deliberating; and 4) whether the trial court erred in admitting a statement the victim made shortly before he died. We find no prejudicial error with respect to the trial court's rulings on each of these four issues.

I.

In the early afternoon of 12 April 1981 defendant, together with his wife Wendy Richardson, Guy Charles Osbahr, and Kathy Reddish (now Kathy Osbahr), went to the Little River in Durham County for an outing. After drinking some beer and playing in the water, defendant and Osbahr went into the woods. While they were there they saw Jerry Michael Penny. Penny testified that defendant threatened him and then hit him with a stick. Defend-

ant stated that he had not provoked the fight, that he had hit Penny only after Penny had struck him.

After the altercation with Penny, defendant and Osbahr saw Mark Demarias. Demarias testified that defendant threatened him as well and also struck him with a stick. At one point, Demarias stated that he threw his green duffel bag at defendant in self defense. Upon returning to retrieve it, defendant threatened him again, so Demarias left without picking up his bag. Demarias testified that when he came back two days later, some personal items from his duffel bag were missing, including $17 from his wallet and the duffel bag itself. The evidence tended to show that defendant had taken the $17 from Demarias' wallet.

After this second altercation, defendant, Osbahr and several others went over to the area where Ronald Antonevitch was seated. The State's evidence tended to show that defendant struck Antonevitch over the head and in the side with a stick while Antonevitch was sitting on a rock reading a book. Antonevitch later died from the blow to his head. Defendant testified that he struck Antonevitch in self defense because he thought Antonevitch was reaching for a gun.

The evidence also tended to show that defendant engaged in these altercations because he was upset that some of the male sunbathers at the Little River were nude and apparently thought some were homosexuals. The evidence showed, however, that all of the victims of these attacks were wearing clothing and that none were engaged in homosexual acts.

A jury found defendant guilty of the second-degree murder of Antonevitch; the armed robbery of Demarias; and assault with a deadly weapon inflicting serious injury on Penny. The Court of Appeals affirmed defendant's convictions. Defendant now appeals to this Court as a matter of right because Judge Hedrick dissented in part to the Court of Appeals' decision.

II.

[1] Defendant contends that the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon at the close of the State's evidence. We agree.

Upon defendant's motion to dismiss, the trial court is to determine whether there is substantial evidence: 1) of each essential element of the offense charged or of the lesser offense included therein, and 2) of defendant's being the perpetrator of the offense. If each of these requirements are satisfied, the motion is properly denied. *State v. Powell*, 299 N.C. 95, 98, 261 S.E. 2d 114, 117 (1980).

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). To withstand defendant's motion to dismiss the armed robbery charge, the State was required to show substantial evidence of each of the essential elements of armed robbery. Under N.C.G.S. § 14-87(a), robbery with a dangerous weapon is defined as "the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm or other deadly weapon with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property." *State v. Powell*, 299 N.C. at 102, 261 S.E. 2d at 119. In the case at bar, the evidence at trial tended to show that after his altercation with Penny, defendant threatened Demarias and struck him with a stick. In self defense, Demarias threw his duffel bag at defendant. Upon returning to the scene to retrieve the bag, Demarias was threatened again by the defendant.

It is well settled law that the defendant must have intended to permanently deprive the owner of his property *at the time the taking occurred* to be guilty of the offense of robbery. *State v. McWilliams*, 277 N.C. 680, 687, 178 S.E. 2d 476, 480 (1971); *State v. Smith*, 268 N.C. 167, 169, 150 S.E. 2d 194, 198 (1966). When Demarias threw his duffel bag at defendant, the uncontroverted evidence indicates that he did so to protect himself. He stated he hoped this would slow down defendant and Osbahr so that he could escape without being harmed. At no point did defendant ask for or demand the property. On cross-examination Demarias testified as follows:

> Q: In the process of hitting you, did he ask you for any money?
>
> A: No.

Q: Did he ask you for that duffle bag?

A: Unh huh.

Q: How did that duffle bag get to him?

A: I threw it when I was protecting myself from that club.

Q: Then you weren't throwing it at him as a result of any request for money?

A: No, just self-protection.

Q: Just self-protection and you didn't throw it at him because you thought maybe he wanted the duffle bag?

A: No, no.

Q: That thought never crossed your mind?

A: Unh huh.

Q: So, therefore, I take it that when you parted with that duffle bag, you did not consider yourself being robbed?

MR. EWARDS: Objection.

COURT: Overruled.

Q: Sir?

A: Repeat the question.

Q: When you parted with it, when you threw the duffle bag, you didn't consider yourself being robbed, you were throwing that duffle bag for self-protection, weren't you?

A: When I parted with that duffle bag, it was in protection, maybe to slow them down so I could get out of there without being harmed. They were both—they wanted to put our lights out. There was no doubt about it. I was scared for my life.

Q: You were concerned that they were going to assault you, isn't that correct? They did assault you, and you were concerned that they were going to assault you further?

A: Correct.

Q: You were not concerned about whether or not anybody was trying to rob you?

A: Not at that point, no.

Q: When you threw the duffle bag?

A: When I threw the duffle bag.

Q: Is it safe to say you threw that duffle bag freely and voluntarily?

A: No.

Q: Except to the extent that you were protecting yourself?

A: Protecting myself. (Nods affirmatively.)

Q: Did anybody ever ask you what was in that duffle bag, sir, prior to the time you threw it, of course?

A: No.

Thus, when Demarias parted with his property, defendant had not committed armed robbery—the necessary element of intent to deprive the owner permanently of his property was not present.

The State argues that defendant committed the offense of armed robbery when he retained possession of Demarias' property while threatening Demarias with the stick when he tried to retrieve his duffel bag. We disagree. Although many jurisdictions hold that evidence of a defendant's retention of property through the use of force or intimidation will support an armed robbery conviction, it appears that the majority of jurisdictions hold otherwise. 67 Am. Jur. 2d *Robbery* § 26, at 45-46 (1973).

Indeed, this Court decided over 125 years ago that the offense of robbery has not been committed unless the essential element of force or intimidation *precedes* or is *concomitant* with the taking. *State v. John*, 50 N.C. 163 (1857). Under an analogous circumstance—the use of force to escape with another's personal property after the property had been seized by stealth—the Court held that the offense of highway robbery was not committed. In *John*, the evidence tended to show that the defendant had his hand in the victim's pocket on his pocketbook, that the victim

immediately seized the defendant's arm, and that a scuffle ensued in which the victim was thrown out of a wagon while the defendant escaped with the victim's property. The court held that this was not sufficient evidence of highway robbery because there was "no violence—no circumstance of terror resorted to for the purpose of *inducing* the prosecutor to part with his property for the sake of his person." *Id.* at 167 (emphasis added). Instead, the court viewed the struggle between the defendant and the victim as "fairly imputable to an effort on the part of the prisoner to get loose from [the victim's] grasp and make his escape." *Id.* at 169. The holding in *John* indicates that in this State, the defendant's use of force or intimidation must necessarily precede or be concomitant with the taking before the defendant can properly be found guilty of armed robbery. That is, the use of force or violence must be such as to *induce* the victim to part with his or her property. This rule appears to be in accord with the majority of jurisdictions. 67 Am. Jur. 2d *Robbery* § 26, at 45-46. *See* Annot., 93 A.L.R. 3d 643, 643-53 (1979); *See also State v. Chapman*, 49 N.C. App. 103, 270 S.E. 2d 524 (1980), *citing State v. John*, 50 N.C. 163 (1857). Although the evidence tended to show defendant took Demarias' money, it is not sufficient as a matter of law to support the armed robbery conviction: there is no evidence that defendant's threats or use of violence preceded or were concomitant with the taking of the victim's property. As noted above, defendant's initial threats were not made to *induce* Demarias to part with his property. Thus, the trial court's denial of defendant's motion to dismiss the charge of armed robbery was in error. We hold, therefore, that defendant's conviction and sentence for robbery with a dangerous weapon must be vacated. *State v. Powell*, 299 N.C. at 102, 261 S.E. 2d at 119.

III.

[2] Defendant contends that the trial court erred in denying his motion for a change of venue. Specifically, defendant argues that his constitutional right to due process was violated because of the existence of prejudicial pretrial publicity which prevented him from receiving a fair trial.

We note first that a motion for a change of venue as "addressed to the discretion of the trial judge and his ruling thereon will not be disturbed on appeal unless a manifest abuse of discre-

tion is shown." *State v. Faircloth*, 297 N.C. 100, 105, 253 S.E. 2d 890, 893, *cert. denied*, 444 U.S. 874, 100 S.Ct. 156, 62 L.Ed. 2d 102 (1979). The burden of showing "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial" falls on the defendant. *State v. Boykin*, 291 N.C. 264, 269, 229 S.E. 2d 914, 917-18 (1976), *quoting* N.C.G.S. § 15A-957. Further, in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966), the United States Supreme Court held that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." *Id.* at 363, 86 S.Ct. at 1522, 16 L.Ed. 2d at 620. In determining whether the defendant in *Sheppard* received a fair trial, the United States Supreme Court examined a number of circumstances surrounding the defendant's trial. The Court looked not only at the nature and extent of the media coverage of the defendant's case but also at the court's control, or lack of it, over the trial itself.

With respect to the case at bar, we have examined the assorted newspaper clippings, televison news tapes, a public opinion poll and almost 250 pages of transcript dealing with the extensive *voir dire* conducted to select the members of the jury who eventually heard defendant's case. We are convinced after having viewed all of these materials that a change of venue was not required under the circumstances of this case.

The vast majority of these newspaper articles, and radio and television news broadcasts were factual, noninflammatory news accounts of the events that transpired. This Court has consistently held that where defendant shows only that the publicity surrounding his case consists of such factual, noninflammatory news stories, a trial court's denial of a change of venue is proper. *E.g., State v. Oliver*, 302 N.C. 28, 36-37, 274 S.E. 2d 183, 189-90 (1981); *State v. Matthews*, 295 N.C. 265, 278-79, 245 S.E. 2d 727, 735-36 (1978), *cert. denied*, 439 U.S. 1128, 99 S.Ct. 1046-47, 59 L.Ed. 2d 90 (1979).

Defendant further argues, however, that two editorials which appeared in the Durham newspapers were extremely inflammatory. We note that the first editorial reflected on the brutality of the attack and stated that the perpetrators of the crime should

receive the harshest punishment the law allows. The second editorial mentioned the Little River incident in discussing generally the prevalence of senseless violence in society. Neither editorial mentioned defendant's name. We hold that these articles do not amount to inflammatory pretrial publicity sufficient to demand the granting of a motion for a change of venue.

Defendant also argues that he did not receive a fair trial because of the media's reports on three meetings held by homosexuals and their supporters to protest the Little River attacks. Various accounts of the incident suggested that the perpetrators of the attacks had committed the assaults because of their disapproval of a group of people they thought were homosexuals who were swimming and sunning along the Little River. About 125 to 200 people participated in the first rally at the Durham County Judicial Building. The meeting was held two days after defendant was arrested but more than five months before he was tried. A second meeting, a march through downtown Durham, was held on 27 June 1981 in which about 260 people participated. Although a newspaper account of the march stated that references were made during the march to the Little River incident, the theme of the march was a commemoration of the 12th anniversary of the gay rights movement. The marchers chanted, "Out of the closet and into the streets," while holding a banner which read, "Our Day Out, Durham, N.C.". Clearly, the Little River incident was not the focus of this march. A third rally, in which about 150 people participated, was held in Chapel Hill to protest the Little River attacks. Significantly, the protest was not held in Durham. We hold, therefore, that these meetings do not demonstrate that the Durham community as a whole held a pervasive prejudice against defendant.

Defendant next urges that a public opinion survey which he submitted in support of his motion for a change of venue demonstrated that the pretrial publicity surrounding defendant's case created such prejudice against defendant that he could not receive a fair trial. Dr. James Luginbuhl, an Associate Professor of Psychology at North Carolina State University, conducted a survey which indicated that of the 121 people included in the survey, 87 percent indicated that they remembered that a man had been attacked at the Little River and died. Various statistics were produced showing, among other things, the percentage of

people who correctly remembered the cause of death and whether someone had been arrested in the case. Defendant further supports his assertion that he has demonstrated extensive prejudicial pretrial publicity because 48 percent of the survey sample responded that they thought the perpetrator of the attack was "probably guilty," when asked: "From what you know right now do you think a person or persons who were arrested are probably guilty or probably not guilty?" We do not agree that defendant has demonstrated prejudicial pretrial publicity. We believe that the statistics that 87 percent of those surveyed were aware of the Little River incident shows only that many people were aware of the attack. The existence of publicity alone does not constitute sufficient grounds for a change of venue; the publicity must be *prejudicial. E.g., State v. Matthews*, 295 N.C. at 279, 245 S.E. 2d at 736. Further, as the District Attorney pointed out on the cross-examination of Dr. Luginbuhl, the survey did not attempt to determine the respondents' attitudes to the presumption of innocence until guilt is proven beyond a reasonable doubt or whether, as jurors, they could confine their determinations of guilt or innocence to the evidence presented in court. We think this is particularly significant given the fact that the survey participants were asked whether they thought the perpetrators of the attack were "probably guilty" on the basis of "*what you know right now.*"

Perhaps the most persuasive evidence that the pretrial publicity was not prejudicial or inflammatory are the potential jurors' responses to questions asked at the *voir dire* hearing conducted to select the jury. At the *voir dire* hearing, in which each potential juror was questioned about his or her knowledge of the case out of the presence of the others, almost all admitted to having read about the case in the newspaper or having heard about it on television. However, their recollections of those media accounts could only be described as vague. Indeed, when pressed for more details about the incident, several potential jurors apologized for not having remembered more about the Little River stories. More importantly, however, each juror selected to hear defendant's case unequivocally answered in the affirmative when asked if they could set aside what they had previously heard about defendant's case and determine defendant's guilt or innocence based solely on the evidence introduced at trial. In

sum, therefore, we hold that the trial court did not abuse its discretion in denying defendant's motion for a change of venue.

IV.

[3] Defendant also contends that the trial court erred in arraigning defendant when his name failed to appear on the arraignment calendar. We agree that this was error but hold that it was not prejudicial to defendant.

We note that defendant's trial was calendared for the week of 21 September 1981. Defendant appeared in court on 21 September with his counsel, stated that he had not yet been arraigned, and then objected to being arraigned on that day because his name had not appeared on the arraignment calendar. The trial court agreed that defendant's name was not on the arraignment calendar. However, in proceeding to arraign defendant on that day the trial court further found that defendant's case had been on previous Motion, Arraignment and Probation Calendars for hearings on various pretrial motions. The trial court further found that at the last pretrial hearing the District Attorney and defendant, through counsel, advised the trial court that they would all be ready for trial on 21 September 1981. In arraigning defendant on 21 September 1981, the trial court, nevertheless, continued defendant's case for one week.

N.C.G.S. § 15A-943 (1978), the statute governing arraignment procedures in Superior Court, provides as follows:

> § 15A-943. Arraignment in superior court—required calendaring.—
>
> (a) In counties in which there are regularly scheduled 20 or more weeks of trial sessions of superior court at which criminal cases are heard, and in other counties the Chief Justice designates, the prosecutor must calendar arraignments in the superior court on at least the first day of every other week in which criminal cases are heard. No cases in which the presence of a jury is required may be calendared for the day or portion of a day during which arraignments are calendared.
>
> (b) When a defendant pleads not guilty at an arraignment required by subsection (a), he may not be tried without his consent in the week in which he is arraigned.

> (c) Notwithstanding the provisions of subsection (a) of this section, in any county where as many as three simultaneous sessions of superior court, whether criminal, civil, or mixed, are regularly scheduled, the prosecutor may calendar arraignments in any of the criminal or mixed sessions, at least every other week, upon any day or days of a session, and jury cases may be calendared for trial in any other court at which criminal cases may be heard, upon such days.

We note subsection (a) governs the procedures certain county prosecutors are required to follow in calendaring arraignments in Superior Court. In *State v. Shook*, 293 N.C. 315, 237 S.E. 2d 843 (1977), this Court held that subsection (a) places a statutory duty upon designated prosecutors to calendar *every* arraignment. *Id.* at 319, 237 S.E. 2d at 846 (emphasis in original). In *Shook*, the Court also interpreted subsection (b) as providing a defendant with the statutory right not to be tried without his consent in the week in which he was arraigned. *Id.* This Court further held that a violation of subsection (b), that is where defendant is tried without his consent in the week in which he was arraigned, is reversible error even though defendant does not show prejudice. *Id.*, 237 S.E. 2d at 847. The Court grounded its conclusion on the determination that subsection (b) vests defendant with a right to at least a week's interim between his arraignment and trial in order to prepare his case. The Court in *Shook* expressly left open the question with which we are presented here: Whether a violation of subsection (a) standing alone—that is, a failure to calendar a defendant's arraignment—constitutes reversible error when defendant nevertheless is given a week's interval between his arraignment and trial.

In *Shook*, we noted the official commentary to General Statutes, Chapter 15A, Article 51, Arraignment, which declares:

> It is the purpose of this Article not only to define arraignment in any court but also to provide for a separate time of arraignment in superior court. Time for jurors and witnesses will be saved if matters not requiring their presence can be disposed of before they are brought in. The Commission feels that it is important to our system of justice that unnecessary impositions on the time of citizens be avoided. Thus, in the more populous counties here defined as those

> having as much as 20 weeks of criminal court (and others which the Chief Justice may designate), a separate time for arraignment will be required. In other counties it is authorized on an optional basis.

Id. at 317-18, 237 S.E. 2d at 845. In so doing, the Court wrote that: "Obviously the financial interest of the state as well as the private interests of the individual jurors and witnesses are served by requiring arraignments to be calendared on days when jurors and witnesses are not called." *Id.* at 318, 237 S.E. 2d at 846. This Court then distinguished the societal interest in the efficient use of court time from the interest that is furthered under subsection (b), a defendant's right to a week's interval between his arraignment and trial. *Id.* Thus, it appears that the thrust of subsection (a), unlike subsection (b), is the promotion of the efficient use of time by the courts. Defendant has no direct interest in this underlying value. Rather, his only interest is in his vested right to a week's interval between his arraignment and trial which is provided under subsection (b).

We agree that it was error for the trial court to arraign defendant without his consent when the prosecutor failed to carry out his statutory duty to place defendant's name on the arraignment calendar. Indeed, to hold that it was not error would fail to recognize the prosecutor's statutory duty to calendar *all* arraignments. However, we do not find that in this case the error was prejudicial to defendant. Defendant was given notice that he would be tried on 21 September 1981. His counsel even stated that they would be prepared for trial at that time. Instead of going to trial, however, defendant was arraigned on 21 September and given an additional week to prepare his case.

V.

[4] The thrust of defendant's next contention is that the trial court erred in failing to properly admonish the jury that, among other things, they were not to form any opinions about the case or discuss the case with anyone during court recesses, as required by N.C.G.S. § 15A-1236(a) (Cum. Supp. 1981). That statute provides:

> (a) The judge at appropriate times must admonish the jurors that it is their duty:

(1) Not to talk among themselves about the case except in the jury room after their deliberations have begun;

(2) Not to talk to anyone else, or to allow anyone else to talk with them or in their presence about the case and that they must report to the judge immediately the attempt of anyone to communicate with them about the case;

(3) Not to form an opinion about the guilt or innocence of the defendant, or express any opinion about the case until they begin their deliberations;

(4) To avoid reading, watching, or listening to accounts of the trial; and

(5) Not to talk during trial to parties, witnesses, or counsel.

The judge may also admonish them with respect to other matters which he considers appropriate.

Defendant contends that the trial court erred in giving only partial instructions. Defendant is apparently contending that at each recess the trial court must recite each provision of N.C.G.S. § 15A-1236(a). We do not agree. The trial court admonished the jury about its duties many, many times throughout this trial which lasted several days. Those admonitions to the jurors ranged from an extensive enumeration of the juror's duties to a brief reminder to be aware of the instructions the court had given them previously. For example, at one point the trial court stated:

> Members of the jury, it is time, now, for the evening recess. Please be back in your seats tomorrow morning at nine o'clock. We will resume the trial at that time. I caution you not to have any contact with the witnesses, attorneys or parties in this case, not to read anything in the newspaper, hear any radio or television production about the trial. Do not talk with your family at home about the case or with anyone else. Don't talk about it among yourselves. Don't form any impressions or opinions until you have heard all of the evidence, the arguments and instructions of the Court and have retired to deliberate.

This particular instruction is a model of clarity. Indeed, we fail to see why defendant contends that this particular instruction was erroneous because it contains every caution set out in N.C.G.S. § 15A-1236(a). At other points throughout the trial the instructions were less extensive. For example, the trial court instructed the jury before another recess as follows:

> Remember during the luncheon recess not to discuss the case with anyone or allow anyone to discuss it with you. Do not discuss it among yourselves. Don't form any opinions or conclusions about the case until you have heard all the evidence and arguments of counsel and the charge of the Court.

In perhaps one of his briefest instructions the trial court stated before one evening recess:

> Members of the jury, please observe carefully the cautions that I haven (sic) you at the other recesses. I know you don't want me to repeat them and every one (sic), but I am required by law to remind you of them at every recess, and I would appreciate your observing them.

We hold that these instructions, when examined in the context in which they were given—that is, instructions made repeatedly not to discuss the case or form an opinion about it which were delivered to a group of adult men and women—were perfectly adequate. We are confident that the members of the jury who sat on defendant's case were well aware of their statutory duties as jurors.

VI.

[5] Defendant finally contends that the trial court erred in admitting into evidence statements that were made by the deceased, Ronald Antonevitch, a short time before Antonevitch lost consciousness and died. Specifically he contends the trial court erred in not explicitly finding as a fact that Antonevitch believed he had "no hope of recovery" when he made his dying declarations.

In *State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (1981), this Court restated the requirements which must be met before a dying declaration will be admitted into evidence. The Court wrote:

> Dying declarations by the person whose death is at issue have long been admissible in North Carolina provided: (1) at the time they were made the declarant was in actual danger of death; (2) he had full apprehension of the danger; (3) death did in fact ensue; and (4) declarant,[1] if living, would be a competent witness to testify to the matter.

Id. at 495-96, 276 S.E. 2d at 342.

The Court then noted that the "General Assembly codified the essentials of these requirements in G.S. 8-51.1." *Id.* That statute reads:

> The dying declarations of a deceased person regarding the cause or circumstances of his death shall be admissible in evidence in all civil and criminal trials and other proceedings before courts, administrative agencies and other tribunals to the same extent and for the same purposes that they might have been admissible had the deceased survived and been sworn as a witness in the proceedings, subject to proof that:
>
> (1) At the time of the making of such declaration the deceased was conscious of approaching death and believed there was no hope of recovery;
>
> (2) Such declaration was voluntarily made.

"The admissibility of these declarations is a decision for the trial judge, and appellate review is limited to the narrow question of whether there is any evidence tending to show the prerequisites of admissibility." *State v. Hamlette*, 302 N.C. at 496-97, 276 S.E. 2d at 343, *citing State v. Stevens*, 295 N.C. 21, 28-29, 243 S.E. 2d 771, 776 (1978).

In the case at bar, two police officers testified on *voir dire* that they interviewed Antonevitch at the hospital to investigate the assault made on him earlier in the day at the Little River. They testified that throughout the interview, in which Antonevitch recounted the attack made on him, he repeatedly stated to them: "Oh God, I am dying; somebody please help me." They

1. Although the term "defendant" appeared here in *Hamlette*, the correct term, "declarant," is found in *State v. Stevens*, 295 N.C. 21, 28, 243 S.E. 2d 771, 776 (1978), one of the cases upon which the Court relied in *Hamlette* in restating the requirements a dying declaration must satisfy before it will be admitted into evidence.

testified that these statements were made about 5 p.m. and 7 p.m., a short time before Antonevitch lost consciousness about 8 or 8:30 p.m. and died from the blow to his head. Although one of the doctors at the hospital testified that Antonevitch never made any such statements while he was present and that in his opinion Antonevitch was not aware of his approaching death, the trial court found as a fact that Antonevitch did make these statements to the officers which indicated he was aware he was dying. This finding was amply supported by the two officers' testimony. Defendant contends, however, that the trial court erred in not finding explicitly that Antonevitch believed he had "no hope of recovery" when he made these statements. In *State v. Hamlette*, 302 N.C. at 496, 276 S.E. 2d at 343, this Court stated that, "it is not necessary that declarant personally express his belief that he has no chance of recovery. This may be shown by the circumstances." When the trial court found that Antonevitch did in fact make statements to the effect that he knew he was dying, the finding was the same as an explicit statement that the court had found Antonevitch believed he had "no hope of recovery" when he made the statements at issue. As Chief Justice Sharp stated for the Court in *State v. Stevens*, 295 N.C. at 29, 243 S.E. 2d at 776: "Obviously, if one believes he is going to die he believes there is 'no hope of recovery.'" We hold, therefore, that the trial court properly admitted Antonevitch's dying declarations.

VII.

For the reasons discussed above, we must reverse the decision of the Court of Appeals affirming defendant's conviction and sentence on the charge of robbery with a dangerous weapon and remand the case to the Court of Appeals with directions to remand to the Superior Court, Durham County, for proceedings consistent with this opinion.

Case No. 81CRS10449 reversed and remanded.

We affirm the Court of Appeals' decision to the extent it held that defendant's convictions for murder in the second degree and assault with a deadly weapon inflicting serious injury were free from prejudicial error.

Case No. 81CRS9076 and No. 81CRS10740 affirmed.

ALMA CHRISTINE BOYLES v. PAUL W. BOYLES

No. 671A82

(Filed 31 May 1983)

Constitutional Law § 26.1; Judgments § 51.1— foreign judgment concerning alimony arrearages—no adequate notice—no full faith and credit in North Carolina

A default judgment rendered by a Florida court was void and subject to collateral attack because the defendant did not receive adequate notice in compliance with the Florida standard of reasonable notice. Defendant did not receive actual notice and there was no affirmative evidence that he had refused the notice. Being invalid under Florida law, the judgment was not entitled to full faith and credit in North Carolina.

Justice MARTIN dissenting.

Chief Justice BRANCH joins in this dissenting opinion.

ON 21 April 1971 in the Circuit Court of the Eleventh Judicial Circuit, DADE County, Florida, plaintiff was awarded a default judgment for alimony arrearages against defendant. On 30 April 1981, plaintiff filed a complaint in Superior Court, WAKE County, asking the North Carolina court to grant full faith and credit to the 21 April 1971 Florida court judgment. During the 14 September 1981 Civil Session of Superior Court, WAKE County, *Judge James H. Pou Bailey* ordered that full faith and credit be accorded the Florida judgment, and in so doing entered judgment against defendant for alimony arrearages of $10,800 plus interest. Defendant appealed to the Court of Appeals. In an opinion written by *Judge Becton*, and with which *Judge Hedrick* concurred, the Court of Appeals reversed the trial court's judgment and determined that full faith and credit should not be accorded the Florida judgment. *Boyles v. Boyles*, 59 N.C. App. 389, 297 S.E. 2d 405 (1982). *Judge Webb* dissented in the case; therefore, plaintiff appeals to this Court as a matter of right under N.C.G.S. § 7A-30(2) (1981).

Douglas F. DeBank, Attorney for plaintiff-appellant.

Sanford, Adams, McCullough & Beard, by Charles H. Montgomery and Cynthia Wittmer West, Attorneys for defendant-appellee.

FRYE, Justice.

The question with which we are presented is whether a North Carolina court is bound to accord full faith and credit to a default judgment for alimony arrearages rendered by a Florida court when the defendant in the action did not receive actual notice of the Florida court proceeding and the plaintiff's certified letter to the defendant notifying him of the action was returned to her marked "unclaimed." We hold that the Florida judgment cannot be accorded full faith and credit because it was not a valid judgment under Florida law: the notice given in the case was inadequate under Florida law. The factual circumstances and legal reasoning underlying this determination will be discussed below.

I.

Paul W. Boyles and Alma Christine Boyles were divorced on 19 October 1962 by the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida. The final decree of divorce required, among other things, that Paul Boyles pay Alma Boyles $200 a month in alimony so long as Alma Boyles remained unmarried.

About nine years later, in an action growing out of the divorce decree, Alma Boyles filed a motion in the Florida circuit court asking for a judgment against Paul Boyles for alimony arrearages. On 21 April 1971, the Florida circuit court awarded judgment to Alma Boyles for alimony arrearages of $10,800 after stating it had been "advised that notice was sent to the plaintiff, Paul W. Boyles, advising him of the Motion for Money Judgment and the date of said hearing, said notice being provided timely and in accordance with the laws of the State of Florida, and the plaintiff, Paul W. Boyles, failing to appear at said hearing. . . ." The only evidence in the record which relates to the Florida court's finding that notice of the alimony proceeding was in accordance with Florida law is: 1) a copy of a certified letter addressed to Paul Boyles at his Pennsylvania residence which bears a postal stamp indicating that the letter was returned to the writer, Alma Boyles' attorney, because the letter was "unclaimed," 2) notations on the certified letter indicating that two notices were left at Paul Boyles' address informing him that the post office had the letter, and 3) a copy of the unsigned receipt for the certified letter.

Over ten years after this Florida judgment for alimony arrearages had been entered, Alma Boyles filed a complaint in this State in Superior Court, Wake County, asking that full faith and credit be accorded the Florida default judgment. In an affidavit filed 16 September 1981, Paul Boyles, now a North Carolina resident, specifically denied he was ever "aware of any such action which allegedly resulted in a Florida judgment for $10,800.00 in April, 1971." He also specifically denied he had ever been served with a complaint for these alimony arrearages while living in Pennsylvania. Nevertheless, on 24 September 1981 the trial court entered an order according full faith and credit to the Florida default judgment. In so doing, it was ordered that defendant pay $10,800 in alimony arrearages together with interest thereon at the rate of eight percent from 21 April 1971. The Court of Appeals reversed this Superior Court judgment and held that full faith and credit should not be accorded the Florida default judgment because the notice of the proceeding was not sufficient under Florida law. *Boyles v. Boyles*, 59 N.C. App. 389, 395, 297 S.E. 2d 405, 409 (1982). We agree.

II.

The Constitution of the United States provides: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." U.S. Const. art. IV, § 1. In carrying out this constitutional mandate, the United States Supreme Court has consistently held that "the judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced." *E.g., Underwriters Nat'l Assur. Co. v. North Carolina Life and Accident and Health Ins. Guar. Ass'n* [hereinafter cited as *Underwriters*], 455 U.S. 691, 704, 102 S.Ct. 1357, 1365, 71 L.Ed. 2d 558, 570 (1982), *quoting Hampton v. M'Connel*, 3 (Wheat.) 234, 235, 4 L.Ed. 378, 379 (1818). *See also* 28 U.S.C. § 1738 (1976) (acts, records and judicial proceedings of every other state "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the Court of such State, Territory or Possession from which they are taken").

Because a judgment from a rendering court is only entitled to the "*same* credit, validity and effect" in a sister state as it had

in the state where it was pronounced, the judgment from the rendering court must be deemed to have satisfied certain requisites of a valid judgment before full faith and credit will be granted to it. Restatement (Second) of Conflict of Laws § 92 and § 92 Comment c (1971). For example, the rendering court must have had subject matter jurisdiction—the power to pass on the merits of the case—before full faith and credit will be granted. *E.g., Underwriters*, 455 U.S. at 704, 102 S.Ct. at 1365, 71 L.Ed. 2d at 570; *Durfee v. Duke*, 375 U.S. 106, 110, 84 S.Ct. 242, 244, 11 L.Ed. 2d 186, 190 (1963); *Frances Hosiery Mills, Inc. v. Burlington Industries, Inc.*, 285 N.C. 344, 352, 204 S.E. 2d 834, 839 (1974). The rendering court must also have respected the demands of due process. That is, the rendering court must have had personal jurisdiction—otherwise known as "minimum contacts"—over the affected parties, *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and have afforded the parties adequate notice and an opportunity to be heard, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), before full faith and credit will be accorded the judgment. *See Griffin v. Griffin*, 327 U.S. 220, 228-29, 66 S.Ct. 556, 560, 90 L.Ed. 635, 640 (1946) (judgment obtained in violation of procedural due process is not entitled to full faith and credit). "A judgment rendered without judicial jurisdiction ['minimum contacts'] or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in the other states." Restatement (Second) of Conflict of Laws § 104.

We note that the second court's scope of review concerning the rendering court's jurisdiction is very limited. In *Underwriters*, 455 U.S. 691, 102 S.Ct. 1357, 71 L.Ed. 2d 558 (1982), *rev'g* 48 N.C. App. 508, 269 S.E. 2d 688, *disc. rev. denied*, 301 N.C. 527, 273 S.E. 2d 453 (1980), the United States Supreme Court reiterated the rule that "a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the judgment." *Id., quoting Durfee v. Duke*, 375 U.S. at 111, 84 S.Ct. at 245, 11 L.Ed. 2d at 191. It follows that the second court's limited inquiry into the rendering court's jurisdiction—simply whether the jurisdictional issue was "fully and fairly litigated"—rests on the presupposition that the requirement of ade-

quate notice had been met in the original proceeding. Indeed, if a litigant has no notice of a court proceeding, *a fortiori*, the litigant could not "fully and fairly litigate" *any* issue in the case. In recognizing this distinction between notice and jurisdiction, it follows that when a party against whom a default judgment was entered subsequently challenges the validity of the original proceeding on the grounds that he did not receive adequate notice, the reviewing court ordinarily must examine the underlying facts in the record to determine if they support the conclusion that the notice given of the original proceeding was adequate. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

In addition, full faith and credit requires that the rendering court must also have been competent. Restatement (Second) of Conflict of Laws § 105. *See also* R. Weintraub, *Commentary on the Conflict of Laws* § 4.3, at 96-97 (2d ed. 1980). That is, the rendering court must have been given the power by its state to entertain the particular action and there must have been compliance with the requirements the rendering state deems necessary for the exercise of judicial power. Restatement (Second) of Conflict of Laws § 105 Comment a. "A judgment rendered by a court lacking competence to render it and for that reason subject to collateral attack in the state of rendition will not be recognized or enforced in other states." *Id.* § 105. *See also* R. Weintraub, *Commentary on the Conflict of Laws* § 4.3, at 96-97. The reason for the rule is this: If a court lacks competence to render a particular judgment, the judgment is void in the state of rendition itself. Thus, the judgment will not be recognized or enforced by a sister state because under the Full Faith and Credit Clause a judgment can only be given the "same" effect, not a greater effect, in other states. Restatement (Second) of Conflict of Laws § 105 Comment a.

In the case at bar, defendant contends that the Florida default judgment is void and thus not entitled to full faith and credit because one of the requisites of a valid judgment—adequate notice—was not met before the Florida court entered judgment against him. Specifically, defendant contends that the Florida judgment is void for two reasons: 1) the Florida judgment was rendered in violation of defendant's fourteenth amendment right to due process under the United States Constitution which

requires adequate notice of a proceeding; and 2) the Florida court was not competent to render judgment because there was not compliance with the notice requirements the state of Florida has imposed in domestic cases like defendant's.

Defendant argues that his fourteenth amendment right to adequate notice was violated because the notice in the Florida proceeding did not meet the constitutional standard of reasonableness set out in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). That is, the notice was not "reasonably calculated, under all the circumstances," to apprise him of the pendency of the action and afford him an opportunity to present his objections. *Id.* at 314, 70 S.Ct. at 657, 94 L.Ed. at 873.

In addition, defendant contends that the Florida court was not competent to render judgment because there was not compliance with the reasonable notice requirement the Supreme Court of Florida set out in *Kosch v. Kosch*, 113 So. 2d 547 (Fla. 1959). In *Kosch*, the Florida Supreme Court held that proceedings supplemental to a divorce decree (*e.g.*, enforcement of alimony provisions of a divorce decree) "can be bottomed on a reasonable notice which affords an opportunity to be heard. This notice may be by mail and its sufficiency in each particular instance should be tested by its reasonableness and by the adequacy of the opportunity afforded the opposing party to be heard and to defend himself or herself. . . ."[1] *Id.* at 550. We will address first defendant's contention that the Florida court was not competent to

1. It may be argued that the reasonable notice standard under the fourteenth amendment Due Process Clause is the same as the Florida standard of reasonable notice under *Kosch v. Kosch*, 113 So. 2d 547 (Fla. 1959). *See Walsh v. Walsh*, 388 So. 2d 240, 241 n. 3 (Fla. Dist. Ct. App. 1980) ("[n]otice to the husband which satisfied due process considerations was sufficient" in a proceeding to enforce the child support provisions of a property settlement agreement incorporated in a divorce decree, *citing Kosch v. Kosch*, 113 So. 2d 547 (Fla. 1959)). *But see Maner v. Maner*, 412 F. 2d 449, 451-52 (5th Cir. 1969) (in citing *Kosch*, a federal appellate court upheld an arrearage judgment on the grounds that the notice given did not offend "Florida's doctrine of fair notice" and stated in a footnote that the "Florida standard for notice of proceedings to enforce alimony decrees does not offend the due process clause of the Fourteenth Amendment," thereby indicating the two standards are not necessarily the same). We need not go so far as to decide whether the Florida standard of reasonable notice is the same as the fourteenth amendment standard because we are only asked to determine whether under Florida case law interpreting the Florida standard the notice given in the case at bar was adequate.

render judgment because the Florida standard of reasonable notice had not been met in the original proceeding. In so doing, we will determine whether the certified letter sent to defendant at his Pennsylvania address but returned to plaintiff's attorney marked "unclaimed" satisfied the reasonable notice standard under Florida law, and thus rendered the Florida court competent to enter the default judgment against defendant.

A.

As we noted above, "A judgment rendered by a court lacking competence to render it and for that reason subject to collateral attack in the state of rendition will not be recognized or enforced in other states." Restatement (Second) of Conflict of Laws § 105. Therefore, in determining whether to accord full faith and credit to the Florida judgment, we must first answer the following threshold issue: Is a Florida judgment void, and thus subject to collateral attack, if the Florida court renders judgment in a case in which the reasonable notice requirements under Florida law have not been satisfied?

In answering this question we note that "the statutes and decisions of the courts in the state in which the judgment was rendered are controlling." *Id.* § 105 Comment b. *See also Adam v. Saenger*, 303 U.S. 59, 63, 58 S.Ct. 454, 456, 82 L.Ed. 649, 652 (1938); *Am. Inst. of Mkt. Sys., Inc. v. Willard Realty Co.*, 277 N.C. 230, 233-34, 176 S.E. 2d 775, 777 (1970). We have examined the applicable Florida statutes and case law. It appears to us that, under Florida law, a default judgment rendered in violation of Florida's reasonable notice requirement is void and subject to collateral attack. Although we did not find any cases on point holding that a default judgment is void and subject to collateral attack if the reasonable notice requirement of *Kosch* has not been met, we did find that a Florida appellate court has held that a default judgment is void and subject to collateral attack when entered without "substantial compliance" with notice requirements as set out in Florida's substituted service of process statute, Fla. Stat. Ann. § 48.161 (West 1969 & Supp. 1983). *Parish Mortgage Corp. v. Davis*, 251 So. 2d 342 (Fla. Dist. Ct. App. 1971). We are aware that in defendant's case, a domestic case seeking enforcement of alimony provisions, plaintiff need not comply with the Florida substituted service of process statutes; the notice need only be "reasonable." *E.g., Kosch v. Kosch*, 113 So. 2d at

550. This determination rests on the supposition that the court already has jurisdiction over the defendant. *Id.*

We note that, generally speaking, service of process statutes are considered jurisdictional only because they mark the beginning of a court's assertion of jurisdiction over the defendant. 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1063, at 204; 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1353, at 580 (1969). The *primary purpose* of service of process statutes, aside from this jurisdictional ritual, is to provide mechanisms for bringing *notice* of the commencement of an action to the defendant's attention. *Id.* It follows, therefore, that if a failure to substantially comply with notice requirements under Florida's substituted service of process statute renders a default judgment void and subject to collateral attack, an analogous result should obtain where one has failed to comply with Florida's fair notice doctrine under *Kosch.* This determination is further supported by the fact that if there has been a failure to comply with the due process standard of adequate notice, a default judgment is always void and subject to collateral attack. *See Griffin v. Griffin,* 327 U.S. 220, 66 S.Ct. 556, 90 L.Ed. 635 (1946).

B.

Having answered affirmatively the threshold issue of whether a Florida judgment is void and subject to collateral attack if rendered without compliance with Florida's fair notice doctrine under *Kosch,* we turn now to the question of whether the notice given of the Florida proceeding did in fact violate the *Kosch* standard. As noted before, the Supreme Court of Florida, relying on its precedents, held in *Kosch* that proceedings supplemental to a divorce decree (*e.g.,* enforcement of alimony provisions of a divorce decree) "can be bottomed on a reasonable notice which affords an opportunity to be heard. This notice may be by mail and its sufficiency in each particular instance should be tested by its reasonableness and by the adequacy of the opportunity afforded the opposing party to be heard and to defend himself or herself. . . ." *Kosch v. Kosch,* 113 So. 2d at 550. *See also Marshall v. Bacon,* 97 So. 2d 252 (Fla. 1957); *Watson v. Watson,* 88 So. 2d 133 (Fla. 1956); *Moore v. Lee,* 72 So. 2d 280 (Fla. 1954).

In examining the Florida courts' interpretations and applications of this rule, we have found that, without exception, notice

sent by mail is considered reasonable only if the affected party received actual notice or there was affirmative evidence that he or she had refused the notice. *Kosch v. Kosch*, 113 So. 2d 547 (Fla. 1959) (notice adequate where defendant and his attorneys were sent notice by mail; defendant filed a special appearance at proceeding); *Marshall v. Bacon*, 97 So. 2d 252 (Fla. 1957) (notice adequate where defendant found to have received actual notice by mail because he entered a special appearance through his counsel at proceeding); *Watson v. Watson*, 88 So. 2d 133 (Fla. 1956) (notice adequate where defendant received actual notice by mail); *Spencer v. Spencer*, 311 So. 2d 822 (Fla. Dist. Ct. App. 1975) (notice adequate where motion was mailed to defendant's attorneys and to defendant; defendant's copy of motion returned marked "refused" but signed by defendant); *Sikes v. Sikes*, 286 So. 2d 210 (Fla. Dist. Ct. App. 1973) (notice adequate where notice of proceeding given to defendant by mail; defendant was represented by her attorney at the proceeding); *Carter v. Carter*, 164 So. 2d 219 (Fla. Dist. Ct. App. 1964) (notice adequate where notice sent by mail to defendant and his attorneys; defendant's attorneys appeared at proceeding but maintained they were not present; first hearing was continued for convenience of defendant's attorneys; payment of arrearages was made within two weeks of the hearing through attorneys for defendant; defendant failed to deny receiving notice or that he lived at the address to which notice was sent). *See also Hartley v. Hartley*, 134 So. 2d 281 (Fla. Dist. Ct. App. 1961) (notice not adequate where it reached the affected party one day after the hearing because it had to be forwarded to the party from Florida to New York; neither the affected party nor her counsel appeared at the hearing).

We also examined analogous cases, decisions determining what is adequate notice under Florida's substituted service of process statutes. In so doing, we found that substituted service of process was effective, despite evidence in some cases that the affected party did not actually receive service, *only if* there was affirmative evidence that the affected party refused it or was concealing his or her whereabouts. *Cortez Dev. Co. v. New York Capital Group, Inc.*, 401 So. 2d 1163 (Fla. Dist. Ct. App. 1981) (certified letter sent to defendant but returned marked "refused" together with evidence that defendant lived at address to which letter was sent supported inference that return of the letter was

chargeable to defendant); *Fernandez v. Chamberlain*, 201 So. 2d 781 (Fla. Dist. Ct. App. 1967) (evidence that certified letter sent to defendant was returned marked "refused" but signed by defendant's father; defendant appeared specially to move to quash the service of process supported trial court's denial of defendant's motion to quash service); *Steedman v. Polero*, 181 So. 2d 202 (Fla. Dist. Ct. App. 1966) (substituted service effective when made on secretary of state where defendant failed to show that he was not concealing his whereabouts in light of plaintiff's evidence that he was, and defendant did not disclose where he could be found).

In the case at bar, the only evidence in the record which relates to the Florida court's finding that notice of the Florida alimony proceeding was in accordance with Florida law is: 1) a copy of a certified letter address to Paul Boyles at his Pennsylvania address which bears a postal stamp indicating that the letter was returned to the writer, Alma Boyles' attorney, because it was "unclaimed"; 2) notations on the letter indicating that two notices had been left at defendant's address; and 3) a copy of the unsigned receipt for the certified letter. This evidence, standing alone, does not support the conclusion that defendant received actual notice of the Florida proceeding. Moreover, all of the evidence indicates just the opposite—that defendant did not receive any notice. The certified letter was returned marked "unclaimed." Neither defendant nor his attorneys ever appeared at the Florida proceeding; the judgment was by default. Defendant vehemently denies in his affidavit that he ever received notice of the proceeding. Moreover, plaintiff did not present any evidence that defendant had actual notice of the proceeding or that he was concealing his whereabouts so as to avoid notice. Similarly, there is no direct evidence that defendant affirmatively refused the letter or even knew of its attempted delivery. Although the postal stamp on the certified mail form contained the word "Refused," the "Refused" block was not checked. Instead, a check mark was placed beside the word "Unclaimed." There is no signature or other notation on the envelope to indicate whether anyone was at home when the postman attempted delivery of the certified letter or left the two notices at the Pennsylvania address.

It may be argued, however, that one can infer that a party has refused notice or has actual knowledge of judicial proceedings when a party, such as defendant, fails to pick up his mail from the

post office after two notices have been left at his apparent address informing him that the post office has a letter for him. We do not believe that such evidence, standing alone, supports such an inference. We note that a postal notice generally only informs a party that the post office has a letter for him or her; it does not tell the party the identity of the person who sent the letter or what is in the letter. Although defendant here stated that his ex-wife "has harassed me with dozens of motions and complaints through the years," we do not think, in light of defendant's assertion that he was never aware of the Florida proceeding, that the evidence in this case supports the conclusion that defendant actually knew that the certified letter being held at the post office was from his ex-wife notifying him that she was suing him again.

In support of this conclusion, we note the Florida decision which indicated that a failure to pick up one's mail, standing alone, does not amount to a refusal to accept notice of a pending lawsuit. In *Lendsay v. Cotton*, 123 So. 2d 745 (Fla. Dist. Ct. App. 1960), the only evidence that defendant had refused service of process was: 1) a registered letter addressed to the defendant but returned to the sender marked "unclaimed"; and 2) evidence that several postal notices had been sent to the defendant's address indicating that the post office was holding a registered letter for him. It appears to us that this is precisely the same evidence upon which the trial court in the case at bar relied in determining that Paul Boyles had received adequate notice of the Florida proceeding. In *Lendsay*, the Florida Court of Appeals articulated two inferences that may be drawn when a letter is returned marked "unclaimed":

> The fact that the appellant did not claim the registered letter is susceptible not only to the inference that he refused to do so, but is also susceptible to the inference that he did not then live at the address to which the letter was directed.

Id. at 747.[2] The Florida court then concluded that the defendant "did not receive or refused to receive this letter." *Id.*

2. We agree with the majority opinion in the court below in noting that, "the facts suggest at least one other inference—that the appellant was on vacation or temporarily absent from the home at the time the notices were left." *Boyles v. Boyles*, 59 N.C. App. at 394, 297 S.E. 2d at 408.

Lendsay thus articulated two inferences that arise when a letter is returned "unclaimed": 1) that the defendant refused service, and 2) that the defendant did not then live at that address. In analyzing the case, however, the Florida court did not require a showing that defendant did not then live at the posted address in reversing the trial court's determination that defendant had refused service of process. Significantly, the appellate court impliedly assumed not only that the defendant may have lived at the posted address but also that he may have received the several notices the postal authorities left him at his address because it indicated, nevertheless, that the defendant was under no duty to go to the post office to pick up his mail. In quoting favorably from a Delaware Supreme Court decision holding that a defendant is under no duty to help the plaintiff complete service, the Florida court wrote:

> "There was no duty upon him to help the plaintiff complete the service [by going to the post office to pick up the letter] any more than there is a duty upon a resident defendant to go to the Sheriff's office in response to a phone call for the purpose of accepting personal service of a writ. This is not the case where the defendant made it impossible for the plaintiff to comply with the act, for, even after the return of the original letter, the plaintiff could have caused another one to be delivered or tendered to the defendant by sending it special delivery. *See Wise v. Herzog*, 72 App. D.C. 335, 114 F. 2d 486."

Lendsay v. Cotton, 123 So. 2d at 747, *quoting Paxson v. Crowson*, 8 Terry 114, 117, 47 Del. 114, 117, 87 A. 2d 881, 882 (1952). In the case at bar, plaintiff did not send a second letter or use any other alternate method of providing defendant with actual notice of the proceeding. No constructive notice was attempted. Accordingly, the evidence was insufficient for the trial court to find that defendant received actual notice of the proceeding, or that he refused such notice or that he concealed his whereabouts so as to avoid receipt of notice. We hold, therefore, that the evidence was insufficient to support the trial court's finding that defendant received adequate notice under Florida law.

The default judgment rendered by the Florida court is therefore void and subject to collateral attack because the defend-

ant did not receive adequate notice in compliance with the Florida standard of reasonable notice under *Kosch.* Being invalid under Florida law, the judgment is not entitled to full faith and credit in North Carolina.

In holding that the Florida judgment rendered was void under Florida law, we need not address defendant's contention that the Florida judgment was void because it was rendered in violation of defendant's constitutional right to due process in that the notice given failed to meet the standard of reasonableness demanded under the fourteenth amendment of the United States Constitution.

The decision of the Court of Appeals is affirmed.

Affirmed.

Justice MARTIN dissenting.

I dissent from the majority opinion. This appeal involves only the question whether defendant had adequate notice of the hearing in the Florida court. No question of jurisdiction over the defendant arises. He appeared personally in the trial of the action in Florida; in fact, Paul W. Boyles was the plaintiff in the original lawsuit in Florida.

The validity of the notice and resulting judgment in the Florida case is determined by the law of Florida. *Dansby v. Insurance Co.*, 209 N.C. 127, 183 S.E. 521 (1936). North Carolina must give full faith and credit to the judgments of Florida courts pursuant to article IV, section 1, of the Constitution of the United States. *Thomas v. Frosty Morn Meats*, 266 N.C. 523, 146 S.E. 2d 397 (1966). Where the Florida court has litigated and determined the issue of notice in the very case being enforced in North Carolina, we must give full faith and credit to such determination. *Underwriters Assur. v. North Carolina Life*, 455 U.S. 691, 71 L.Ed. 2d 558 (1982). Here, the Florida court did litigate and determine the issue of the validity of notice. It was not a "mere recital in the judgment" that the Florida court had jurisdiction. Judge Christie, the Florida judge who presided over both Florida proceedings, found that "[the court is] advised that notice was sent to the plaintiff, Paul W. Boyles, advising him of the Motion for

Money Judgment and the date of said hearing, said notice being provided timely and in accordance with the laws of the State of Florida . . . ." The exhibits supporting the service on Paul Boyles by certified mail were before the Florida court.

North Carolina is bound by the Florida judgment which has expressly determined the issue of notice. True, the present defendant was not present when the issue was determined, but that is irrelevant. It is the court that must have resolved the issue, otherwise a party could thwart the court's resolution of such issues by merely refusing to attend the court proceedings. Such cannot be the law.

The Florida court is presumed to know the law of Florida. In determining the issue of notice, the Florida case of *Lendsay v. Cotton*, 123 So. 2d 745 (Fla. Dist. Ct. App. 1960), provides logic to support Judge Christie's ruling. *Lendsay* held that where a registered letter was unclaimed, two inferences arose: (1) the party refused to claim the letter, or (2) he did not live at the address to which the letter was directed. In the *Boyles* case, all the evidence shows that at the time the letter was mailed, defendant lived at 205 Lenape Drive, Berwyn, Pennsylvania 19312, the address on the letter. As stated in defendant's brief, he did not deny that he lived at this address in March 1971. Two notices of the letter were left at this address. Therefore, the only remaining inference is that Dr. Boyles refused the letter. Under Florida law, this is sufficient notice. *See Cherry v. Heffernan*, 132 Fla. 386, 182 So. 427 (1938). Therefore, this Court is bound by the determination of the Florida court that the notice to defendant of the hearing on this motion in the cause was lawful under Florida law, and we must give full faith and credit to the judgment entered by that court. *Thomas v. Frosty Morn Meats, supra*, 266 N.C. 523, 146 S.E. 2d 397 (1966). The majority explicitly refrained from discussing any constitutional due process issues. I vote to reverse the decision of the Court of Appeals.

Chief Justice BRANCH joins in this dissent.

STATE OF NORTH CAROLINA v. DONALD ABERNATHY FREEMAN

No. 623PA82

(Filed 31 May 1983)

1. **Criminal Law § 91— Speedy Trial Act—actions in different prosecutorial districts—not one common scheme or plan**

Where criminal actions occur in different prosecutorial districts, they cannot be considered as one common scheme or plan under the Speedy Trial Act.

2. **Criminal Law § 91— Speedy Trial Act—superseding indictments—good faith**

The State appropriately and in good faith obtained superseding indictments pursuant to G.S. 15A-646, and the 120-day statutory speedy trial period thus began on the day the new indictments were returned, where defendant was indicted on 17 November 1980 on three charges of conspiracy to obtain money by false pretense; these three charges were voluntarily dismissed on 5 May 1981; defendant was indicted on 23 March 1981 on one charge of conspiracy to commit false pretense and three counts of aiding and abetting in obtaining money by false pretense; the dates of the alleged conspiracy were changed in the new indictment, and it appears that by obtaining a superseding indictment on the conspiracy charge, the State was acting on additional information and attempting to protect its interests in proving defendant's guilt; the three 23 March indictments alleging the separate crime of aiding and abetting represented the result of additional information leading to new and more specific charges; and there was no evidence that the State sought to obtain the 23 March indictments merely to avoid the time limitations of the Speedy Trial Act. G.S. 15A-701(a1)(3).

3. **False Pretense § 2.1— fictitious business—worthless checks—aiding and abetting in obtaining money by false pretense**

Defendant was properly indicted and convicted under G.S. 14-100 for aiding and abetting in obtaining money by false pretense where the evidence tended to show that defendant was instrumental in creating a fictitional business with an account at a reputable bank for the sole purpose of inducing merchants to cash worthless checks purportedly issued to employees of the business; defendant furnished a worthless check drawn on the business account to a payee who was permitted to cash the check at a supermarket; and the payee knew at the time that the business was not legitimate, that it had been set up by defendant, and that it existed for the purpose of inducing merchants to cash worthless checks.

4. **Criminal Law § 146.1— scope of review of Court of Appeals' decision**

Pursuant to App. Rule 16, the scope of review of decisions of the Court of Appeals is limited to those issues properly presented for review to that Court.

5. **Criminal Law § 13— right to try person brought within jurisdiction illegally**

The fact that a person accused of a crime is improperly or illegally brought to this State after being apprehended in another jurisdiction does not affect the right of the State to try and imprison him for the crime.

6. False Pretense § 1; Forgery § 1— false pretense—uttering worthless checks not lesser included offense

The crime of uttering worthless checks is not a lesser included offense of obtaining property under false pretense. Therefore, in a prosecution for aiding and abetting in obtaining money by false pretense, the trial court did not err in failing to instruct the jury concerning the crime of uttering worthless checks.

THE State of North Carolina appeals from a decision of the Court of Appeals filed on 5 October 1982 reversing defendant's conviction for aiding and abetting in obtaining property by false pretense in violation of G.S. § 14-100, and remanding the cause for a determinaion of whether the case should be dismissed with or without prejudice. The judgment was entered by *Snepp, J.*, at the 29 June 1981 Session of Superior Court, MECKLENBURG County. We granted the State's petition for discretionary review on 11 January 1983. On the same day we allowed defendant's petition for discretionary review of that portion of the Court of Appeals' opinion finding no error in the trial court's denial of defendant's motion to dismiss.

The appeal concerns, *inter alia*, the application of the Speedy Trial Act to charges pending in two prosecutorial districts. Facts pertinent to the case are as follows:

LINCOLN COUNTY INDICTMENTS

On 20 October 1980 defendant was indicted in Lincoln County on three counts of obtaining money by false pretense from Food World, Inc. on 30 November 1979, Triangle Mini Mart, Inc. on 28 November 1979, and Ben Franklin Store Company on 28 November 1979 by presenting checks to those businesses drawn on a purported account of Budget Merchandise and Financing at City National Bank in Charlotte and made payable to the defendant. The defendant represented to those businesses that the checks were his payroll checks from Budget Merchandise and Financing. The indictments further alleged that in truth and in fact the defendant knew at the time of presenting the checks that they were not valid and negotiable; that they were not valid payroll checks; that the Budget Merchandise and Financing account with the City National Bank of Charlotte was opened on 5 November 1979 and was closed on 16 November 1979, and that Budget Merchandise and Financing was not in business at the address represented.

On 23 December 1980 the three Lincoln County indictments were dismissed inasmuch as the defendant was to be tried in Mecklenburg County "on related charges."

MECKLENBURG COUNTY INDICTMENTS

On 17 November 1980, prior to the dismissal of the Lincoln County indictments, defendant was indicted in Mecklenburg County on three separate charges of *conspiracy* to obtain money by false pretense.

On 23 March 1981 defendant was indicted in Mecklenburg County on three counts of *aiding and abetting* in obtaining property by false pretense. Indictment 81CR019807 alleged as follows:

> that on or about the 9th day of November, 1979, in Mecklenburg County, Donald Abernathy Freeman, did unlawfully, wilfully and feloniously aid and abet Harry Lee Gaston in obtaining unlawfully, wilfully, feloniously, knowingly, and designedly, with the intent to cheat and defraud, $150.00 in currency and goods from Harris-Teeter Supermarkets, Inc., a corporation, doing business in North Carolina, without making proper compensation or bona fide arrangements for compensation. The property was obtained by means of Harry Lee Gaston, who represented himself to be an employee of Budget Merchandise and Financing Company, presenting to Harris-Teeter Supermarkets, Inc., for payment for goods and for cashing check number 315, drawn to Harry Lee Gaston, on the account of Budget Merchandise and Financing Company, which appeared to be a legitimate business, when in fact Harry Lee Gaston knew at the time he presented the check that Budget Merchandise and Financing Company was not a legitimate business, but rather had been created by Donald Abernathy Freeman and was existing for the sole purpse of inducing merchants to cash worthless checks which appeared to be checks from a legitimate business, presented by people who appeared to be employees of the business. The pretense made was calculated to deceive and did deceive.

The other two indictments were substantially similar, alleging that on the same date Gaston presented check number 328 in the amount of $110.00 and check number 317 in the amount of $80.00 to Harris-Teeter. Defendant was also indicted on 23 March on one

count of conspiracy to commit false pretense. The indictment alleged

> that on or about the 5th day of November, 1979, and continuing thereafter up through and including the 12th day of February, 1981, in Mecklenburg County, and elsewhere within the state of North Carolina, at places known and unknown to the Grand Jury of Mecklenburg County, Donald Abernathy Freeman, did unlawfully, wilfully and feloniously with common design and set purpose, agree, plan, combine, conspire, and confederate each with the other, with Robert Junior Winchester, William Henry Cloud, Carol Laney, Harry Lee Gaston, Johnny Lee Mumford, Jr., and divers others to commit the felony of false pretense by presenting to various commercial establishments including Harris-Teeter Supermarkets, Inc., Atlantic and Pacific Tea Company, Inc., Winn Dixie, Inc., The Kroger Company, a corporation, doing business as Kroger Sav-On, Woolworth/Woolco, Inc., corporations doing business in North Carolina, checks which appeared to be valid checks drawn on the account of a p[ur]portedly legitimate business, Budget Merchandise and Financing Company, thereby inducing the commercial establishments to cash these checks when in fact there was no such legitimate business and there were no funds in any account to cover the checks presented. This pretense made was calculated to deceive and did deceive.

On 5 May 1981 the prosecutor entered voluntary dismissals on the Mecklenburg County indictments of 17 November 1980.

EVIDENCE

At trial, the State's evidence tended to show that on 5 November 1979, the defendant opened an account at the City National Bank in Charlotte in the name of Budget Merchandise and Financing. He presented identification (a South Carolina driver's license) and a document from the Register of Deeds registering the company in Mecklenburg County. He deposited $75.00 in cash. Defendant represented that his business was to finance "general and special merchandise." He ordered 300 checks. Later that month defendant brought Carol Laney to the bank to sign a signature card on the account. There was evidence that the address given by the defendant as that of his business, 704 East 36th

Street, Charlotte, was in fact the address of a rooming house that had burned in June 1979 and had been condemned in October 1979. Defendant lived next door. Harry Lee Gaston testified that in September 1979 defendant approached him about making "some quick and easy money." Defendant told Gaston that Budget Merchandise and Financing Company did not exist but they "would just be cashing checks." Gaston would cash the checks at various business establishments. Defendant would receive sixty percent of the face value of the checks and Gaston would take forty percent of the purchases. Defendant provided Gaston with identification. According to Gaston, he, the defendant, and others, including William Cloud, "would go about cashing the checks at that time by all of us meeting at a certain location. Mr. Freeman would pass the checks out to us and then we would all get in his automobile and he would point out the various stores to go to. He would wait outside until we came back out of the store."

Donald Allen, a special agent for the State Bureau of Investigation, testified that he took defendant into custody in Suffolk, Virginia, advised him of his rights, and returned defendant to North Carolina. S.B.I. Agent Allen further testified that:

> On this day, the first of October, 1980, in route back to Lincoln County we had a conversation at which time he advised that he [had] been the president of Budget Merchandise and Financing Company. He said that he had set the company up. We had a discussion about the legalities involved and the charges against him at which time he stated that he was not contesting the facts and the cases against him in North Carolina but rather he was contesting the constitutionality of the North Carolina General Statute 14-100 which is the false pretense law. He acknowledged that he had written numerous Budget Merchandise and Financing checks in North Carolina and Lincoln County. There were not forgeries involved. That there was a person named Carol Laney who had signed some of the checks in addition to him. He did state that some of the checks with her signature on them he was not familiar with and did not know who cashed them. He further related that Virginia authorities had held him and in his opinion illegally because he had filed a writ of habeas corpus which he stated had never been heard in Court. He told me further that he had never committed any bad crime such as

burglary or larcenies of people's things or never hurt anyone and that with reference to the checks he stated he felt the big stores could afford the losses and no one was really hurt from cashing the checks at these types of places. He told me that Budget Merchandise and Financing Company was a business deal that went sour because he tried to help some unfortunate friends out and it ended up getting him in trouble. He said that he had told a Carol Ann Sadler and a Luther Gamble not to go to Gastonia and cash any checks in that area and that they went anyway and got caught. He said that his intentions in opening up Budget Merchandise and Financing account was to raise money to go to Wilmington and open a legitimate business there in which he would be selling books and appliances. He said several people went with him to the Wilmington area.

Based on the 23 March 1981 indictments, defendant was tried and convicted on 1 July 1981 of one count of *aiding and abetting* in obtaining property by false pretense. On appeal to the Court of Appeals, that court reversed, finding that the State had failed to comply with the North Carolina Speedy Trial Act, G.S. § 15A-701(a1). The court rejected defendant's argument that under the evidence he could not be prosecuted under the false pretense statute when other statutes, specifically G.S. § 14-106 (obtaining property in return for worthless check, draft or order) or G.S. § 14-107 (worthless check) more specifically fitted the alleged activities.

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

Donald Abernathy Freeman, for himself as defendant-appellant.

MEYER, Justice.

STATE'S APPEAL

The State contends that the Court of Appeals erred in holding that the State failed to comply with the Speedy Trial Act. G.S. § 15A-701(a1)(3) provides in pertinent part:

(a1) Notwithstanding the provisions of subsection (a) the trial of a defendant charged with a criminal offense who is ar-

rested, 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:

. . . .

(3) When a charge is dismissed, other than under G.S. 15A-703 or a finding of no probable cause pursuant to G.S. 15A-612, and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 120 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last, for the original charge; . . . .

In its opinion, the Court of Appeals concluded that:

> We believe the false pretense for which the defendant was charged in Lincoln County and the aiding and abetting false pretense for which the defendant was convicted in Mecklenburg County were part of the same scheme or plan. *See State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981). The Lincoln County charges were not dismissed under G.S. 15A-703 or on a finding of no probable cause. The trial in Mecklenburg County was not held within 120 days of the indictment in Lincoln County which delay violated the provisions of G.S. 15A-701(a1). *See State v. Norwood*, --- N.C. App. ---, 291 S.E. 2d 835 (1982); *State v. Walden*, 53 N.C. App. 196, 280 S.E. 2d 505 (1981); and *State v. Dunbar*, 47 N.C. App. 623, 267 S.E. 2d 577 (1980).

State v. Freeman, 59 N.C. App. 84, 86, 295 S.E. 2d 619, 620-21 (1982).

[1] In so holding, the Court of Appeals erred. Where criminal actions occur in different prosecutorial districts,[1] they cannot be considered as one common scheme or plan under the Speedy Trial Act. We cannot ascribe a legislative intent that would so drastically hinder respective district attorneys in performing the duties of their offices. To hold otherwise would allow the dismissal of a case in one district as a result of actions by a

1. Lincoln County is in District 27-B; Mecklenburg County is in District 26.

district attorney in another district without the knowledge or consent of the district attorney in the affected district. The law does not contemplate such a bizarre result.

[2] Defendant was tried and convicted under a 23 March Mecklenburg County indictment of *aiding and abetting* in obtaining money by false pretense. Although defendant was earlier indicted in Mecklenburg County on 17 November on conspiracy to commit false pretense, these indictments were not dismissed until 4 May. G.S. § 15A-701(a1)(3) is applicable only after charges are dismissed and the defendant is later charged with the same or similar offense. *See State v. Dunbar*, 47 N.C. App. 623, 267 S.E. 2d 577 (1980). 17 Wake Forest Law Review 173, 185 (1981). Thus, the issue in the present case is whether the State appropriately and in good faith obtained superseding indictments pursuant to G.S. § 15A-646. We recently addressed this issue in *State v. Mills*, 307 N.C. 504, 299 S.E. 2d 203 (1983), and held that where the State has a valid reason for obtaining new indictments, the 120-day period begins on the date the superseding indictments are returned. Here, the Record discloses that, at least with respect to the three 17 November *conspiracy* indictments and the one 23 March *conspiracy* indictment, the State properly obtained the superseding indictment. The 17 November indictments alleged that on or about 9 November, 12 November and 15 November 1979, defendant conspired with others to obtain money by false pretense. The 23 March 1981 indictment alleged that on or about 5 November 1979 and continuing through 12 February 1981, defendant conspired to obtain money and goods by false pretense. As we stated in *Mills*, the dates "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." *Id.* at 507, 299 S.E. 2d at 205. In fact, we held in *State v. Christopher*, 307 N.C. 645, 300 S.E. 2d 381 (1983), that a variance between the date alleged in the indictment and the date shown by the evidence at trial prejudiced defendant's ability to present an alibi defense to a charge of conspiracy. We of course recognize that the defendant in the present case was not tried or convicted on the charge of conspiracy. Nevertheless, it appears that by obtaining a superseding indictment on the conspiracy charge, the State was acting on additional

information and attempting to protect its interests in proving defendant's guilt.

Likewise, the three 23 March indictments alleging the separate crime of *aiding and abetting* simply represent the result of additional information leading to new and more specific charges.[2] In *Mills* we recognized that although G.S. § 15A-646, which affords the State the opportunity to obtain a superseding indictment, *could* be misused by the State for the purposes of defeating the time limitations under the Speedy Trial Act, the good faith requirement enunciated in *Mills* affords adequate protection against such abuse.

On the Record before us there is no evidence that the State sought to obtain the 23 March indictments merely to avoid the time limitations of the Speedy Trial Act. At the time the 23 March indictments were obtained, there remained twenty-five days within which the State could have brought defendant to trial under the 17 November 1980 indictments (excluding the period from 21 November, when defendant was served with these indictments, to 19 December, on motions for continuance). In fact, the 23 March case was first calendared for trial on 21 April 1981 at which time defendant moved to dismiss the 17 November indictments and the 23 March superseding indictments. We therefore hold that for purposes of the Speedy Trial Act, 23 March 1981 is the controlling date. As defendant was brought to trial on 29 June 1981, well within the 120-day time limitation, no violation occurred. We reverse the Court of Appeals on this issue.

2. On 25 August 1980, on a plea of guilty to four counts of false pretense, prayer for judgment was continued until 15 December 1980 or "until such time as all cases relating to the investigation of Budget Merchandise & Financing Co. of Charlotte, N. C., said investigation being conducted statewide by the State Bureau of Investigation, are resolved." Defendant agreed to co-operate with law enforcement authorities in their investigation and to give truthful testimony. It appears, then, that investigation into defendant's activities was ongoing. An official of the City National Bank testified that 214 checks were written on the Budget Merchandise account totaling $24,437.00. We also note that defendant began by presenting checks himself. Later he solicited the help of others. In short, considering the scope of defendant's operation, the number of checks and individuals involved, and the extent of the investigation, we believe the State acted as promptly as possible in defining the charges and bringing defendant to trial.

DEFENDANT'S APPEAL

[3] Defendant first contends that the trial court erred in denying his Motion to Dismiss the charge of false pretense, G.S. § 14-100, where the evidence showed only a violation of G.S. § 14-106 or § 14-107, uttering worthless checks. We disagree.

G.S. § 14-100 provides in pertinent part:

> (a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony, ...

In *State v. Cronin*, 299 N.C. 229, 242, 262 S.E. 2d 277, 286 (1980), we held that

> the crime of obtaining property by false pretenses pursuant to G.S. 14-100 should be defined as follows: (1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.

In the present case, defendant aided and abetted in falsely representing to Harris-Teeter Supermarkets, Inc. that Harry Gaston was an employee of Budget Merchandise and Financing Company, which was made to appear a legitimate business, and in that capacity Gaston was permitted to cash a check drawn on the Budget account. Gaston knew at the time that Budget Merchandise and Financing was not a legitimate business; that it had in fact been set up by the defendant; and that the business existed for the sole purpose of inducing merchants to cash worthless checks. "The pretense was," in the words of the indictment, "calculated to deceive and did deceive."

In *State v. Clontz*, 4 N.C. App. 667, 167 S.E. 2d 520 (1960), the Court of Appeals affirmed defendant's conviction of obtaining property by means of false pretense where defendant represented

himself to a salesman as Thomas E. Crabtree and based on that representation was permitted to cash a check for the purchase of paint and related material. Likewise, defendant in the case sub judice did more than aid or abet in presenting a worthless check. He was instrumental in creating a fictional business, the purpose of which was to belie unwary merchants into believing that the payroll checks drawn on that business, with an account at a reputable bank, were guaranteed. "[T]he crime of obtaining property by means of a false pretense may be committed when one obtains goods . . . by a wilful misrepresentation of his identity . . .," because "[t]he decision of a merchant to extend credit ordinarily turns upon his evaluation of the financial status and history of the applicant." *State v. Tesenair*, 35 N.C. App. 531, 535, 241 S.E. 2d 877, 880 (1978). In *Tesenair*, defendant introduced himself as Boyce Tesenair and, after checking, the merchant learned from the Credit Bureau that Tesenair had a good credit rating. Based on this information, the merchant permitted defendant to purchase paint and supplies on credit. Defendant argued that the evidence showed nothing more than his failure to fulfill a promise to pay in the future. In responding, the Court of Appeals wrote that defendant's arguments overlooked

> the significance of the evidence that defendant obtained goods on credit by a deliberate misrepresentation of his identity. The crime of obtaining property by means of a false pretense is committed when one obtains a loan of money by falsely representing the nature of the security given. *State v. Roberts*, 189 N.C. 93, 126 S.E. 161 (1925), or by falsely representing that the property pledged as security is free from liens. *State v. Howley*, 220 N.C. 113, 16 S.E. 2d 705 (1941); *See* Annot., 24 A.L.R. 397 (1923), *supplemented in* 52 A.L.R. 1167 (1928).

Id. at 535, 241 S.E. 2d at 879-80.

A defendant may obtain money or property by falsely representing his own identity (which defendant's cohorts effectively did as purported employees of Budget Merchandise and Financing Company) or he may do so by creating the identity of a "business" calculated to engender confidence in the inherent worth of the check. The fact remains that behind the mere writing of a worthless check lies a cleverly devised plan to deceive.

This is the very essence of a false pretense—to obtain or attempt to obtain a thing of value with the intent to cheat or defraud. We therefore hold that the indictment was carefully and lawfully styled and defendant was properly convicted of the crime charged.

[4] In his new brief,[3] defendant raises numerous assignments of error which were neither presented nor argued before the Court of Appeals. Pursuant to Rule 16 of the North Carolina Rules of Appellate Procedure, the scope of review of decisions of the Court of Appeals is limited to those issues properly presented for review to that court. Thus, the questions defendant attempts to present are not properly before us. *See State v. Hurst*, 304 N.C. 709, 285 S.E. 2d 808 (1982). We have, nevertheless, reviewed these questions and find them to be without merit.

The issues deal substantially with the following: the extradition process; the trial court's failure to instruct on a worthless check crime; the failure of the indictment to allege a crime; probable cause for arrest and detention; the prosecutor's discretion to impanel a grand jury to consider a crime defined by G.S. § 14-100; the constitutionality of G.S. § 14-100 as it relates to commercial paper; the repeal of G.S. § 14-100 and G.S. § 14-106; the exclusive application of G.S. § 14-107 to crimes involving worthless checks; the lack of a prima facie case under G.S. § 14-107.1; failure to toll the Statute of Limitations as to both G.S. § 14-106 and G.S. § 14-107; the lawfulness of defendant's arrest, detention, indictment, process, imprisonment, and extradition when predicated upon a violation of G.S. § 14-100; and, suppression of evidence as fruit of the poisonous tree. Most of these issues are resolved by our holding today that defendant was properly charged and convicted under G.S. § 14-100. The questions of extradition and jury instruction deserve separate consideration.

[5] Defendant contends that he was denied due process of law in that he was given no opportunity to be heard prior to his extradition from the State of Virginia; that the matter of his petition for a writ of habeas corpus was unresolved prior to his extradition; and that he was extradicted for acts proscribed by a repealed or unlawful statute, namely G.S. 14-100. He further contends that

3. Appellant's brief is from his own pen.

the seizure of his person was in violation of the fourth amendment and that the trial court lacked jurisdiction over him. "Even if the defendant was improperly or illegally brought to North Carolina after being apprehended in Virginia, this would not affect the right of the State of North Carolina to try him and imprison him on the felony charges. . . ." *State v. Green*, 2 N.C. App. 391, 393, 163 S.E. 2d 14, 16 (1968); *State v. Smith*, 33 N.C. App. 511, 235 S.E. 2d 860, *appeal dismissed* 293 N.C. 364 (1977), *cert. denied* 434 U.S. 1076 (1978).

[6] The defendant requested that the trial court charge the jury on the crime of uttering worthless checks. The trial court did not so charge the jury. Defendant first contends that the jury could find no crime because conviction was impossible under G.S. § 14-100 and because the jury was not instructed on the crime of uttering worthless checks. In the alternative, he contends that the trial court erred in failing to charge on the crime of uttering worthless checks. Defendant admits, and we agree, that the crime of uttering worthless checks is not a lesser included offense of obtaining property under false pretense. *See State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982) (detailing the standard in determining lesser included offenses). Therefore, the trial court did not err in failing to instruct the jury concerning the crime of uttering worthless checks. There was ample evidence for the jury to find the crime of aiding and abetting the obtaining of property under false pretense.

We affirm that part of the Court of Appeals' opinion finding no error in the trial court's failure to dismiss the indictment under G.S. § 14-100.

For error in reversing the trial court and remanding for a determination as to dismissal with or without prejudice, the decision of the Court of Appeals is reversed. The cause is remanded to the Court of Appeals for reinstatement of the judgment of the trial court.

Reversed and remanded.

STATE OF NORTH CAROLINA v. ROBERT HOLLAND GREER

No. 560PA82

(Filed 31 May 1983)

1. **Public Officers §§ 11, 11.1— removal of magistrate—indictment sufficient—statute not in irreconcilable conflict**

The legislature did not intend to exempt magistrates from indictment and criminal prosecution under G.S. 14-230 when it included magistrates under the sanctions of G.S. 7A-173 and G.S. 7A-376.

2. **Public Officers § 11— magistrate unlawfully jailing person—sufficiency of evidence**

There was substantial evidence that a person was confined in jail unlawfully by the defendant, a magistrate, where a jury could reasonably conclude that the person was jailed at the direction of the defendant and that the defendant was fully aware that the person remained confined without a charge ever being filed against him.

3. **Public Officers § 11— magistrate corruptly violating his oath—sufficiency of evidence**

There was substantial evidence that the defendant, a magistrate, corruptly violated his oath by placing a person in jail without any charge and by keeping him there until he paid $200 where there was substantial evidence that the defendant intended to keep the man in jail until he paid $200 and that he intended to pay over part of that "bond" money to victims, and where defendant attempted to avoid any written record which might indicate that he had done something wrong.

ON the State's petition for discretionary review of the decision of the Court of Appeals, 58 N.C. App. 703, 294 S.E. 2d 745 (1982) (opinion by *Judge Wells*, with *Judge Robert Martin* concurring in the opinion and *Judge Webb* concurring in the result) arresting and vacating the judgment of *Grist, J.*, entered 2 April 1981 in Superior Court, CALDWELL County.

The State presented evidence at trial tending to show that Mr. Ottie Carroll and his daughter, Ms. Rebecca Cox, were driving through Caldwell County in route to Blowing Rock, North Carolina when a bottle was thrown against the windshield of their car by a passing motorist. Mr. Carroll called the police who responded immediately and apprehended Mr. Larry Hafner who was identified by Mr. Carroll and Ms. Cox as the culprit. At the time Mr. Hafner was apprehended he was intoxicated, belligerent and uncooperative. Mr. Hafner testified that at the time of the incident he was "drunk as a cooter."

Mr. Hafner, Mr. Carroll and Ms. Cox accompanied the police to the Caldwell County Courthouse where the defendant, Mr. Greer, was the magistrate on duty. The defendant's attempt to interview Mr. Carroll and Ms. Cox was repeatedly interrupted by the belligerent actions of Mr. Hafner. As a result of this unruly behavior, the defendant ordered the attending officers to take Mr. Hafner out of his courtroom. Mr. Carroll testified that the defendant instructed the officers to lock up Mr. Hafner for contempt of court. Although neither attending officer could remember the defendant ordering that Mr. Hafner be put in jail for contempt, they both believed that the order was for contempt and the jail records so indicate. No charge was ever filed against Mr. Hafner for either the bottle throwing incident or his belligerent behavior in the magistrate's court.

Mr. Carroll testified that he repeatedly asked the defendant to issue a criminal warrant against Mr. Hafner but the defendant indicated that he would handle it his own way. Before leaving the defendant's office Mr. Carroll gave the defendant his daughter's telephone number and indicated that the amount of damage was one hundred and twenty-five dollars ($125.00).

At the time Mr. Hafner was jailed the officers filled out the jail card and the jail log in a manner consistent with a confinement for contempt although no contempt citation was ever issued by the defendant. The notation "No Bond" was entered on the jail card by the attending officers. Later that same day Larry Hafner's stepfather, Mr. James Moss, arrived at the magistrate's office for the purpose of posting bond for Mr. Hafner. At that time the defendant had gone off duty and had been replaced by Magistrate John Parlier. Magistrate Parlier testified that at the time Mr. Moss arrived to secure Mr. Hafner's release the jail log indicated that the bond was in the amount of two hundred dollars ($200.00) and was for contempt. However, the word "contempt" had a line through it prompting Magistrate Parlier to call the defendant in order to obtain the proper disposition. The defendant told Magistrate Parlier that Mr. Hafner was not being held for contempt and the two hundred dollars ($200.00) bond was the result of Mr. Hafner having damaged a windshield on a car. Magistrate Parlier released Mr. Hafner after receiving two hundred dollars ($200.00) from Mr. Moss. Although the receipt indicated that the money was a bond for contempt, Magistrate Parlier

treated the money differently from other bond money and gave the cash to the defendant.

After receiving the two hundred dollars ($200.00), the defendant called Mr. Carroll and Ms. Cox and told them he had one hundred and ninety-dollars ($190.00) for them to pick up. Ms. Cox testified that the defendant refused to send her a cashier's check because he did not want any record of the transaction since he handled the matter in an "underhanded" manner. As a result Mr. Carroll returned to Caldwell County where the defendant gave him one hundred and twenty-five dollars ($125.00) and said that the remaining sixty-five dollars ($65.00) was for court costs and if there was any left Mr. Carroll would get it. Mr. Carroll further testified that the defendant refused to take a receipt for the money because he had been advised that it was "hot." Before the defendant gave Mr. Carroll any money he asked Carroll to write a letter to his superior indicating what a fine job he had done in handling the matter.

The defendant presented evidence directly and through cross-examination of the State's witnesses tending to show that Ms. Cox was very afraid of Mr. Hafner and his friends and did not want her address to appear on the arrest warrant. The defendant testified that Mr. Carroll was not interested in having a warrant issued against Mr. Hafner but that he did want to receive a cash payment to settle the entire matter.

The defendant testified that Mr. Hafner was sent from his courtroom because of his behavior but that he never ordered him jailed for contempt of court. Officer Kirby stated that she changed the disposition on the jail card from "contempt" to "hold till sober" at the direction of the defendant the day after Mr. Hafner was released from jail.

The defendant further testified that he told Magistrate Parlier that Mr. Hafner was being held until he became sober and that the two hundred dollars ($200.00) was for a windshield Mr. Hafner damaged. The defendant stated that the men with Hafner at the time of the incident agreed to get the money to pay for the windshield and that he had awaited their return until he went off duty. He testified that he handled the Hafner incident in an informal capacity and all parties were satisfied until he refused to give Mr. Carroll the entire one hundred and ninety dollars ($190.00),

the balance of the two hundred dollars ($200.00) after deducting jail fees. The defendant stated that he always intended to return the remaining sixty-five dollars ($65.00) to Mr. Hafner, that he unsuccessfully attempted to find Hafner and that he still had the sixty-five dollars ($65.00) in an envelope in his desk.

At the close of all the evidence the jury found the defendant guilty of corrupt practices in violation of G.S. 14-230 and Judge Grist removed him from his office as Magistrate for Caldwell County. The Court of Appeals arrested and vacated the judgment of Judge Grist. We allowed the State's petition for discretionary review 11 January 1983.

Additional facts pertinent to the disposition of this case will be provided within the opinion.

Rufus L. Edmisten, Attorney General, by Assistant Attorney General Christopher P. Brewer, for the State-appellant.

Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A., by James E. Ferguson, II, for the defendant-appellee.

COPELAND, Justice.

In its first argument the State asserts that the majority opinion of the Court of Appeals was in error by holding that G.S. 14-230, so far as it applies to magistrates, was repealed by implication through the enactment of G.S. 7A-173 and G.S. 7A-376. In this State "repeal by implication" is not a favored rule of statutory construction. *Commissioner of Insurance v. Automobile Rate Office*, 294 N.C. 60, 241 S.E. 2d 324 (1978). However, if two statutes are truly irreconcilably in conflict it is logical that the later statute should control, resulting in a repeal of the earlier statute. In the case *sub judice* G.S. 7A-173 and G.S. 7A-376 are not irreconcilably in conflict with G.S. 14-230.

In *State v. Hockaday*, 265 N.C. 688, 144 S.E. 2d 867 (1965) this Court held that the legislature's decision to bring justices of the peace within the scope of a removal from office statute did not exempt them from indictment and prosecution under G.S. 14-230. We find that the reasoning in *Hockaday* controls the first issue in this case.

[1] G.S. 7A-173 and G.S. 7A-376 fall within Chapter 7A titled, "Judicial Department" and provide for the censure, suspension or

removal of those magistrates who are guilty of misconduct in office. On the other hand, G.S. 14-230 falls within Chaper 14 which is titled "Criminal Law" and provides for criminal punishment for misconduct in office. As Justice (later Chief Justice) Bobbitt pointed out in *State v. Hockaday*, 265 N.C. 688, 144 S.E. 2d 867 (1965), G.S. 14-230 applies to misconduct in office unless another statute provides for the "indictment" of the officer. Neither G.S. 7A-173 nor G.S. 7A-376 provide for criminal charges to be brought against a magistrate who is guilty of misconduct in office. As a result, we do not find that the legislature intended to exempt magistrates from indictment and criminal prosecution under G.S. 14-230 when it included magistrates under the sanctions of G.S. 7A-173 and G.S. 7A-376. The Court of Appeals' opinion holding that G.S. 14-230 was repealed by implication is therefore in error.

As a result of this decision we must address the question of whether there was sufficient evidence to warrant submitting this case to the jury and to sustain the jury's verdict of guilty. The defendant's motion to dismiss for insufficiency of the evidence is tantamount to a motion for nonsuit. *State v. Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969). Such a motion "in a criminal case requires a consideration of 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). See also: *State v. Williams*, 307 N.C. 452, 298 S.E. 2d 372 (1983). Viewing the evidence in the light most favorable to the State, the trial court must determine whether there is "substantial evidence" to support each element of the offense. *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (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, 265 S.E. 2d 164, 169 (1980). (Emphasis added.) We have reviewed the record in this case and find that there was substantial evidence of each element of the offense from which the jury could reasonably find this defendant guilty of corruptly violating his oath of office.

[2] In his brief the defendant contends that there was not substantial evidence to support two key elements of the State's case: (1) that the defendant unlawfully placed Larry Hafner in jail for contempt of court and (2) that the defendant's actions were a willful and corrupt attempt to extort two hundred dollars

($200.00) from Mr. Hafner. We disagree with the defendant and address each contention separately. First, under the indictment in this case all the State had to show was that the defendant placed Mr. Hafner in jail in order to extort and collect from him two hundred dollars ($200.00). Although the record indicates that the defendant would have been justified in jailing Mr. Hafner on a contempt charge, it is undisputed that Mr. Hafner was jailed without ever being charged with any crime. The State's evidence also indicates that at the time Mr. Hafner's stepfather arrived to post bond the defendant knew he had not jailed Hafner for contempt but instead was holding him for two hundred dollars ($200.00) for a windshield that had been damaged. It is also undisputed that the defendant instructed one of the attending officers to change the disposition of Mr. Hafner's confinement from "contempt" to "hold till sober" after Mr. Hafner paid two hundred dollars ($200.00) in order to secure his release. Considering these facts in the light most favorable to the State, a jury could reasonably conclude that Mr. Hafner was jailed at the direction of the defendant and that the defendant was fully aware that Mr. Hafner remained confined without a charge ever being filed against him. Therefore, there was substantial evidence that Mr. Hafner was confined in jail unlawfully by the defendant.

[3] Secondly, the State presented evidence that the defendant refused to issue a criminal warrant against Mr. Hafner and said he "would handle it his way." Rebecca Carroll Cox, one of the victims, testified that the defendant called her the next day (Sunday) on the phone and told her she could come and get the money for her broken windshield. When Ms. Cox requested that the defendant send her a cashier's check he said, "No, I don't wany any records of it because I handled it in an *underhanded way*." Ms. Cox's father, Mr. Ottie Carroll, testified that he returned to Caldwell County to pick up the money for the damaged windshield and that prior to receiving any money the defendant asked him to write his superior (Senior Resident Superior Court Judge Forrest Ferrell) a letter commending the defendant on the fine way the entire matter was handled. Mr. Carroll also stated that the defendant gave him one hundred and twenty-five dollars ($125.00) and said the rest was to cover court costs. The evidence shows that no charge was ever filed, so no court costs would have been owed. Mr. Carroll testified further that the defendant

refused a receipt for the money paid to Mr. Carroll because he didn't want any receipt in this case and because the money was "hot" and he wanted to be careful. It is uncontradicted that Larry Hafner was not released from jail until he posted what he thought was a two hundred dollars ($200.00) bond. There is sufficient evidence from which a reasonable mind could conclude that the defendant intended to keep Larry Hafner in jail until he paid two hundred dollars ($200.00) and that he intended to pay over part of that "bond" money to Mr. Carroll and Ms. Cox. There is also substantial evidence that the defendant attempted to avoid any written record which might indicate that he had done something wrong. As a result we hold that there was substantial evidence that the defendant corruptly violated his oath by placing Mr. Hafner in jail without any charge and by keeping him there until he paid two hundred dollars ($200.00).

We wish to point out that even if the defendant was attempting to reach a fair settlement between the victims and Mr. Hafner, he did so without the consent of either party. Mr. Hafner was clearly an unwilling participant in the defendant's settlement scheme. Corruption is defined as, "The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others." Black's Law Dictionary, 311 (Rev. 5th Ed. 1979). The evidence in this case supports the conclusion that the defendant, contrary to the rights of Mr. Hafner and at least for the benefit of Mr. Carroll and Ms. Cox, wrongfully used the power of his office to confine Mr. Hafner and obtain from him two hundred dollars ($200.00) for which there was no legal obligation.

We reverse and vacate the opinion of the Court of Appeals and remand this case to that court for the reinstatement of the trial court's judgment.

Reversed and remanded.

STATE OF NORTH CAROLINA v. RONNIE RICKS

No. 556A82

(Filed 31 May 1983)

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

A pretrial procedure at which photographs of seven black males, many of them wearing black caps or toboggans, were displayed to a rape victim was not impermissibly suggestive or conducive to irreparable mistaken identification because the victim's assailant had been described as wearing a dark colored coat and toboggan and defendant was the only person in the photographs wearing a dark coat; moreover, the fact that the victim was unable to make a positive identification of defendant from the photographs belies defendant's assertion that the procedure was impermissibly suggestive. Even if the photographic procedure was impermissibly suggestive, the trial court's determination that the victim's in-court identification of defendant was of independent origin was supported by evidence that the victim observed defendant for a period of at least three to four minutes while he stood on her lighted front porch; although defendant's face was partially covered by a toboggan, the victim was able to see his face, eyes and mouth; and the victim gave a description of her assailant to an officer when he interviewed her in the hospital some six days after the crime occurred.

2. **Criminal Law § 66.1 — identification testimony — opportunity for observation**

A rape victim's identification of defendant as her assailant was not inherently incredible and unworthy of belief where the victim was afforded a sufficient opportunity to observe her assailant so as to be able to make an accurate identification of him in that the victim observed defendant for a period of at least three to four minutes while he stood on her lighted front porch, and although defendant's face was partially covered by a toboggan, the victim was able to see his face, eyes and mouth.

3. **Criminal Law §§ 76.10, 146.1 — attack on confession — theory not used at trial**

Defendant cannot attack the admissibility of his confession in the appellate division upon a theory entirely different from that relied upon at trial.

ON appeal by defendant from *Allsbrook, Judge*, at the 29 March 1982 Session of NASH County Superior Court.

Defendant was tried upon separate bills of indictment charging him with first-degree rape and first-degree burglary. Defendant entered pleas of not guilty to each of the offenses charged.

The State offered evidence tending to show that on the evening of 24 November 1981, a young black male, later identified as defendant, came to the home of Ms. Lula Rogers in Sharpsburg,

North Carolina. Ms. Rogers testified that she talked to defendant through a partially opened door for about three or four minutes. Although it was dark outside, she could see defendant clearly because the porch was illuminated by an overhead light.

After this short conversation, defendant forced his way into the house and turned off all the inside lights. Defendant Ricks forced Ms. Rogers to have sexual intercourse with him and remained in the house for 30 to 45 minutes thereafter.

Ms. Rogers was hospitalized that evening as a result of the rape. On 30 November 1981, Officer Terry Newell, a special agent with the State Bureau of Investigation, came to the hospital to question Ms. Rogers about the evening of 24 November. At the time she first saw Newell, Ms. Rogers was taking medication for pain.

During this first visit, Ms. Rogers gave Officer Newell a description of her assailant. She described him as being 18 to 20 years old, approximately five feet, four and one-half inches tall, and wearing a dark colored coat and toboggan which covered most of his face. She said that despite the toboggan she could see his eyes, nose and mouth, but she was unable to tell whether he had sideburns.

Officer Newell returned to the hospital on 1 December 1981 to confer further with Ms. Rogers. At this time, he exhibited seven photographs to her, one of which was of defendant. Three of the men were wearing dark toboggans but only defendant wore both a toboggan and a coat. Ms. Rogers testified that she identified defendant from this array but her testimony was contradicted by Officer Newell. He stated that Ms. Rogers eliminated five of the pictures but that she was unable to positively identify either of the men in the remaining photographs as her assailant.

After extensive *voir dire* testimony, the trial court allowed the victim to make an in-court identification of defendant. Judge Allsbrook specifically found that Ms. Rogers' identification was based solely upon her observation of defendant on the night of 24 November, and that the in-court identification was in no way influenced by the photographic identification procedure conducted by Officer Newell at Nash General Hospital on 1 December. On cross-examination of Ms. Rogers before the jury, defense counsel

elicited details of the photographic identification made in the hospital.

The State offered further testimony of Officer Newell. He stated that he interviewed defendant on two separate occasions regarding the 24 November incident. Ricks did not make a statement during the first interview. However, during their second meeting at the Greenville S.B.I. office on 2 December 1981, defendant confessed to the rape of Ms. Rogers.

On *voir dire*, Officer Newell testified that defendant voluntarily came to the Greenville S.B.I. office on 2 December 1981 for the purpose of taking a polygraph test. After the examination, Newell advised defendant of his *Miranda* rights. When asked if he understood the warnings, defendant replied that he did. Defendant then made an oral statement while Officer Newell took notes. Newell then wrote a statement reflecting the substance of what Ricks had told him, read it to defendant and afforded him an opportunity to make corrections. Defendant made one change and then initialed each page and placed his signature at the end.

Officer William Robert Pernell of the Sharpsburg Police Department was also present when defendant offered this statement. His testimony corroborated that of Officer Newell with respect to the circumstances surrounding defendant's confession.

Defendant denied making any statement to the police on 2 December 1981. He testified that he merely wrote his name on a blank sheet of paper and then asked the police to take him back to work.

Following the *voir dire* hearing, Judge Allsbrook found facts and entered conclusions of law, including a conclusion that defendant voluntarily made the confession and "freely, knowingly, intelligently and voluntarily waived" his constitutional rights to remain silent and to have counsel present during interrogation. He then ruled that defendant's confession was admissible.

Other witnesses testifying for the State included Donna Marie Purnell, a cashier at L & L Food Store in Sharpsburg. She stated that on 24 November 1981, between 7:00 and 8:00 p.m., defendant came into the store wearing a toboggan and a dark jacket.

Dr. Hal Stephen Hemme testified that he treated Ms. Rogers at Nash General Hospital on the night of 24 November. He found sperm in the vaginal pool and a bruised vaginal wall.

Dr. Leon Robertson attended the victim on the following day. Ms. Rogers informed him that she had received the injuries as a result of being raped and beaten at her home.

Finally, a neighbor of the victim, James Melvin Joyner, stated that Ms. Rogers called him at about 10:00 p.m. on 24 November and asked him to come to her house. When he arrived, Ms. Rogers was extremely upset and told Joyner that she had been raped.

Defendant presented evidence in the nature of an alibi. Ricks took the stand on his own behalf and testified that he remained at home with his family throughout the evening of 24 November. He stated that he fell asleep at 8:00 p.m. and did not waken until 7:30 the next morning.

Lonnie Dortch, defendant's brother, testified that he was at home with defendant on the evening of 24 November. He stated that he knew defendant remained in bed from at least 9:00 until 11:00 p.m., at which time Dortch fell asleep.

The jury returned verdicts of guilty on each charge. The trial judge imposed a sentence of life imprisonment on the first-degree rape charge and a consecutive sentence of 20 years on the first-degree burglary charge. Defendant appealed the life sentence directly to this Court as a matter of right pursuant to G.S. 7A-27(a). On 21 October 1982, we allowed defendant's motion to bypass the Court of Appeals on the burglary charge pursuant to G.S. 7A-31(b).

Rufus L. Edmisten, Attorney General, by Blackwell M. Brogden, Jr., Assistant Attorney General, and Michael R. Morgan, Assistant Attorney General, for the State.

Antonia Lawrence for defendant-appellant.

BRANCH, Chief Justice.

[1] By his first assignment of error, defendant challenges the admissibility of the victim's in-court identification testimony on the

ground that it was tainted by an impermissibly suggestive out-of-court identification procedure.

We have consistently held that an in-court identification is competent, even if improper pretrial identification procedures have taken place, so long as it is determined on *voir dire* that the in-court identification is of independent origin. *State v. Jackson*, 306 N.C. 642, 295 S.E. 2d 383 (1982); *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). Defendant recognizes this rule, but asserts that the trial court erred in concluding that the victim's in-court identification was independent of any influence other than her observations on the night of the crime.

First we consider the question of whether a constitutionally impermissible pretrial identification procedure took place in instant case. On 1 December 1981, Officer Newell exhibited a photographic array to Ms. Rogers containing the photographs of seven black males, many of them wearing black caps or toboggans. Although defendant does not refer to any specific evidence which tends to indicate that the array or the circumstances surrounding the procedure were impermissibly suggestive, we presume that defendant bases his argument on the fact that defendant's picture was the only photograph depicting an individual wearing both a black toboggan *and* a dark coat, thereby fitting the details of the earlier description given by Ms. Rogers.

The trial judge specifically found that the photographic identification procedure employed by Officer Newell at the Nash General Hospital was free of constitutional error. When a trial court's findings of fact are supported by competent evidence, they are binding upon this Court. *State v. Yancey*, 291 N.C. 656, 662, 231 S.E. 2d 637, 641 (1977); *State v. Tuggle*, 284 N.C. 515, 520, 201 S.E. 2d 884, 887 (1974).

We are of the opinion that the *voir dire* evidence clearly supports Judge Allsbrook's findings. The mere fact that defendant was the only individual in the photographs wearing a dark coat is insufficient to overturn the trial judge's specific finding that the identification procedure was not suggestive or conducive to irreparable mistaken identification. The very fact that the victim was unable to make a positive identification of defendant from the

photographs belies defendant's assertion that the procedure was impermissibly suggestive.

Even were we to accept defendant's position that the pretrial identification procedure was constitutionally infirm, the trial court properly admitted the in-court identification of defendant if the in-court identification was of an independent origin. *United States v. Wade*, 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967).

The trial judge held separate *voir dire* examinations of both Ms. Rogers and Officer Newell before admitting Rogers' testimony identifying defendant as her assailant. Ms. Rogers testified that she observed defendant for a period of at least three to four minutes while he stood on her lighted front porch. Although defendant's face was partially covered by the toboggan, Ms. Rogers was able to see his face, eyes and mouth. Furthermore, she gave a description of her assailant to Officer Newell on 30 November 1981 when he interviewed her in the hospital.

The trial court specifically found as a fact that "the identification of the defendant by Ms. Rogers was based solely upon her observation of the perpetrator of this offense at her home on the night of November 24, 1981; and that this in-court identification was in no way influenced by the photographic identification procedure conducted by Officer Newell at Nash General Hospital on December 1, 1981." This finding is supported by competent evidence elicited from the witnesses on *voir dire* and is therefore conclusive upon this Court. *State v. Yancey, supra.* We hold that even if the photographic array had been impermissively suggestive, the trial judge's ruling that the in-court identification was independent in origin and therefore admissible was correct.

[2] Defendant advances an additional argument in support of his position that the in-court identification testimony was improperly admitted. Relying on *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967), defendant contends that Ms. Rogers' testimony identifying defendant as her assailant should have been excluded because it was inherently incredible and unworthy of belief. For the reasons hereafter stated, we find *Miller* totally inapposite to instant case and reject defendant's argument that the victim's testimony was inherently incredible.

In *Miller*, the only evidence connecting the defendant with the crime for which he was charged was the testimony of a witness who identified the defendant in a lineup as one of the perpetrators of the crime. The witness testified that he viewed the defendant at the scene of the crime at night from a distance of approximately 286 feet. Other than this distant glance, the witness had never seen the man before and could not describe the clothes he wore or the color of his hair. On the basis of this testimony, this Court held that the distance was too great for an observer to note and store in memory features which would enable him, six hours later, to identify a complete stranger with the degree of certainty which would justify the submission of the defendant's guilt to the jury. The Court went on to note, however, that "[w]here there is a *reasonable possibility of observation sufficient to permit subsequent identification*, the credibility of the witness' identification of the defendant is for the jury, ..." *Id.* at 732, 154 S.E. 2d at 906 (emphasis added).

We are of the opinion that in this case, Ms. Rogers was afforded sufficient opportunity to observe her assailant that she might subsequently make an accurate identification of him. The victim's limited opportunity for observation goes to the *weight* the jury might place upon her identification rather than its admissibility. The trial court correctly admitted the in-court identification testimony of the prosecuting witness and this assignment of error is overruled.

[3] Defendant also assigns as error the admission into evidence of a statement he made to Officer Newell on 2 December 1981.

At trial, defendant unequivocally testified on *voir dire* and on direct examination before the jury that he signed only a blank piece of paper and that he did not make any statement to the police admitting his involvement in the crime. Officers Newell and Pernell testified that after executing a waiver of rights form, defendant did in fact make a statement to them on 2 December confessing to the rape of Ms. Rogers. The trial court resolved this conflict in the evidence and found as a fact that defendant made this statement to the officers on 2 December in the manner described by them. The court's conclusion, properly supported by the findings of fact, was that defendant made the statement freely and voluntarily after a knowing and understanding waiver of his constitutional rights.

Defendant now argues for the first time on appeal that the confession was erroneously admitted because he did not have sufficient opportunity to execute a knowing and intelligent waiver. Defendant hypothesizes that "[o]nly an individual of the highest intelligence, possessing extreme emotional control, could have been able to contemplate the consequences of his actions or consider the seriousness of the situation at hand, within the time span and under the circumstances described by Officer Newell."

We decline to consider this theory for the reasons stated in *State v. Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1982). In that case, we held that "when there is an objection to the admission of a confession or a motion to suppress a confession, counsel must specifically state to the court before voir dire evidence is received the basis for his motion to suppress or for his objection to the admission of the evidence." *Id.* at 112, 286 S.E. 2d 539. *See also State v. Oxendine*, 305 N.C. 126, 286 S.E. 2d 546 (1982).

At trial, defendant objected to the admission of the confession on the sole ground that he had in fact made no statement to the police. The trial court chose to accept the officers' contrary testimony and, after entering appropriate findings of fact and conclusions of law, correctly overruled defendant's objection on the theory advanced. Defendant cannot attack the admissibility of his confession in the appellate division upon a theory entirely different from that relied upon at trial. *State v. Hunter*, at 112-13, 286 S.E. 2d at 539; *State v. Oxendine* at 136, 286 S.E. 2d at 551. This assignment of error is dismissed.

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

No error.

STATE OF NORTH CAROLINA v. ROBERT EUGENE BENNETT

No. 664PA82

(Filed 31 May 1983)

1. **Criminal Law § 163— necessity for jury instruction conference—no inconsistency between statute and rule of practice**

If either party to the trial desires a *recorded* instruction conference, G.S. 15A-1231(b) requires that party to make such a request to the trial judge. Absent such a request, G.S. 15A-1231(b) is silent and Rule 21 of the General Rules of Practice for the Superior and District Courts supplements the statute by requiring the trial court to hold an *unrecorded* conference. Therefore, there is no conflict between the two provisions and both may be given full effect. Art. IV, § 13(2) of the N.C. Constitution.

2. **Criminal Law § 158.2— silence of record—presumption that judge acted properly**

Where the record is silent as to whether the trial judge conducted a jury instruction conference as required by Rule 21 of the General Rules of Practice for the Superior and District Courts, it will be presumed that he did so.

3. **Criminal Law § 163— opportunity to object to jury instructions out of hearing of jury**

Defendant was given a sufficient opportunity to object to the jury instructions out of the hearing of the jury as required before a waiver of the right to assert an assignment of error based on the instructions can be found under App. Rule 10(b)(2) where, at the conclusion of the charge, the court asked if there was "anything further from either the State or the defendant," to which defendant responded, "Nothing for the defendant," since defendant could have objected at this time to the instructions out of the hearing of the jury or requested that he be permitted to make his objections out of the presence of the jury. Therefore, since defendant did not object to the instructions as given, he is precluded by App. Rule 10(b)(2) from assigning as error any portion of the jury charge.

4. **Criminal Law § 163— necessity for objection to instructions—conflict between appellate rule and statute**

The provisions of G.S. 15A-1446(d)(13) permitting appellate review of errors in the charge "even though no objection, exception or motion had been made in the trial division" and of G.S. 15A-1231(d) stating that "[f]ailure to object to an erroneous instruction or to the erroneous failure to give an instruction does not constitute a waiver of the right to appeal on that error in accordance with G.S. 15A-1446(d)(13)" are inconsistent with App. Rule 10(b)(2) and must yield thereto, since Rule 10(b)(2) is a rule of appellate practice and procedure promulgated by the Supreme Court pursuant to its exclusive authority under Art. IV, § 13(2) of the N.C. Constitution.

5. Criminal Law § 163— instructions not plain error—necessity for objection

The trial court's instructions on defendant's failure to testify did not contain "plain error" such as to require a new trial despite defendant's failure to object to the instructions given as required by App. Rule 10(b)(2).

ON discretionary review of the decision of the Court of Appeals, 59 N.C. App. 418, 297 S.E. 2d 138 (1982) finding no error in the defendant's trial before *Friday, Judge,* at the 30 November 1981 Criminal Session of Superior Court, CLEVELAND County.

Rufus L. Edmisten, Attorney General, by Thomas H. Davis, Jr., and Thomas B. Wood, Assistant Attorneys General, for the State.

Adam Stein, Appellate Defender, by Marc D. Towler, Assistant Appellate Defender, for defendant appellant.

MITCHELL, Justice.

The defendant's sole question before the Court of Appeals concerned the propriety of the trial court's unrequested jury instruction regarding the defendant's failure to testify at trial. The Court of Appeals found that the defendant had not preserved his right of appeal due to his failure to object to the instruction as given as required by Rules of Appellate Procedure [hereinafter "Rules"] 10(b)(2). The Court of Appeals held that Rule 21 of the General Rules of Practice for the Superior and District Courts [hereinafter "General Rules"] conflicted with G.S. 15A-1231(b) and, since both deal with trial rather than appellate practice and procedure, General Rule 21 must give way to the statute. For the reasons enumerated below, we hold that General Rule 21 does not conflict with G.S. 15A-1231(b). Nevertheless, we find that, pursuant to Rule 10(b)(2), the defendant waived his right to assert an assignment of error based on the jury instructions.

The defendant was charged with two counts of felonious possession of marijuana with the intent to sell and with two counts of felonious sale and delivery of marijuana. The charges arose out of an undercover operation by the Cleveland County Sheriff's Department. An officer testified that he purchased marijuana from the defendant on two occasions. The defendant did not testify or offer any evidence at trial. The jury found the defendant guilty of all four charges. He was sentenced to two years for

each count, all but two years to run concurrent with each other with the remaining two years to run at the expiration of the other sentences. From this judgment, the defendant appealed to the Court of Appeals. The Court of Appeals, in an opinion by Judge Wells with Judge (now Chief Judge) Vaughn and Judge Whichard concurring, found no error in the defendant's trial. The defendant's motion for discretionary review was allowed by this Court.

The defendant assigns as error the trial court's instruction to the jury concerning the defendant's failure to testify at trial. The defendant did not request such an instruction and contends that the instruction given was inadequate and improper. The defendant admits that he did not object to the jury charge before the jury retired to consider its verdict as required by Rule 10(b)(2). He acknowledges that his failure would normally amount to a waiver of his right to assign as error any portion of the charge. However, he contends that his failure to object should be excused due to the trial court's failure to hold a jury instruction conference as required by General Rule 21. He also contends that he was not given the opportunity to make an objection out of the hearing of the jury as required before a waiver can be found under Rule 10(b)(2). Finally, the defendant argues that even if he is deemed to have waived his assignment of error, this Court should find plain error in the instructions.

The Court of Appeals compared the provisions of G.S. 15A-1231(b) with General Rule 21 and found that the rules conflicted. Article IV, Section 13(2) of the North Carolina Constitution vests in the Supreme Court the "exclusive authority to make rules of procedure and practice for the Appellate Division." That same section gives the General Assembly the power to make rules of practice and procedure for the Superior Court and District Court Divisions, but allows the General Assembly to delegate this authority to the Supreme Court. The General Assembly did in fact make such a delegation of power to the Supreme Court in G.S. 7A-34, but only to the extent that any rules promulgated under this grant of power are to be "supplementary to, and not inconsistent with, acts of the General Assembly." General Rule 21 imposes a requirement on the trial court to hold a jury instruction conference. As such, it is a rule of procedure and practice of the Superior Court and District Court

Divisions and must fail if it is inconsistent with an act of the General Assembly.

G.S. 15A-1231(b) is as follows:

> On request of either party, the judge must, before the arguments to the jury, hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.

General Rule 21, in pertinent part states:

> At 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. Such requests, objections and the rulings of the court thereon shall be placed in the record.

The Court of Appeals held that there was an inconsistency in the provisions of G.S. 15A-1231(b) and General Rule 21 and therefore only G.S. 15A-1231(b) could be given effect. The Court of Appeals ruled that an instruction conference must be held only upon the request of one of the parties. We disagree with the Court of Appeals' interpretation.

[1] As indicated in G.S. 7A-34, the Supreme Court can prescribe rules of practice and procedure for the trial courts that are sup-

plementary to the acts of the General Assembly as long as the rules are not inconsistent with such acts. If either party to the trial desires a *recorded* instruction conference, G.S. 15A-1231(b) requires that party to make such a request to the trial judge. Absent such a request, G.S. 15A-1231(b) is silent and General Rule 21 supplements the statute by requiring the trial court to hold an *unrecorded* conference. *State v. Fennell*, 307 N.C. 258, 297 S.E. 2d 393 (1982).

Since General Rule 21 requires a conference without regard to whether it is requested by a party and G.S. 15A-1231(b) requires a *recorded* conference only at the request of either party, there is no conflict between the two provisions. Both may be given full effect. There is no indication in the record that either party requested a recorded conference, therefore the failure of the court to hold a *recorded* conference was clearly not erroneous.

[2] The defendant argues further that there is nothing in the record to indicate that *any* instruction conference was held. It is true that the record is silent as to whether a conference was held, but the failure of the record on this point must be attributed to the defendant. The defendant, as appellant, has the duty under Rule 11 to preserve the record on appeal. If there was no instruction conference held, the defendant could have sought a stipulation from the State pursuant to Rule 11(a) acknowledging the trial court's failure in this regard. Had the State refused to agree to the stipulation, and objected to such a notation in the record, then the defendant could have requested that the trial judge settle the record on appeal pursuant to Rule 11(c). *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). Of course, the defendant also could have assured a notation in the record of the judge's failure to hold a conference by objecting at trial.

Despite the aforementioned methods of noting any failure of the trial court to hold a conference, the record is silent on this point. As we stated in *State v. Fennell*, 307 N.C. 258, 262, 297 S.E. 2d 393, 396 (1982):

> 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. We therefore conclude, in the absence of any evidence whatsoever to the contrary, that the

trial judge fully complied with [General] Rule 21 in conducting the instruction conference. (Citations omitted.)

[3] The defendant also argues that he was not given the opportunity to object to the instructions out of the hearing of the jury as required before a waiver can be found under Rule 10(b)(2). We find this argument to be without merit. At the conclusion of his charge to the jury, the court asked if there was "anything further from either the State or the defendant," to which the defendant responded, "Nothing for the defendant." At this time the defendant could have objected to the instructions out of the hearing of the jury or requested that he be permitted to make his objections out of the presence of the jury. The record reveals that the defendant did neither. His failure to object to the instructions cannot, on the record before us, be said to have been caused by a lack of opportunity for the defendant to make his objections out of the hearing of the jury. The defendant did not object to the instructions as given and he is therefore precluded by Rule 10(b)(2) from assigning as error any portion of the jury charge.

[4] The Court of Appeals correctly noted that Rule 10(b)(2) and G.S. 15A-1446(d)(13) are in conflict. G.S. 15A-1446(d)(13) allows for appellate review of errors in the charge to the jury "even though no objection, exception or motion has been made in the trial division." Rule 10(b)(2) states: "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 . . . ." Rule 10(b)(2) is a rule of appellate practice and procedure, promulgated by the Supreme Court pursuant to its exclusive authority under the Constitution of North Carolina, Article IV, Section 13(2). To the extent that G.S. 15A-1446(d)(13) is inconsistent with Rule 10(b)(2), the statute must fail. *See State v. Elam*, 302 N.C. 157, 273 S.E. 2d 661 (1981). We also note that G.S. 15A-1231(d) states in part that "[f]ailure to object to an erroneous instruction or to the erroneous failure to give an instruction does not constitute a waiver of the right to appeal on that error in accordance with G.S. 15A-1446(d)(13)." Inasmuch as this section also conflicts with Rule 10(b)(2), it too must fail.

[5] Finally, the defendant contends that even if he waived his right to appeal the Court should reverse his conviction since the trial court's instruction involved "plain error." *State v. Odom*, 307

N.C. 655, 300 S.E. 2d 375 (1983). Having reviewed this instruction and the whole record, we find that the trial court did not commit "plain error" such as to require a new trial in spite of the defendant's failure to comply with the requirements of Rule 10(b)(2).

The opinion of the Court of Appeals, as modified herein, is affirmed.

Modified and affirmed.

EARL H. BYRD, JR. v. RODNEY A. MORTENSON, M.D., P.A., AND RODNEY A. MORTENSON, M.D.

No. 45A83

(Filed 31 May 1983)

Rules of Civil Procedure § 55.1 — motion to set aside entry of default — erroneously ruled upon as matter of law

Where defendants moved to set aside and vacate entry of default under Rule 55(d) and coupled that motion with a motion to enlarge the time in which to file answer under Rule 6(b), the trial judge erred by failing to exercise his discretion and ruling as a matter of law that defendants had not demonstrated "good cause" to justify setting aside the entries of default against him.

ON appeal from a decision of the Court of Appeals, opinion by *Arnold, J.*, with *Whichard, J.*, concurring and *Martin, J.*, dissenting, 60 N.C. App. 85, 298 S.E. 2d 170 (1982), setting aside the default judgment entered against defendants in this action on 23 September 1981.

Plaintiff instituted this medical malpractice suit in Wake County Superior Court on 24 February 1981 against defendant orthopedic surgeon and the professional association that employs him. On 26 February, defendant professional association was served with a copy of the summons and complaint through its registered process agent, Paul H. Stam. On that same day, Stam informed Dr. Mortenson of the pending action against him. Dr. Mortenson was himself served with a copy of the summons and complaint on 3 March.

After receiving notice of the suit from Stam on 26 February, Dr. Mortenson promptly contacted his insurance carrier. He in-

formed Mr. A. J. Saunders, the claims manager of the Greensboro field office for The St. Paul Insurance Companies, that he had been sued by Mr. Earl H. Byrd, a former patient. Mr. Saunders instructed Dr. Mortenson to forward to the claims office certain medical documents and notes relevant to the case. During this same telephone conversation, Mr. Saunders advised Dr. Mortenson that the insurance company would retain attorney Perry C. Henson to represent defendants in this matter.

Subsequent to his conversation with Saunders, Dr. Mortenson spoke with his business manager, Mrs. Jackie Kiser, concerning the request for medical records. On 11 March 1981, Mrs. Kiser mailed a copy of the office notes, hospital records and other medical information pertaining to plaintiff to Mr. Saunders at the Greensboro claims office. On that same date, she called the claims office in an effort to notify Mr. Saunders that the records had been mailed and to request further instructions. Mr. Saunders was not in the office, however, because of an illness that kept him out of work until 16 March. On 4 April, Mr. Saunders again left work to enter the hospital for an ear operation and thereafter remained at home for a substantial period of time while recovering.

On 12 March 1981, Mrs. Shirley Bennett Cocklereece, an employee of The St. Paul Insurance Companies in the Greensboro office, telephoned Mr. Saunders at home to discuss the receipt of plaintiff's medical information from Dr. Mortenson's office. Mr. Saunders instructed Mrs. Cocklereece to place the information in an "incidental" file. Subsequent to 11 March 1981, neither Dr. Mortenson, Mrs. Kiser, the registered agent, nor any other employee or representative of defendants received any communications, instructions or requests for further information from the liability insurance carrier.

It was not discovered that the medical records had been erroneously placed in an incidental file rather than a pending lawsuit file until 8 April 1981, when Mr. Stam notified the insurance carrier that he had received earlier that morning a copy of an entry of default against the professional association. A default was entered against the defendant association on 3 April and against the individual defendant on 6 April for failure to file a responsive pleading within 30 days as required by G.S. 1A-1, Rule 12(a)(1). Stam demanded that the insurance carrier retain an

attorney for defendants and immediately proceed to protect their interests in the lawsuit.

The insurance carrier contacted attorney Henson on 8 April. Henson immediately telephoned the Deputy Clerk of Superior Court of Wake County and informed her that he was making an appearance for defendants. She noted Henson's telephone call in the court file and contacted plaintiff's attorneys to inform them of Henson's action.

On the same day, Henson sent a letter to the Deputy Clerk confirming their conversation. The letter was placed in the court file upon receipt at 2:08 p.m. on 9 April. Copies also were mailed to plaintiff's attorneys and were received by them on 10 April.

On 9 April at 3:27 p.m., Judge A. Pilston Godwin, Jr., entered judgment by default against defendants in this action.

Defendants moved to vacate the entries of default and default judgment on 16 April 1981. Affidavits in support of the motion were filed on 28 April.

This matter came on for hearing before Judge Bailey on 10 July. He found that defendants had made an appearance in the action on 8 April 1981 and were therefore entitled, under G.S. 1A-1, Rule 55(b)(2), to three days' notice prior to the hearing on the default judgment. Since defendants had received no notice of the hearing, Judge Bailey vacated the 9 April default judgment. Defendants' motion to set aside the entries of default was not ruled upon and their oral motions to be permitted to file answer or to have an extension of time to file answer were denied.

In motions filed on 13 July, defendants sought to vacate the entries of default and secure an extension of time to file answer. On 14 July, plaintiff filed a motion to strike defendants' motion for extension of time.

These motions were heard on 14 September 1981 in Wake County Superior Court. Judge Bailey denied defendants' motions to set aside the entries of default and to allow additional time to file answer and granted plaintiff's motion for default judgment.

The Court of Appeals reversed, holding that the trial court's refusal to set aside the entries of default was "manifestly unsupported by reason." *Byrd v. Mortenson*, 60 N.C. App. at 90, 298

S.E. 2d at 173. The court also determined that the trial judge abused its discretion in failing to grant defendants' motion for leave to file answer after the expiration of the 30-day period allowed by G.S. 1A-1, Rule 12(a)(1). *Id.* at 90-91, 298 S.E. 2d at 173. Judge Robert Martin dissented for the reason that, in his opinion, the trial judge had not abused his discretion in refusing to vacate the entries of default. *Id.* at 92, 298 S.E. 2d at 174.

Plaintiff appealed to this Court as a matter of right pursuant to G.S. 7A-30(2).

Purser, Cheshire, Manning & Parker, by Joseph B. Cheshire, V. and Barbara Anne Smith, and Bode, Bode & Call, by Robert V. Bode, for plaintiff-appellant.

Henson & Henson, by Perry C. Henson and Perry C. Henson, Jr., for defendant-appellee.

BRANCH, Chief Justice.

The questions presented by this appeal are (1) whether the trial judge properly refused to set aside the entries of default and (2) whether it was error for the trial judge to deny defendants' motion for additional time to file answer.

Rule 55(d) of the North Carolina Rules of Civil Procedure provides that the trial court may set aside an entry of default "for good cause shown." G.S. 1A-1, Rule 55(d). The determination of whether an adequate basis exists for setting aside the entry of default rests in the sound discretion of the trial judge. *Frye v. Wiles*, 33 N.C. App. 581, 235 S.E. 2d 889 (1977); *Howell v. Haliburton*, 22 N.C. App. 40, 205 S.E. 2d 617 (1974); *Crotts v. Camel Pawn Shop, Inc.*, 16 N.C. App. 392, 192 S.E. 2d 55, *cert. denied*, 282 N.C. 425, 192 S.E. 2d 835 (1972).

Defendants' motion to set aside and vacate entry of default under Rule 55(d) was here coupled with a motion to enlarge the time in which to file answer under Rule 6(b). Under Rule 6(b), a trial judge may permit an enlargement of time to file answer "where the failure to act [is] the result of *excusable neglect.*" G.S. 1A-1, Rule 6(b) (emphasis added).

The Court of Appeals found the facts presented in instant case so compelling that it chose to make the extraordinary ruling

that the trial judge abused his discretion in refusing to set aside the entries of default and in denying defendants' motion for extension of time to file answer.

We do not reach these questions decided by the Court of Appeals because it appears that rather than exercising his *discretion*, the trial judge erroneously ruled as a *matter of law* that defendants had not demonstrated "good cause" to justify setting aside the entries of default against them. There is nothing in the record to support a conclusion that Judge Bailey *discretionarily* refused to set aside the entries of default. We therefore express no opinion concerning the Court of Appeals' decision that the trial judge's refusal to set aside the entries of default and permit defendants to file answer was "manifestly unsupported by reason."

The default judgment entered by the trial court is vacated and this cause is remanded to the Court of Appeals, with directions to remand to the Superior Court of Wake County, to the end that the trial judge may exercise his discretion as to whether defendants have demonstrated "good cause" sufficient to justify setting aside the entries of default. In the event the trial judge determines that the entries of default should be vacated, he must also exercise his discretion as to whether defendants' failure to file answer within the time allowed by Rule 12(a) was due to "excusable neglect," thereby entitling defendants to additional time in which to file answer.

Modified, affirmed and remanded.

ONSLOW WHOLESALE PLUMBING & ELECTRICAL SUPPLY, INC. v. LEONARD FISHER AND J. DANIEL FISHER

No. 35A83

(Filed 31 May 1983)

APPEAL as a matter of right under G.S. 7A-30(2) from the decision of the Court of Appeals (*Judge Hill*, with *Judge Martin* concurring and *Judge Hedrick* dissenting). 60 N.C. App. 55, 298 S.E. 2d 718 (1982). By its decision the Court of Appeals affirmed

in part and reversed in part summary judgment in favor of the defendants entered by *Judge Barefoot* on 27 July 1981 in Superior Court, ONSLOW County. The Court of Appeals also remanded the case for entry of partial summary judgment in favor of the plaintiff and for trial on the remaining issues. Both the plaintiff and the defendants gave notice of appeal.

White, Allen, Hooten, Hodges and Hines, P.A., by John M. Martin, for plaintiff-appellant-appellee.

Jeffrey S. Miller, and Ellis, Hooper, Warlick, Waters and Morgan, by N. B. Tisdale, for defendant-appellants.

PER CURIAM.

The plaintiff seeks in this civil action, *inter alia*, to have a constructive trust declared on certain stocks purchased by the defendant, Leonard Fisher. The plaintiff's claim for relief are based on breach of fiduciary duty owed the plaintiff by the aforementioned defendant pursuant to his position as general manager and agent of the plaintiff and as a director and officer of the plaintiff.

Rather than filing an answer, the defendants filed a motion for summary judgment. The plaintiff filed affidavits in opposition to the defendants' motion. The trial court refused to enter partial summary judgment in favor of the plaintiff, and allowed the defendants' motion for summary judgment. The plaintiff appealed.

The Court of Appeals affirmed summary judgment in favor of the defendants on the issues of punitive damages. It reversed summary judgment in favor of the defendants in all other respects and found the plaintiff to be entitled to summary judgment on the issue of breach of fiduciary duty with regard to the purchase of shares of stock by the defendant Leonard Fisher from James and Marshall Batchelor. The Court of Appeals remanded the case for trial on the issue of breach of fiduciary duty with regard to the defendant Leonard Fisher's purchase of shares of stock from Norman Mercer.

The decision of the Court of Appeals is affirmed.

Affirmed.

Bradley v. Bradley

ELIZABETH M. BRADLEY	)	
	)	
v.	)	ORDER
	)	
EARL T. BRADLEY, JR.	)	

No. 140P83

(Filed 31 May 1983)

DEFENDANT'S petition for discretionary review is allowed for the limited purpose of entering the following order:

That part of the Court of Appeals' decision affirming the award of attorney's fees to plaintiff is reversed on the authority of G.S. 50-13.6 and *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980).

In all other respects the Court of Appeals' decision is affirmed.

BY ORDER OF THE COURT IN CONFERENCE, this 31st day of May, 1983.

FRYE, J.
For the Court

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

BROWN v. FULFORD

No. 130P83.

Case below: 60 N.C. App. 499.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 May 1983.

BUCK v. PROCTOR & GAMBLE

No. 85P83.

Case below: 58 N.C. App. 804.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 31 May 1983.

COLLIER COBB & ASSOC. v. LEAK

No. 220P83.

Case below: 61 N.C. App. 249.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 31 May 1983.

DUKE POWER v. JOWDY d/b/a IGA STORES

No. 144P83.

Case below: 61 N.C. App. 168.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 May 1983.

GLENN v. GLENN

No. 197P83.

Case below: 61 N.C. App. 567.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 May 1983.

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

GREGORY v. TOWN OF PLYMOUTH

No. 95P83.

Case below: 60 N.C. App. 431.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 31 May 1983.

IN RE WILLIAMS v. SCM PROCTOR SILEX

No. 132P83.

Case below: 60 N.C. App. 572.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 31 May 1983.

McCALL v. CONE MILLS CORP.

No. 191P83.

Case below: 61 N.C. App. 118.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 31 May 1983.

McKENZIE v. CITY OF HIGH POINT

No. 224P83.

Case below: 61 N.C. App. 393.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 26 May 1983.

NORTHWESTERN BANK v. MORRISON

No. 118P83.

Case below: 60 N.C. App. 767.

Petition by defendants for discretionary review under G.S. 7A-31 denied 31 May 1983.

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

STATE v. BOYD

No. 252P83.

Case below: 61 N.C. App. 238.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 31 May 1983.

STATE v. BYRD

No. 158P83.

Case below: 60 N.C. App. 624.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 May 1983.

STATE v. CAPPS

No. 208P83.

Case below: 61 N.C. App. 225.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 May 1983.

STATE v. CARR

No. 229P83.

Case below: 61 N.C. App. 402.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 May 1983. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 May 1983.

STATE v. CAUDLE

No. 235P83.

Case below: 58 N.C. App. 89.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 31 May 1983.

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

STATE v. LOCKLEAR

No. 114PA83.

Case below: 60 N.C. App. 524.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 31 May 1983. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question denied 31 May 1983.

STATE v. MORROW

No. 188P83.

Case below: 61 N.C. App. 162.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 May 1983. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 May 1983.

STATE v. OGBURN

No. 127P83.

Case below: 60 N.C. App. 598.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 May 1983.

STATE v. PARTOZES

No. 238P83.

Case below: 61 N.C. App. 752.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 May 1983. Notice of appeal dismissed 31 May 1983.

STATE v. ROGERS

No. 217P83.

Case below: 61 N.C. App. 349.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 May 1983. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 May 1983.

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

STATE v. SHEPHARD

No. 186P83.

Case below: 61 N.C. App. 159.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 May 1983. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 May 1983.

STATE v. STATON

No. 208P83.

Case below: 61 N.C. App. 225.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 May 1983.

STATE v. SWINSON

No. 222P83.

Case below: 61 N.C. App. 349.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 May 1983. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 May 1983.

STATE v. TAYLOR

No. 161P83.

Case below: 60 N.C. App. 673.

Petitions by defendants and by additional defendant Moore for discretionary review under G.S. 7A-31 denied 31 May 1983. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 31 May 1983.

STATE v. WOOD

No. 241P83.

Case below: 61 N.C. App. 446.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 May 1983.

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

STATE ex rel. COMMISSIONER OF INSURANCE
v. N.C. RATE BUREAU

No. 210P83.

Case below: 61 N.C. App. 262.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 31 May 1983.

TUCKER v. CHARTER MEDICAL CORP.

No. 162P83.

Case below: 60 N.C. App. 665.

Petition by defendant for discretionary review under G.S. 7A-31 denied 31 May 1983.

WATERS v. PHOSPHATE CORP.

No. 182PA83.

Case below: 61 N.C. App. 79.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed upon reconsideration 31 May 1983.

STATE OF NORTH CAROLINA v. JAMES WALLACE JACKSON

No. 300A82

(Filed 7 July 1983)

1. **Criminal Law § 76.7— confession—voir dire hearing to determine admissibility—sufficiency of findings**

In a prosecution for first degree murder where there was a voir dire hearing to determine the admissibility of defendant's confession, although some findings might have been more appropriately designated as mixed findings of fact and law and where other "findings" were rather discussions of law, defendant did not argue that he was prejudiced in any way by their being erroneously denominated as findings of fact rather than conclusions of law, and all of the "findings" were supported by competent evidence.

2. **Criminal Law § 75.9— trickery by officers—confession not rendered inadmissible**

In a prosecution for first degree murder, the trial court properly found that defendant's confession was not constitutionally impermissible since the defendant was never in custody or under arrest before he confessed; he was told by an officer on the day he confessed that he was free to go at any time; he was not restrained, touched, threatened, or intimidated; he was taken where he wanted to go after the first two sessions with the officers; he walked to the police station one day; there was at least a week between the second and third interviews; defendant had an extensive criminal history and had previous experience with interrogation; the defendant was repeatedly given proper *Miranda* instructions although he was not in custody; the officers attempted to deceive defendant and lied to him about the evidence they had; defendant also made misrepresentations to the officers and was aware to some extent that the officers were not truthful with him; defendant was not questioned for undue periods of time, and no promises or threats were made to him. No "seizure" of defendant occurred within the meaning of the Fourth Amendment, and although the officers' actions in deceiving and lying to the defendant are not condoned by the courts, standing alone, they were not sufficient to render defendant's confession inadmissible.

3. **Criminal Law § 75.9— test of voluntariness of confession**

The North Carolina test to determine the admissibility of a confession is whether the confession is voluntary under the totality of the circumstances of the case. It has never been held by the Court that a confession is inadmissible in evidence unless it is "attributable to that love of truth which predominates in the breast of every man." Therefore, the trial court in suppressing defendant's confession erred in applying such a standard in determining the voluntariness of that confession.

Justice MITCHELL concurring.

Justice EXUM dissenting.

Chief Justice BRANCH and Justice FRYE join in this dissent.

State v. Jackson

APPEAL of right by the State of North Carolina pursuant to N.C.G.S. 15A-979(c) and Rule 4 of the North Carolina Rules of Appellate Procedure from an order entered by *Brannon, J.*, 18 February 1982 Criminal Session of WAKE County Superior Court.

Defendant was charged in a proper indictment that on 15 March 1981 he committed murder in the first degree of Leslie Hall Kennedy. This bill of indictment was returned on 27 April 1981. On 10 July 1981, defendant filed a motion to suppress the use of all evidence in the possession of the state consisting of oral and written statements taken from defendant by law enforcement officers. In his motion defendant alleges that the statements were taken from him in violation of his rights under the constitutions of the State of North Carolina and the United States and contrary to the decided case law of the Supreme Court of North Carolina. On 14, 15 and 16 October 1981, the trial court heard evidence relative to this motion, and on 15 December 1981 the court heard statements and arguments of counsel for the defendant and the state. Thereafter, on 18 February 1982, the court signed and entered an order allowing the motion of the defendant and suppressing the use of the oral and written statements and confessions made by the defendant. From this order the state appealed to this Court. The defendant also filed exceptions to certain findings of fact and conclusions of law which were brought forward and argued in his brief.

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

Gerald L. Bass for the defendant.

MARTIN, Justice.

The pertinent portions of the order entered by the trial court are:

> THIS CAUSE coming on to be heard and being heard upon the defendant's Motion to Suppress any and all statements of his made to police officers on April 8, 1981, and dated and filed of record on July 10, 1981, the defense acknowledging there is no constitutional objection to any statement given prior thereto; and the Court having heard evidence on October 14, 15 and 16, 1981, and thereafter the statements and

arguments of counsel for the defendant and of the Assistant District Attorney were heard on December 15, 1981, makes the following Findings of Fact and mixed Findings of Fact and Conclusions of Law, all findings of fact being found by at least a preponderance of the evidence.

(1) That defendant was personally present in open Court with his counsel;

(2) That this evidentiary hearing was held in the absence of a jury;

(3) That the Court has had an opportunity to see and observe each witness and to determine what weight and credibility to give to each witness' testimony, including the defendant.

(4) That on or about the 15th day of March, 1981, the Major Crimes Task Force of the Raleigh Police Department, Raleigh, North Carolina, was assigned to investigate the homicide-death of Leslie Hall-Kennedy . . . .

(5) . . . That Ms. Hall-Kennedy had been stabbed twice in the back with one exit wound over her left breast. That while at the scene Detective Williams interviewed the three occupants of a rear apartment who had discovered the body. That the two men and one woman described a fourth individual, a young black male, who had also been at the scene when the body was found, prior to the police arriving. . . .

(6) That a search of Ms. Hall-Kennedy's apartment on March 15 and 16, revealed that the only item missing was a J. H. Hinckle brand, Kitchen knife . . .

(7) . . . [T]hat through the efforts of the three witnesses who had seen the black male on March 15, 1981, at 207 Cox Avenue, the defendant James Wallace Jackson was identified as that man;

(8) That sometime prior to March 26, 1981, Detective A. L. Watson and Detective John Beasley called the defendant's mother and left a message for the defendant to call them. That on March 26, 1981 at 5:30 p.m. the defendant called those officers and they came to the defendant's mother's house and picked him up. That the officers told the

defendant who they were and that they wanted to talk with him as a possible witness. That they did not place the defendant under arrest. That after arrival at the Investigative Division at about 6:00 p.m., the defendant was fully advised of his MIRANDA rights, understood those rights, never requested an attorney, and waived those rights in writing. That Detective Watson and Detective Beasley interviewed the defendant for about one hour. That Detective Mack then interviewed the defendant for about one hour and forty-five minutes. That at the completion of this interview, Detective Williams, Watson and Mack took the defendant to his mother's house and let him out of the car, and that the defendant agreed to return to the Investigative Division for further interviews and to take a polygraph test the next day;

(9) [Set out hereinafter.]

(10) [Set out hereinafter.]

(11) [Set out hereinafter.]

(12) That on March 27, 1981 at 10:00 a.m., the defendant arrived at the Investigative Division. That he walked from his mother's house to that location. That the defendant was advised of his MIRANDA rights by Officer Knox, waived those rights in writing, and voluntarily took a polygraph test. That after the interview with Officer Knox at about 1:00 p.m., the defendant was interviewed by Detective Mack and Detective Privette. That this interview lasted until about 5:00 p.m. when Detective Watson took the defendant to Hargett Street and let the defendant out of the car. That the defendant was not under arrest;

(13) . . . Detective Mack has met and interviewed the defendant in connection with two other investigations; one being an attempted rape at Dorothea Dix Hospital, the other a rape and armed robbery at a fast food place of business. . . .

(14) . . . That prior to the asking of questions the defendant was advised of his constitutional rights by Detective Mack. . . .

(15) That during this interview no threats or promises were made to the defendant, that the defendant never asked

for an attorney, or to leave the room or police station; that he appeared to know where he was and who Detective Mack was; that he did not appear to be under the influence of drugs or alcohol; and that the defendant acted quite normal and very similar in manner to past meetings with Detective Mack.

(16) That the defendant gave an exculpatory statement indicating he went with other persons who had heard screams or other sounds into the apartment of Leslie Hall-Kennedy on March 15, 1981; handled a file, and handled the victim, raising her up to see if she was alive, but that he did not commit the homicide; that he had washed his hands and used the bathroom at a nearby apartment afterwards. That the interview lasted about two and one-half hours to three hours. That after the interview concluded the defendant left, being told the officers would be getting back in touch with him. That no promises or threats or hope of reward for a statement were made to the defendant during the interview.

(17) That the defendant did not see any of these police officers again until approximately 6:00 p.m. on April 8, 1981, when Detective Williams approached the defendant on Hargett Street and told the defendant that Detective Mack wanted to talk with him about the murder on Cox Avenue. That Detective Williams did not place the defendant under arrest and the defendant voluntarily got into the car and came to the station. That every time the defendant was interviewed by the police they advised him of his MIRANDA rights . . . .

(18) That on March 31, 1981, a J. H. Hinckle brand kitchen knife, with a blade ten inches long, was found near the railroad tracks which are in the area of Cox Avenue. That this knife was identical to the knife missing from the set in Ms. Hall-Kennedy's apartment. . . .

(19) . . . That Detective Williams obtained a knife identical to State's Exhibit 3, pricked his own finger, placed his blood on the blade of the knife and placed his right thumb print in the blood. That Detective Williams then had two photographs prepared of that print and marked as Detective Parker had requested. . . .

(20) That Detective Williams knew when he prepared State's Exhibit 1 and 2 that no fingerprints or blood were on the knife, State's Exhibit 3, which the officers felt was the murder weapon; that Detective Williams knew the defendant had been interviewed on March 26 and 27 and knew that the defendant had denied the homicide while admitting part of what the witnesses had said and denying part;

(21) That at about 6:00 p.m. on April 8, 1981, Detective Williams saw the defendant on Hargett and Haywood Streets in Raleigh. That Detective Williams stopped his car and the defendant came up to it. That Detective Williams identified himself to the defendant orally and by showing his police identification. That the defendant was asked to get in the car and he did so voluntarily. That Detective Williams advised the defendant that the police wanted to talk with the defendant about this homicide and that Detective Mack would interview him. . . .

(22) That Detective Williams did not know if the defendant had eaten and did not offer any food to him. That Detective Mack was a black detective assigned to this investigation, the others being white.

(23) That on April 8, 1981 at about 8:00 p.m., Detective Parker was called and came to the Investigative Division to interview the defendant. . . .

(24) That Detective Mack interviewed the defendant on April 8, 1981 beginning at about 6:20 or 6:30 p.m. in the same room at the Investigative Division. . . . That the defendant's appearance was the same as on March 27; that he never asked for a lawyer, was never threatened or promised anything in exchange for his signature on the State's Exhibit #5, or promised or threatened in any way to make a statement. That the defendant was aware that he was free to leave whenever he felt like it from the outset of the interview and he never asked to leave or got up to leave. That Detective Mack never told the defendant he could not leave, that Detective Mack told the defendant he was not under arrest at the outset of the interview and that the defendant was told he was not in custody. He was not handcuffed and the interview room door was not locked.

(25) That this interview with Detective Mack lasted from 6:30 p.m. until 10:00 p.m., everyone being seated and Detective Mack speaking in a normal voice. . . . That the officer had a knife in the interview room, that the knife was not exhibited directly to the defendant, nor was he shown fingerprints or blood or photographs of fingerprints. That the defendant was truthfully informed where and when the knife, State's Exhibit #3 was found and asked a question: How he would explain his fingerprints on the knife? (Detective Mack did not tell him that his fingerprints were on the knife.) That Detective Mack's intent was to find out if he'd offer an explanation or deny it. That the defendant said his fingerprints could not be on the knife.

(26) That Detective Mack was aware of the existence of State's Exhibit #1 and #2, and how they happened to be created and how these exhibits were to be used during the interview of the defendant. . . .

(27) [Set out hereinafter.]

(28) That during this same interview Detective Mack told the defendant that a witness had seen him running from the victim's apartment; that this was not true in that the witness could not identify the defendant and that the person seen was running down Cox Avenue and not from the apartment;

(29) That there was a plan of approach by the officers for their interview with the defendant on April 8, 1981. Officer Mack was to interview the defendant and obtain as much information as he could regarding this incident, dealing also with discrepancies in the defendant's statements. If the discrepancies still existed (they apparently did) and if the defendant was unable to give an explanation for them (he apparently could not) then Officer Parker was to take over the interview.

(30) That Detective Mack spoke to the defendant about emotions in a jury trial . . . .

(31) . . . That Detective Mack told the defendant that if the defendant's girl friend were pregnant, and the defendant were convicted, then in all probability it would be unlikely

that the defendant would raise his child; and that Detective Mack said this to get the defendant to comprehend the seriousness of his situation, this being a real circumstance.

(32) That Detective Mack told the defendant that the defendant had friends in the interview room; that Detective Mack said this to keep the defendant from being alienated or hostile, the officers not having anything against him, and to obtain a truthful statement which would clarify the discrepancies and inconsistencies in the prior two statements; and, any other statement which would have been a complete and honest statement would have been as acceptable to the officers.

(33) That during the interview on April 8, 1981, Detective Mack twice displayed several color photographs of Leslie Hall-Kennedy to the defendant; that this was done to show the defendant the appearance of the scene and to be used by the defendant to explain his activities when he was at the scene on March 15, 1981, and inconsistencies in his earlier statements;

(34) That during the interview on April 8, 1981, Detective Mack indicated to the defendant that there were discrepancies and inconsistencies in the defendant's statement and when these statements were compared with other evidence; and that Detective Mack did indicate that something just wasn't right and that the defendant had discrepancies in his statement that the police needed to clarify, and that Detective Mack told the defendant that he thought the defendant had committed the homicide, but Detective Mack did not call the defendant a murderer;

(35) That the statement Detective Mack sought from the defendant was a truthful statement which would clarify the discrepancies and lead to a situation where the defendant was no longer a suspect or became a stronger one . . . .

(36) That during the April 8 interview the defendant's demeanor was very calm, casual, never upset, even through the confession he was very calculating and calm. That the defendant showed no emotion throughout any of the interviews or the writing out of his statement. . . . That no officer

ever physically threatened or made a show of force toward the defendant. That the defendant never requested to speak with family members or an attorney or anyone other than the police officers;

(37) That at about 10:00 p.m. on April 8, 1981, Detective Mack and Detective Privette left the defendant in the interview room; that the defendant continued to deny having committed the homicide during this interview; that the defendant had not requested nor been given food;

(38) . . . That at 10:00 p.m. Detective Mack asked Detective Parker to interview the defendant and Detective Parker, alone, entered the interview room having State's Exhibit #1 and #2 and a cassette tape recorder and two cups of ice water in his possession;

(39) . . . That Detective Mack introduced Detective Parker to the defendant by name and as a police officer as Detective Parker had never seen the defendant before that day. That Detective Mack left the room and the defendant and Detective Parker were alone;

(40) That Detective Parker gave a cup of water to the defendant, seated himself across from the defendant, introduced himself by name, asked the defendant if he had been advised of his rights, he said he had, and told the defendant that Detective Parker's job was to examine physical evidence which would be presented in court but that he was not directly involved in the investigation himself. That Detective Parker laid State's Exhibit #1 on the left side of the table, put State's Exhibit #2 (photographs resembling a fingerprint exhibit) next to #1 (the police prepared knife), and placed a tape recorder on the right side of the table;

(41) That Detective Parker then engaged the defendant who was seated, in a general conversation in a normal tone of voice . . . . That the defendant was polite, attentive and listening;

(42) That Detective Parker then told the defendant that he would like to go over some of the physical evidence obtained at the crime scene and the defendant said fine; that Detective Parker told the defendant: that a murder weapon,

a knife, had been found near some railroad tracks near the crime scene; that the murder weapon contained a bloody fingerprint; that the defendant's fingerprints had been photographed; and that Detective Parker had taken the murder weapon to the FBI and a laser beam had lifted the fingerprint from the weapon;

(43) That Detective Parker then pushed State's Exhibit #1 over to the right side of the table and out of the way; and then showed the defendant the two photographs, State's Exhibit #2;

(44) [Set out hereinafter.]

(45) That Detective Parker asked the defendant if he had lied to Detective Mack and the defendant said he had; that the defendant then asked to speak to Detective Mack again; that Detective Parker left the interview room at 10:20 p.m.;

(46) That at 10:20 p.m. Detective Mack entered the interview room and talked with the defendant until 11:15 p.m. That during this time the defendant admitted touching the knife but continued to deny the murder of Leslie Hall-Kennedy. New discussion items were added, such as an afghan found on the dead girl's porch, which the defendant would probably have had to have been there to know about. When asked about it by Detective Mack after Detective Parker had interviewed him after 10 p.m., April 8, 1981, the defendant indicated he'd picked it up from a couch or chair inside the house and had attempted to open the front door with it (Detective Mack assuming the defendant did this to keep his fingerprints from getting on the front door, and being dropped by the defendant on his way out).

(47) That at about 11:15 p.m. Detective Mack left the interview room and Detective Parker entered. That Detective Parker asked the defendant if he was tired and the defendant said a little bit, but not too tired. That Detective Parker asked the defendant if he wanted a cup of coffee; that the defendant did and that Detective Parker got both himself and the defendant cups of coffee;

(48) . . . That Detective Parker then told the defendant the following: that the police had a murder weapon; had the

defendant's fingerprints; had the defendant's fingerprints on a knife sharpener found at the scene; had the defendant's fingerprints on a wooden post on the front porch, and had a witness who saw the defendant coming out the door carrying a knife. That these statements were not true. That the defendant responded that he did it. That Detective Parker then told the defendant that he knew the defendant did it and wanted to know why. That the defendant then told Detective Parker his version of what had occurred on March 15, 1981 at 207 Cox Avenue and admitted that he stabbed Leslie Hall-Kennedy. That the defendant talked for ten to fifteen minutes. That the defendant was attentive setting up, listened and responded to questions and appeared to Detective Parker to be normal and not fatigued. That the defendant was not angry or upset.

(49) That Detective Parker then told the defendant that he would like a written statement as to what the defendant had told him, that the defendant wanted to write the statement himself; that Detective Parker then gave the defendant paper and a pen. . . . That during the writing, the defendant stopped and took a break, going to the bathroom. . . . That when the defendant finished writing, Detective Parker asked him if the statement was voluntary and the defendant said yes and wrote on the statement that it was voluntary. . . .

(50) [Set out hereinafter.]

(51) . . . That Detective Parker had State's Exhibit #1 and #2 to convince the defendant that the police had certain evidence, not to put the defendant in fear. . . . That Detective Parker knew that all of the evidence which he recounted to the defendant was false. That Parker accepted all the defendant said as true and never said or told the defendant that he (the defendant) was lying; and, that during the final part of the discussion between the defendant and Detective Parker that Detective Parker told him (the defendant) that he (the defendant) could go into Court and plead not guilty and that the other officers would probably testify that the defendant was a black man raping and killing white women; that Detective Parker did not believe this and that, if the defendant wanted to tell Parker about it, Parker would

listen. This remark by Detective Parker had no effect on the defendant, if he even heard it, inasmuch as he doesn't recall it at this hearing. . . .

(52) That Detective Parker never knew what the defendant would respond to his review of the evidence; never tried to coerce or frighten the defendant or raise his voice to him, tried to get friendly with him and hoped for a truthful statement from the defendant.

(53) . . . That there were ten to fifteen other suspects in this case besides the defendant. That Detective Privette told the defendant that he (Detective Privette) thought the defendant had killed Ms. Kennedy but did not call him a murderer. That it would be best if the defendant would just tell the truth in the long run. That Detective Privette never threatened or promised the defendant anything or denied the defendant anything the defendant requested . . . .

(54) [Set out hereinafter.]

(55) That the defendant is twenty-two (22) years old and went to the tenth grade at Broughton High School. That on April 8, 1981 the defendant was living with his girl friend on Hargett Street and with his mother on Dorsett Street;

(56) That the defendant had served time in prison before March 15, 1981; being released on parole in September of 1980; that court-appointed attorneys had represented him on previous charges; that he was interviewed by police officers on those charges; that he was advised of his rights more than once in the past; that during the times he was interviewed with respect to the Kennedy homicide the defendant knew he had a right to a court-appointed attorney but never requested one. . . .

(57) That each and every time the police interviewed the defendant, the defendant, James Wallace Jackson, was given all of the warnings required by *MIRANDA v. ARIZONA*; that these warnings were complete, in detail, and fully complied with and even went beyond the requirements of *MIRANDA* . . . .

(58) That after being advised of his rights orally and in writing, the defendant waived his rights after being read a

written waiver of rights which the defendant read and said he understood . . . .

(59) [Set out hereinafter.]

(60) [Set out hereinafter.]

(61) That on April 8, the defendant was questioned by Detective Mack for about three hours; that the defendant never asked to leave or for an attorney; that Detective W. M. Parker questioned the defendant for about twenty minutes; that Detective Parker displayed for and told the defendant that the defendant's fingerprint had been found on the murder weapon which was false; that Detective Parker also told the defendant that the defendant had been seen running from the victim's apartment with a knife which was also false; that Detective Mack then questioned the defendant for about one hour; that Detective Parker than questioned the defendant for an additional hour during which time the defendant admitted committing the homicide and signed a handwritten statement . . . .

(62) [Set out hereinafter.]

(63) [Set out hereinafter.]

(64) [Set out hereinafter.]

(65) In the present case it simply cannot be said that the defendant made the admissions he did because he abstractively wanted to confess or because he spoke out in a completely spontaneous manner. . . .

. . . In a nutshell, the defendant figured the game was up and he'd best put the best face on it (the killing) that he could.

(66) [Set out hereinafter.]

(67) That all of the above findings of fact, as well as the last findings of fact and conclusions of law are found to exist and to be true by at least a preponderance of the evidence, the State bearing the burden of proof.

Upon the foregoing findings of fact the Court concludes as a matter of law that:

(1) None of the constitutional rights, either Federal or State, of the defendant, James Wallace Jackson, were violated by his interrogation, confession, or his detention and arrest after "confessing".

(2) There were no promises, offers of reward, or improper inducements to defendant to make a statement.

(3) There was no threat or suggested violence or show of violence to persuade or induce defendant to make the statements.

(4) The statements made by the defendant to the officers of the Major Crimes Task Force of the Raleigh Police Department on April 8, 1981, were made freely, voluntarily, and understandingly.

(5) Defendant was in full understanding of his constitutional right to remain silent and right to counsel, and all other rights;

(6) He freely, knowingly, intelligently, and voluntarily, waived each of those rights and thereupon made the statements to the officers above mentioned.

(7) That because the defendant "confessed" because he thought he'd been found out and caught, rather than because such confession was "attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with *him*," it is not admissible under State law.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendant's Motion to Suppress is denied on grounds that his Federal Constitutional Rights were violated but is granted on the grounds that his State Rights under the decisional law of the North Carolina Supreme Court was violated.

This the *18th* day of February, 1982.

Signed out-of-date and out-of-term
by consent of the parties.

s/ ANTHONY BRANNON
ANTHONY BRANNON
Judge Presiding

The following is a typewritten copy of the defendant's confession, the original having been made by the defendant in his own handwriting:

> On Friday 13th I met Leslie Hall Kennedy at Pullen Park. We walked around and talked for a while, then she gave me her address and told me to come by that following Sunday. I went over there at first I started not to go in so I walked down the street then I came back up. And I went to knock on the door and she open the door and I went in. We went back into her room. She got under the covers and I sat on the bed beside her. I had notice the knife on the table beside the bed. I guess she had been sharping it or was getting ready to. But I didn't pay it to much attention. I just sat there and we talked a while and then I was thinking that she was giving me a cue to get in the bed with her. So I started touching and feeling her. And this was going on for a few min. then she started streaming and I got scarded. I don's know what went through my mind at the time. I just paniced. And I picked up the knife and stabbed her in the back and jolted it some. She just kelp on streaming and I just ran out of the house and down the street towards Pullen Park. I had stopped at the path down the street and stuld there for a while. I was afraid and was hoping that I didn't kill her. And I wanted to see if she was still alive so I stuck the knife in the ground beside a tree and went back up the street. I guess when I realize what I had done it scared me cause I was hoping that I didn't kill her. When I got up the street I saw those guys standing in the yard. I didn't know what to say so I said a girl said that she heard somebody streaming up here. And one guy said yea! And they started walking towards the house and went with them. The tall guy went over and looked in through her window and then came back across the proch and went in the front door.
>
> Me and the other guy followed him in the house. He got to the door of her bed room and saw her and just turn around and told us to go back out. We had started out the door and I was afraid telling them to hurry up and call the police and the ambulance. I just kept telling them that and I told the guy that I was going back in there to see if there were anything that I could do. He told me not to but I went

anyway. I went back there and she was lying there on her back and I just frosed and the guy that was at the door kept calling me. When I went in there I just picked the fail up off of the basket and was holding it in my hands. And the guy kept calling me to come out and I trun around and started going back out. I was in the kitchen when I realize that I still had the fail in my hand so I started to put it on the stove and looked up and saw the rake that on the wall so I put it in there and came out the house. We walked around the side of the house to the other guy,s house behind hers. I was going to stand out side but the guy told me to come on in, so I went in the tall guy was on the phone and I stude there for a min. or two then ask him if I could use the bath room. He said yes I went in and used it and wash my hands and came back out. The tall guy was getting his girl friend to go home but she wouldn't go. So we went back outside and waited for the police to come. When they came they ask what was going on and the tall guy said that they heard somebody streaming in the room in front of them and they came out but didn't see nobody. The police said O.K. that's it and walked up to the house So I walked back down the street where I had stuck the knife in the ground and picked it up and through it down the railroad track and went home.

I voluntary gave this statement to Det. Parker on 4-8-81

James W. Jackson
4-9-81
1:15 am

Witness:
Det. W. M. Parker, Jr.

The evidence before the trial judge can fairly be summarized as hereinafter set forth. About 15 March 1981, the Major Crimes Task Force of the Raleigh Police Department was assigned to investigate the homicide of Leslie Hall-Kennedy. Mrs. Hall-Kennedy was in her mid-twenties of age and resided at 207 Cox Avenue in Raleigh. The Major Crimes Task Force consisted of detectives D. C. Williams, G. L. Mack, K. N. Privette, John Beasley, and one supervisor. Williams was the coordinator of this investigation. At about 11:00 p.m. on 15 March 1981, Detective Williams arrived at the dwelling house of Mrs. Hall-Kennedy and met with Dr. Laurin

Kaasa, the Wake County Medical Examiner, and Detective Beasley. The dwelling was divided into three apartments, each having a separate outside entrance. Williams went into the bedroom of the front apartment and observed the body of Mrs. Hall-Kennedy lying in a bed. Mrs. Hall-Kennedy had been stabbed twice in the back, with one exit wound over her left breast. A search of the apartment revealed that the only item missing was a J. H. Hinckle brand kitchen knife with a ten-inch blade. Later in the investigation Detective Williams obtained an identical knife and showed it to the pathologist, who gave the opinion that the knife could have been the murder weapon.

Detective Williams interviewed the three occupants of a rear apartment who had discovered the body. These witnesses, two men and a woman, described a young black male who had also been at the scene when the body was found, before the police arrived. The young black male left the scene shortly after the police arrived without giving a statement to them.

The detectives tried to learn the identity of the man who had left the scene to determine what information he had as a witness. Through the efforts of the three occupants of the rear apartment, the defendant, James Wallace Jackson, was identified as the young black male in question. Sometime before 26 March 1981, Detectives Watson and Beasley called the defendant's mother and requested that she ask the defendant to call them. On 26 March 1981 at about 5:30 p.m., the defendant did call these officers, and they came to defendant's mother's house. The officers told the defendant who they were and that they wanted to talk with him as a possible witness in the Hall-Kennedy murder case. The defendant was not placed under arrest, but he accompanied them to the Investigative Division. Upon arrival at the Investigative Division at about 6:00 p.m., the defendant was fully advised of his *Miranda* rights and waived those rights in writing. He never requested an attorney. Detectives Watson and Beasley interviewed defendant for about an hour, and Detective Mack then interviewed the defendant about an hour and forty-five minutes. After this was completed, Williams, Watson and Mack took the defendant to his mother's house and let him out of the car.

Defendant agreed to return to the Investigative Division for further interviews and to take a polygraph test the next day. The

detectives also asked the defendant to give them the shoes and pants he had worn on 15 March 1981. The defendant gave them a pair of shoes and pants, but they were not the shoes and pants the defendant had worn on 15 March. At the time the defendant gave the officers the wrong shoes and pants, he knew that he was not giving them the clothes that they requested. The shoes and pants given to the officers were tested at a later time, but no bloodstains were found upon those clothes.

On 27 March 1981, the defendant arrived at the Investigative Division at about 10:00 a.m., having walked there from his mother's house. He was again advised of his *Miranda* rights, waived those rights in writing, did not request an attorney at any time, and voluntarily took a polygraph test. After this was completed about 1:00 p.m., the defendant was interviewed by detectives Mack and Privette until around 5:00 p.m. when Detective Watson took the defendant to Hargett Street in the city of Raleigh and let the defendant out of the car. At no time on 27 March was defendant under arrest. During the interview on 27 March, Detective Mack told defendant that they had gotten some bloodstains off the pants that the defendant had given him the previous day and that tracks made by his tennis shoes were found by the police in the house. The defendant knew that this was not true because he knew that he had not given the officers the clothing that he had been wearing on the night of 15 March. On the 27th the defendant gave an exculpatory statement to the officers, indicating that he went with other persons into the apartment of Leslie Hall-Kennedy after they heard screams coming from the apartment and that while in the apartment he handled a file and touched the victim, raising her up to see if she was alive. He further stated that he did not commit the homicide; that he had washed his hands and used the bathroom at a nearby apartment. At the conclusion of this interview, the officers told the defendant that they would get back in touch with him later.

Defendant did not see or hear from any of these officers until about 6:00 p.m. on 8 April 1981 when Detective Williams approached the defendant on Hargett Street and told him that Detective Mack wanted to talk with him about the murder on Cox Avenue. The defendant was not arrested and he voluntarily got into the car with Officer Williams and went to the police station.

In the meantime, on 31 March 1981, a J. H. Hinckle brand kitchen knife had been found near the railroad tracks in the area of Cox Avenue. This knife was identical to the one missing from Mrs. Hall-Kennedy's apartment. The knife had no fingerprints or bloodstains upon it. Detective Williams obtained a knife similar to the one found on 31 March, placed blood on the knife and a fingerprint into the blood. He then had black and white and colored photographs made of the fingerprint and outlined as if an identification of the print had been made.

About 6:30 p.m. on 8 April 1981, defendant was again advised of all of his *Miranda* rights, waived those rights in writing, and consented to be questioned by the officers without the presence of an attorney. At this interview Detective Mack told the defendant he was not under arrest and that he was not in custody. He was not handcuffed and the interview room door was not locked. This interview with Detective Mack lasted from 6:30 until about 10:00 p.m. The knife which the officers had prepared with the blood and fingerprint was in the interview room, and the defendant was asked how he would explain his fingerprints on a knife which had been found near the scene of the murder. Defendant responded that his fingerprints could not be on the knife. During this interview Detective Mack explained to the defendant that the legal maximum punishment for murder in North Carolina was the death penalty. However, defendant was not threatened that if he did not cooperate he would get the death penalty. Detective Mack also told the defendant that a witness had seen the defendant running from the victim's apartment. This was not true, because the witness could not identify the defendant and the person seen was running down Cox Avenue and not from the apartment.

About 10:00 p.m., Mack and Privette left the defendant and Officer Parker went into the interview room. Parker gave the defendant a cup of water. The knife which had been prepared by the police was on the left side of the table with the photographs of the fingerprint. Parker talked with the defendant and told him that the murder weapon, the knife, had been found near the railroad tracks, that it contained a bloody fingerprint and that the fingerprint had been photographed and identified as the defendant's; that the photograph had been raised from the murder weapon by the use of a laser beam by the FBI. He also showed

the photographs of the fingerprint to the defendant and explained them to him. Defendant responded that his fingerprint was on the knife because he had picked up the bloody knife while walking down a path near the railroad tracks and threw it.

Defendant continued to deny committing the murder of Leslie Hall-Kennedy. About 11:15 p.m. Parker got coffee for himself and the defendant and went over the evidence again with the defendant, stating that the police had a murder weapon, they had defendant's fingerprints and the defendant's fingerprints at the scene, that they were on a knife sharpener and on a wooden post on the decedent's front porch, and that they had a witness who saw the defendant coming out the door carrying a knife. These statements were not true. At that point the defendant responded that he did it. Detective Parker told the defendant that he knew that defendant had committed the murder and wanted to know why. Defendant then told Detective Parker his version of what happened on 15 March and admitted that he had stabbed Leslie Hall-Kennedy. At this time defendant was attentive, sitting up, and listened and responded to questions and appeared to be normal and not fatigued. He was not angry or upset. Detective Parker requested that defendant give him a written statement as to what defendant had just told him. Defendant stated that he wanted to write the statement himself and was given paper and a pen. At this time the defendant wrote the statement which is set out above. When defendant completed writing the statement, the officer asked him if it was voluntary, and defendant replied yes and wrote on the statement that it was voluntary.

During all of his interviews on 26 March 1981, 27 March 1981, and 8 April 1981, defendant's demeanor was calm, cool and collected. He was never upset, emotional, or disturbed. None of the officers threatened the defendant in any way nor did they promise him anything in order to obtain a confession or statement from him. During this entire time the defendant was never placed under arrest or in custody until after he made the confession. Defendant was twenty-two years of age and went to the tenth grade at Broughton High School. He had served time in prison, having been released on parole in September of 1980. He had been represented by court appointed attorneys on previous charges and had been interviewed by police officers at various

times in the past. At no time during any of the investigations did the defendant ask to have an attorney present while he was being questioned.

DEFENDANT'S ASSIGNMENTS OF ERROR

[1] Defendant contends that findings of fact 9, 10, 11, 27, 44, 50, 54, 59, 60, 62, 63, 64, and 66 are not supported by the evidence. Defendant did not except to any other findings of fact. Findings of fact made by a trial judge following a voir dire hearing on the voluntariness of a confession are conclusive upon this Court if the findings are supported by competent evidence in the record. *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982); *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975). No reviewing court may properly set aside or modify those findings if so supported. *State v. Rook, supra; State v. Barber*, 278 N.C. 268, 179 S.E. 2d 404 (1971). This is true even though the evidence is conflicting. *State v. Rook, supra; State v. McRae*, 276 N.C. 308, 172 S.E. 2d 37 (1970).

We now turn to examine the findings which defendant alleges are not supported by the record.

Finding of Fact (9):

> That after the interview on March 26, 1981, the officers asked the defendant to give them the shoes and pants he was wearing on March 15, 1981. That the shoes and pants he gave the officers and which were later tested and found negative for the presence of bloodstains, were not the shoes and pants the defendant was wearing on March 15th and the defendant knew these shoes and pants were not the ones asked for by the officers because they were not the clothes he was wearing that night; that this falsehood was the first one told to anyone in this case and it was told by this defendant to the investigating officers at the end of the very first interview, when they were talking to him as a possible witness;

Defendant does not argue that the facts stated in this finding are not accurate. He argues, rather, that there is no evidence to support the court's conclusion that this event constituted the first "falsehood" in the case. On the contrary, the evidence shows that by giving the officers clothes that he knew were not the ones he

had worn on 15 March 1981, defendant committed the first act of deception. The record further shows that the first possible misrepresentation by the police to Jackson occurred after defendant's misrepresentation concerning the clothes that he gave the officers. On 27 March, Officer Mack stated to defendant that they had discovered blood on the pants which defendant had given them. Of course, defendant knew that this was a misrepresentation because he knew that the pants which he had given the officers were not the ones which he wore on the day of the killing. We hold that this finding of fact is supported by competent evidence.

Finding of Fact (10):

> That on March 27, 1981, when Detective Mack was interrogating defendant, Mack told him they'd gotten some bloodstains off the pants of this defendant and tracks made by his tennis shoes were found by the police in the house. The defendant knew this was not true inasmuch as he knew he'd given them false answers about the clothing he'd been wearing the night of March 15 at the time he gave them the "false clothing". So at least by this point in time he was fully aware that each side was not going to be overly truthful with the other side as to what the evidence was and what it was not;

Again, defendant does not argue that the account of events set out in this finding of fact is inaccurate but argues that the court's statement that defendant was fully aware that each side was not going to be overly truthful with the other side is unsupported by the evidence. To the contrary, we hold that the record does support the finding that defendant knew that each side was not going to be overly truthful in the investigation. Defendant knew that he had not given the officers the clothes that they requested, and the defendant also knew that the officers had misrepresented the facts to him when they stated that they had found blood upon those clothes, as the defendant knew there was no blood on those pants because they were not the ones that he wore at the time of the murder. Therefore, defendant knew that he had misrepresented the facts to the officers, and he also knew that the officers had misrepresented the facts to him. The finding is supported by competent evidence.

Finding of Fact (11):

That the defendant's demeanor during each of the interviews was calm; that if he was scared he did not show it; and that his demeanor at all times was no different than it was in Court at this hearing and the Court has observed that at all times during this hearing over a three-day period, the defendant has been cool, calm, composed, and collected and has answered each question only as he wanted the words to be uttered and to sound in the record;

All of the officers testified that the defendant was calm and deliberate during each of the three interviews. They stated that he carefully reflected before answering the questions of the officers. The testimony further states that at no time did the defendant become emotional or upset. Defendant himself testified at the hearing that he was calm during the interviews of March 26 and 27 and that in fact he was "no different than what I am now." The trial judge having had the opportunity to see and observe the defendant during the hearing, described the demeanor of the defendant at the hearing as calm, cool, composed, and collected. This finding of fact is supported by competent evidence.

Finding of Fact (27):

That during this interview detective Mack told the defendant that the legally mandated maximum punishment in North Carolina for a capital offense was the death penalty; the defendant was not told that if he did not cooperate he would get the death penalty. The defendant was told tht whether or not a defendant got the death penalty depended on the circumstances under which the crime was committed. That this and all other mention of the death penalty was to enable the defendant to understand the seriousness of his situation; and not to frighten him, intimidate him or cause the defendant to cooperate with Detective Mack; and, that whether it could apply to him called for judgment on his part alone. The Court notes that it is permissible for trial counsel in N.C. to tell the jury what the statutory punishment for a given offense actually is and; therefore, what the consequences of their verdict may be. It is said that this is allowed

for the purpose of impressing upon the jurors the importance of what they are about to consider.

It would seem to be equally fair to tell a potential defendant what the punishment is and consequences are for a particular crime, in order to make him fully cognizant of the possible consequences of his words to the police, if he chooses to say anything at all.

At least one opinion (dissenting) of our State Supreme Court tends toward the view that in order to secure a valid statement the defendant would have to know of the possible death penalty involved. *S. v CARTER*, 296 NC 354 (1978) [296 N.C. 344, 250 S.E. 2d 263, *cert. denied*, 441 U.S. 964 (1979)].

Defendant argues that the trial judge equated the right of trial counsel to inform the jury of the statutory sentence for an offense with the right of detectives to talk with a defendant about the death penalty. A proper reading of this finding of fact does not sustain defendant's interpretation. The court used the right of counsel in arguing to the jury in capital cases as an analogy to officers advising defendants of the death penalty and concluded that the purpose of counsel in making this argument to the jury was to impress the jurors with the importance of what they are about to consider. By analogy, the purpose of the detectives making these observations to a defendant is to impress upon him the seriousness of the matter in question. We hold the finding is supported by competent evidence.

Finding of Fact (44):

That Detective Parker showed the defendant the color photograph first; that Detective Parker told the defendant that each line represented a point of identification; that five points were needed to make an identification; and asked the defendant how many points the defendant saw. That the defendant responded seven. That detective Parker then showed the defendant the black and white photograph and asked how many points he saw. That the defendant responded eight. That Detective Parker told the defendant that the police had the murder weapon and the defendant's fingerprints. That Detective Parker then asked the defendant why the defendant's fingerprints were on the murder weapon.

That the defendant then said he had picked up the bloody knife and while walking down a path near the railroad tracks threw it, and that is how his fingerprints got on the knife.

Police trickery has frequently been discussed in the context of confession. Even those who decry it acknowledge that it is clearly not "per se" illegal. [White,] POLICE TRICKERY IN INDUCING CONFESSIONS, 127 Univ. of Penna. L.R. 581 (1979). (For a view virtually espousing it, see [Grano,] VOLUNTARINESS, FREE WILL AND THE LAW OF CONFESSIONS, 65 Va. Law Review 859 (1979)).

The general rule in the United States appears to be that "while the indulgence in deceptive methods or false statements is not morally justifiable or a commendable practice, this alone does not render a confession of guilt inadmissible . . . *if the means employed were not calculated to procure an untrue statement.*" (emphasis added) CONFESSION —FRAUD—TRICKERY—EFFECT, 99 American Law Reports 2d, 712. What is noteworthy is that all of the techniques used by the Raleigh Police in this case in connection with this defendant are police techniques discussed and advocated by the leading author and authority in this area, Fred E. Imbau [*sic*], Professor of Law at Northwestern University, in his textbook CRIMINAL INTERROGATION AND CONFESSIONS, 2nd Ed. (1967) *written after* the *MIRANDA v ARIZONA*, 384 US 436 (1966), decision. The U.S. Supreme Court seems to be of the same view. In *FRAZIER v CUPP*, 394 US 731 [22 L. Ed. 2d 684] (1969), three years after *MIRANDA*, Mr. Justice Marshall, for a unanimous Court, held that "The fact that the police misrepresented [evidence] is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible. These cases must be decided by viewing the 'totality of the circumstances' . . . ."

This Court finds that the techniques used by the Raleigh Police in their interviews with this defendant were not such as were apt to make an innocent person confess, which is the constitutional test set forth in CRIMINAL INTERROGATION AND CONFESSIONS, supra, at p 163, as being "the only test that is fair both to the public and to the accused or suspected individual." The means employed in the case at hand had no

tendency to produce a confession that was not in accord with the truth.

Defendant argues that the finding by the court that the techniques used by the police in their interviews with the defendant were not such as to make an innocent person confess is not supported by the evidence. The basic technique used, as stated by the court in findings of fact (42) and (44), was to tell the defendant that the police had recovered certain items of physical evidence which implicated him and then ask the defendant to explain this evidence. It is true that the officers made false statements in so doing and in using trickery with their presentation to the defendant. The use of trickery by police officers in dealing with defendants is not illegal as a matter of law. *See generally* Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 Va. L. Rev. 859 (1979); White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581 (1979). The general rule in the United States, which this Court adopts, is that while deceptive methods or false statements by police officers are not commendable practices, standing alone they do not render a confession of guilt inadmissible. The admissibility of the confession must be decided by viewing the totality of the circumstances, one of which may be whether the means employed were calculated to procure an untrue confession. *Frazier v. Cupp*, 394 U.S. 731, 22 L. Ed. 2d 684 (1969); *State v. Rook, supra*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982). False statements by officers concerning evidence, as contrasted with threats or promises, have been tolerated in confession cases generally, because such statements do not affect the reliability of the confession. *Confessions*, 79 Harv. L. Rev. 935 (1966); *Hopt v. Utah*, 110 U.S. 574, 28 L.Ed. 262 (1884); *Moore v. Hopper*, 389 F. Supp. 931 (M.D. Ga. 1974), *aff'd*, 523 F. 2d 1053 (5th Cir. 1975); *Roe v. People of State of New York*, 363 F. Supp. 788 (W.D.N.Y. 1973), *aff'd*, 495 F. 2d 764 (2d Cir. 1974). Although this finding might be more appropriately designated a mixed finding of fact and law, it is supported by the evidence.

Finding of Fact (50):

That Detective Parker never threatened or promised the defendant anything in order to obtain State's Exhibit #6. That the defendant never requested to leave the interview

room (except to go to the bathroom—which he did), or made any requests that were denied; that the defendant never requested to speak with anyone except the officers; and

Defendant objects to the portion of this finding of fact which states that Detective Parker never threatened the defendant in order to obtain the confession. Defendant's argument is based upon Officer Parker's statement to him that he could plead not guilty and that the other officers could probably go into court and testify that defendant was a black man, killing and raping white women, but that he (Parker) did not believe that. Defendant did not remember this statement at the hearing before Judge Brannon. Defendant did not testify that Officer Parker or anyone else threatened him. Officer Parker testified that he did not threaten the defendant and that the statement was made to encourage the defendant to give his version of the incident. The technique of describing the crime in more vicious terms than it actually probably happened is used by police officers in an effort to get the suspect to explain what he claims really happened. F. Inbau and J. Reid, *Criminal Interrogation and Confessions* (2d ed. 1967). Further, defendant did not confess at the time Parker made the statement. Even official misconduct, so long as it did not play a role in securing a confession, does not call for suppression of evidence. *See Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824 (1979); *Brown v. Illinois*, 422 U.S. 590, 45 L.Ed. 2d 416 (1975). The finding is supported by competent evidence.

Finding of Fact (54):

That the defendant was never placed under arrest prior to the end of the third interview on April 9th and 10th, 1981; that he never asked for a lawyer, although he knew he could have such; that he never asked to go home; that the officers took him home and released the defendant after the first two interviews; that the defendant knew he had not been charged or arrested; that the defendant never asked for and was never offered food but was given water and coffee. That the defendant at all times prior to his arrest at the end of the third interview, was not in custody nor was his freedom restrained in any significant way, so there was no legal requirement to give him the *MIRANDA* warnings that he was given each time.

Defendant argues that this finding is erroneous and unsupported by the evidence when it states that defendant was never in custody, never under arrest, and his freedom was never restrained in any way during the interviews prior to the time he made the confession. Defendant observes that all of the interviews were in the Investigative Division of the Raleigh Police Department in a room 10 feet by 10 feet, with a table and two chairs. The room contained a one-way mirror, and there were many officers in the building. He states that the officers never told him that he could leave.

The defendant was never placed under arrest. He never asked for a lawyer, although he was well aware that he could have one. He was taken home by the officers on the 26th and 27th of March, and on the 27th of March, after defendant received the officers' message, he voluntarily walked to the police station. At no time was he ever handcuffed nor were any doors locked behind him.

Officer Williams described how defendant arrived at the police station on 8 April as follows: "I pulled my car up beside him. He walked up to the car. I told him who I was and we wanted to talk with him again in reference to the murder on Cox Avenue, and he says okay and got in the car." At that time defendant was not placed under arrest. Officer Williams further testified that at one interview defendant had the run of the building, going to the bathroom anytime he wanted to. Detective Mack testified that during the interview of 27 March, he advised the defendant that he was free to leave if he wanted to, and after the completion of the interview, the officers did take him where he wanted to go. Again, on the interview of 8 April, Officer Mack advised the defendant that he was free to leave if he wanted to do so. He was made aware of that from the outset of the interview. Even Jackson testified at least three times that he was never placed under arrest during the interviews. He stated that on 8 April the officers did not say he was under arrest but that they just wanted to talk to him. He got into the police car voluntarily.

The test to determine custody is whether a reasonable person in the suspect's position would believe himself to be in custody or that his freedom of action was deprived in some

significant manner. *Oregon v. Mathiason*, 429 U.S. 492, 50 L.Ed. 2d 714 (1977); *Moore v. Ballone*, 658 F. 2d 218 (4th Cir. 1981); *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982). *See United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed. 2d 497 (1980). The evidence in this case clearly indicates that had the defendant chosen to get up and leave the detective offices at the time he gave his confession, rather than stay and make that confession, the officers would not have hindered his departure. We find that the facts in this case are very close to those in *Davis, supra.* In *Davis*, the defendant came to the police station voluntarily and unescorted on one occasion, pursuant to a request from the officers. He was questioned about a murder and denied any implication in it. He was also requested to take a polygraph examination and refused to do so. Thereupon, he was allowed to leave and was given a ride home. Later, the officers asked to see the defendant at the police station, and he agreed to meet with them at that time. They drove through his neighborhood and gave him a ride to the station. He was questioned in comfortable surroundings and his physical needs were cared for. The Court in *Davis* held that the defendant was not in custody.

Likewise, in this case we hold that the defendant was not in custody prior to the time that he gave his confession. There was no seizure of defendant in violation of his Fourth Amendment rights. Defendant voluntarily went to police headquarters in response to a request of the police. *Dunaway v. New York, supra*, 442 U.S. 200, 60 L.Ed. 2d 824 (1979). *See People v. Morales*, 42 N.Y. 2d 129, 366 N.E. 2d 248, 397 N.Y.S. 2d 587 (1977), *cert. denied*, 434 U.S. 1018 (1978). Unlike the defendant in *Dunaway*, Jackson was told he was free to go on the very day he confessed. There was nothing in the conduct of the law enforcement officers during any of the interviews of the defendant which would have indicated to a reasonable person in defendant's position that he had been taken into custody or otherwise deprived of his freedom of action in any significant manner. *Davis, supra.* There was no threatening presence of several officers, no display of weapons, no physical touching of Jackson, no use of language or tone of voice indicating that compliance with the officers' request might be compelled. *United States v. Mendenhall, supra*, 446 U.S. 544, 64 L.Ed. 2d 497 (1980). In fact, he exercised his freedom by leaving the police department at the close of the interviews on 26

and 27 March and being driven by the officers to the destination which he chose. The evidence further indicates that defendant was given water and coffee and was allowed to use the bathroom facilities and that the officers did not deny any request made by him. We cannot say that the confession was obtained in a police dominated atmosphere. The trial court's finding is amply supported by the evidence, and we are therefore compelled to accept it.

Finding of Fact (59):

> That the defendant understood what he was doing in executing the waiver; that he was not under the influence of drugs or alcohol; that he was made no promises nor coerced nor threatened in any way by any person to cause the defendant to waive his rights or to make any statement;

In arguing that this finding of fact is erroneous, the defendant does not contend that the finding is unsupported by the evidence but argues that it is a conclusion of law. A finding by the court that no promises were made to the defendant and that he was not threatened in any way to induce him to make a statement or execute a waiver of counsel is a proper finding of fact. *State v. Stinson*, 297 N.C. 168, 254 S.E. 2d 23 (1979). Although defendant does not contend that this finding is unsupported by competent evidence, a review of the record indicates that it is so supported. Officer Mack testified that no one to his knowledge made any threats or promises to the defendant to induce him to execute a waiver and make a statement to the officers. Officer Parker, to whom Jackson ultimately confessed, testified that he did not threaten Jackson in any way or make any show of physical force towards him during the interview in which Jackson confessed. He also testified that he never promised Mr. Jackson anything or threatened him with anything in order to obtain this statement.

Officer Privette testified as to what he understood Detective Mack indicated to the defendant with respect to promises. Privette said that

> seems like I do recall him saying that, you know, if he would tell the truth about the incident that it would certainly come out in court that he cooperated. But as far as—and that

would help him, couldn't hurt him, something to that effect; may not have been the exact same words.

Officer Privette testified that he told the defendant that it would be best if he would just tell the truth in the long run. He also told him that "we could not promise him anything." That was told to Jackson several times in the interview. Privette also testified that they never told defendant that he was going to benefit from confessing to this crime. They did not tell him he was going to get any particular punishment. Admonitions by officers to a suspect to tell the truth, standing alone, do not render a confession inadmissible. *State v. Dishman*, 249 N.C. 759, 107 S.E. 2d 750 (1959); *State v. Thomas*, 241 N.C. 337, 85 S.E. 2d 300 (1955); *State v. Thompson*, 227 N.C. 19, 40 S.E. 2d 620 (1946). *See State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968). In *Thompson*, the defendant was told "it would be better to go on and tell us the truth than try to lie about it." We believe that the instant case falls within the language of *Thompson*. The statement attributed to Mack, "it would certainly come out in court that he cooperated," does not provide a basis to hold that Jackson's confession was induced by hope. Any inducement of hope must promise relief from the criminal charge to which the confession relates. *State v. Pruitt*, *supra*, 286 N.C. 442, 212 S.E. 2d 92 (1975). Such does not appear in the record before us. We hold defendant's confession was not a product of hope or induced by fear. *State v. Rook*, *supra*, 304 N.C. 201, 283 S.E. 2d 732, *cert. denied*, 455 U.S. 1038 (1982). *See State v. Simpson*, 299 N.C. 335, 261 S.E. 2d 818 (1980). Although not challenged on this basis, we conclude that this finding is supported by competent evidence.

Finding of Fact (60):

That the defendant had voluntarily come to the Investigative Division of the Raleigh Police Department on March 26 and March 27, and April 8, 1981; that he had not been taken into custody nor arrested but was advised fully and completely as required by *MIRANDA* and orally and in writing waived those rights prior to being interviewed; that after the interviews on March 26 and March 27, 1981, the police officers took the defendant to his home and released him;

Again, defendant does not argue that this finding is unsupported by competent evidence but merely asserts in one sentence that it is a conclusion and not a true finding of fact. As discussed in previous exceptions by the defendant, we conclude that the evidence in the record does support this finding.

Finding of Fact (62):

> That neither Detective Mack nor Detective Parker made any promises to nor threatened nor coerced this "street-wise" defendant in any way to obtain a statement; that the statement made by the defendant was knowingly, freely, voluntarily, and understandingly made without the slightest hope or fear; see *U.S. v SMITH*, 574 F. 2d 707 [2d Cir., *cert. denied*, 439 U.S. 986] (1978); *U.S. v HARTMAN*, 566 F. 2d 49 [8th Cir. 1977]; *CHANEY v. WAINWRIGHT*, 561 F. 2d 1129 [5th Cir. 1977, *cert. denied*, 443 U.S. 904 (1979)]; *U.S. v GREER*, 566 F. 2d 472 [5th Cir.], cert. denied, 435 US 1009 (1978). See *U.S. v SIKORA*, 635 F. 2d 1175 [6th Cir.] (1980), statements made immediately after DEA Agent informed defendant that governor had enough evidence to convict not involuntary, cert. denied, 449 US 993 (1980), and *U.S. v HART*, 619 F. 2d 325 (4th Circuit, 1980), falsely informing suspect that cooperation 'could have a bearing on bond reduction did not render resulting statement involuntary.'

Defendant objects to the finding that the defendant was "street-wise," arguing that there is no evidence to support such a finding. "Street-wise" is not found in The American Heritage Dictionary of the English Language (1980 edition). However, in today's parlance it is sometimes used to describe a person who has had extensive experience with the criminal law and knows how to deal with the criminal law system. The evidence which indicates that defendant has some significant prior involvement with the criminal law, including serving time in prison and several times being interrogated by the police department, supports this finding that the defendant was in fact street-wise, as that term is sometimes used.

Defendant alleges that findings (63), (64), and (66) are not true findings of fact but are largely discussions of law. This is apparent from a reading of these findings. Defendant does not argue

that these findings are improper or that he was prejudiced in any way by their being erroneously denominated as findings of fact rather than conclusions of law. We find no prejudicial error with respect to these findings.

[2] Next, defendant argues that the trial court erred in holding that his constitutional rights, federal or state, were not violated by his interrogation or confession. We do not agree and affirm this ruling by the trial court.

The North Carolina rule and the federal rule for determining the admissibility of a confession is the same. It is a rule or test of voluntariness in which the court looks at the totality of the circumstances of the case in determining whether the confession was voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed. 2d 854 (1973); *Frazier v. Cupp, supra*, 394 U.S. 731, 22 L.Ed. 2d 684 (1969); *State v. Schneider*, 306 N.C. 351, 293 S.E. 2d 157 (1982); *State v. Booker*, 306 N.C. 302, 293 S.E. 2d 78 (1982); *State v. Davis, supra*, 305 N.C. 400, 290 S.E. 2d 574 (1982). Insofar as the trial court found to the contrary, it is in error.

We turn then to examine the totality of the circumstances of the case as found by the trial judge and above affirmed by this Court. It would serve no useful purpose to set forth again the evidence in this case or the trial court's extensive findings. In brief summary they show: the defendant was never in custody or under arrest before he confessed; he was told by an officer on the day he confessed that he was free to go at any time; he was not restrained, not touched, threatened, or intimidated; he was taken where he wanted to go after the first two sessions with the officers; he walked to the police station one day; there was at least a week between the second and third interviews; defendant had an extensive criminal history and had previous experience with interrogation; Jackson was repeatedly given proper *Miranda* instructions although he was not in custody; the officers attempted to deceive defendant and lied to him about the evidence they had; defendant also made misrepresentations to the officers and was aware to some extent that the officers were not truthful with him; defendant was not questioned for undue periods of time, and no promises or threats were made to him.

The findings of fact, which we have held are supported by the evidence, are binding upon this Court. *State v. Rook, supra*,

304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982). The legal significance of the findings of fact made by the trial court is a question of law for this Court to decide. *State v. Davis, supra.* The facts so found support the conclusion that the confession was not constitutionally impermissible. Defendant's only argument arises from the trial court's findings that the officers deceived and lied to the defendant. Such actions are not to be condoned by the courts, but standing alone, as here, they are not sufficient to render defendant's confession inadmissible. *Frazier v. Cupp, supra*, 394 U.S. 731, 22 L.Ed. 2d 684 (1969); *Moore v. Hopper, supra*, 389 F. Supp. 931 (M.D. Ga. 1974), *aff'd*, 523 F. 2d 1053 (5th Cir. 1975); *Roe v. People of State of New York, supra*, 363 F. Supp. 788 (W.D.N.Y. 1973), *aff'd*, 495 F. 2d 764 (2d Cir. 1974); *Sovalik v. State*, 612 P. 2d 1003 (Alaska 1980); *Moore v. State*, 230 Ga. 839, 199 S.E. 2d 243 (1973); *Jacobs v. State*, 133 Ga. App. 812, 212 S.E. 2d 468 (1975); *State v. Booker, supra*, 306 N.C. 302, 293 S.E. 2d 78 (1982). *See generally* 99 A.L.R. 2d 772 (1965); 23 C.J.S. *Criminal Law* § 827 (1961). Deception or trickery is merely one of the circumstances that the court may consider in looking at the totality of the circumstances surrounding the confession. *Booker, supra.*

The other circumstances do not support a conclusion that the confession was involuntary. Defendant was not in custody. He was not deceived or tricked about the nature of the crime involved or the possible punishment. *Carter v. Garrison*, 656 F. 2d 68 (4th Cir. 1981), *cert. denied*, 455 U.S. 952 (1982). His *Miranda* rights were not violated. He was not held incommunicado. *Davis v. North Carolina*, 384 U.S. 737, 16 L.Ed. 2d 895 (1966). He was not subjected to prolonged uninterrupted interrogation. *State v. Morgan*, 299 N.C. 191, 261 S.E. 2d 827, *cert. denied*, 446 U.S. 986 (1980). He was not subjected to physical threats or shows of violence. *Brown v. Mississippi*, 297 U.S. 278, 80 L.Ed. 682 (1936). No promises were made to him in return for his confession. He was experienced in the criminal justice system and was not retarded, feebleminded, or emotionally upset. *Schneckloth v. Bustamonte, supra*, 412 U.S. 218, 36 L.Ed. 2d 854 (1973). Defendant's independent will was not overcome, so as to induce a confession he was not otherwise disposed to make, by mental or psychological coercion or pressure. *State v. Morgan, supra*, 299 N.C. 191, 261 S.E. 2d 827, *cert. denied*, 446 U.S. 986 (1980).

No due process or Fifth Amendment rights, state or federal, of the defendant were violated. We now examine the issue of defendant's Fourth Amendment rights. *Dunaway v. New York*, *supra*, 442 U.S. 200, 60 L.Ed. 2d 824 (1979), held that taking a person into custody and to the police station for questioning on less than probable cause to arrest violates the Fourth Amendment. Confessions obtained during such detention are inadmissible even though the Fifth Amendment has been complied with, unless there has been a sufficient break in the causal connection between the illegal action and the confession.

Before the principles of *Dunaway* can be applied to a confession, there must be a finding supported by competent evidence that the confessor was, prior to the confession, taken into custody, arrested, or detained by law officers upon less than probable cause to arrest. Here, the officers certainly did not have probable cause to arrest Jackson prior to his confession. *Whiteley v. Warden of Wyoming Penitentiary*, 401 U.S. 560, 28 L.Ed. 2d 306 (1971). The evidence, however, fails to support a finding that Jackson was at any time prior to his confession in custody, under arrest, or that his freedom of action was deprived in any significant way or that he was not free to leave at any time. *United States v. Mendenhall*, *supra*, 446 U.S. 544, 64 L.Ed. 2d 497 (1980). This issue has been fully considered and determined by the Court in its decision that there is no error in finding of fact (54), *supra*. The United States Supreme Court held in *Mendenhall*:

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. . . . In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

Id. at 554-55, 64 L.Ed. 2d at 509-10 (citations omitted). We hold that on the facts of this case, no "seizure" of Jackson occurred within the meaning of the Fourth Amendment. Therefore, the principles of *Dunaway* are not applicable to Jackson's confession. *State v. Morgan, supra,* 299 N.C. 191, 261 S.E. 2d 827, *cert. denied,* 446 U.S. 986 (1980). *Cf. Oregon v. Mathiason, supra,* 429 U.S. 492, 50 L.Ed. 2d 714 (1977).

STATE'S ASSIGNMENT OF ERROR

[3] The last issue on this appeal is the contention of the state that the trial court applied an improper standard in determining the voluntariness of defendant's confession. We agree and accordingly reverse the decision of the trial court suppressing defendant's confession.

The trial court concluded that defendant's confession was not "attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with him," and, therefore, it was not admissible under the decisional law of the Supreme Court of North Carolina. The decision to which the trial court referred is *State v. Roberts,* 12 N.C. 259 (1827). The pertinent parts of that opinion are:

> Confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with him, and which, it is said, in the perfectly good man cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected.

Id. at 261-62. The above quotation comes from the concurring opinion of Justice Henderson, one member of the three-justice Court. Although portions of Justice Henderson's opinion have been quoted by this Court, it has never been held by this Court that a confession is inadmissible in evidence unless it is "attributable to that love of truth which predominates in the breast of every man." In *State v. Rook, supra,* 304 N.C. 201, 283 S.E. 2d

732 (1981), *cert. denied*, 455 U.S. 1038 (1982), *Roberts* was quoted and relied upon for the holding that a confession obtained by the influence of hope or fear implanted in defendant's mind by the officers is inadmissible. Likewise, in *State v. Pruitt, supra*, 286 N.C. 442, 212 S.E. 2d 92 (1975), this Court again relied upon *Roberts* for its holding that a confession is inadmissible if procured under the influence of hope or fear arising from the words or actions of the officers who held defendant in custody. The reliance of this Court upon *Roberts* in *Rook* and *Pruitt* for the purposes expressed is entirely proper and appropriate. We decline, however, to extend our reliance upon *Roberts* to include the rule adopted by the trial court in this case.

The North Carolina test to determine the admissibility of a confession continues to be whether the confession is voluntary under the totality of the circumstances of the case. *State v. Schneider, supra*, 306 N.C. 351, 293 S.E. 2d 157 (1982); *State v. Booker, supra*, 306 N.C. 302, 293 S.E. 2d 78 (1982); *State v. Davis, supra*, 305 N.C. 400, 290 S.E. 2d 574 (1982); *State v. Morgan, supra*, 299 N.C. 191, 261 S.E. 2d 827, *cert. denied*, 446 U.S. 986 (1980). Under this test, defendant's confession is admissible.

The order of the trial court suppressing the confession of the defendant is

Reversed.

Justice MITCHELL concurring.

I concur in Justice Martin's scholarly opinion for the majority. I hasten to point out, however, that, in my view a different result might well be required *had this defendant been in custody* at the time he confessed.

The defendant has had the benefit of excellent appellate advocacy before this Court. Counsel for the defendant has been diligent in marshaling all or most of the confession cases which have been decided by this Court. Only one of those cases, *State v. Whitfield*, 70 N.C. 356 (1874), dealt with an accused who was not in custody at the time of his confession. That case involved a recently freed slave who was approached in a field in a rural county of this State shortly after obtaining his freedom by his former master and two other white men. Quite probably no per-

son living today can adequately appreciate the coercive effect upon this former slave when he was accused by these three white men of stealing a hog and told he had "better say so." *Whitfield* is, in my view, a unique case having no applicability here.

The trial court's determination that the defendant was not in custody was supported by overwhelming evidence. For me, this fact is decisive. Had it not been established in this case that the defendant was not in custody at the time of his confession, I might well join the dissenters.

Justice EXUM dissenting.

The majority's summarization of the facts, while generally adequate, does omit some critical details about defendant's 8 April 1981 interrogation and the events which preceded it. Before 8 April defendant had taken a polygraph, the results of which do not appear in the record. On two separate days, March 26 and 27, several different officers interrogated him for a total of six and three-quarters hours. Officer Mack, the principal interrogator during this period, told defendant bloodstains had been found on his pants and tracks from his tennis shoes were found in the victim's house—neither of which was true.

On 8 April Detective Williams, who was in charge of the investigation, picked defendant up about 5:30 or 6 p.m. and asked him to come to the police station for more questioning. Defendant agreed. Williams did not arrest defendant, but he was taken to an interrogation room in the Investigative Division of the police station.

Before Williams had picked up defendant he had made special arrangements with Detective Parker to aid in the interrogation if necessary. Although Parker was not assigned to the case he was asked to help because in Williams' view, "He is a good interrogator. He comes across well. He knows how to use stuff and when I say 'stuff' I refer to theatrics and this kind of stuff, extremely well."

Williams prepared, at Parker's request, the bloody thumbprint on the knife which resembled the murder weapon and photographs of the prints showing various identification markings. Both Parker and Williams knew no prints or blood had been found on the knife.

After defendant was brought to the interrogation room by Williams he was told Officer Mack, the only black officer involved in the investigation, would be with him shortly. Mack knew defendant before this investigation because he had questioned defendant about an armed robbery and rape at a fast-food restaurant in 1979 and an attempted rape in 1977 or 1978.

Mack, accompanied by Detective Privette, first gave defendant his *Miranda* warnings, orally and with a written form. Mack began the interrogation by going over defendant's previous statements and pointing out discrepancies. The doctored knife was in the room so defendant could see it and at some point Mack asked defendant how he would explain his fingerprints on the knife, even though Mack knew defendant's fingerprints were not on the knife. Mack acknowledged that he encouraged defendant to believe the doctored knife was the murder weapon, and that if defendant "had seen the knife previous to us presenting it to him, I'm sure he would have been frightened by it."

During this interrogation of defendant the officers introduced the specter of the death penalty. Mack told defendant the maximum penalty for a capital case was death. Mack testified:

> I made the statement to Mr. Jackson that if after he was convicted of the death penalty, or if after he received the death penalty in the State of North Carolina, if after, and if he did go to the gas chamber, nobody, after the pill was dropped in the bucket of water, would rush in to save his life.

On redirect-examination Mack more fully set forth what he told defendant about the death penalty:

> I had been talking with Mr. Jackson about this incident and I explained to Mr. Jackson that in North Carolina . . . whether or not he got the death penalty depended on the circumstances under which the crime was committed. I went on to explain to Mr. Jackson that if there were extenuating circumstances, that if he waited until he went into the gas chamber and they dropped the pill in the bucket nobody would rush in to take his statement at that time.

According to Privette, Mack "explained what the death penalty was as far as maximum, minimum, second degree," and Privette

was "pretty sure" he explained parole possibilities. Privette testified:

> I recall, seems like that Detective Mack said something to the effect that if you did kill the girl and you done it by accident, or it wasn't premeditated, or it happened at a rational moment, irrational moment or something to that effect, that the judge and jury should know that, what was going through your mind at the time, not that you premeditated, set there with a knife and went through the house and stabbed her without some other circumstance besides premeditation. I remember that was explained to him.
>
> . . . .
>
> He said if he felt sorry that he did kill the girl, where it was in court or whatever, and he felt like shedding tears, something like that in effect, or before a judge or jury, do so; something to that effect. He didn't tell him to get up and shed tears, Mr. Bass, just to let the jury feel sorry for him, no, if that's what you asked; but he did say something about shedding tears. I believe that's the way you put it.
>
> Q. This conversation concerning the jury and shedding of tears was a means of giving the defendant some hope, would that be fair?
>
> A. Hope for what?
>
> Q. Hope for himself, his future, his life?
>
> A. If it meant let him feel better, that's the way I took it, I guess that's what Gerald meant by telling him that. No, I don't think that was the occasion, Mr. Bass.
>
> Q. It gave him hope to avoid the death penalty?
>
> A. It might would have, I don't know.

Mack told defendant "that he had friends in that room at that time," when the only people in the room were the officers and defendant. Mack also asked defendant how he could be so calm in the interview room. Mack talked with him about lying to the officers in the interview room. At some point near the end of the interrogation he told defendant he thought he was lying. Mack also admitted telling defendant, "James, we have a witness who saw

you running out of that house on Cox Avenue," even though he knew there was no such witness. Mack further admitted telling defendant "that the jurors were people just like him and me; that they were sensitive to his disposition in court; that if he acted more less a macho man, many people would be turned off by that and I told him that he could learn to use the emotions of people even in a situation like this." Mack responded to the following question in the manner set forth:

> Q. You talked about working on emotions, emotions to a jury, and this type of interview on your part was intended to work on his emotions, is that correct?
>
> A. This part of the interview was, I guess you could say that.

Mack testified he told defendant he thought his girlfriend was pregnant. He told defendant he thought "he was not capable of making any babies." He informed defendant "that if indeed his girlfriend was pregnant, if he were convicted of the offense which we were talking about, that in all probablility it would be unlikely that he would be the one to raise his child."

Both Mack and Privette acknowledged they told defendant they believed he was guilty of the crime. Privette said he told defendant it was "very easy to tell he was lying about it . . . . I told him it would be best if he would just tell the truth in the long run." Privette recalled Mack telling defendant, "If he would tell the truth about the incident that it would certainly come out in court that he cooperated."

After Mack and Privette finished questioning defendant at 10 p.m. Officer Parker took over. When Officer Parker went in to interrogate defendant he had two photographs, a cassette tape recorder and two cups of ice water. Parker told defendant it was his "job to examine the physical evidence and go over the physical evidence that would be presented to the court by officers involved in the investigation." He said he "was not directly involved in the investigation," but he wanted to go over the available physical evidence with defendant. Parker related how the FBI had used a laser beam to obtain defendant's fingerprint from the murder weapon. He then showed defendant the photographs and explained the identification markings. Parker testified:

> I said [to defendant] it is evident we have your fingerprints. I said you can go into court and say they're not your fingerprints and I can go into court and be my job to prove that they are your fingerprints. I said now if you have a logical reason for having your fingerprints on the murder weapon, then you can tell me and I can relay it to the court as to why your fingerprints were on that weapon.

Parker asked defendant if he had lied to Mack. Defendant said he had, so Parker left about 10:20 p.m. and Mack reentered. During this session defendant admitted touching the knife but denied killing the victim.

At 11:15 p.m. Mack left and Parker came back in, bringing coffee for defendant and himself. Parker reviewed the evidence for defendant:

> I told him that we had a murder weapon; that it was evident that we had his fingerprints. I told him that we had his fingerprints on a knife sharpener which was found inside the residence where the homicide took place. I told him that we had a fingerprint on a wooden post on the front porch that was his fingerprint; and I asked him if he saw the composite sketch that was put in the newspapers and he replied that he did. I asked him how he thought we got the composite sketch. He said he did not know. I said we have a female eyewitness that saw you coming out the door carrying the knife in your hand. I said now this is the evidence that we are going to present to the court. I said you can go into court and say no, it's not me, or we can go into court and say it is.

Parker also testified that during the final part of the discussion he told defendant that "he would go into court and plead not guilty and if he did that then the other officers would probably go into court and testify that he was a black man out here viciously raping and killing white women and I did not feel that that was the case, and if he wanted to tell me his side of it that I would listen to him." Finally, Parker told defendant he believed he had committed the murder.

After Parker told defendant he would listen to him defendant said, "[O]kay, I'll tell you I did it." Parker proceeded to have

defendant write his confession. He began writing about 11:55 p.m., approximately six hours after the questioning began.

All of the foregoing testimony was elicited from the officers themselves. Defendant's testimony is generally consistent with the officers'.

Defendant testified he was twenty-two years old and had attended the tenth grade at Broughton High School. Although defendant had been questioned by Officer Mack about other, more serious, offenses, he only had been convicted of possession of stolen property, breaking and entering and simple assault and had served thirteen months in prison. He was released on parole in September 1980.

Defendant admitted that he gave the officers the wrong tennis shoes and pants but the correct shirt when asked for them on 26 March. He also acknowledged the officers advised him of his rights at the start of every interrogation. But this "street-wise" defendant, as the trial court and the majority characterize him, never asked for an attorney, never refused to answer questions, and agreed to take a polygraph test. The officers stated defendant never asked for food or drink, although he accepted coffee and water when it was offered. The officers also testified defendant never asked to leave; defendant testified he tried to leave a few times but Officers Williams and Mack stopped him. He said he was not told he could leave when he wanted to.

His testimony about what was said and done differed from the officers primarily in the following significant respects. Defendant testified that he was scared and frightened during the interrogation but he tried to appear calm because he did not want the officers to know he was frightened.

During his first interrogation by Detective Beasley on 26 March Beasley threatened defendant with his fist and called him a "f_____ murderer." Beasley denied any show of physical force but did admit he told defendant several times he believed defendant had killed the girl although he denied using the exact phrase defendant recalled.

Defendant said the officers told him the only way he could keep from going to death row was by making a statement. He also testified Officer Privette suggested to him during the second

session with Mack and Privette on 8 April that he say he met the victim in Pullen Park. Defendant said Mack told him his state-appointed attorney would not care whether he won or lost his case because the attorney would be paid irrespective. Parker told him there was a warrant waiting for him when he walked out the room if he did not make a statement to help himself in front of the jury. Mack also told him they would not accept a plea bargain if he did not make a statement. Defendant said Parker told him he had witnesses on tape who saw him leave the victim's house. Finally, in an unusual twist, defendant testified he did not recall Parker's statement about officers testifying that he was viciously raping white women, which Parker had already admitted he made.

From the acts and declarations of the interrogating officers as revealed by their own testimony, it should be clear that the majority's categorical conclusion that no promises or threats were made to defendant is simply wrong. The conclusion seems to be based either on the proposition that promises or threats must be express rather that implied, inferred or suggested, or on the proposition that the trial court's finding that none were made is binding on this Court. Neither proposition is true. "[W]hether the conduct and language of the investigating officers amounted to such threats or promises or influenced the defendant by hope and fear as to render the subsequent confession involuntary is a question of law . . . reviewable on appeal." *State v. Rook*, 304 N.C. 201, 216, 283 S.E. 2d 732, 742 (1981), *cert. denied*, 455 U.S. 1038 (1982); *accord, State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975). Threats may be inferred from statements tending to provoke fright and promises may be implied from statements suggesting some hope. *State v. Pruitt, supra; State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968). *Pruitt* and *Fox* and the cases they cite make it abundantly clear that if the language and conduct of interrogating officers suggests or implies some hope as a consequence of confessing or if it tends to provoke fright as a consequence of not confessing, the resulting confession is involuntary and inadmissible as a matter of law. These cases and *Rook* also make it clear that whether the language and conduct have these effects is a question of law determinable after review of all the circumstances surrounding the confession. Indeed, the inadmissibility of this con-

fession is dictated by the principles set out in and the holdings of *Pruitt* and *Fox.*

State v. Pruitt, supra, an opinion for a unanimous Court by Justice, now Chief Justice, Branch, accurately summarizes our law governing admissibility of confessions and carefully applies that law to facts similar to those at bar resulting in the exclusion of the *Pruitt* confession. Indeed, when the proper legal principles are applied, the facts before us are more compelling for exclusion than those in *Pruitt.*

Pruitt had confessed to entering the residence of neighbors and friends, the Donlins, at approximately 4 a.m. The residence was occupied by Mrs. Donlin (Chris) and the Donlins' two children, Patricia, aged 7, and Jeremiah, aged 4. During a quarrel with Chris defendant said he choked her and beat her with the stock of a rifle. He then choked the children, set the house on fire and left. Other evidence in the case tended to show that the children were burned to death but that Chris Donlin died from "trauma to the head." In addition to Pruitt's confession, the state offered evidence tending to link him to the crimes of arson and murder: Defendant at the scene of the fire was asked whether people were still inside the residence. He replied, "She's in there on the couch. She's been raped and cut open and they've set her house on fire." 286 N.C. at 443, 212 S.E. 2d at 94. A search of Pruitt's residence revealed army fatigues in the closet of a rear bedroom with bloodstains on the jacket and pants. Further, in a conversation with a bailiff in district court defendant was told that he could not get his clothes because his house had burned down. Defendant replied, "No, that house belonged to the woman that I killed." *Id.* at 446, 212 S.E. 2d at 95.

The principal question in *Pruitt* was the admissibility of his confession. On *voir dire* at trial to determine its admissibility only the state offered evidence. This evidence tended to show that Pruitt was taken to the sheriff's interrogation room where he was questioned for 15 to 20 minutes by Lt. Smith, Sgt. Conerly, and Officer Martin. He was given full *Miranda* [*v. Arizona,* 384 U.S. 436 (1966)] warnings and waived in writing his right to counsel and his right to remain silent. This written waiver also contained statements by Pruitt that no one had made promises or threats to him to get him to make a statement and that his statement was

given voluntarily of his own free will. 286 N.C. 450, 212 S.E. 2d at 98. Sgt. Conerly testified that after defendant signed a waiver the officers told him about the bloody fatigues, the discrepancies in his previous statements, and that there were "too many holes in his story." They told him that in their opinion "he had done it," that he was lying and that *"it would be better for him to just go ahead and get it off his chest."* Conerly said, *"I possibly told him that he would be making it harder on himself by not making a statement,"* and that he did tell Pruitt *"that it would simply be harder on him if he didn't go ahead and cooperate." Id.* at 451-52, 212 S.E. 2d at 98-99 (emphasis original). After voir dire the trial judge found that no threats or promises were made to Pruitt and that his statement was voluntarily and knowingly made without inducement or coercion.

This Court reversed and concluded that Pruitt's confession was inadmissible. The Court carefully outlined the law governing admissibility of confessions when *Miranda* warnings have been given as follows: The question for decision is whether the confession was "voluntarily and understandingly made. The answer to this question must be found from a consideration of the entire record." *Id.* at 454, 212 S.E. 2d at 100. Confessions made under the "influence of hope or fear and implanted in defendant's mind by the acts and statements of" the officers interrogating him are involuntary and inadmissible. *Id.* at 455, 212 S.E. 2d at 100. Whether the conduct and language of the interrogating officers amount to promises or threats so as to make the confession involuntary is a question of law fully reviewable on appeal. *Id.* at 454, 212 S.E. 2d at 100.

The Court in *Pruitt* then reviewed the holdings of our leading confession cases. In *State v. Roberts*, 12 N.C. 259 (1827), a confession was held inadmissible as being involuntary when the accused was told that since he was in custody any confession he would make could not be used against him at trial and that it would be to his credit to confess. In *State v. Whitfield*, 70 N.C. 356 (1874), the accused, a Negro, was confronted by his white employer who told the accused that a hog had been stolen and said, "I believe you're guilty; if you are, you had better say so; if you are not, you had better say that." *Id.* at 356. Defendant's immediate confession to the theft was held to be involuntary and inadmissible. In *State v. Stevenson*, 212 N.C. 648, 194 S.E. 81 (1937),

defendant was told by an officer, "There is no use you beginning to tell a lie to me this morning, I have already got too much evidence to convict you." *Id.* at 649, 194 S.E. at 81. Defendant confessed and the Court on appeal concluded that the confession was involuntary and inadmissible. *Id.* at 650, 194 S.E. at 82. The Court in *Pruitt* then reviewed cases in which interrogating officers had told defendants that it would be "easier" or "lighter" on them if they confessed; that it would "be better for him in court if he told the truth"; that the officers would be able to testify that defendants "cooperated if they aided the State in its case"; and that the officers "would try to help defendant." In each of these cases confessions made subsequent to such overtures were held involuntary and inadmissible. 286 N.C. at 457-58, 212 S.E. 2d at 102. The Court in *Pruitt* carefully noted that admonitions to an accused "to tell the truth, standing alone, do not render a confession inadmissible." 286 N.C. at 458, 212 S.E. 2d at 102. But suggestions that it would be better for defendant in court, or easier on him, or that the officers could help him if he confessed, render confessions involuntary and inadmissible.

Applying these cases and principles to the facts before it, the Court in *Pruitt* concluded as follows:

> In instant case the interrogation of defendant by three police officers took place in a police-dominated atmosphere. Against this background the officers repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was 'lying' and that they did not want to 'fool around.' Under these circumstances one can infer that the language used by the officers tended to provoke fright. This language was then tempered by statements that the officers considered defendant the type of person 'that such a thing would prey heavily upon' and that he would be 'relieved to get it off his chest.' This somewhat flattering language was capped by the statement that 'it would simply be harder on him if he didn't go ahead and cooperate.' Certainly the latter statement would imply a suggestion of hope that things would be better for defendant if he would cooperate, *i.e.*, confess.

286 N.C. at 458, 212 S.E. 2d at 102.

In *State v. Fox, supra*, 274 N.C. 277, 163 S.E. 2d 492, interrogating officers told the accused "that he would be a lot better off in court if he would tell them the truth about what happened. . . . [H]e would probably be charged with accessory to murder." In addition the officers showed defendant certain incriminating evidence "to let him know that they 'knew what had happened' and asked him 'if he wanted to give a confession.' " Defendant said that if he confessed, one of his accomplices would kill him. The officer said he would protect the accused from his accomplice "if he would just tell the truth about it." *Id.* at 284, 163 S.E. 2d at 497. Defendant confessed. This Court, speaking through Justice, later Chief Justice, Sharp, concluded that the confession was inadmissible because it was involuntary. The Court reviewed the applicable law as follows:

> When an investigating officer 'offers some suggestion of hope or fear . . . to one suspected of crime and thereby induces a statement in the nature of a confession, the decisions are at one in adjudging such statement to be involuntary in law, and hence incompetent as evidence. . . . (Citations omitted.) *State v. Biggs*, 224 N.C. 23, 26-27, 29 S.E. 2d 121, 123. Whether conduct on the part of investigating officers amounts to a threat or promise which will render a subsequent confession involuntary and incompetent is a question of law, and the decision of the trial judge is reviewable upon appeal. *State v. Biggs, supra.*
>
> . . . .
>
> Where the officers merely ask for the truth and hold out no hope of a lighter punishment a defendant's confession is not rendered involuntary by their request for 'nothing but the truth.' *State v. Thomas*, 241 N.C. 337, 85 S.E. 2d 300; *State v. Thompson*, 227 N.C. 19, 40 S.E. 2d 620; 23 C.J.S., Criminal Law § 817(8) (1961). In *State v. Dishman*, 249 N.C. 759, 107 S.E 2d 750, the officers told defendant that 'it would be better if he would go ahead and tell (them) what had happened.' Nothing else was said. The court's conclusion that the defendant's confession was voluntary was upheld. In *State v. Fuqua*, 269 N.C. 223, 152 S.E. 2d 68, however, the officer testified that he told the defendant 'if he wanted to talk to me then I would be able to testify that he talked to me and

> was cooperative.' We held that "[t]his statement by a person in authority was a promise which gave defendant a hope for lighter punishment"; that therefore the defendant's confession was involuntary and incompetent as a matter of law. *Id.* at 228, 152 S.E. 2d at 72.
>
> Here, the implication of Officer Cunningham's statement to McMahan was (1) if he told the truth about the entire matter it would be better for him in court and (2) he might be charged with a lesser offense. Clearly this statement constituted 'a suggestion of hope' which rendered his subsequent confessions involuntary.

274 N.C. at 292-93, 163 S.E. 2d at 502-03.

It is true that Pruitt and the defendant in *Fox* had been formally arrested at the time they confessed, while defendant here had not. This fact is insufficient to distinguish *Pruitt* and *Fox*. First, it was a fact not much relied on in either case. Rather, the *Pruitt* Court found it important that the interrogation "took place in a police dominated atmosphere," 286 N.C. at 458, 212 S.E. 2d at 102, as did the interrogation of defendant here. The Court in *Fox* relied solely on the "suggestion[s] of hope." 274 N.C. at 293, 163 S.E. 2d at 503. Second, while Pruitt was questioned only for 15 or 20 minutes, and defendant in *Fox* for a similarly short time, defendant's interrogation on 8 April continued for some six hours. Third, there are further facts here which were not present in *Pruitt* or *Fox*. The officers misrepresented the evidence available to them; impliedly threatened to make defendant's crime appear worse than it was; and implied that if defendant cooperated by confessing to extenuating circumstances he might save himself from the gas chamber. These facts more than make up for the absence of a formal arrest of defendant. Finally, as I shall show below, defendant was in custody, if not under formal arrest, at the time he confessed.

In the case before us the officers admitted telling defendant, among other things: (1) The officers were his friends; (2) no one could help him after he was placed in the gas chamber; (3) if his girlfriend was bearing his child he would not be the one to raise it if he were convicted; (4) that if there were extenuating circumstances, defendant should "bring [them] to light" or otherwise risk suffering the death penalty; (5) defendant might avoid the

death penalty by playing on the jurors' emotions at trial; (6) the detectives would offer in court against him the evidence that defendant's fingerprints were on the murder weapon and at various places at the crime scene [all of which was fabricated]; (7) if defendant pled not guilty the officers "would probably go into court and testify that he was a black man out there viciously raping and killing white women"; (8) they believed defendant committed the murder and accused him of lying and of killing the victim; and (9) if he told the truth "it would certainly come out in court that he cooperated." Surely, "one can infer that the language used by the officers tended to provoke fright" and at least implied "a suggestion of hope that things would be better for defendant if he would cooperate, *i.e.*, confess" within the ambit of the language and holdings in *Pruitt* and *Fox*.

As the Court in *Pruitt* said, "The facts of this case disclose the commission of [a] brutal and revolting [crime]. Yet, we must apply well-recognized rules of law impartially to easy and hard cases alike lest we make bad law which will erode constitutional safeguards jealously guarded by this Court for nearly a century and a half." 286 N.C. at 458-59, 212 S.E. 2d at 103. So it should be here. As we held the confession in *Pruitt* should have been suppressed, so we ought to hold here.

Two other cases decided by this Court reinforce the dictates of *Pruitt* and *Fox:*

In *State v. Stephens*, 300 N.C. 321, 266 S.E. 2d 588 (1980), in an opinion by Justice Huskins, the Court held: "If the totality of circumstances indicates that defendant was threatened, *tricked*, or cajoled into a waiver of his rights, his statements are rendered involuntary as a matter of law." 300 N.C. at 327, 266 S.E. 2d at 592 (emphasis original). Both defendant Stephens and his counsel were present in the SBI office in Raleigh for the purpose of defendant's taking a polygraph examination. An SBI agent advised defendant and counsel that counsel could not be present during the polygraph examination but that he could be present during the subsequent interrogation of defendant. The investigators, however, began interrogating defendant after they had given him the polygraph test without notifying his attorney who was waiting outside or defendant that the testing portion had been completed and his attorney could be admitted. Defend-

ant made an incriminating statement during the interrogation. The Court held that his statement was involuntary because "the totality of circumstances indicates that, in effect, defendant was tricked or cajoled into waiving his right to counsel and his privilege against self-incrimination. Absent a knowing and intelligent waiver of these rights, defendant's statements cannot be considered to have been voluntarily made." 300 N.C. at 327, 266 S.E. 2d at 592.

In *State v. Anderson*, 208 N.C. 771, 182 S.E. 643 (1935), defendant had confessed to the crime after being told by his interrogator that some of his accomplices had talked "and he might as well do likewise." The interrogator also "told him it would be better for him to go ahead and tell it just like it was and he might as well go ahead and tell it because it was already told." *Id.* at 780, 182 S.E. at 648-49. The truth was that defendant's accomplices had not talked. This Court, in an opinion by former Chief Justice Stacy, concluded that defendant's confession should not have been admitted against him because his interrogator's statements rendered it involuntary. *Id.* at 783, 182 S.E. at 650.

Thus the majority wrongly adopts for this jurisdiction what it perceives to be the general rule in other jurisdictions that trickery, deception and false statements by police officers, while not commendable, do not standing alone render a confession involuntary, unless they are likely to produce an unreliable confession. Until today this has not been the law in North Carolina. Trickery in *State v. Stephens*, *supra*, and false statements in *State v. Anderson*, *supra*, were held to be sufficient in and of themselves to render the resulting confession involuntary.

Even the "general rule" which the majority now adopts has no application to this case. For here the officers utilized not only deception, false statements, and fabricated evidence, they also used threats and promises tending to suggest hope and provoke fear in the defendant. Even courts that apply the general rule recognize that deception coupled with such promises or threats render the confession involuntary. *United States ex rel. Everett v. Murphy*, 329 F. 2d 68, 70 (2d Cir.), *cert. denied*, 377 U.S. 967 (1964); *Lewis v. United States*, 74 F. 2d 173, 177 (9th Cir. 1934); *Commonwealth v. Meehan*, 377 Mass. 552, 387 N.E. 2d 527, *cert. granted*, 444 U.S. 824 (1979), *cert. dismissed as improvidently granted*, 445 U.S. 39 (1980) (per curiam). *See generally* Annot.,

"Admissibility of Confession as Affected by its Inducement Through Artifice, Deception, Trickery, or Fraud," 99 A.L.R. 2d 772 (1965), and Later Case Service.

Neither can it be seriously questioned that the officers' implications of hope and provocations of fear coupled with misrepresentations of fact resulted in a confession of sorts from the defendant. The officers told defendant that: (1) they had enough evidence to convict him of first degree murder and they were prepared to introduce it into court against him; (2) first degree murder carried the death penalty unless there were extenuating circumstances; and (3) if there were extenuating circumstances it would be best for defendant to tell about them now since no one would hear about them after he entered the gas chamber. Defendant then "confessed" precisely along the lines the officers suggested would be in his best interest. He admitted the murder but said, incredibly, that the victim, a recently married woman, had invited him into her home and had invited him to have intimate sexual contact with her. When he proceeded to accept her invitations, she began to scream. Becoming frightened and in a state of panic, he killed her. Even the trial judge noted the improbability of the truthfulness of defendant's confession. Indeed, it was because the trial judge concluded that defendant's confession was not motivated by a desire to tell the truth that he ordered it suppressed.

Absent torture or other physical abuse, it would be difficult to conceive of interrogation tactics more likely to produce an untruthful, unreliable confession than the ones utilized in this case. Indeed, according to the findings of the trial judge they in fact produced such an untruthful confession. Therefore even under the general rule adopted by the majority, this confession should have been suppressed, as the trial court correctly ruled.

On the question of whether defendant was in custody, although not under formal arrest, at the time he confessed, the majority has enunciated the proper test, but has not correctly applied it to the facts. As the majority states, "The test to determine custody is whether a reasonable person in the suspect's position would believe himself to be in custody or that his freedom of action was deprived in some significant manner." The majority then states, "The evidence in this case clearly indicates that had

the defendant chosen to get up and leave the detective offices at the time he gave his confession, rather than stay and make that confession, the officers would not have hindered his departure." This statement may be true if considered from the standpoint of the officers who knew that, without a confession, they had no case against defendant. Viewed however from the standpoint of a reasonable person in defendant's position, as the test of custody requires us to do, it is clear that defendant could not have believed he was free to go. For at the time he confessed he had been told the officers had rather overwhelming evidence of his guilt—more than enough to give them probable cause to arrest him. He had been told, albeit falsely, that his fingerprints were on the murder weapon, the victim's knife sharpener and in other places in the deceased's dwelling. He had also been told that a witness had seen him running from the dwelling carrying the knife. So confronted, a reasonable person in defendant's position would have believed that he would not be allowed to leave. Thus defendant at the time of his confession was in custody. Had no *Miranda* warnings been given this defendant, I am satisfied this Court would have held the confessions inadmissible on that account. Yet the warnings are required only in *custodial* interrogations.

The majority seems to rely unduly on the trial judge's finding that defendant was "street-wise" and having first made misrepresentations to the officers regarding his clothing, must have been aware that the officers were making similar misrepresentations to him. I concede the facts support the trial judge's finding that defendant knew the officers were lying to him about the bloodstains found on his clothing and his tennis shoe tracks in the dwelling, since defendant acknowledged these were not the clothes he wore on the night in question. Even so, there is no evidence nor any finding by the trial court that defendant knew that evidence concerning his fingerprints and the witness who observed him was fabricated. Indeed, if defendant had known that this evidence was fabricated, the case for an involuntary confession is made even stronger. For defendant is then in the position of being told by the officers that they intend to use fabricated evidence in court to prove his guilt. This constitutes a threat of the very worst sort having a strong tendency to provoke the kind of fear which renders a subsequent confession involuntary. This is especially true when statements about the fabricated evidence

are coupled with other statements indicating that if defendant confesses to certain extenuating circumstances, he might not get the death penalty. Defendant is placed in this position: If he confesses to a murder with extenuating circumstaces he may be spared the death penalty. If he refuses to confess the officers are prepared to offer fabricated evidence and to testify falsely that he, a black man, not only murdered but raped the white victim to insure both defendant's conviction of first degree murder and his sentence to death.

Finally, even if, as the majority concludes, defendant's confession is reliable under all the circumstances, the methods of interrogation utilized are so fundamentally unfair as to deny defendant due process of law under the rationales, if not the holdings, of a number of United States Supreme Court decisions, not the least of which in *Miranda v. Arizona*, 384 U.S. 436 (1966). *See also, e.g., Mincey v. Arizona*, 437 U.S. 385 (1978); *Davis v. North Carolina*, 384 U.S. 737 (1966); *Lynumn v. Illinois*, 372 U.S. 528 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Culombe v. Connecticut*, 367 U.S. 568 (1961); *Rogers v. Richmond*, 365 U.S. 534 (1961); *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Spano v. New York*, 360 U.S. 315 (1959). *Miranda* is significant because in it the Court adopted certain prophylactic rules which must be followed in every custodial interrogation. These rules were developed with the hope that they would preclude the kind of psychological coercion which the *Miranda* Court found to be widely practiced by police interrogators and of which the Court was highly critical. Many of the practices criticized by the Court were drawn from Inbau and Reid, Criminal Interrogation and Confessions (1962).[1]

1. When Inbau and Reid prepared their first edition of this manual for police interrogators, Inbau was Director and Reid was a staff member of the Chicago Police Scientific Crime Detection Laboratory. At the time of the 1967 edition of this work, which was prepared largely as a response to *Miranda*, Inbau was a professor of law at Northwestern University and Reid a director of John E. Reid and Associates. I think it unfortunate that the trial court and the majority place such reliance on this book. Although the book has a section on the law governing the admissibility of confessions, the greater part of the book is nothing more than a police manual suggesting methods of interrogation. Neither the trial court nor the majority indicate upon which aspect of the book they rely. The truth is that the Supreme Court in *Miranda* was critical of some of the methods suggested by Inbau and Reid, 384 U.S.at 448-56, and Inbau and Reid are equally critical in their latest version of the *Miranda* decision, Inbau and Reid, Criminal Interrogation and Confessions, 1-3 (2d ed. 1967). We, of course, are bound by *Miranda*.

I vote to affirm the trial court.

Chief Justice BRANCH and Justice FRYE join in this dissent.

LEA COMPANY v. NORTH CAROLINA BOARD OF TRANSPORTATION

No. 397PA82

(Filed 7 July 1983)

1. **Constitutional Law § 1.1— authority to construe N.C. Constitution and laws**

Only the N.C. Supreme Court may authoritatively construe the Constitution and laws of North Carolina with finality, and decisions of the N.C. Supreme Court in this regard are binding upon the U.S. Supreme Court and all other courts.

2. **Eminent Domain § 13— highway structures—easement for flooding—foreseeability of 100 year flood**

In an inverse condemnation action seeking damages for an easement for flooding allegedly taken by defendant Board of Transportation by its construction of certain highway structures, the evidence supported findings by the trial court that a 100 year flood which occurred on 1 September 1974 was a reasonably foreseeable event and that the increased flooding which damaged plaintiff's property on that date was the direct and foreseeable result of the structures constructed by defendants.

3. **Negligence § 1.1— meaning of "Act of God"**

The statement in *Midgett v. Highway Commission*, 260 N.C. 241 (1963) that the term "Act of God" in its legal sense "applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them" is disapproved, since such statement incorrectly implies that an "Act of God" is by definition an unforeseeable event.

4. **Eminent Domain § 13; Negligence § 1.1— easement for flooding—"Act of God" not determinative of liability**

The holding in *Midgett v. Highway Commission*, 260 N.C. 241 (1963) that, in order to recover damages for an easement for flooding, the plaintiff must show that the flood in question was not an Act of God is overruled, since the liability of defendant is not determined by whether the flood was an Act of God but is controlled by a determination of whether the flood was a reasonably foreseeable event.

5. **Eminent Domain § 13— easement for flooding—injury as foreseeable result of highway structures**

Injury from flooding may properly be found to be a foreseeable direct result of government structures when it is shown that the increased flooding

causing the injury would have been the natural result of the structures at the time their construction was undertaken.

6. Eminent Domain § 2.6— easement for flooding—frequency of flooding

It is not required that flooding caused by government structures be shown to occur with any particular frequency before a taking will have occurred, it being sufficient to show that plaintiff's property is subject to permanent liability to intermittent but inevitably recurring overflows.

7. Eminent Domain § 2.6— easement for flooding—frequency of flooding—use of property

The frequency of flooding which will constitute a taking generally will vary with the use to which the property is put.

8. Eminent Domain § 2.6— highway structures—taking of easement for flooding

The trial court did not err in concluding that the increased flooding directly resulting from defendant Board of Transportation's highway structures was a permanent invasion of plaintiff's property and a taking by the State where the evidence tended to show that the structures built and maintained by defendant caused increased flooding and substantial injury to plaintiff's relatively high density apartments in an urban area; the increased flooding on plaintiff's property will occur with a statistical return frequency of from once in every 26 years to once in every 100 years; and the highway structures built and maintained by defendant were permanent in nature.

9. Eminent Domain §§ 2.6, 5.8— easement for flooding—evidence of damages

In an inverse condemnation action seeking damages for an easement for flooding, evidence of plaintiff's repair costs and lost present and future rental income was relevant upon the issue of whether there had been a taking and could perhaps be shown to influence what a willing buyer would pay a willing seller for the property, but such repair costs and lost income could not be directly recovered as damages. However, the trial court properly found that plaintiff made a prima facie showing of substantial and measurable damages where plaintiff offered evidence that the monetary value of its property immediately after the taking was substantially less than it had been immediately before the taking.

10. Eminent Domain § 2.6— easement for flooding—maximum and minimum boundaries of easement taken

The evidence supported the trial court's determination that plaintiff should receive compensation for injury to its property arising from increased flooding directly caused by defendant's highway structures beginning with the level of increased flooding associated with a 26 year flood and ending with the level of increased flooding associated with a 100 year flood.

11. Eminent Domain § 2.6— easement for flooding—maximum boundaries of easement taken

Injury from increased flooding foreseeably and directly resulting from structures built and maintained by the State, but occuring above the level of increased flooding such structures would cause during a 100 year flood, may

not be included as a part of a taking by the State, since evidence concerning damage resulting from increased flooding above the level of increased flooding the State's structures would cause during a 100 year flood is inherently too speculative and remote in its nature to be relied upon by our courts.

12. Eminent Domain § 2.6; Nuisance § 1— easement for flooding—inapplicability of doctrine of moving to the nuisance

The doctrine of "moving to the nuisance" or "priority of occupation" has no applicability in an action against the State for a taking by flooding directly caused by permanent structures constructed by the State.

13. Eminent Domain § 2.6— easement for flooding taken on certain date—evidence of flooding on subsequent occasions—disregard by trial court

While evidence tending to show flooding of plaintiff's property on four occasions subsequent to a flood on 1 September 1974 was incompetent with regard to the issue of whether a taking had occurred as the result of the flood of 1 September 1974, it is clear that the trial court was not influenced by such incompetent evidence where the findings, conclusion and judgment of the trial court clearly indicated that the court relied upon competent scientifically approved statistical data based upon actual measurements of high water levels occurring at the site in question during the 1 September 1974 flood in determining that the increased flooding caused by defendant's highway structures comprised a taking.

14. Eminent Domain § 13.4— inverse condemnation action—easement for flooding—calculations of flood levels by plaintiff's experts

In an inverse condemnation action to recover damages for an easement for flooding allegedly taken from plaintiff by defendant as a result of flooding on 1 September 1974 caused by defendant's highway structures, evidence of calculations of flood levels by plaintiff's experts was not incompetent because construction of the highway structures was not completed until after the flood where many of the calculations made by plaintiff's experts were based upon measurements of actual high water levels during the 1 September 1974 flood which were made and recorded by a witness for defendant, and where there was evidence of substantial similarities existing at the time of the 1 September 1974 flood and all later periods.

15. Evidence § 47.1— expert testimony—statement of facts as basis for opinion

The trial court did not abuse its discretion in requiring defendant's expert witness to relate the underlying facts he used in making calculations and computations upon which he based his opinion before giving his opinion or in excluding his opinion when he was unable to present the documentation which comprised the facts underlying his opinion.

16. Eminent Domain § 13— easement for flooding—inverse condemnation action—statute of limitations

The evidence supported the trial court's determination that the injury to plaintiff's property from excess flooding was the direct result of the combination of defendant's highway structures in place on 1 September 1974, although there was some evidence that flooding had occurred on plaintiff's property dur-

ing the 1940's and 1950's. Therefore, plaintiff's commencement of an inverse condemnation action on 30 May 1975 was within the applicable statute of limitations of G.S. 136-111.

17. Eminent Domain § 13; Judgments § 37.5— consent judgment in condemnation action—no bar to damages for easement for flooding

Plaintiff's inverse condemnation action to recover damages for an easement for flooding allegedly taken by defendant Board of Transportation by its construction of certain highway structures was not barred by a consent judgment entered in the prior condemnation action in which defendant took a small portion of plaintiff's property for the highway project, particularly by language stating that the judgment included "any and all damages" caused by the highway project, since neither the interest nor the area involved in the taking by flooding were within the contemplation of the parties when they agreed to and signed the consent judgment.

18. Eminent Domain § 13— ongoing condemnation proceedings—separate inverse condemnation action

Property owners are not required to seek to recover compensation in ongoing condemnation proceedings for a subsequent further taking by the State but may bring a separate action for inverse condemnation pursuant to G.S. 136-111 when there is a further taking by the State after the initiation of the original condemnation action. However, injuries accruing to the remaining property caused by the original taking by condemnation, including injuries resulting from the condemnor's use of the previously taken portion, are not compensable in an inverse condemnation action unless they are so great as to amount in themselves to a separate taking.

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

ON discretionary review, pursuant to G.S. 7A-31, of the decision of the Court of Appeals, 57 N.C. App. 392, 291 S.E. 2d 844 (1982), affirming judgment for the plaintiff by *McLelland, J.*, 3 November 1980, Superior Court, GUILFORD County.

The plaintiff brought this inverse condemnation action and sought damages for an easement for flooding allegedly taken by the defendant when it constructed certain highway structures. The plaintiff alleged that the defendant's structures foreseeably increased the level of flooding on the plaintiff's property and resulted in substantial damage to its apartments on the property. Following trial without a jury, the trial court adjudged that the highway structures constructed and maintained by the defendant had increased the flooding of the plaintiff's property during a flood on 1 September 1974 and that the defendant had taken a defined interest in the plaintiff's property as a result. The trial

court ordered that just compensation for the taking of the plaintiff's property be determined by a jury. The defendant appealed to the Court of Appeals which affirmed the judgment of the trial court. The defendant's petition for discretionary review pursuant to G.S. 7A-31 was allowed by the Supreme Court on 26 August 1982.

Turner, Enochs and Sparrow, P.A., by C. Allen Foster, for plaintiff appellee.

Rufus L. Edmisten, Attorney General, by James B. Richmond, Special Deputy Attorney General, and Nichols, Caffrey, Hill, Evans and Murrelle, by Lindsay R. Davis, Jr., for defendant appellant.

MITCHELL, Justice.

This case presents two basic issues for our consideration. The first issue is whether an easement for flooding was taken from the plaintiff by the defendant, a State agency. The second involves whether the plaintiff retained its right to compensation in this action in light of a prior consent judgment and other facts. We hold that there was a taking by the defendant and that the plaintiff is entitled to compensation.

The evidence introduced at trial tended to show *inter alia* the following: In 1972, the plaintiff, Lea Company, sought to acquire real property for the construction of apartments in the vicinity of Greensboro, North Carolina. During the summer of 1972, Lea Company purchased two contiguous parcels of undeveloped land near the junction of United States Interstate Highway 40 [hereinafter "I-40"] and High Point Road. The property lay several hundred feet to the northwest of the junction and was bisected by South Buffalo Creek. Shortly after purchasing the property, Lea Company began construction of the La Mancha Apartments, a 224 unit apartment complex, on a portion of the property.

On 6 November 1973, the defendant in this case, the North Carolina Board of Transportation[1] [hereinafter "BOT"], notified

1. This action was brought against the former Board of Transportation on 30 May 1975. Effective 1 July 1975, the Department of Transportation was created.

Lea Company that it was condemning certain property owned by Lea Company. The property interest being condemned consisted of fee title to a portion of land at the southern boundary of the plaintiff's property to be used for lateral support and construction in connection with highway improvements to be made at the interchange of I-40 and High Point Road. BOT instituted a civil action in 1973 against Lea Company in connection with this condemnation. After the filing of the complaint and declaration of taking in that case, BOT and Lea Company negotiated a compromise settlement. Counsel for BOT prepared and signed a consent judgment and sent it to counsel representing Lea Company in that action on 25 April 1974. Counsel for Lea Company and others involved in that action signed the consent judgment at later times. The consent judgment was signed by Honorable Charles T. Kivett, Superior Court Judge, on 6 September 1974. It was recorded in the Office of the Register of Deeds of Guilford County on 9 December 1974. Later that month the Clerk of Superior Court of Guilford County caused payment to be made to Lea Company in accord with the consent judgment.

On 1 September 1974 there was a heavy rainfall in the Greensboro area including the watershed of South Buffalo Creek upstream from the La Mancha Apartments. The waters of the creek rose above the banks and flooded parts of the La Mancha Apartments causing extensive damages.

Prior to 1955, High Point Road was part of the State highway system. It was built on a raised roadbed constructed of soil with a culvert passing through the roadbed to allow the waters of South Buffalo Creek to pass through. When I-40 was constructed, an interchange between I-40 and High Point Road was built. That interchange was a partial cloverleaf with an access ramp (Ramp B) in the northwest quadrant of the intersection of I-40 and High Point Road. Ramp B was also constructed on a raised bed of soil containing culverts to permit the waters of South Buffalo Creek to pass through at a point where the ramp

N.C. Sess. Laws 1975, c. 716, s. 1. Effective 1 July 1977, G.S. 143B-348 was amended to state in pertinent part that: "All actions pending in court by or against the Board of Transportation may continue to be prosecuted in that name without the necessity of formally amending the name to the Department of Transportation." Throughout this opinion we refer to the defendant as the "Board of Transportation" or "BOT."

crossed the creek. High Point Road was reconstructed over a raised roadbed with culverts to carry the waters of the creek through the point at which the raised soil roadbed crossed the creek.

In 1969, BOT designed an additional access ramp (Ramp A) to be located in the northeast quadrant of the intersection of I-40 and High Point Road. The initial stages of this construction project were undertaken in 1972. Construction of an extension (Y-3) of the High Point Road culvert, together with construction of the Ramp A culvert, was substantially completed on 24 July 1974. Although construction of an extension of the Ramp B culvert was not completed until some time after the 1 September 1974 flood, the opening in Ramp B which was to contain the extension of that culvert had been completed on 1 September 1974.

The plaintiff, Lea Company, instituted this action against BOT on 30 May 1975 alleging a cause of action against BOT under Chapter 136 of the General Statutes of North Carolina for the taking of an easement for flooding on or across Lea Company's property. The plaintiff alleged that High Point Road and ramps between High Point Road and I-40 are obstructions to South Buffalo Creek and that BOT had placed culverts under the structures which "are completely inadequate to carry the waters of South Buffalo Creek resulting from induced excessive runoff and caused the water level to be substantially higher upstream from the culverts than it would be if the drainage openings were adequate." Lea Company also alleged that these structures as constructed "constitute a dam across South Buffalo Creek impeding and diverting the natural flow of its waters and causing its waters to back up and flood Plaintiff's property." Lea Company also alleged that its property would continue to be flooded periodically by reason of the structures constructed by BOT and that there had been a taking of its property by BOT. Other evidence introduced at trial will be discussed hereinafter where it is pertinent.

The action was tried before Judge McLelland without a jury on all issues raised by the pleadings except the issue of the appropriate amount of damages. Judgment was entered by the trial court in favor of the plaintiff and against the defendant and it was ordered that the issue of just compensation be determined by

a jury. The defendant appealed. The Court of Appeals, in an opinion by Judge Whichard with Judges Clark and Arnold concurring, affirmed the judgment of the trial court. The defendant then petitioned this Court for discretionary review pursuant to G.S. 7A-31. We allowed the defendant's petition on 26 August 1982. We now affirm the decision of the Court of Appeals.

I.

The defendant, BOT, assigns as error the determination of the trial court that an easement for flooding was taken as a result of flooding caused by its highway structures. In support of this assignment, the defendant refers us to numerous cases decided by the Supreme Court of the United States or by lower Federal Courts.

[1] The cases decided by the Supreme Court of the United States address the issue of whether there has been a taking for which compensation is required by the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of the United States is the unchalleged final judicial authority in construing the Constitution of the United States. The same is not true, however, with regard to questions of state law. Only this Court may authoritatively construe the Constitution and laws of North Carolina with finality. *Watch Co. v. Brand Distributors*, 285 N.C. 467, 474, 206 S.E. 2d 141, 146 (1974). Our decisions in this regard are binding upon the Supreme Court of the United States and all other courts. *See Missouri v. Hunter*, --- U.S. ---, 74 L.Ed. 2d 535, 103 S.Ct. 673 (1983).

In construing the Constitution of North Carolina, we have previously stated that:

> We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of "the law of the land" within the meaning of Article I, Section 19 of our State Constitution.

Long v. City of Charlotte, 306 N.C. 187, 196, 293 S.E. 2d 101, 107-108 (1982). In addressing the question of whether the trial

court in the present case erred in its determination that the defendant has taken an easement for flooding in the plaintiff's property requiring that just compensation be paid, we attempt to interpret and correctly apply the decisions of the Supreme Court of the United States which authoritatively construe the Fourteenth Amendment to the Constitution of the United States. We emphasize, however, that our reasoning and holding with regard to the issue of whether there has been a taking by the State requiring compensation in this case are expressly based upon our interpretations of *both* the Constitution of the United States and the Constitution of North Carolina.

In *Midgett v. Highway Commission*, 260 N.C. 241, 248, 132 S.E. 2d 599, 606-607 (1963) [hereinafter "*Midgett I*"], we applied long established principles of law and held that:

> There need not be a seizure of the property or dispossession of the owners; it is a taking if the value is substantially impaired. *McKinney v. High Point*, 237 N.C. 66, 74 S.E. 2d 440. Permanent liability to intermittent, but inevitably recurring, overflows constitutes a taking. 18 Am. Jur., Eminent Domain, s. 134, pp. 759, 760. In order to create an enforceable liability against the government it is, at least, necessary that the overflow of water be such as was reasonably to have been anticipated by the government, to be the *direct* result of the structure established and maintained by the government and constitute an actual permanent invasion of the land or a right appurtenant thereto, amounting to an appropriation of and not merely an injury to the property. *Sanguinetti v. United States*, 264 U.S. 146 (1924). (Emphasis in original.)

These principles are controlling in the present case. Bearing them in mind, we turn to a brief review of some of the competent evidence introduced at trial and pertinent to this assignment of error.

Some of the evidence before the trial court tended to show that BOT sent a representative, Jerry Peede, to the site several days after the 1 September 1974 storm and flooding. He observed and measured high water marks left by the flooding and recorded his observations in a notebook. His notebook was introduced at trial by Lea Company together with a graph he had prepared representing flooding and other movements of water in the area of

the plaintiff's property associated with the storm. Peede also testified concerning these matters.

Dr. Frank L. Parker, a professor of Environmental and Water Resources Engineering at Vanderbilt University who has published in excess of one hundred and thirty articles and books concerning water behavior and systems, calculated the flow of water at Ramp A on the occasion of the 1 September 1974 flood. Using Peede's notes and other information supplied by BOT, he was able to calculate the volume and velocity of water in the area of Ramp A at the time of the flooding. He was then able to calculate the level of flooding associated with that flow of water and its probable return frequency.

Dr. Parker performed these calculations by accepted scientific methods which included plotting on a graph the actual maximum recorded flows in the stream in question as measured by official United States Geological Survey water gauges maintained on the stream over a period of years. Using this information concerning actual flows and water levels in the stream, Dr. Parker applied mathematical principles to show the probability of various unrecorded flows and levels by the use of a statistically derived curve. This curve was similar to the standard "bell shaped" curve for standard distribution and is known as the Pearson Log Type III curve. By referring to this curve, Dr. Parker could determine the flow and levels of water associated with a flood of any given return frequency at the gauging station. He could then use an equation based upon mathematical technique known as regression analysis to determine the magnitude of flooding at the construction site upstream from the gauge and the frequency with which any particular level of flooding at the construction site was statistically likely to return. Dr. Parker's results from such methods were also corroborated by results he obtained using different methodologies advocated by hydrologists and described in published literature.

Dr. Parker's calculations indicated that the flood occurring at the site on 1 September 1974 was higher than that which would be experienced during a flood of a return frequence of once in one hundred years. Dr. Parker testified that the one hundred year flood is a concept regularly used in the science of hydrology and well known to professionals in this field. This testimony was cor-

roborated by BOT's witnesses and witnesses from the United States Army Corps of Engineers. The evidence indicated that a one hundred year flood is a flood of a return frequency of once in each one hundred years, or which can be anticipated statistically to occur once in a period of one hundred years. Stated otherwise, there is a one percent chance of a one hundred year flood occurring in any given year.

Evidence was introduced tending to show that, both before and after the modifications of 1972-1974, the culverts at the interchange were inadequate to accommodate the waters associated with a fifty year flood. Based upon a computer program developed by the United States Army Corps of Engineers and widely used and accepted as authoritative by hydrologists, computations were made which determined the high water level which would be experienced at the La Mancha Apartments during flood with various statistical return frequencies. These computations were made to compute the levels of flooding which would be experienced if the natural flow of South Buffalo Creek had been undisturbed by the interference caused by the combined effects of Ramp A, Y-3 and Ramp B.

Similar computations were made to determine the level of high water which would occur at the La Mancha Apartments with Ramp A, Y-3 and Ramp B in place. A comparison of the two sets of calculations tended to show the number of *additional* feet the high water level would rise as a result of the defendant's structures during a flood of any given return frequency. This evidence further tended to show that the *increase* in the high water level caused by Ramp A, Y-3 and Ramp B would begin to flood units of the La Mancha Apartments during high water levels associated with a flood statistically predictable to occur once in every twenty-six years—a twenty-six year flood. Evidence was also introduced tending to show the amount of additional flooding which would be experienced in the La Mancha Apartments as a result of *increased* high water levels caused by the structures built by BOT, to and including the increased high water levels which would be experienced during a one hundred year flood. The evidence tended to show that the flooding which actually occurred in the La Mancha Apartments on 1 September 1974 reached all of these levels.

A.

[2] In order to recover in the present case, the plaintiff was required to show that the increased overflow of water was such as was reasonably to have been anticipated by the State to be the direct result of the structures it built and maintained. *Midgett I*, 260 N.C. at 248, 132 S.E. 2d at 606-607. In order to show this, the plaintiff must show that both the magnitude of the flood of 1 September 1974 and any increased flooding directly caused by the State's structures during that flood were reasonably foreseeable by the State at the time it undertook to erect the structures.

The trial court made findings of fact supported by and substantially in accord with the evidence introduced at trial as previously outlined in this opinion. The trial court determined *inter alia*:

> 5. The construction of Ramp A in conjunction with the existence of Ramp B and Y-3 directly and proximately caused plaintiff substantial damage to its La Mancha property on September 1, 1974 by directly and proximately causing the property to be flooded to a substantially greater depth than it would have experienced on that occasion had Ramp B and Y-3 not been extended and had Ramp A not been constructed. By reason of the foregoing, defendant has taken an interest in plaintiff's property for which plaintiff is entitled to just compensation.
>
> 6. The construction of Ramp A in conjunction with the existence of Ramp B and Y-3 will continue to directly and proximately cause plaintiff substantial damage by raising the level of flooding otherwise to be expected on the property by a substantial amount every time a flood of a return frequency of between 26 and 100 years is experienced at the site, which floods are reasonably foreseeable and recurring events. By reason of the foregoing, defendant has taken an interest in plaintiff's property for which plaintiff is entitled to just compensation.
>
> . . . .
>
> 12. The interest taken by defendant is an easement for the accommodation of those flood waters in excess of those which would have been experienced on the site had the struc-

tures identified as Y-3, Ramp B, and Ramp A not been constructed, maintained, and/or extended.

13. The amount of excess waters by which plaintiff's property is burdened varies with the magnitude of flood waters experienced by South Buffalo Creek. The interest taken by defendant is maximally defined as that surcharge of waters which would be experienced at the property on the occasion of the 100 year flood, which flood is a reasonably foreseeable and recurring event. The maximum lateral extent and height of flooding associated with such a flood at the location of plaintiff's property are approximately those which were experienced on September 1, 1974.

The defendant BOT contends that the trial court erred in determining (1) that the one hundred year flood which occurred on 1 September 1974 was a reasonably foreseeable event, and (2) that the increased flooding which damaged the plaintiff's property on that date was the direct and foreseeable result of the structures constructed by BOT. We address each of these contentions separately.

The trial court did not err in determining that the one hundred year flood which occurred on 1 September 1974 was a reasonably foreseeable event. The defendant concedes that a one hundred year flood is by definition one which may be statistically predicted to occur once in every one hundred years. Nevertheless, the defendant contends that floods which can be anticipated to occur only once every one hundred years are "Acts of God" and not such as to be reasonably anticipated by the State.

[3] We have stated that, "[t]he term 'Act of God,' in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them." *Midgett I*, 260 N.C. at 247, 132 S.E. 2d at 606. We now reject and disapprove that statement, as we believe that it incorrectly implies that an "Act of God" is by definition an unforeseeable event. Such is not the case.

The term "Act of God" is more correctly defined as follows:

An act occasioned exclusively by violence of nature without the interference of any human agency. It means a

> natural necessity proceeding from physical causes alone without the intervention of man. It is an act, event, happening, or occurrence, due to natural causes and inevitable accident, or disaster; a natural and inevitable necessity which implies entire exclusion of all human agency which operates without interference or aid from man and which results from natural causes and is in no sense attributable to human agency. It is an accident which could not have been occasioned by human agency but proceeded from physical causes alone.

Black's Law Dictionary, 31 (rev. 5th ed. 1979). We accept and adopt this definition as our own.

[4] Based upon this correct definition of the term "Act of God," we reject and overrule our holding in *Midgett I* that the plaintiff must show that the flood in question was not an Act of God. 260 N.C. at 247, 132 S.E. 2d at 606. The 1 September 1974 flood was an Act of God. That fact is not, however, determinative of the issue of the liability of the defendant. The liability *vel non* of the defendant is controlled by the determination of whether the one hundred year flood experienced on 1 September 1974 was a reasonably foreseeable event. It remains true that an unforeseeable flood is one the coming of which is not to be anticipated from the usual course of nature. A reasonably foreseeable flood is one, the repetition of which, although at uncertain intervals, can be anticipated. *Id.*

The evidence in the present case tended to show that floods of a magnitude occurring once in every one hundred years under the conditions shown to exist in the particular locality which is the subject of this case were statistically reasonably foreseeable by those familiar with the science of hydrology. Whether such floods were in fact reasonably foreseeable by the State was a question for the trier of fact with the burden of proof being upon the plaintiff. The evidence supported the trial court's findings with regard to the reasonable foreseeability of the one hundred year flood experienced in the present case, and those findings are binding upon us on appeal. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975).

[5] In addition, the trial court did not err in determining that the injury to the plaintiff's property by increased flooding during the 1 September 1974 flood was a *foreseeable direct result* of the

structures constructed by the defendant. *Midgett I*, 260 N.C. at 248, 132 S.E. 2d at 607. Injury properly may be found to be a foreseeable direct result of government structures when it is shown that the increased flooding causing the injury would have been the natural result of the structures *at the time their construction was undertaken.* Injury caused in substantial part by subsequent or contemporaneous acts or construction by others is not a direct result of the government structures. A showing of injury caused by such subsequent or contemporaneous acts or construction will not support a finding that there has been a taking by the State. To require the State to anticipate the shifting of business and population centers and the attendant acts or construction by others contemporaneous with or subsequent to the State's construction, and to hold the State liable for a taking if it fails to do so, would place an unreasonable and unjust burden upon public funds. No such result is required by the Constitution of the United States or the Constitution of North Carolina.

Thus, it is important to note that in the present case both parties contended that the flooding on 1 September 1974 occurred almost exactly at the time of the completion of the defendant's construction. All of the evidence introduced was to this effect. No contention was made and no evidence was offered tending to show that any acts or construction by others contemporaneous with or subsequent to the defendant's construction had a substantial effect upon the injury to the plaintiff's property. Competent evidence was introduced which tended to show that the defendant's structures substantially increased the level of flooding which would have been experienced had the structures not been built. The evidence also tended to show the specific increases in flooding which would be caused on the plaintiff's property by the defendant's structures during floods of varying and statistically foreseeable return frequency. The evidence tended to show that the injury to the plaintiff's property by increased flooding was that which would naturally result from the defendant's structures *at the time construction was undertaken.* This was sufficient evidence in the present case to support the trial court's finding that the increased flooding of the plaintiff's property on 1 September 1974 was the foreseeable direct result of the structures established and maintained by the State. *Midgett v. Highway Commission*, 265 N.C. 373, 144 S.E. 2d 121 (1965)

[hereinafter "*Midgett II*"]. *See United States v. Cress*, 243 U.S. 316, 61 L.Ed. 746, 37 S.Ct. 380 (1917). *But see Sanguinetti v. United States*, 264 U.S. 146, 68 L.Ed. 608, 44 S.Ct. 264 (1924), *and Christman v. United States*, 74 F. 2d 112 (7th Cir. 1934).

B.

[6] In order to recover for a taking in the present case, the plaintiff must additionally show that the defendant's structures caused an actual permanent invasion of the plaintiff's land or a right appurtenant thereto. The defendant contends that the increased flooding on the plaintiff's property which will occur with a statistical return frequency of from once in every twenty-six years to once in every one hundred years is not sufficiently "frequent" to constitute a taking.

"Permanent liability to intermittent, but inevitably recurring, overflows constitutes a taking." *Midgett I*, 260 N.C. at 248, 132 S.E. 2d at 606. As the Supreme Court of the United States has stated:

> There is no difference of kind, but only of degree, between a permanent condition of continual overflow by back-water and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land. The taking by condemnation of an interest less than the fee is familiar in the law of eminent domain.

United States v. Cress, 243 U.S. 316, 328-329, 61 L.Ed. 746, 753, 37 S.Ct. 380, 385 (1917).

The defendant contends, however, that in order to be permanent and constitute a taking such overflows must also be "frequent." The defendant relies primarily upon the authority of *Fromme v. United States*, 412 F. 2d 1192 (Ct. Claims 1969), a *per curiam* opinion in which the United States Court of Claims affirmed a referee's report holding that the flooding once every fifteen years of agricultural land used for grazing cattle was not sufficiently frequent to constitute a taking by the government for public use. In establishing the requirement that flooding be frequent in order to constitute a taking, the Court in *Fromme* relied

upon the opinion of the Supreme Court of the United States in *Sanguinetti v. United States*, 264 U.S. 146, 68 L.Ed. 608, 44 S.Ct. 264 (1924).

We do not believe that *Sanguinetti* established a frequency requirement per se in cases involving a governmental taking by intermittent flooding, nor do we find *Fromme* persuasive on this point. It is true that in *Sanguinetti* the Court analyzed its earlier opinion in *Cress* and described it as a case in which "the Government by means of a lock and dam, had raised the water of the Cumberland river above its natural level, so that lands not normally invaded were subjected permanently to frequent overflows, impairing them to the extent of one-half of their value." 264 U.S. at 149, 68 L.Ed. at 610, 44 S.Ct. at 265. It is also true that in *Cress* the Court made reference to the fact that frequent overflows on the plaintiffs' lands had been shown to have occurred. 243 U.S. at 318, 61 L.Ed. at 749, 37 S.Ct. at 381. We do not believe, however, that either *Cress* or *Sanguinetti* was intended to establish a requirement that flooding caused by government structures must be shown to occur with any particular frequency before a taking will have occurred. It remains sufficient to show that the plaintiff's property is subject to permanent liability to intermittent but inevitably recurring overflows.

In both *Sanguinetti* and *Cress*, the Supreme Court seems to have focused its attention on the substantiality of the injury occurring rather than upon the frequency with which flooding occurred as a result of government structures. The frequency of the flooding of the agricultural lands of the plaintiffs in those cases appears to have been one factor which the Supreme Court considered in determining whether substantial injury had been shown. The Supreme Court apparently felt that a showing of infrequent flooding of agricultural land which had always flooded from time to time and which would quickly correct itself after flooding did not amount to a showing that substantial injury had occurred. This being the case, the flooding caused by the government was viewed to be in the nature of a negligent tortious invasion of the property, for which no recovery could be had from the government, rather than a permanent invasion and taking. This view of *Sanguinetti* and *Cress* is borne out by the fact that in other cases, when flooding of agricultural land by government construction began to change the nature of the land and make it

unsuitable for agriculture, the Supreme Court allowed compensation. *E.g., United States v. Williams*, 188 U.S. 485, 47 L.Ed. 554, 23 S.Ct. 363 (1903); *United States v. Lynah*, 188 U.S. 445, 47 L.Ed. 539, 23 S.Ct. 349 (1903).

The defendant also directs our attention to the language of the Supreme Court in *Danforth v. United States*, 308 U.S. 271, 286-87, 84 L.Ed. 240, 247, 60 S.Ct. 231, 237 (1939) indicating that, "retention of water from unusual floods for a somewhat longer period or its increase in depth or destructiveness by reason of the [government structure]" does not amount to a taking. The "unusual" flood involved in *Danforth* happened to have been the highest flood in recorded history on the Mississippi River. The evidence offered to show any specific amount of *increased* flooding as the *foreseeable direct result* of the government structure in that case would have been highly speculative at best. Again, it appears to us that the Supreme Court was focusing its attention upon whether it had been shown that substantial injury had been caused as the foreseeable direct result of the structure built and maintained by the government.

[7] Ordinarily, a mechanical approach should not be taken with regard to the frequency of flooding required to constitute a taking by "[p]ermanent liability to intermittent but inevitably recurring overflows. . . ." *Midgett I*, 260 N.C. at 248, 132 S.E. 2d at 606. The frequency of flooding which will constitute a taking generally will vary with the use to which the property is put. A frequency of flooding sufficient to establish a taking of high density urban residential property, for example, may well fail to be sufficient to establish a taking of low lying grazing lands or other agricultural lands. The issue will hinge to a great extent upon whether the value of the property has been substantially impaired by the additional flooding directly caused by the State's structures. *Midgett I*, 260 N.C. at 248, 132 S.E. 2d at 606-607.

[8] In the present case the evidence tended to show that the structures built and maintained by the defendant caused increased flooding and substantial injury to the plaintiff's relatively high density apartments in an urban area. The highway structures built and maintained by the defendant which were found to have directly caused the increased flooding were permanent in nature. *Midgett I*, 260 N.C. at 248, 132 S.E. 2d at 607. In light of

this evidence, the trial court did not err in concluding that the increased flooding directly resulting from the defendant's structures was a permanent invasion of the plaintiff's property and a taking by the State.

C.

[9] In order to recover damages in the present case, the plaintiff was also required to make a *prima facie* showing of substantial and measurable damages. *Midgett II,* 265 N.C. at 377-78, 144 S.E. 2d at 125. The defendant contends that the trial court erred in finding that the plaintiff had made the required showing.

The plaintiff introduced extensive evidence of its monetary loss in terms of repair costs, lost present and future rental income and the value of the property before and after the taking by the defendant. Although the evidence of the plaintiff's repair costs and lost present and future rental income were relevant upon the issue of whether there had been a taking and could perhaps be shown to influence what a willing buyer would pay a willing seller for the property, such repair costs and lost income may not be directly recovered as damages in this case. The measure of damages to be used in condemnation cases in which the State does not take the plaintiff's property in its entirety is mandated by G.S. 136-112(1) to be "the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking . . ." less any special or general benefits. The plaintiff offered evidence that the monetary value of the property immediately after the taking was substantially less than it had been immediately before the taking. This constituted the required *prima facie* showing of damage, and the trial court properly adjudged that the plaintiff was entitled to just compensation in an amount to be determined by a jury.

II.

[10] The defendant also assigns as error the trial court's determination as to the maximum and minimum boundaries of the easement taken. The trial court specifically concluded that:

> 14. Although the return frequency of the upper limit of the estimates of the magnitude of the September 1, 1974 flood at the La Mancha Apartments exceeds the maximum

> flood for which plaintiffs are entitled to compensation, *i.e.*, the 100 year flood, plaintiff's property is nonetheless still burdened by an easement for the accommodation of flood waters of lower magnitudes, *i.e.*, those waters associated with floods of return frequencies between 26 and 100 years.

The trial court concluded that the plaintiff should receive compensation for injury to its property arising from increased flooding directly caused by the defendant's structures beginning with the level of increased flooding associated with a twenty-six year flood and ending with the level of increased flooding associated with a one hundred year flood. The trial court's conclusions as to both the maximum and minimum boundaries of the easement for flooding taken by the defendant were correct.

Although the evidence tended to show that increased flooding caused by the defendant's structures during the 1 September 1974 flood invaded the plaintiff's real property prior to reaching the level of increased flooding the defendant's structures would have caused during a twenty-six year flood, this increased flooding appears to have passed over open lands which were a part of the plaintiff's property. The evidence did not tend to indicate, however, that such flooding substantially impaired such lands. The trial court correctly concluded that these lands should not be included in defining the easement for flooding taken by the defendant.

Some evidence also tended to show that the increased flooding caused by the defendant's structures during the 1 September 1974 flood may have slightly exceeded that which would have been caused by the structures during a one hundred year flood. The trial court correctly concluded that any portions of the plaintiff's property above the level of increased flooding which would have been caused by the defendant's structures during a one hundred year flood should be excluded in defining the easement for flooding taken.

[11] We have indicated herein that the frequency of flooding is not ordinarily the sole factor in a determination of whether a taking has occurred. Nevertheless, we hold that injury from increased flooding foreseeably and directly resulting from structures built and maintained by the State, but occurring above the level of increased flooding such structures would cause during a

one hundred year flood, may not be included as a part of a taking by the State.

Although floods of a magnitude greater than a one hundred year flood are statistically foreseeable, we hold as a matter of law that evidence concerning damage resulting from increased flooding above the level of increased flooding the State's structures would cause during a one hundred year flood is inherently too speculative and remote in its nature to be relied upon by our courts. *Cf. Danforth v. United States*, 308 U.S. 271, 84 L.Ed. 240, 60 S.Ct. 231 (1939) (highest flood ever recorded on the Mississippi River). Therefore, the trial court correctly excluded such evidence from its consideration in reaching its judgment in the present case.

It will no doubt at times be the case that all available evidence will be too speculative or remote to show that increased injury occurring at or below the level associated with a one hundred year flood was in fact the foreseeable direct result of structures built by the State. In each case it will be the responsibility of the trial court to make an initial determination as to whether the evidence introduced is sufficiently substantial and bears sufficient indicia of reliability to support a finding that such increased injury was the foreseeable direct result of the State's structures. If the trial court determines that the evidence introduced is substantial and bears the necessary indicia of reliability, it will then be the duty of the trier of fact—judge or jury—to determine whether the injury occurring was in fact the foreseeable direct result of the State's structures.

Given the particular evidence introduced in this case, we do not think that the trial court erred in determining that the evidence before it concerning increased flooding directly caused by the defendant's structures, during flooding at and below the level which these structures would have caused during a one hundred year flood, was substantial and bore sufficient indicia of reliability to support a finding of a taking. Dr. Parker, the expert in hydrology who testified for the plaintiff, had available to him the actual maximum recorded flows in the stream in question over a period of years as measured and recorded by official United States Geological Survey water gauges maintained on the stream over a period of years. He also had available meas-

urements of the actual flooding which occurred on the plaintiff's property on 1 September 1974 which had been recorded by an agent of the defendant. Using these actual measurements, he applied well recognized mathematical principles and generally accepted scientific techniques to determine with precision the amount of increased flooding which would be caused on the plaintiff's property by the defendant's structures during floods of any given magnitude. All of this evidence was properly admitted by the trial court.

Given such evidence, the trial court was justified in its determination that the evidence before it was substantial and bore sufficient indicia of reliability to support a determination that there had been a taking. Based upon this evidence, the trial court made appropriate findings and correctly concluded that the maximum boundary of the easement for flooding taken by the defendant was the level of increased flooding directly resulting from the defendant's structures during a one hundred year flood.

III.

[12] The defendant also contends that this action for inverse condemnation is based upon a theory of a taking by nuisance and that it should be barred by the doctrine of "moving to the nuisance." It is true that an inverse condemnation action for a taking by flooding is based upon a nuisance theory. *Midgett I*, 260 N.C. at 248, 132 S.E. 2d at 606. In an action among private parties the question of "moving to the nuisance" or "priority of occupation" is relevant but not conclusive as to the existence of a nuisance. *Watts v. Manufacturing Co.*, 256 N.C. 611, 619, 124 S.E. 2d 809, 815 (1962). Priority of occupation in such cases is to be considered with all the evidence in determining whether the party alleged to be engaged in maintaining a nuisance is engaged in a reasonable use of his property. The "reasonable use" rule is not applicable, however, in an action against the government for a taking. *Board of Transportation v. Warehouse Corp.*, 300 N.C. 700, 268 S.E. 2d 180 (1980). Therefore, the doctrine of "moving to the nuisance" or "priority of occupation" has no applicability in an action against the State for a taking by flooding directly caused by permanent structures constructed by the State.

The defendant argues that a refusal to apply the doctrine of "moving to the nuisance" or "priority of occupation" in the pres-

ent case will subject it to liability for unlimited future damages because the plaintiff may now construct new apartments in the area in question and then recover damages against the defendant if the defendant's structures later cause those apartments to flood. Again, we believe that this argument fails to draw a proper distinction between an action in tort against a private party for the maintenance of a nuisance and an action in inverse condemnation against the State for the permanent taking of property.

Here, the State has been found to have taken a defined portion of the plaintiff's land as a permanent easement for flooding and will be required to compensate fully for this permanent taking. Having taken and paid for a permanent easement for flooding in a defined portion of the plaintiff's property, the State now has the right to the permanent use of the easement taken without incurring further liability to the plaintiff or its successors in title. *See Midgett I,* 260 N.C. at 249, 132 S.E. 2d at 607; *Bruton v. Light Co.*, 217 N.C. 1, 6 S.E. 2d 822 (1940); *Staton v. R.R.*, 147 N.C. 428, 442-43, 61 S.E. 455, 460 (1908). Thus, the defendant's fears in this regard are unfounded, and this contention is without merit.

IV.

The defendant further assigns as error the admission by the trial court of certain evidence as well as findings and conclusions by the trial court which the defendant contends were based upon such erroneously admitted evidence. In a trial before the court without a jury, there is a rebuttable presumption that the trial court disregarded any incompetent evidence which may have been admitted. *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668, *cert. denied,* 358 U.S. 888, 3 L.Ed. 2d 115, 79 S.Ct. 129 (1958). Further, the trial court's findings of fact which are supported by competent evidence are conclusive on appeal even though the evidence also might sustain findings to the contrary. *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E. 2d 368, 371 (1975). If, however, it appears that the trial court was influenced to the prejudice of a party by the incompetent evidence, the presumption disappears and error is shown. *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114 (1954).

[13] The defendant contends that evidence which was introduced tending to show flooding of the plaintiff's property on four occasions subsequent to the flood on 1 September 1974 was irrelevant and prejudicial. In its amended complaint, the plaintiff alleged that the appropriation of an easement in its property occurred as a result of increased flooding caused by the defendant's structures during the 1 September 1974 flood and during the subsequent floods. Although only one taking of an easement for flooding in the plaintiff's property occurred, the plaintiff was entitled to allege that the taking of its property occurred on alternative dates and arose from alternative events. The evidence relating to flooding of plaintiff's property after 1 September 1974 was relevant to the alternative dates and alternative flooding alleged in the complaint and was admissible. Such evidence was not, however, competent with regard to the issue of whether a taking had occurred as the result of the flood of 1 September 1974. *Midgett II,* 265 N.C. at 377, 144 S.E. 2d at 124.

It is clear, however, that the trial court was not influenced by the evidence concerning flooding subsequent to 1 September 1974. The trial court made appropriate findings and specifically concluded that an easement for flooding was taken in the plaintiff's property during the 1 September 1974 flood. The trial court made no findings or conclusions indicating that the flooding subsequent to 1 September 1974 was considered by it to comprise any part of the taking of the easement for flooding in the defendant's property. Instead, the findings, conclusion and judgment of the trial court clearly indicate that the trial court relied upon scientifically approved statistical data based upon actual measurements of high water levels occurring at the site in question during the 1 September 1974 flood in determining that the increased flooding caused by the defendant's structures comprised a taking. The evidence which the trial court clearly relied upon was competent and relevant for such purposes. Therefore, the defendant failed to rebut the presumption that the trial court disregarded any incompetent evidence in deciding this issue.

[14] The defendant also contends that the trial court erred in admitting the evidence of calculations of flood levels by the plaintiff's experts. The defendant contends these calculations were based on the false assumption that conditions had remained unchanged at the site since the time of the 1 September 1974

flood. The defendant argues that conditions were indisputably different at the site after the flood because construction at the site was not completed until after the flood. This argument is in part correct but not determinative. It ignores the fact that many of the calculations made by the plaintiff's experts were based upon measurements of actual high water levels during the 1 September 1974 flood which were made and recorded by a witness for the defendant.

Further, there is evidence in the record of substantial similarities existing at the time of the 1 September 1974 flood and all later periods. Although construction of an extension of the Ramp B culvert was not completed on 1 September 1974, for example, the opening in Ramp B which was to contain the extension of that culvert had been completed and presumably would have allowed an amount of water at least equal to that which the completed culvert would have carried to pass through the raised bed of the road.

The defendant presented no specific evidence and makes no specific argument as to how conditions at the site on 1 September 1974 differed in any material way from conditions there after construction was completed. Whether the calculations of the expert witnesses were made under sufficiently similar conditions to be admissible was within the discretion of the trial court. *See Mintz v. R.R.*, 236 N.C. 109, 115, 72 S.E. 2d 38, 43 (1952). We find no basis in the record before us to support a holding that the trial court abused its discretion by the admission of the calculations of the experts introduced in evidence in this case.

The defendant also presents numerous additional assignments of error relative to the trial court's actions in allowing into evidence testimony and computations concerning the depths and rates of the flow of water near the defendant's construction site which would have been experienced under varying conditions or which were alleged to have been experienced on 1 September 1974. Without reviewing each of the defendant's as-signments and contentions in detail, it is sufficient for us to observe that the thrust of these assignments and contentions by the defendant seems to involve a challenge to the credibility of the testimony and computations and not to their competency or admissibility. The admission into evidence of the testimony and computations challenged by the defendant was not error.

V.

[15] The defendant also assigns as error the trial court's exclusion of certain evidence the defendant sought to introduce through an expert witness. The defendant sought to show through the testimony of Bernard Ingram that the structures complained of would have a negligible effect on flooding during a one hundred year flood. The defendant sought to have Ingram state his opinion on this and related matters. Prior to an opinion being given by the witness, however, it became clear that his opinion was based, at least in part, upon the results of computations from a computer "run" by the United States Army Corps of Engineers. Some of the documents produced during this computer "run" and other data the witness apparently used in arriving at his conclusions were not presented at trial.

Assuming that this expert witness would have testified concerning his personal calculations and computations, it was within the discretion of the trial court to require him first to relate the underlying facts he used in making the calculations and computations upon which he based his opinion before giving his opinion. *Board of Transportation v. Warehouse Corp.*, 300 N.C. 700, 708, 268 S.E. 2d 180, 185 (1980). Here, there is no indication that the trial court abused its discretion by requiring the witness to state the underlying facts before giving his opinion[2] or in excluding his opinion when he was unable to present the documentation which comprised the facts underlying his opinion.

VI.

The plaintiff additionally assigns as error the action of the trial court in allowing the plaintiff's motion to amend its pleadings, which motion was filed after all of the evidence in the present case had been introduced. The defendant contends that allowing the plaintiff's motion to amend permitted the trial court to consider and rely upon irrelevant evidence having no bearing on whether there was a taking on 1 September 1974. We do not agree.

The defendant contends that the amendment to the plaintiff's pleadings permitted the court to rely upon evidence of flooding on

2. *But cf.* G.S. 8-58.14 for rules applicable to trials on and after 1 October 1981.

occasions after 1 September 1974 in determining whether a taking had occurred, and that reliance upon such evidence was improper. We need not determine, however, whether the trial court's act in permitting the pleadings to be amended to allege the later flooding of the plaintiff's property or the introduction of evidence concerning such later flooding was erroneous. The findings and conclusions set forth in the trial court's judgment make it absolutely clear that the trial court did not in any way rely upon evidence of flooding occurring after 1 September 1974 in reaching its judgment.

The defendant also contends that the amendment to the plaintiff's pleadings permitted the trial court to improperly consider events such as water levels and discharges during a one hundred year flood. Evidence of such matters was offered as proof of the claim for relief for a taking on 1 September 1974 which had already been pled in the complaint. It was not necessary that such matters going to prove the claim for relief already alleged in the complaint be included as a part of the complaint. A party is not required to plead evidence. G.S. 1A-1, Rule 8; *Fox v. Southern Appliances*, 264 N.C. 267, 141 S.E. 2d 522 (1965). The amendment to the pleadings caused no harm to the defendant.

VII.

[16] The defendant pled as a defense the statute of limitations. It now assigns error to the trial court's conclusion that the plaintiff's claim for relief arose on 1 September 1974 and that commencement of this action on 30 May 1975 was within the applicable statute of limitations. This assignment is without merit.

The statute of limitations having been pled, the burden was on the plaintiff to show that its claim for relief accrued within the time prescribed. *Hooper v. Lumber Co.*, 215 N.C. 308, 1 S.E. 2d 818 (1939). As we have previously pointed out, the plaintiff's claim for relief for inverse condemnation did not arise until injury had been inflicted to its property by excess flooding directly resulting from the defendant's structures. *Midgett I*, 260 N.C. at 249, 132 S.E. 2d at 607; *Midgett II*, 265 N.C. at 377, 144 S.E. 2d at 124. The defendant contends that its uncontested evidence tended to show that substantial flooding occurred on the plaintiff's property during the 1940's and 1950's and that the plaintiff's claim for relief, if any, arose during one of those periods. We do not agree.

The defendant introduced evidence through a witness who was a paper boy in the area during the 1940's tending to show that flooding occurred on the plaintiff's property as a result of the overflow of South Buffalo Creek at various times during that decade. The witness was a child during those years, and his testimony related the flooding during that period to homes and other structures which were in place at the time. During the decade of the 1940's, High Point Road had been built and was maintained by the defendant, but none of the construction associated with the interchange had been constructed. The defendant also introduced testimony of a witness indicating that flooding occurred in the area of the plaintiff's property during the 1950's, at a time when Ramp B and the original culvert at Y-3 had been constructed.

The plaintiff introduced expert testimony tending to show that the flooding on its property on 1 September 1974 occurred as a direct result of the effect upon the creek of the *combination* of Ramp B, Y-3, and Ramp A. This *combination* of the defendant's structures was not in existence until 1974. No evidence was introduced tending to show any flooding by this *combination* of structures prior to 1 September 1974.

Here, the trial court acted in the dual capacity of judge and jury. Having weighed the evidence introduced by the parties and the conflicting inferences which could be drawn therefrom, the trial court was free to disbelieve the defendant's evidence and to believe the plaintiff's. Having weighed the evidence of the parties and the conflicting inferences, the trial court determined that the injury to the plaintiff's property was the direct result of the *combination* of the defendant's structures in place on 1 September 1974. By this determination, the trial court rejected all opposing evidence and inferences to be drawn therefrom including inferences that the flooding on 1 September 1974 would have occurred in the absence of Ramp A which was completed in 1974. *See Williams v. Insurance Co.*, 288 N.C. 338, 343, 218 S.E. 2d 368, 372 (1975). The trial court's findings and conclusions resolved the ultimate issues presented and are binding upon us, since the evidence supports the findings which in turn support the trial court's conclusions and judgment. *Id.*

The trial court having properly determined that the plaintiff's property first suffered injury as a direct result of the

defendant's structures on 1 September 1974, the plaintiff's claim for relief first arose on that date. The filing of the plaintiff's complaint on 30 May 1975 was within the time prescribed by G.S. 136-111.

VIII.

[17] The defendant, BOT, assigns as error the trial court's failure to sustain its plea in bar based upon the consent judgment entered in the prior condemnation action brought by BOT against Lea Company in which BOT took a small portion on the southern boundary of Lea Company's property. The defendant contends that the language of the consent judgment, and particularly the portions thereof reciting that the consent judgment includes "any and all damages" caused by the construction of the interchange modifications involved here, cuts off any recovery of compensation for flooding caused by the defendant's construction. The defendant contends also that, under the rule of damages prescribed by G.S. 136-112(1), the compensation for flooding which Lea Company seeks to recover in this action was recoverable as a matter of law in the prior action only. We find the defendant's assignment and contentions in this regard to be without merit.

After hearing arguments of counsel for the parties, the trial court ruled as follows:

> The language in the consent judgment "for any and all damages caused by the construction of that project" cannot be construed to preclude a claim by plaintiffs [sic] arising from construction other than on or directly affecting the plaintiffs' [sic] property which was taken or which lies directly adjacent to the property taken whatever the project numbers may have been recited, the language relied on by defendant cannot be construed to have covered within the necessary contemplation of the parties to the consent judgment, damages arising from construction away from plaintiff's property. This Motion in bar is denied.

The defendant contended at trial and argues on appeal that the taking of the easement for flooding on 1 September 1974 constitutes "part of the damages caused by the construction of said project" contemplated by the parties at the time the consent judgment was signed by them. The language of the consent judgment relied upon by the defendant is as follows:

> The sum of Three Thousand Five Hundred Dollars ($3,500) is the full, fair and adequate value of just compensation for the taking of the hereinabove described interest and area by the Board of Transportation and for any and all damages caused by the construction of said project.

The "hereinabove described interest and area" referred to in the consent judgment does not include any specific reference to the interest or area comprising the easement taken here for flooding. Further, the stipulated facts before us on appeal clearly indicate that counsel for both BOT and Lea Company had signed the consent judgment by 25 April 1974. All parties to the prior action, including those who were arguably not essential parties, had signed the consent judgment by 27 August 1974. Without belaboring the point further, it suffices to say that the evidence before the trial court supported its determination that neither the interest nor the area involved in the 1 September 1974 taking by flooding were within the contemplation of the parties when they agreed to and signed the consent judgment.

[18] We next reach the defendant's contention that under the rule of damages prescribed in G.S. 136-112(1) the injury by flooding resulting in the taking of property for which Lea Company seeks compensation in this action was as a matter of law damages recoverable only in the prior action. We have recently held that, "when the Department of Transportation takes only a part of a tract of land, the owners may introduce at the jury trial on the issue of compensation any evidence of damage to the remaining property caused by the Department of Transportation before the opening of the jury trial." *Department of Transportation v. Bragg*, 308 N.C. 367, 371, 302 S.E. 2d 227, 230 (1983). *See also, e.g., Board of Transportation v. Warehouse Corp.*, 300 N.C. 700, 268 S.E. 2d 180 (1980). We explained this holding in part by pointing out that, when trial on the issue of damages in the initial condemnation action has not yet occurred, "principles of judicial economy dictate that the owners of the taken land may allege a further taking by inverse condemnation in the ongoing proceedings." *Department of Transportation v. Bragg*, at 371 n. 1, 302 S.E. 2d at 230 n. 1.

Nothing in our opinion in *Bragg*, the statutes or our previous opinions, however, mandates that property owners must seek to

recover compensation in the ongoing condemnation proceedings for a subsequent further taking by the State. Property owners may choose to bring a separate action for inverse condemnation pursuant to G.S. 136-111 when there is a further taking by the State after the initiation of the original condemnation action. When choosing to bring a separate action for inverse condemnation, however, it should be borne in mind that the property owners will not be entitled to damages which are merely a consequence of the taking in the prior condemnation action. Injuries accruing to the remaining property caused by the original taking by condemnation, including injuries resulting from the condemnor's use of the previously taken portion, are not compensable in an inverse condemnation action unless they are so great as to amount in themselves to a separate taking.

Even if we adopted the view that *Bragg* requires a property owner to seek to recover damages for an inverse condemnation of his property in a prior ongoing action for a partial taking initiated by the State under G.S. 136-103—a view which we specifically reject—the defendant could not prevail here. In the present case, the prior action for a partial taking of Lea Company's property was not "ongoing" at the time of the taking of the easement for flooding by inverse condemnation. No issues concerning compensation remained to be decided in that prior action after the parties signed the consent judgment. All parties signed the consent judgment prior to the first flooding of the plaintiff's property on 1 September 1974. The plaintiff had no claim for relief for inverse condemnation of an easement for flooding until its property was actually invaded by water on 1 September 1974. *Midgett I,* 260 N.C. at 249, 132 S.E. 2d at 607; *Midgett II,* 265 N.C. at 377, 144 S.E. 2d at 124. Therefore, the defendant had no injury to allege as a further taking by inverse condemnation at any time during which the prior condemnation proceeding was *ongoing* within the meaning of *Bragg.*

For the foregoing reasons we reject the defendant's contention that compensation for the inverse condemnation of an easement for flooding, which the plaintiff seeks to recover in this action, was recoverable in the prior condemnation action or not at all. The trial court did not err in denying the defendant's plea in bar based upon the prior consent judgment.

For the reasons set forth herein, the decision of the Court of Appeals affirming the judgment of the Superior Court is

Affirmed.

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

STATE OF NORTH CAROLINA v. FREDDIE LEE STOKES

No. 448A82

(Filed 7 July 1983)

1. **Courts § 9.1; Jury § 6— individual voir dire of jurors—discretion of trial judge—effect of prior order by another judge**

The trial judge in a first degree murder case was not bound by a pretrial order entered by another judge which provided for individual voir dire of the prospective jurors since (1) the rule that one judge may not review orders, judgments or actions of another judge of coordinate jurisdiction does not apply to interlocutory orders given during the progress of an action which affect the procedure and conduct of the trial, and (2) the judge who actually tried the case was given the discretionary power by G.S. 15A-1214(j) to determine whether jurors should be selected one at a time.

2. **Jury § 6— denial of motion for individual voir dire and to sequester jury**

The trial court did not abuse its discretion in denying defendant's motion for individual voir dire in jury selection, to sequester the jury venire during voir dire proceedings, and to sequester the trial jury after selection was completed because of pretrial publicity concerning defendant's case where defendant failed to produce any evidence tending to show the existence of inflammatory, nonfactual reporting by the news media or that any seated juror was affected by pretrial publicity. Nor did the denial of such motion constitute prejudicial error because it permitted jurors to be "educated" by other jurors' answers to questions posed on the voir dire so as to enable them to escape jury service.

3. **Constitutional Law § 31— indigent defendant—refusal to appoint expert in psychology**

The trial court did not abuse its discretion in the denial of an indigent defendant's motion that he be permitted, at State expense, to retain an expert in psychology experienced in jury selection in criminal cases where defendant failed to show that the denial of his motion deprived him of a fair trial or that he would have been materially assisted in the preparation of his defense had the motion been granted. G.S. 7A-450(b).

4. Criminal Law § 75.3— confession—effect of confronting defendant with statements of others

Confronting an accused with statements of his codefendants which implicate him in a crime does not, standing alone, render an ensuing confession involuntary.

5. Criminal Law § 75.2— confession not coerced by threats of gas chamber

The evidence supported the trial court's determination that defendant was not coerced into confessing by threats that he would go to the gas chamber unless he admitted his participation in the crimes charged.

6. Criminal Law § 75.14— confession—subnormal mentality

A subnormal mental condition standing alone will not render an otherwise voluntary confession inadmissible.

7. Homicide § 21.6; Larceny § 7— murder in perpetration of felony—larceny—sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of larceny and first degree murder committed in the perpetration of armed robbery where it tended to show that defendant clubbed the victim to the ground and took his automobile and other property; there was medical evidence that the victim died as a result of blows to the head from a blunt instrument; and there was further evidence that defendant was seen in the victim's stolen automobile shortly after the killing took place and articles taken from the victim were found in defendant's possession.

8. Criminal Law § 135.4; Homicide § 31.1— felony murder—instructions on when death penalty may be imposed

Where the evidence in a felony murder case was conflicting as to whether defendant himself robbed the victim and delivered the fatal blows or whether defendant participated in the crime only as a lookout, the trial court correctly instructed the jury that defendant could be found guilty of felony murder under the theory that defendant was the actual perpetrator of the crime and struck the fatal blows or under the theory that, although not the actual perpetrator, he was present and aided and abetted in the commission of the robbery and the resultant felony murder actually committed by another, and the jury's verdict was guilty of first degree murder without an indication as to the theory upon which defendant was convicted, the trial court erred in failing to instruct the jurors during the penalty phase of the trial that, in order to impose the death penalty, they would have to find that defendant killed, attempted to kill or intended or contemplated that the victim would be killed.

9. Criminal Law § 135.4— first degree murder—submission of mitigating circumstances

The burden of persuading the jury as to the existence of any mitigating circumstance is upon the defendant to so prove by a preponderance of the evidence, and when all the evidence tends to show the existence of a particular mitigating circumstance, a defendant is entitled to a peremptory instruction on that issue. Even when a defendant offers no evidence to support the existence of a mitigating circumstance, the mitigating circumstance must be submitted

when the State offers or elicits evidence from which a jury could reasonably infer that the circumstance exists.

10. Criminal Law § 135.4— first degree murder—no significant history of prior criminal activity—failure to submit as mitigating circumstance

The trial court in a capital case did not err in refusing, upon defendant's request, to submit as a mitigating circumstance that defendant had no significant history of prior criminal activity where the State, upon cross-examination of defendant, elicited evidence of numerous past criminal activities. G.S. 15A-2000(f)(1).

11. Criminal Law § 135.4— first degree murder—mental or emotional disturbance mitigating circumstance—error in failure to submit

The trial court erred in failing to submit to the sentencing jury in a first degree murder case the mitigating factor as to whether defendant was under the influence of a mental or emotional disturbance at the time the crime was committed where there was lay testimony that defendant had a long history of treatment for mental problems which began when he was 10 years old, and a psychiatrist testified that defendant was mildly mentally retarded and had an antisocial personality disorder. G.S. 15A-2000(f)(2).

12. Criminal Law § 135.4— first degree murder—impaired capacity mitigating circumstance—error in failure to submit

The trial court erred in failing to submit to the sentencing jury in a first degree murder case the mitigating circumstance as to whether defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired where there was lay testimony that defendant had a long history of treatment for mental problems which began when he was 10 years old, and a psychiatrist testified that she had examined defendant after the commission of the charged crime and that defendant was mildly retarded and had an antisocial personality disorder. G.S. 15A-2000(f)(6).

13. Criminal Law § 135.4— first degree murder—accomplice or accessory mitigating circumstance—error in failure to submit

The trial court erred in failing to submit to the sentencing jury in a first degree murder case the mitigating circumstance as to whether defendant was an accomplice in or an accessory to the capital felony committed by another person and whether his participation was relatively minor where the State presented evidence that defendant actually delivered the blows which caused the victim's death, and the State further offered a purported confession which tended to show that defendant was only a lookout and did not deliver the fatal blows. G.S. 15A-2000(f)(4).

14. Criminal Law § 135.4— first degree murder—insufficient evidence to support certain mitigating circumstances

The evidence was insufficient to require the trial court to submit to the sentencing jury in a first degree murder prosecution mitigating circumstances as to whether defendant was subjected in his formative years to cruelty and physical abuse by his parents and as to whether defendant in his formative years was subjected to mental abuse by his parents.

15. Criminal Law § 135.4— first degree murder—mitigating circumstance—no relationship with natural father—insufficient evidence

The evidence did not require the trial court to submit to the sentencing jury in a first degree murder case the mitigating circumstance as to whether defendant was an illegitimate child who never experienced a relationship with his natural father where the evidence showed that defendant was an illegitimate child; a marriage was never consummated between defendant's mother and his natural father, but the father lived with the mother "off and on" in the past; defendant's older sister had the responsibility of rearing defendant since his mother was often away working to help support the family; defendant's father left the household when defendant was about five or six years old; at about that time, defendant was in an accident and sustained a serious injury to his leg; on occasion, defendant's father would come to the home to see how he was progressing; and although the father was not in the home, defendant's mother would call him and tell him that defendant "had to go to the hospital or something like that and he could come out there."

APPEAL by defendant from *Stevens, Judge*, at 18 May 1982 Criminal Session of NEW HANOVER Superior Court.

Defendant, Freddie Lee Stokes, was charged with first-degree murder, armed robbery of Kuano Lehto, and felonious larceny of Kuano Lehto's automobile. He entered a plea of not guilty to each charge.

The State's evidence tended to show that on 28 December 1981, Kuano A. Lehto was president and owner of the Wilmington Bonded Warehouse in Wilmington, North Carolina. Mr. Lehto worked at the warehouse until around 6:00 or 6:05 in the evening. As he left the warehouse Mr. Lehto was attacked by two men. He was hit several times about his head with a wooden club-like stick. His assailants took at least $200 in cash, credit cards, a money clip, and his 1973 blue Chevrolet automobile. He was left lying on a ramp leading to the warehouse office door.

Around 6:30 p.m., Mr. Lehto's wife called the warehouse but received no answer. She called Mr. Leslie Boney, Jr., at about 8:15 and, pursuant to this conversation, Mr. Boney and his son, Leslie Boney, III, drove to the warehouse where they found Mr. Lehto lying in a pool of blood on the warehouse ramp. He had two large gashes on his head and his skull was so crushed that a portion of his brain was visible. Blood was gushing from his mouth as he tried unsuccessfully to arise on three occasions.

An ambulance was summoned and Mr. Lehto was taken to the New Hanover Memorial Hospital where he was treated by Dr. Robert Moore, a neurosurgeon.

Dr. Moore testified at trial that Mr. Lehto's skull was fractured in several places and that the bones over one eye and at the base of the brain were shattered. Mr. Lehto died about ten hours after he was admitted to the hospital.

Dr. Ralph McKoy, a pathologist at the hospital, testified that he performed an autopsy on the victim and that Mr. Lehto died as a result of multiple blows to the head.

Lorenzo Thomas, testifying for the State, stated that in the early evening of 28 December 1981, he went to a basketball court in the Houston-Moore housing project where he met defendant, Ricky Benbow and James "Jimmy Jew" Murray. Benbow told Thomas that he, Murray and defendant were going to the warehouse to rob the "old man." He asked Thomas to act as a lookout and Thomas agreed.

As they proceeded toward the warehouse, defendant was carrying a wooden stick in his hand. The stick was approximately 18 inches long and about two and one-half inches wide. Benbow told Thomas to stop as they neared the warehouse and to whistle if he saw anyone coming. Thomas further testified that after standing out of sight of the warehouse for about five minutes he walked up the street where he could see the warehouse. At that time, he observed Benbow at the bottom of the ramp. Murray and defendant each held a stick in their hands and were bent over. Thomas testified that they appeared to be in a struggle. Shortly thereafter, defendant, Murray and Benbow left in Mr. Lehto's car with defendant driving. They did not stop for him so he walked back to the housing project. Thomas stated that defendant gave him a bag of marijuana for acting as a lookout at the scene of the crime.

A corroborative statement made by Thomas to the police officers prior to trial was read into evidence.

Gloria Robinson testified that she had formerly been defendant's girlfriend and that on 28 December 1981, at about 7:00 p.m., she saw defendant driving a blue Chevrolet automobile. She had never known defendant to own an automobile. Upon being shown photographs of Mr. Lehto's car, she stated that the vehicle

depicted in the photographs looked like the car defendant was driving that night. She further testified that on 31 December 1981, she saw defendant at a local club and at that time he had a wallet containing fifty and twenty dollar bills. She was then shown State's exhibit 2 and identified it as the wallet she saw in defendant's possession on 31 December. State's exhibit 2 was a wallet which was taken from defendant when he was arrested and thereafter identified at trial as looking exactly like a wallet belonging to Mr. Lehto.

The State also introduced into evidence a statement made by defendant while he was in police custody. The essence of this statement was that defendant acted as a lookout while Benbow and Thomas went to the warehouse, and that Thomas was the person who actually hit Mr. Lehto. Defendant stated that he then joined Benbow and Thomas in the parking lot of the warehouse where Thomas gave him $150, a wallet, and the keys to Mr. Lehto's automobile. Defendant drove Mr. Lehto's automobile to the home of Gloria Robinson, his girlfriend, but she was not at home. He then drove the car to Martin Street and parked it.

The statement of Ricky Benbow was also read into evidence. According to this statement, Benbow was at the apartment where defendant lived on 28 December 1981. He and defendant left the apartment and walked to Thirteenth Street. Defendant told Benbow that he was going to "hit the old man up on the hill" and that the man "had a lot of money on him." Shortly thereafter, defendant and Benbow were joined by Thomas and Murray and they discussed "hitting the man at the warehouse." As they neared the warehouse, Thomas and Benbow remained across the street while defendant and Murray went to a door located at the end of a warehouse ramp. When Mr. Lehto came out of the warehouse, defendant hit him in the face. At that point, Benbow ran back to defendant's apartment. Defendant later came home and scolded Benbow for leaving the scene. He showed Benbow some bills, including fifties, twenties, and tens, and told him that they had taken Mr. Lehto's car. Later that evening as defendant, Benbow, Terry Green, and some members of defendant's family were walking up Thirteenth Street, defendant showed them where he had parked the Lehto automobile.

Defendant took the stand and testified that he did not participate in the killing of Mr. Lehto. He stated that the statement

he gave to the police was a lie and that he gave the statement because he was frightened and was threatened with the death penalty by the police officers. According to defendant, on 28 December 1981, he went to a nearby mall in the afternoon and bought some towels for his mother. He then stopped by a friend's house at about 6:00 and returned to his apartment about 30 minutes later.

Defendant's mother testified that she had been asleep most of the afternoon of 28 December 1981 and after she wakened, she went to visit Yvonne Nixon who lived in a nearby apartment. When she arrived there, the evening news was on the television. Defendant and Ricky Benbow came by the Nixon apartment while she was there and stayed for about ten minutes. The evening news was still in progress when they left. Shortly thereafter, she returned to her own apartment and defendant came home within an hour. Between 8:00 and 9:00 p.m. defendant, members of his family and some friends went to a local nightspot known as Kerosene City and remained there until sometime after midnight.

Defendant presented other witnesses whose testimony tended to corroborate his mother's testimony.

The jury returned verdicts of guilty of first-degree murder, armed robbery, and felonious larceny. The court arrested judgment on the armed robbery conviction because defendant was found guilty of felony murder and this was the underlying felony.

A sentencing hearing was held to determine whether defendant would receive life imprisonment or the death penalty for the felony murder conviction.

At the sentencing hearing the State presented the testimony of only one witness and relied principally on the evidence presented at the guilt-innocence phase of the trial. Defendant presented the testimony of his mother and sister and read into evidence a report prepared by Dr. Mary M. Rood, a forensic psychiatrist at Dorothea Dix Hospital in Raleigh, North Carolina. Further evidence pertinent to this hearing will be set forth in the opinion.

The trial court submitted two aggravating circumstances to the jury, to wit: (1) was the murder committed for pecuniary gain, and (2) was the murder especially heinous, atrocious or cruel. The

jury found both of these aggravating circumstances to exist beyond a reasonable doubt. The jury also found beyond a reasonable doubt that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty.

The trial judge submitted eight mitigating circumstances and instructed the jury that it could consider any other circumstance or circumstances arising from the evidence which it deemed to have mitigating value. The jury found that one or more mitigating circumstances existed, but did not indicate which mitigating circumstances were found.

The jury found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances and recommended that defendant be sentenced to death. The trial judge sentenced defendant to death for the felony murder of Kuano Lehto and to imprisonment for a period of ten years for felonious larceny. Defendant appealed the death sentence directly to this Court as a matter of right pursuant to G.S. 7A-27(a). On 15 December 1982, we allowed defendant's motion to bypass the Court of Appeals on the felonious larceny conviction pursuant to G.S. 7A-31(a).

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

Arnold Smith for defendant-appellant.

BRANCH, Chief Justice.

I

GUILT-INNOCENCE PHASE

Defendant assigns as error the trial judge's denial of his motion to permit individual *voir dire* of the jury venire, to sequester the jury venire during the *voir dire* proceedings, and to sequester the trial jury after selection was completed. This motion was apparently addressed to the trial judge after the jury selection process had been underway for one day.

[1] In support of this assignment of error, defendant first takes the position that the trial judge was bound by a pretrial order entered by Judge Llewellyn, which provided for individual *voir dire* of the prospective jurors.

The general rule in this jurisdiction is that ordinarily a trial judge may not review the orders, judgments, or actions of another judge of coordinate jurisdiction. In such cases, a defendant's remedy is to perfect his appeal to the appellate division. *Thornburg v. Lancaster*, 303 N.C. 89, 277 S.E. 2d 423 (1981); *State v. McClure*, 280 N.C. 288, 185 S.E. 2d 693 (1972); *Price v. Ins. Co.*, 201 N.C. 376, 160 S.E. 367 (1931). To permit one superior court judge to overrule the final order or judgment of another would result in the disruption of the orderly process of a trial and the usurpation of the reviewing function of appellate courts. *State v. Duvall*, 304 N.C. 557, 284 S.E. 2d 495 (1981).

This rule does not apply, however, to *interlocutory* orders given during the progress of an action which affect the procedure and conduct of the trial. *Carr v. Carbon Corp.*, 49 N.C. App. 631, 272 S.E. 2d 374 (1980), *disc. review denied*, 302 N.C. 217, 276 S.E. 2d 914 (1981); *see also Calloway v. Motor Co.*, 281 N.C. 496, 189 S.E. 2d 484 (1972). An interlocutory order or judgment does not determine the issues in the cause but directs further proceedings preliminary to the final decree. *Carr v. Carbon Corp., supra; In re Blalock*, 233 N.C. 493, 64 S.E. 2d 848 (1951). Such order or judgment is subject to change during the pendency of the action to meet the exigencies of the case. *Skidmore v. Austin*, 261 N.C. 713, 136 S.E. 2d 99 (1964).

In *Oxendine v. Dept. of Social Services*, 303 N.C. 699, 281 S.E. 2d 370 (1981), we recently held that a pretrial ruling by a superior court judge consolidating claims for trial was not binding on the superior court judge who tried the case. We note that a motion for individual jury selection and jury segregation are matters addressed to the *trial* judge's discretion. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. Taylor*, 298 N.C. 405, 259 S.E. 2d 502 (1979). G.S. 15A-1214(j), in part, provides:

> In capital cases the *trial* judge for good cause shown *may* direct that jurors be selected one at a time, . . . (emphasis added).

We interpret the above-quoted statute as placing this discretionary power in the trial judge who actually tries the case. Judge Stevens, who denied defendant's motion, was the judge who actually tried the case and, accordingly, the motion for individual jury selection and jury sequestration was directed to *his*

discretion. His exercise of discretion will not be disturbed absent a showing of an abuse of discretion. *State v. Oliver, supra.*

[2] We find no merit in defendant's argument that his motion should have been allowed because of pretrial publicity concerning this "sensitive" case. Defendant completely failed to produce any evidence tending to show the existence of inflammatory, nonfactual reporting by the news media or that any seated juror was affected by pretrial publicity. Neither is there substance in his contention that the denial of his motion constituted prejudicial error because it permitted jurors to be "educated" by other jurors' answers to questions posed on the *voir dire* so as to enable them to escape jury service. We have rejected similar arguments in *State v. Barfield,* 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied,* 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed. 2d 1137, *reh. denied,* 448 U.S. 918, 101 S.Ct. 41, 65 L.Ed. 2d 1181 (1980); and *State v. Oliver, supra,* as being speculative and unpersuasive. We elect to follow the holdings of these recent cases.

We hold that defendant has failed to show that Judge Stevens abused his discretion in denying the motion for individual *voir dire* in jury selection, to sequester the jury venire during *voir dire* proceedings, and to sequester the trial jury after selection was completed.

[3] Defendant assigns as error the denial of his motion that he be permitted, at State expense, to retain an expert in psychology experienced in jury selection in criminal cases. He relies upon the arguments in the preceding assignments of error to support this contention. The relevance of these arguments to the assignment here considered is nebulous and of no force in view of our disposition of the contentions in the previous assignment of error.

Although not relied upon or brought to our attention by defendant's brief, we believe that the disposition of this assignment of error turns upon the provisions of G.S. 7A-450(b) and our interpretation of that statute. This statute provides:

> Whenever a person, under the standards and procedures set out in this Subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. The professional relationship of counsel so

provided to the indigent person he represents is the same as if counsel had been privately retained by the indigent person.

It is well established by our decisions that in order for an indigent defendant to be furnished an expert witness at State expense, the defendant must make a showing that there is a reasonable likelihood that he will be materially assisted in the preparation of his defense or that without the expert's services it is probable that the defendant will not receive a fair trial. *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, --- U.S. ---, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982), *reh. denied*, --- U.S. ---, 103 S.Ct. 839, 74 L.Ed. 2d 1031 (1983); *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). The appointment of an expert for an indigent defendant is a matter addressed to the trial judge's discretion and such appointment should be made with caution. *State v. Tatum*, *supra*.

Defendant has not shown that the failure of the trial judge to grant his motion deprived him of a fair trial or that he would have been materially assisted in the preparation of his defense had the motion been granted. To the contrary, this record shows that defense counsel diligently and adequately explored the question of whether each juror seated could give defendant an impartial and fair trial.

We hold that defendant has failed to show any abuse of discretion on the part of the trial judge. Accordingly, this assignment of error is overruled.

Defendant next assigns as error the denial of his motion to suppress a written inculpatory statement made by him to police officers.

At the hearing held pursuant to defendant's motion to suppress, the State offered evidence tending to show that defendant was questioned by police officers at the law enforcement center on 28 January 1982. He was advised of his rights, stated that he understood them and at that time signed a written waiver, including a waiver of the right to counsel. He was specifically asked if he wanted a lawyer and replied in the negative. Defendant stated that he had completed the tenth grade and, upon request, read to the officers from a *Miranda* form. The officers testified

that there was no physical abuse, threats or promises made to defendant and specifically denied making any statements to defendant concerning the death penalty. Defendant originally made an oral statement which was reduced to writing. Defendant read the statement and signed it. He then stated that he felt better and that he had a lot off his mind.

On cross-examination it was established that before defendant made the inculpatory statement, he was shown statements implicating him in the crimes under investigation and was told that he had been seen driving the victim's automobile shortly after the crime occurred.

Defendant offered evidence tending to show that the police officers told him that he was going to get the gas chamber unless he admitted his participation in the crimes under investigation.

At the conclusion of the hearing, the trial judge found and concluded in relevant part the following:

> . . . that the Court further finds that the defendant—at the time that the statements were taken—was not under the influence of alcohol or drugs—that he was coherent and responded understandably—that at no time were any promises or threats or offers of reward—or there was no violence or threat of violence—made to persuade or induce the defendant to make a statement or either—that the defendant was given the Miranda warnings—and rights—which were taken from the Miranda card—and included the right to remain silent and the other provisions which the Court has found the—in fact from the—from the document itself—which was submitted and entered into evidence—which the Court has now found as a fact—that all rights contained in the Miranda card were read to the defendant—who signed a waiver of these rights—including the right to have a lawyer present—which he indicated that he did not want—that the interrogation took place—at which time that only the two officers at any one time were present—that—based upon the foregoing facts—the Court concludes that none of the defendant's constitutional rights—either federal or state were violated by reason of his arrest, detention, interrogation or confession. That the statements made that are by the defendant to the officers on the 28th January, 1982, were freely, knowing-

ly, voluntarily, and under—understandably made—that the defendant was in full understanding of his constitutional rights to remain silent, right to counsel, and all the other rights which he freely, knowingly, intelligently and voluntarily waived.

The trial judge thereupon overruled defendant's motion to suppress and ruled that the statement was admissible into evidence.

Defendant contends that his statement was involuntary and inadmissible into evidence because (1) he was confronted with statements which implicated him in the crime, (2) he was threatened with the death penalty, and (3) he had a low I.Q. which, considered with the other matters surrounding his confession, rendered the confession involuntary. We consider these contentions *seriatim.*

[4] It is well settled in this jurisdiction that the confrontation of an accused with inculpatory evidence does not render an ensuing confession inadmissible absent trickery, coercion or other improper inducements. *State v. Mitchell,* 265 N.C. 584, 144 S.E. 2d 646 (1965), *cert. denied,* 384 U.S. 1024, 86 S.Ct. 1972, 16 L.Ed. 2d 1029 (1966); *State v. Smith,* 213 N.C. 299, 195 S.E. 819 (1938). *See also State v. Booker,* 306 N.C. 302, 293 S.E. 2d 78 (1982). It is not the disclosure of the evidence to an accused, but an impermissible use of such evidence which may affect the admissibility of a confession. *State v. Booker, supra.* More specifically, we have held that confronting an accused with statements of his co-defendants which implicate him in a crime does not, standing alone, render an ensuing confession involuntary. *State v. McNeil,* 263 N.C. 260, 139 S.E. 2d 667 (1965). *See also State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363 (1965). We find the rule stated in *McNeil* to be consistent with other jurisdictions. *Williams v. Ohio,* 547 F. 2d 40 (6th Cir. 1976), *cert. denied,* 435 U.S. 998, 98 S.Ct. 1654, 56 L.Ed. 2d 88 (1978); *Degler v. State,* 257 Ark. 388, 517 S.W. 2d 515 (1974); *Gibson v. State,* 347 So. 2d 576 (Ala. Cr. App. 1977); *People v. Smith,* 93 Ill. App. 3d 1133, 418 N.E. 2d 172 (1981).

[5] Defendant's contention that he was coerced into confessing by threats that he would go to the gas chamber unless he admitted to his participation in the charged crimes will not support this assignment of error.

The evidence on this point was in sharp conflict. The court heard the evidence of the State and the evidence of defendant and resolved this conflict by finding that "at no time were any promises or threats . . . made to persuade or induce the defendant to make a statement . . ." When the court's findings are supported by competent evidence such findings are binding on the appellate court. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980); *State v. Jackson*, 292 N.C. 203, 232 S.E. 2d 407, *cert. denied*, 434, U.S. 850, 98 S.Ct. 160, 54 L.Ed. 2d 118 (1977).

Defendant finally seeks to support this assignment of error on the theory that the above-discussed matters in combination with his low I.Q. (63), rendered his confession involuntary.

[6] A subnormal mental condition standing alone will not render an otherwise voluntary confession inadmissible. *State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976); *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), *death sentence vacated* 428 U.S. 908, 96 S.Ct. 3215, 49 L.Ed. 2d 1213 (1976). Thus, defendant's argument becomes feckless since we have found no merit in the other matters which defendant contends tended to render his confession involuntary. It appears from the record that defendant could read and write and that he had completed the tenth grade in school. Further, the trial judge who observed defendant and heard the testimony presented concluded that defendant "knowingly, voluntarily, and . . . understandably" made the inculpatory statement.

There is ample evidence to support the trial judge's findings of fact. These findings, in turn, support the conclusions of law and the trial judge's ruling denying defendant's motion to suppress.

[7] Defendant next contends that the trial judge erred by failing to grant his motions for judgment as of nonsuit at the close of the State's evidence and at the completion of all the evidence.

When we consider the evidence in the light most favorable to the State, allow the State the benefit of every inference of fact that may reasonably be drawn therefrom, and disregard all discrepancies and contradictions in the evidence, as we must, we conclude that there was ample evidence to repel defendant's motions. *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977); *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977).

The evidence tended to show that defendant clubbed the victim to the ground and took his automobile and other property. There was medical evidence that the victim died as a result of blows to the head from a blunt instrument. There was further evidence tending to show that defendant was seen in the victim's stolen automobile shortly after the killing took place and articles taken from the victim were found in defendant's possession.

This evidence was sufficient to permit the jury to reasonably infer that the crimes charged were committed and that defendant was the perpetrator of the crimes. This assignment of error is overruled.

II

SENTENCING PHASE

[8] Defendant argues that in light of the evidence that he was only the lookout the court should have instructed the jurors that in order to impose the death penalty, they would have to find that defendant killed, attempted to kill, or intended or contemplated that Mr. Lehto would be killed. We agree, and for reasons hereinafter stated, this cause is remanded for a new sentencing hearing.

The landmark case on this question is *Enmund v. Florida*, --- U.S. ---, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982). We note that the able trial judge did not have the benefit of this decision when this case was tried. In *Enmund*, Sampson and Jeanette Armstrong went to the home of an elderly couple and robbed and killed them. Enmund drove the getaway car. There was no evidence that Enmund had actually participated in the killing of the couple or that he attempted to kill or intended that they be killed. Under the then existing Florida law, Enmund was convicted of felony murder as a principal in the second degree and was sentenced to death. The Supreme Court of Florida found no error in the trial but the United States Supreme Court reversed the death sentence. In so holding, the Court pointed out that the death sentence was excessive punishment for an armed robber who, as such, did not take human life. The Court also emphasized that in determining whether the death penalty is an appropriate punishment, the focus of the inquiry must be in the individual conduct of

an accused and not on the conduct of others. Mr. Justice White, speaking for the Court, stated:

> Here the robbers did commit murder; but they were subjected to the death penalty only because they killed as well as robbed. The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence," *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed. 2d 973, [990] (1978) (footnote omitted), which means that we must focus on "relevant facets of the character and record of the individual offender." *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed. 2d 944, [961] (1976).

--- U.S. at ---, 102 S.Ct. at 3377, 73 L.Ed. 2d at 1152. The Court concluded:

> Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

--- U.S. at ---, 102 S.Ct. at 3379, 73 L.Ed. 2d at 1154.

The case before us differs from *Enmund* in that here there was strong evidence that defendant himself robbed the victim and delivered the fatal blows. This evidence would have permitted conviction of felony murder and would have supported the imposition of the death penalty. However, the State offered defendant's confession which, in part, stated that defendant participated in the crime only as a lookout, and that he did not deliver the fatal blows. We quote from that confession:

> When we reached the Pace Setter Tie and Shirt factory—Ricky and Lorenzo crossed the street headed toward the Bond—the Bonded Warehouse. I crossed over the street with them—I went to the Hanover Work Shop which is across from the Wilmington Bonded Warehouse and stood

beside the work shop building and a fence. Ricky and Lorenzo went up on the concrete ramp located at the Wilmington Bonded Warehouse. They stood in the corner behind the door located on the ramp. I was still standing beside the warehouse—correction—beside the work shop—waiting on them—was watching out for them. I then saw an old man—correction—saw an old white man come out of the door located at the top of the concrete ramp. The old man had a brief case in his hand. It looked like he was getting ready to lock the door when Lorenzo struck him with the stick that he was carrying. When the old man was hit with the stick—he turned toward Lorenzo and Ricky who was still in the corner—Lorenzo then hit the old man again. The old man then fell back onto the concrete ramp. Lorenzo and Ricky started going through the old man's pockets. While Lorenzo and Ricky were going through the old man's pockets—the old man was throwing up blood from his mouth. Lorenzo and Ricky then came down the ramp and went to a car located in front of the Wilmington Bonded Warehouse next to a light pole. I then crossed over the dirt road and went to where Lorenzo and Ricky was at—when I approached them they were taking money of a black wallet. They started passing out the money. Lorenzo gave me one hundred and fifty dollars—which was a hundred dollar bill, two twenty dollar bills and one ten dollar bill. Lorenzo then stuck a brown long wallet in his pocket. Lorenzo then gave Ricky some money also. Lorenzo had some car keys in his hand. I took the car keys from him—I unlocked the driver's side of the door—driver's side door of the car—I started the car up and left. Lorenzo and Ricky did not get into the car. I left them at the Bonded Warehouse. . . .

When several persons aid and abet each other in an armed robbery in the course of which the victim is fatally wounded, all being present, each person is guilty of murder in the first degree. *State v. Peplinski*, 290 N.C. 236, 225 S.E. 2d 568, *cert. denied*, 429 U.S. 932, 97 S.Ct. 339, 50 L.Ed. 301 (1976). Nevertheless, we must decide whether the sentencing jury correctly recommended the death penalty.

At the guilt phase of the trial, the trial judge correctly instructed the jury that defendant could be found guilty of felony murder under the theory that defendant was the actual per-

petrator of the crime and struck the fatal blows during the course of the robbery. He also instructed that defendant could be convicted upon the theory that although not the actual perpetrator, he was present and aided and abetted in the commission of the robbery and the resultant felony murder actually committed by another.

The verdict of the jury was guilty of first-degree murder. There was no indication as to the theory upon which defendant was convicted.[1]

Enmund dictates that absent proof that a defendant killed or attempted to kill or intended or contemplated that life would be taken, the death penalty cannot be imposed. The facts of this case require a resolution of whether this case comes within the purview of that holding.

We hold that failure to give the instruction required by *Enmund* was prejudicial error requiring remand to the Superior Court of New Hanover County for proceedings consistent with this opinion.

Therefore, in instant case, at the new sentencing hearing and before the sentencing jury begins its consideration of aggravating and mitigating circumstances toward returning its recommendation as to punishment, the trial judge should submit to and the jury answer issues as follows:

1. Did defendant deliver the fatal blows which caused the victim's death?

2. If not, did defendant, while acting as an aider and abettor, attempt to kill, intend to kill, or contemplate that life would be taken during the commission of the felony?

1. Judicial economy requires that when first-degree murder is submitted to the jury on more than one theory at the guilt-innocence phase of the trial, the trial judge should submit the issues so as to require the jury to indicate the theory upon which their verdict is returned. *See State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). This requirement would, in many instances, obviate the necessity of considering the *Enmund* holding at the sentencing phase of a trial. For instance, if accused is convicted of first-degree murder on the theory of premeditated and deliberated murder, the *Enmund* holding would have no application. Likewise, *Enmund* would not apply in a felony murder case if all the evidence discloses that the accused was the actual perpetrator of the crime who delivered the fatal blows.

Of course, defendant and the State will be permitted to offer competent evidence pertinent to the resolution of these issues.

If the jury should answer either of the above-stated questions "yes," then the jury would proceed to hear competent evidence concerning the aggravating and mitigating circumstances and return its recommendation as to whether defendant's punishment should be imprisonment for life or the death sentence. However, if the jury should answer both issues "no," it would return a recommendation of life imprisonment.

We wish to make it clear that the additional procedure herein set out is only necessary when the *Enmund* question is presented.

Although we have held that there must be a new sentencing hearing in light of the *Enmund* decision, we find it necessary to consider the refusal of the trial judge to instruct the jury that it could consider certain mitigating circumstances which were specifically requested by defendant since these questions may recur at the next sentencing hearing. In this connection, we deem it appropriate to summarize certain established guidelines.

The trial judge should submit to the jury in writing any mitigating circumstance listed in G.S. 15A-2000(f)(1), (2), (3), (4), (5), (6), (7) and (8) which is supported by the evidence. Further, pursuant to G.S. 15A-2000(f)(9), the trial judge should submit in writing any other relevant circumstance proffered by and specifically requested by a defendant which is supported by the evidence and from which the jury might reasonably find mitigating value.

[9] The burden of persuading the jury as to the existence of any mitigating circumstance is upon the defendant to so prove by a preponderance of the evidence, and when all the evidence tends to show the existence of a particular mitigating circumstance, a defendant is entitled to a peremptory instruction on that issue. *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979). Even when a defendant offers no evidence to support the existence of a mitigating circumstance, the mitigating circumstance must be submitted when the State offers or elicits evidence from which the jury could reasonably infer that the circumstance exists. *See State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981).

The trial judge's determination of whether a mitigating circumstance should be submitted to the sentencing jury should be guided by our statement in *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, --- U.S. ---, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982), *reh. denied*, --- U.S. ---, 103 S.Ct. 839, 74 L.Ed. 2d 1031 (1983). There Justice Copeland speaking for the Court, stated:

> Moreover, we must also point out that common sense, fundamental fairness and judicial economy dictate that any reasonable doubt concerning the submission of a statutory or requested mitigating factor be resolved in the defendant's favor to ensure the accomplishment of complete justice at the *first* sentencing hearing.

306 N.C. at 27, 292 S.E. 2d at 223.

Here the trial judge denied defendant's request that the jury be instructed on four of the mitigating circumstances listed in G.S. 15A-2000(f) and three mitigating circumstances pursuant to the provisions of G.S. 15A-2000(f)(9). The specifically enumerated mitigating circumstances listed in G.S. 15A-2000(f) are deemed to have mitigating value since they are specifically set out in the statute. *State v. Pinch, supra.* Therefore, our inquiry as to the statutorily enumerated mitigating circumstances is limited to the question of whether there was sufficient evidence from which the jury could reasonably infer that these mitigating circumstances existed.

[10] We first consider the question of whether the trial judge erred by refusing, upon defendant's request, to submit as a mitigating circumstance that defendant had no significant history of prior criminal activity. G.S. 15A-2000(f)(1).

Defendant failed to present any evidence of his lack of prior criminal history. However, upon cross-examination of defendant, the State elicited evidence of numerous past criminal activities. This evidence disclosed that on 10 February 1974 defendant broke into and stole property from a van. On 17 February 1974, defendant broke into and stole property from a vending machine. On 1 January 1975, defendant broke into a car and stole some tapes. On 18 June 1979, he assaulted a female. On 18 July 1979, he stole an air conditioning unit from the Houston-Moore Community Center and sold it. On 15 August 1979, he stole an air condition-

ing unit from the Lake Forest School. On 30 November 1981, he broke and entered the home of Gloria Robinson. He admitted that he sold marijuana on numerous occasions and that he possessed marijuana on many occasions for his own personal use. Finally, defendant testified that he had stolen marijuana from other drug dealers.

We cannot perceive how a jury could, in the face of this evidence, reasonably find defendant's criminal history to be other than significant. We therefore hold that the trial judge correctly refused to submit the mitigating circumstance of no significant history of prior criminal activity.

[11] Defendant next assigns as error the trial court's denial of his request that the jury be instructed that the capital felony was committed while he was under the influence of a mental or emotional disturbance. G.S. 15A-2000(f)(2).

At the sentencing hearing, defendant's sister testified that at a young age defendant had been treated by Dr. Fisscher, a psychiatrist at a Mental Health Center, for mental problems. Pursuant to a stipulation between the State and defense counsel, a report was admitted into evidence which showed that Dr. Mary M. Rood, a forensic psychiatrist at Dorothea Dix Hospital in Raleigh, examined defendant to determine whether he was competent to stand trial and whether he was able to distinguish right from wrong at the time the offenses were committed. This report indicated that defendant had an I.Q. of 63 and a reading level of 2.9. His social history contained in the report indicated that by age ten, defendant was being treated at a mental health center where he was diagnosed as having an unsocialized aggressive behavior and borderline mental retardation. The report also indicated that these conditions had been unsuccessfully treated with medication. Dr. Rood's own diagnosis was that defendant was mildly mentally retarded and had an antisocial personality disorder. However, she concluded that defendant was competent to stand trial and that he was capable of distinguishing right from wrong at the time the offenses were committed.

Although it was not an issue in that case, we note that in *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, --- U.S. ---, 103 S.Ct. 474, 74 L.Ed. 2d 622 (1982), there was psychiatric testimony that the defendant suffered from "the emo-

tional disturbance of antisocial personality." *Id.* at 704, 292 S.E. 2d at 272. There, the trial judge submitted the mitigating factor set forth in G.S. 15A-2000(f)(2) and the jury found this factor to exist.

We believe that the evidence presented here was sufficient for the jury to reasonably find that defendant was under the influence of a mental or emotional disturbance at the time the crimes were committed. The trial judge should have submitted to the sentencing jury the mitigating factor set forth in G.S. 15A-2000(f)(2).

[12] Relying on the same evidence set forth in the preceding assignment of error, defendant contends that the trial court erred in failing to submit to the sentencing jury the mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. G.S. 15A-2000(f)(6).

We considered the circumstances under which this mitigating circumstance could be said to exist in the case of *State v. Johnson, supra.* We quote the following pertinent language from that case:

> This mitigating circumstance may exist even if a defendant has capacity to know right from wrong, to know that the act he committed was wrong, and to know the nature and quality of that act. It would exist even under these circumstances if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished).

298 N.C. at 68, 257 S.E. 2d at 613.

Here, defendant presented lay testimony that he had a long history of treatment for mental problems which began when he was ten years old. Dr. Mary M. Rood's stipulated testimony was to the effect that she had examined defendant after the commission of the charged crime and that in her opinion, defendant was mildly retarded and had an antisocial disorder. Applying this evidence to the rule set forth in *State v. Johnson, supra,* we con-

clude that there was sufficient evidence to permit, but not require, the sentencing jury to reasonably infer that defendant's capacity to fully comprehend the wrongfulness of his conduct was impaired or diminished. Thus, the trial judge should have submitted the mitigating circumstance set forth in G.S. 15A-2000(f)(6) to the sentencing jury.

[13] We next consider defendant's argument that the trial court erred in failing to instruct the sentencing jury that it could consider as a mitigating circumstance that defendant was an accomplice in or an accessory to the capital felony committed by another person and that his participation was relatively minor. G.S. 15A-2000(f)(4).

In order to be entitled to an instruction on this mitigating circumstance, it is necessary that there be evidence tending to show (1) that defendant was an accomplice in or an accessory to the capital felony committed by another, and (2) that his participation in the capital felony was relatively minor. G.S. 15A-2000(f)(4).

In the case before us for decision, defendant testified at trial that he had no part in the crime. The State offered a purported confession which tended to show that defendant was a lookout but did not deliver the fatal blows. Also, there was evidence to the effect that defendant actually delivered the blows which caused the victim's death.

This conflicting testimony created a question of fact for the sentencing jury as to whether defendant was an accomplice or accessory to the murder of Mr. Lehto and as to whether his participation in the capital felony was relatively minor. If the jury accepted defendant's confession, it could have found that defendant's role as a lookout was relatively minor when compared to the conduct of other participants in the commission of the crime. Therefore, pursuant to the admonition in *State v. Pinch* that "any reasonable doubt concerning the submission of a statutory or requested mitigating factor be resolved in the defendant's favor," 306 N.C. at 27, 292 S.E. 2d at 223, we hold that the trial court erred by failing to submit the mitigating circumstance set forth in G.S. 15A-2000(f)(4).

Defendant contends that the court erred by denying his request to submit three non-statutory mitigating circumstances pur-

suant to G.S. 15A-2000(f)(9). Since defendant made a timely request that these possible mitigating circumstances be submitted to the jury, our inquiry is whether these circumstances are supported by the evidence and whether these circumstances are such that the jury could reasonably deem them to have mitigating value. *State v. Johnson, supra.*

The three circumstances for our consideration are as follows:

(9) The defendant in his formative years was subjected to cruelty and physical abuse by his parents.

(11) The defendant in his formative years was subjected to mental abuse by his parents.

(15) The defendant is an illegitmate child and has never experienced a relationship with his natural father.

We are of the opinion that the jury could have reasonably found each of these circumstances to have mitigating value. Accordingly, the trial judge should have granted defendant's request to submit these circumstances if they were supported by the evidence.

[14] We hold that the trial court did not err in refusing to submit Nos. (9) and (11) as mitigating circumstances because there is absolutely no evidentiary support for either in the record.

[15] The trial court's refusal to submit to the sentencing jury the mitigating circumstance that defendant was an illegitimate child and never experienced a relationship with his natural father presents a more difficult question.

The undisputed evidence established that defendant was an illegitimate child. The evidence further showed that defendant's natural father was Frank Myers. A marriage was never consummated between defendant's mother and Myers, but Myers lived with her "off and on" in the past. Defendant knew that Myers was his natural father.

Defendant's older sister testified that she had the responsibility of rearing defendant since his mother was often away working to help support the family. She was specifically asked to describe the relationship between defendant and his natural father. She responded that defendant's father had left the

household when defendant was about five or six years old. At about that time, defendant was in an accident and sustained a serious injury to his leg. On occasion, defendant's father would come to the home to check on him and see how he was progressing. The witness was also asked if defendant's father had ever taken him to the hospital or to see a doctor. She replied that although the father was not in the home, defendant's mother would "call him and tell him that Freddie had to go to the hospital or something like that and he could come out there."

We are of the opinion that although this evidence indicates that the best relationship did not exist between defendant and his father, it was insufficient to show that he *never* experienced *a* relationship with his natural father.

We therefore hold that the trial judge correctly refused to submit this possible mitigating circumstance to the jury.

In the guilt-innocence phase of the trial we find no error.

For the reasons stated, the verdict rendered at the sentencing phase of defendant's trial and the judgment sentencing defendant to death are vacated and this cause is remanded to the Superior Court of New Hanover County for a new trial on the sentencing phase.

No error in the guilt-innocence phase of the trial.

New trial on sentencing phase of the trial.

STATE OF NORTH CAROLINA v. RUSSELL COUNCIL JUDGE

No. 55A83

(Filed 7 July 1983)

1. Homicide § 21.5— first degree murder—sufficiency of evidence

The trial court did not err in submitting the charge of first degree murder to the jury where the evidence tended to show that defendant had shot at the deceased two weeks prior to the killing; the defendant and the deceased had argued earlier in the day and fought with knives, resulting in a cut on the defendant's shoulder; just prior to the fatal shooting, a witness told the defendant that the deceased was coming in his car and that if he wanted to

"get" him this was his chance; following that, the defendant took his shotgun and pointed it at the deceased's car; the deceased had opened the door and placed one foot outside the car when the defendant shot him once with a sawed-off shotgun; and the defendant then got in his own car and left.

2. **Criminal Law § 89.4— admission of prior inconsistent statements of defendant's witnesses—proper**

In a prosecution for first degree murder, the trial court did not err in allowing two officers to testify on rebuttal concerning two witnesses' prior inconsistent statements where the statements were pertinent and material to the pending inquiry and evidence of the facts contained within the statements would have been admissible if offered for some purpose other than mere contradiction. One of the witness's statements tended to show that defendant acted with premeditation and deliberation and the other witness's statement dealt with whether or not defendant's shooting of the deceased was in self-defense.

3. **Homicide § 30.2— failure to charge on voluntary manslaughter—harmless error**

Even assuming the evidence in a trial for first degree murder supported an instruction on manslaughter, the court's failure to give the requested instruction was harmless error since the court instructed the jury on murder in the first degree, murder in the second degree and self-defense and since the jury returned a verdict of murder in the first degree.

BEFORE *Brown, Judge,* at the 30 August 1982 Criminal Session of Superior Court, DUPLIN County, the defendant was convicted of murder in the first degree and sentenced to life imprisonment. 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 David Roy Blackwell, Assistant Attorney General for the State.

Samuel S. Popkin, Attorney for defendant appellant.

MITCHELL, Justice.

The defendant contends that there was not sufficient evidence to submit the charge of murder in the first degree to the jury. The defendant also argues that the court erred in allowing the State to produce evidence of the defendant's witnesses' prior inconsistent statements. Finally, the defendant assigns as error the trial court's refusal to charge the jury with regard to the possible verdict of guilty of voluntary manslaughter. Having reviewed the defendant's assignments of error, we find no reversible error.

The State produced evidence which tended to show that the deceased, Benny Frank Farrior, was killed on 21 June 1982 by a single shot from a shotgun. The deceased and the defendant, Russell Council "Bobby" Judge, had known each other for several years and lived on the same road. Approximately two weeks before the fatal shooting, the two men had argued and the defendant shot at, or in the general direction of, the deceased. On the morning of 21 June 1982, the defendant and the deceased again argued and fought. The defendant received a knife cut on his shoulder. The two men parted and the defendant left to drink beer with some friends. Later that afternoon the defendant was in his house as the deceased was driving down the road. Someone yelled to the defendant, "if you want to get [the deceased], you better come on." The defendant grabbed his sawed-off shotgun, went out to the deceased's car and stuck the gun through the window on the passenger side of the car. The deceased opened the door of the car and placed one foot outside when the defendant fired one shot from his gun.

After the shooting, the defendant got into his car and sped off. The police were called and a chase ensued during which the defendant threw the shotgun and a box of shotgun shells from his car. He finally crashed his car near the Duplin-Onslow County line.

The pathologist testified that the pellets passed through the deceased's arm and into his chest, causing his death. No gun was found near the body or in the deceased's car.

The defendant did not testify but presented four witnesses. The defendant's evidence was consistent with the evidence for the State concerning the earlier confrontation between the defendant and the deceased. The defendant's evidence concerning the fatal shooting differed considerably from the State's evidence. According to the witnesses for the defendant, the deceased drove by the defendant's house and the two men exchanged words. The deceased was standing beside his car when he reached into the car and pulled out a rifle or shotgun, pointed it at the defendant, cocked it and pulled the trigger. The gun did not fire. He was cocking the gun again when he was shot. None of the defendant's witnesses testified that they saw the defendant with his shotgun, although the State introduced an earlier statement made to police

officers by one of the defendant's witnesses in which she said that the defendant had taken his shotgun with him when he went outside to see the deceased immediately before the shooting. Several of the witnesses identified the State's exhibit as a shotgun that belonged to the defendant. One of the defendant's witnesses testified that, after the shooting occurred but before the police arrived, she saw a man remove a gun that was inside the deceased's car.

[1] The defendant first assigns as error the failure of the trial court to dismiss the charge of murder in the first degree for insufficiency of the evidence at the close of all the evidence. This assignment is without merit.

Before a charge of murder in the first degree can be submitted to the jury, 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. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981); *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).

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). 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). Premeditation is defined as thought beforehand for some length of time, however short. *Id.* Deliberation means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed designed 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 fact that there was a quarrel does not preclude the possibility that the defendant formed the intent to kill with premeditation and deliberation. *State v. Tysor*, 307 N.C. 679, 300 S.E. 2d 366 (1983); *State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981).

The evidence, taken in the light most favorable to the State, indicates that the defendant had shot at the deceased two weeks prior to the killing. The defendant and the deceased had argued earlier in the day and fought with knives, resulting in a cut on the defendant's shoulder. Just prior to the fatal shooting, a witness told the defendant that the deceased was coming in his car and that if he wanted to "get" him this was his chance. Following that, the defendant took his shotgun and pointed it at the deceased's car. The deceased had opened the door and placed one foot outside the car when the defendant shot him once with a sawed-off shotgun. The defendant then got in his own car and left. This evidence was sufficient to allow the charge of murder in the first degree to go to the jury.

[2] The defendant's next assignment of error concerns the admission by the trial court of evidence of prior inconsistent statements made by two of the defendant's witnesses. We find no error.

Christine McMillan Littlejohn testified for the defendant that she was living with him on 21 June 1982 and was home when the shooting occurred. She testified that she did not see the defendant with a gun when he left the house immediately prior to the shooting. On cross examination, the State asked the witness if she had told Detective Alfred Basden that she had seen the defendant with a shotgun. Littlejohn replied, "I probably did. I might have did, but I don't believe saying that I saw the gun." When pressed further she stated that she did not see the gun but she told the detective that she did because she was "very upset." On rebuttal, the State called Detective Basden who testified that he in-

vestigated the shooting and on 21 June 1982 Littlejohn told him that when she heard the deceased's car approaching, the defendant went into the bedroom and came out with the shotgun.

The defendant also called Ronny Bradshaw who testified that he did not see the defendant with the gun and that he saw the deceased pull a gun from his car and aim it at the defendant before he was killed. On cross examination, the State asked the witness if he told Detective Basden and SBI Agent John Payne that he had seen the defendant with a gun and that he never saw the deceased with a gun. Bradshaw responded that the officers "[m]ust have misunderstand [sic] me . . . I was drinking . . . I told Mr. Basden both of them had a gun." Detective Basden and Agent Payne testified on rebuttal that Bradshaw told them that he saw the defendant with a shotgun and that he did not see the deceased with a gun.

Any witness may be cross examined by confronting him or her with prior statements inconsistent with any part of that witness's testimony. 1 Brandis, North Carolina Evidence, § 46 (1982). The use of the testimony of others to impeach a witness by showing he has made prior inconsistent statements was thoroughly dealt with in *State v. Green*, 296 N.C. 183, 193, 250 S.E. 2d 197, 203 (1978), in which the Court stated:

> If the statements relate to a matter which is "pertinent and material to the pending enquiry," *Jones v. Jones*, 80 N.C. 246 (1879), or which respects "the subject matter in regard to which he is examined," *State v. Patterson*, 24 N.C. 346 (1842), they may be proved by other witnesses without first calling them to the attention of the main witness on cross-examination. *State v. Patterson, supra;* 1 Stansbury, *supra*, § 48.

The distinction between material and collateral evidence was made in *State v. Long*, 280 N.C. 633, 640, 187 S.E. 2d 47, 51 (1972):

> The proper test for determining what is material and what is collateral is whether the evidence offered in contradiction would be admissible if tendered for some purpose other than mere contradiction; or in the case of prior inconsistent statements, whether evidence of the facts stated would be so admissible.

The statements by the witnesses in the present case were certainly "pertinent and material to the pending enquiry" and evidence of the facts contained within the statements would have been admissible if offered for "some purpose other than mere contradiction." Littlejohn's statements detailed the actions of the defendant when he returned to the house and retrieved his shotgun after the deceased's car was heard approaching. This is some evidence which tends to show an essential element of murder in the first degree: that the defendant acted with premeditation and deliberation. Bradshaw's statement dealt with the question of whether the defendant had a gun and, more importantly for impeachment purposes, whether the deceased had a gun. If the deceased had a gun and pointed it at the defendant and pulled the trigger, then quite possibly the defendant's shooting of the deceased was in self-defense. The court did in fact instruct on self-defense. The trial court did not err by allowing Detective Basden and Agent Payne to testify on rebuttal concerning the witnesses' prior inconsistent statements.

[3] Finally, the defendant assigns as error the trial court's failure to submit the charge of voluntary manslaughter to the jury. We find no prejudicial error.

The defendant's request for an instruction on voluntary manslaughter was denied. The court instructed the jury on murder in the first degree, murder in the second degree and self-defense. The jury returned a verdict of guilty of murder in the first degree. Assuming *arguendo* that the evidence supported an instruction on voluntary manslaughter, the court's failure to give the requested instruction was harmless error. In *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969), the defendant alleged an error in the trial court's instructions on voluntary manslaughter and an error in the court's refusal to instruct on involuntary manslaughter. The court properly instructed on murder in the first degree and murder in the second degree and the jury returned a verdict of guilty of murder in the first degree. This Court, in finding no error in the defendant's trial, stated:

> A verdict of murder in the first degree shows clearly that the jurors were not coerced, for they had the right to convict in the second degree. That they did not indicates their certainty of his guilt of the greater offense. The failure to

instruct them that they could convict of manslaughter therefore could not have harmed the defendant.

Id. at 668, 170 S.E. 2d at 465. *See also 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).

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

No error.

CHARLES W. MCCUISTON, JR., EMPLOYEE v. ADDRESSOGRAPH-MULTIGRAPH CORPORATION, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 627PA82

(Filed 7 July 1983)

Master and Servant § 67.1 — workers' compensation — occupational loss of hearing — noise level — affirmative defense

In seeking to recover workers' compensation for occupational loss of hearing, an employee does not have the burden of proving as part of his prima facie case that the workplace sound which caused his hearing loss was of intensity of 90 decibels, A scale, or more. Rather, proof that the sound causing plaintiff's injury was of an intensity less than 90 decibels, A scale is an affirmative defense available to the employer. G.S. 97-53(28)(a), (b).

ON discretionary review of the decision of the Court of Appeals, 59 N.C. App. 76, 295 S.E. 2d 490 (1982), affirming the decision of the North Carolina Industrial Commission filed 16 July 1981.

Plaintiff seeks an award of workers' compensation for loss of hearing resulting from his employment around noisy machines. Upon evidence presented by the parties, a deputy commissioner of the Industrial Commission determined that plaintiff suffered from a permanent 47.9 percent sensorineural loss of hearing in both ears which was caused by exposure to harmful noise in his workplace. Plaintiff had worked around noisy machines while employed by defendant Addressograph-Multigraph Corporation from 1 April 1952 through 25 September 1978. Pursuant to N.C.G.S.

97-53(28), plaintiff was awarded $168 per week for 74.55 weeks for his occupational loss of hearing. Defendants appealed this decision to the full Industrial Commission, which reversed the deputy commissioner. The full Commission concluded as a matter of law that plaintiff had the burden of proving that the noise level to which he was exposed during his employment with defendant was of an intensity of at least 90 decibels, A scale ("90 dBA") and that plaintiff had failed to meet this burden of proof. Plaintiff appealed the decision of the full Commission to the Court of Appeals, which affirmed. We granted plaintiff's petition for discretionary review 11 January 1983.

James W. Workman, Jr., Lore & McClearen, by R. James Lore, and Hassel & Hudson, by Robin E. Hudson, for plaintiff appellant.

Smith Moore Smith Schell & Hunter, by J. Donald Cowan, Jr., and Caroline Hudson, for defendant appellees.

John C. Brooks, Commissioner of Labor for the State of North Carolina, amicus curiae.

MARTIN, Justice.

The sole question for review is whether the Court of Appeals erred in holding that as a part of his prima facie case plaintiff must prove that the sound which caused his hearing loss was of intensity of 90 dBA or more. N.C. Gen. Stat. § 97-53(28)(a) (1979). We hold that the Court of Appeals did so err, and we reverse and remand.

N.C.G.S. 97-53(28) provides that an employee may recover compensation for "[l]oss of hearing caused by harmful noise in the employment." The statute continues:

> a. The term "harmful noise" means sound in employment capable of producing occupational loss of hearing as hereinafter defined. Sound of an intensity of less than 90 decibels, A scale, shall be deemed incapable of producing occupational loss of hearing as defined in this section.
>
> b. "Occupational loss of hearing" shall mean a permanent sensorineural loss of hearing in both ears caused

> by prolonged exposure to harmful noise in employment. Except in instances of preexisting loss of hearing due to disease, trauma, or congenital deafness in one ear, no compensation shall be payable under this subdivision unless prolonged exposure to harmful noise in employment has caused loss of hearing in both ears as hereinafter provided.

N.C. Gen. Stat. § 97-53(28)(a), (b) (1979).

In the present case, neither plaintiff nor defendants have introduced any evidence concerning the intensity level of the sound which caused plaintiff's hearing loss. However, all of the evidence shows that Mr. McCuiston in fact suffered from a loss of hearing and that the physical cause of this infirmity was prolonged exposure to harmful noise in his workplace.

In order to be eligible for compensation, an employee must establish that he suffered from an "occupational loss of hearing," i.e., "a permanent sensorineural loss of hearing in both ears caused by prolonged exposure to harmful noise in employment." N.C. Gen. Stat. § 97-53(28)(b) (1979). The term "harmful noise" is defined as "sound in employment capable of producing occupational loss of hearing . . . ." N.C. Gen. Stat. § 97-53(28)(a) (1979). The question dispositive of this appeal is whether the following part of N.C.G.S. 97-53(28)(a) is an element of plaintiff's prima facie case, or whether it is an affirmative defense for the employer: "Sound of an intensity of less than 90 decibels, A scale, shall be deemed incapable of producing occupational loss of hearing as defined in this section."

We hold that in order to establish a prima facie case plaintiff must prove: (1) loss of hearing in both ears which was (2) caused by harmful noise in his work environment. Upon so doing, the burden of proof shifts to the employer. If the employer then proves that the sound which caused plaintiff's hearing loss was of an intensity of less than 90 decibels, A scale, plaintiff cannot recover. In the present case plaintiff established a prima facie case for recovery; therefore, to avoid liability defendants had to prove that the sound to which plaintiff was exposed in the workplace was of an intensity of less than 90 dBA. Defendants failed to so do. Judgment must be entered for the plaintiff.

This interpretation of N.C.G.S. 97-53(28) is consistent with the General Assembly's creation of a statutory means by which an employee may recover compensation for loss of hearing caused by harmful noise in the workplace. It is unreasonable to assume that the legislature intended an employee to bear the burden of making noise-level measurements during his employment in order to lay the groundwork for a workers' compensation claim. Such an interpretation of the statute would make it virtually impossible for an employee to successfully bring suit for compensation for a hearing loss, due to the difficulty he would encounter in attempting to make measurements of sound on his employer's premises. A construction of the statute which defeats its purpose—to provide a means by which employees can recover for injury due to harmful workplace noise—would be irrational and will not be adopted by this Court. *See In re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978); *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975); *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966). We note that no presumption arises if the noise intensity level is 90 decibels or greater. Claimant must still prove a loss of hearing caused by harmful noise in the employment. The only reasonable interpretation of the legislature's intent in enacting the second sentence of N.C.G.S. 97-53(28)(a) is that it meant to allow an employer to avoid liability even if workplace noise is the physical cause of an employee's loss of hearing if the employer proves that the sound was of intensity less than 90 dBA.

That the General Assembly chose to permit this affirmative defense is consistent with the fact that 90 dBA is generally considered a threshold of safe noise under federal and state occupational health and safety standards.[1] Under such noise standards many employers are required to maintain a continuing effective hearing conservation program for employees exposed to occupational noise levels of 85 dBA or more.[2] 29 U.S.C. §§ 651-667 (1975);

1. *See generally* Occupational Noise Exposure; Hearing Conservation Amendment, 46 Fed. Reg. 4077-78, 4087-96 (1981) ("[t]here is an abundance of epidemiological and laboratory evidence that protracted noise exposure above 90 decibels (dB) causes hearing loss in a substantial portion of the exposed population . . . ."). *See also* American Industrial Hygiene Association, *Industrial Noise Manual*, 49-60 (2d ed. 1966).

2. Hearing conservation programs include: "1) periodic noise measurements; 2) engineering and/or administrative controls; 3) personal ear protection; and 4)

29 C.F.R. § 1910.95(c) (1982); N.C. Gen. Stat. § 95-131 (1981); 13 NCAC 7C .0101(a) (1976) (and 1981 amendments) (adopting 29 C.F.R. § 1910.95). Even though under certain circumstances sound of intensity less than 90 dBA may cause loss of hearing, it is generally considered a safe noise level. Under N.C.G.S. 97-53(28) the General Assembly allows employers who maintain workplace noise below 90 dBA to avoid liability for hearing loss resulting from exposure to sound of less than this intensity level.[3]

We note that in order to comply with the federal and state occupational health and safety statutes mentioned above, many employers are required to systematically measure and record noise levels in their workplace. 29 C.F.R. § 1910.95 (1982); 13 NCAC 7C .0101(a) (1976 & amendments 1981). It seems clear that just as the burden is not on an employee to monitor dangerous noise levels under these acts, our General Assembly recognized that under the Workers' Compensation Act employees cannot be expected to set up the recording equipment and test their work environments for harmful noise in order to prove the intensity level of the sound causing them loss of hearing. Employers are in the best position to make such measurements, as occupational health and safety statutes recognize. Although the facts of this case are not typical because plaintiff was not restricted to a single workplace but went from plant to plant servicing machines, defendant employer could have determined the noise levels of these plants more readily than plaintiff. If an employer is able to marshall this information to demonstrate that the workplace noise level is less than 90 dBA, he may avoid liability for an employee's hearing loss caused by such noise.

audiometric monitoring." U.S. Department of Health, Education and Welfare, National Institute for Occupation Safety and Health, *Survey of Hearing Conservation Programs in Industry* at 1 (1975). *See also* Occupational Noise Exposure; Hearing Conservation Amendment, 46 Fed. Reg. at 4079 (1981) (amendment codified at 29 C.F.R. § 1910.95(c) (1982)).

3. By holding that the second sentence of N.C.G.S. 97-53(28)(a) affords employers an affirmative defense, we reject plaintiff's contention that the legislature intended the 90 dBA noise level to raise a rebuttable presumption that sound of less than 90 dBA could not in fact have been the cause of an employee's hearing loss. In the context of N.C.G.S. 97-53(28)(a), the phrase "shall be deemed incapable of producing occupational loss of hearing" creates a conclusive presumption that workplace noise of less than 90 dBA cannot cause occupational loss of hearing. *Cf. Watts v. Brewer*, 243 N.C. 422, 90 S.E. 2d 764 (1956).

In summary, we hold that in seeking to recover workers' compensation for occupational loss of hearing, an employee does not have the burden of proving as part of his prima facie case that the workplace sound which caused his hearing loss was of intensity of 90 decibels, A scale, or more. Rather, proof that the sound causing plaintiff's injury was of intensity less than 90 dBA is an affirmative defense available to the employer.

The decision of the Court of Appeals is reversed, and this case is remanded to the Court of Appeals for further remand to the full Commission with instructions that the Commission reinstate the award to plaintiff.

Reversed and remanded.

DEBORAH MELISSA CHEEK CASSIDY v. ANNIE CAVINESS CHEEK AND CURTIS ASTOR MOORE

No. 576PA82

(Filed 7 July 1983)

Judgments § 4— conditional order—void

An order which stated that plaintiff's action will be dismissed if plaintiff fails to comply with a discovery order before a certain date was conditional and therefore void.

ON discretionary review of the decision of the Court of Appeals, 58 N.C. App. 742, 294 S.E. 2d 414 (1982), affirming judgments for defendants entered by *Wood, J.*, at the 6 April 1981 Civil Session of Superior Court, RANDOLPH County.

Ottway Burton and W. Edward Bunch for plaintiff appellant.

Gavin and Pugh, by W. Ed Gavin, for defendant appellee Annie Caviness Cheek.

Tuggle, Duggins, Meschan, Thornton & Elrod, by Richard L. Vanore, for defendant appellee Curtis Astor Moore.

MARTIN, Justice.

Plaintiff was injured on 22 September 1975 while riding as a passenger in a car driven by her mother, defendant Cheek. The

car collided with a Chevrolet truck operated by defendant Moore. This action was commenced on 18 September 1978. The plaintiff failed to comply with discovery requests, and an order to compel discovery was entered. Plaintiff failed to obey this order. On 14 December 1979, the trial judge entered the following order:

> THIS CAUSE COMING ON TO BE HEARD before the undersigned Judge Presiding at the December 10, 1979, Civil Session of Superior Court of Randolph County on motion of defendant Curtis Astor Moore pursuant to Rule 41(b) and Rule 37 of the North Carolina Rules of Civil Procedure to dismiss the plaintiff's claim for failure of the plaintiff to comply with the order entered by the Honorable Coy E. Brewer, Jr., Superior Court Judge, on July 19, 1979, and it appearing to the Court that the plaintiff did not file answers to interrogatories until November 27, 1979 and did not respond to the Request for Production of Documents until after the call of the motion calendar on December 10, 1979, at which time counsel for the plaintiff hand-delivered to counsel for defendant Curtis Astor Moore two statements for medical expenses in the respective amounts of $126.25 and $171.00 and a letter of an overdue account for medical expenses in the amount of $54.00, and after having considered the court file and hearing arguments of counsel for the parties, it appeared to the Court and the Court finds as a fact that plaintiff has failed to comply with the order entered in the above-entitled action on July 19, 1979 and that if plaintiff fails to comply with said order by failing to produce those documents specified in the Request For Production of Documents before January 7, 1980, then plaintiff's action shall be dismissed;
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that if the plaintiff fails to produce and permit the attorneys for defendant Curtis Astor Moore to inspect and copy those documents specified in the Request For Production of Documents in the manner as set forth in the Request For Production of Documents before January 7, 1980, then plaintiff's action shall be and the same will be dismissed with prejudice; and IT IS FURTHER ORDERED that the motion of defendant Curtis Astor Moore to require the plaintiff or her attorney to pay the reasonable expenses incurred, including an attorney's fee, in obtaining said orders pertaining to dis-

covery shall be continued and heard by the Presiding Judge at the January 7, 1980, Civil Session of Superior Court of Randolph County.

This the 14 day of December, 1979.

s/ JAMES C. DAVIS

Thereafter, plaintiff failed to further comply with the discovery order. On Monday, 7 January 1980, defendant Moore moved to dismiss plaintiff's action based upon the order of Judge Davis. The clerk's minutes for that day contain the following:

Cassidy vs Moore

Motion of the defendant to dismiss upon ORDER OF JUDGE DAVIS. Before the Court rules on said Motion, Counsel for the plaintiff states to the Court that he will take a Voluntary Dismissal.

On 9 January 1980, the following notice of dismissal was filed:

Now comes the plaintiff into Court through her attorney of record, Ottway Burton, pursuant to Rule 41(a)(1) and files notice of dismissal before resting her case.

All parties are hereby notified that the plaintiff hereby dismisses this action as of voluntary dismissal without prejudice under Rule 41(a)(1) to proceed again with this matter within one (1) year from date.

This the 7th day of January, 1980.

s/ OTTWAY BURTON
Ottway Burton, Attorney
for the Plaintiff

Plaintiff reinstated her action against defendants on 6 January 1981. Defendant Cheek moved for summary judgment on the grounds that when plaintiff's cause of action accrued, 22 September 1975, she was an unemancipated seventeen-year-old child of defendant Cheek, residing in the home of defendant Cheek, and that defendant Cheek was immune from suit by her child. This motion was allowed by the trial court. N.C.G.S. 1-539.21, which abolished parent-child immunity in personal injury cases arising from automobile accidents, does not apply to plain-

tiff's cause of action which accrued before the effective date of the statute, 1 October 1975. Plaintiff concedes that the dismissal of her claim against defendant Cheek was proper.

Defendant Moore moved for summary judgment on the grounds that the order of 14 December 1979 by Judge Davis dismissed plaintiff's first action with prejudice and thus bars plaintiff's present action. The trial court allowed defendant Moore's motion and dismissed plaintiff's action. Upon review, the Court of Appeals affirmed the decision of the trial court.

The sole issue before this Court is whether the Court of Appeals erred in affirming the trial court's dismissal of plaintiff's claim against defendant Moore. We hold that the Court of Appeals erred and accordingly reverse.

The order of 14 December 1979 by Judge Davis did not dismiss plaintiff's action. The key portions of the order are:

> [I]f plaintiff fails to comply with said order by failing to produce those documents specified in the Request For Production of Documents before January 7, 1980, then plaintiff's action *shall be* dismissed;
>
> . . . [I]f the plaintiff fails to produce and permit the attorneys for defendant Curtis Astor Moore to inspect and copy those documents specified in the Request For Production of Documents in the manner as set forth in the Request For Production of Documents before January 7, 1980, then plaintiff's action *shall be* and the same *will be* dismissed with prejudice . . . .

(Emphasis added.) Rather than dismissing plaintiff's action, the order states that the action will be dismissed if plaintiff fails to comply with the discovery order before 7 January 1980. The order is a conditional order and therefore void. *Hagedorn v. Hagedorn*, 210 N.C. 164, 185 S.E. 768 (1936); *Flinchum v. Doughton*, 200 N.C. 770, 158 S.E. 486 (1931). In *Hagedorn*, the order striking defendant's answer was dependent upon the failure of Heyman Hagedorn to appear for an adverse examination prior to a day certain. Our Court held this rendered the order alternative or conditional and thereby void. So here, the order of Judge Davis was dependent upon plaintiff's failing to produce the discovery materials previously ordered. The order is not self-

executing. It is, therefore, conditional and void. *Lloyd v. Lumber Co.*, 167 N.C. 97, 83 S.E. 248 (1914).

Because the order of 14 December 1979 did not dismiss plaintiff's action against Moore, plaintiff had the right to take a voluntary dismissal on 7 January 1980 before the trial judge ruled upon defendant Moore's motion to dismiss. The record does not indicate that the trial court ruled upon defendant's motion to dismiss at the January term. The clerk's minutes show that plaintiff's counsel took a voluntary dismissal in open court on 7 January 1980. Thereafter, written notice of the taking of the dismissal was filed on 9 January 1980. Although written notice of dismissal was filed, the effective date of the dismissal for statute of limitations purposes is the date the dismissal was announced in open court, 7 January 1980. *Danielson v. Cummings*, 43 N.C. App. 546, 259 S.E. 2d 332 (1979), *aff'd*, 300 N.C. 175, 265 S.E. 2d 161 (1980). The subsequent reinstitution of plaintiff's suit on 6 January 1981 was within one year after the date of the dismissal, 7 January 1980, and therefore within the statutory period. N.C.R. Civ. P. 41(a)(1).

The order of the trial court of 8 April 1981 dismissing plaintiff's action against defendant Moore was erroneous. The decision of the Court of Appeals affirming that order is reversed.

The decision of the Court of Appeals affirming the dismissal of plaintiff's action against the defendant Cheek is affirmed.

Affirmed as to defendant Cheek.

Reversed as to defendant Moore.

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

BAILEY v. GOODING

No. 135P83.

Case below: 60 N.C. App. 459.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 July 1983.

BREWER v. HATCHER

No. 124P83.

Case below: 60 N.C. App. 602.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 July 1983.

BROWN v. BROWN

No. 251P83.

Case below: 61 N.C. App. 348.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 July 1983.

BUILDERS, INC. v. CITY OF WINSTON-SALEM

No. 271P83.

Case below: 61 N.C. App. 682.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 July 1983.

CUNNINGHAM v. BROWN

No. 310P83.

Case below: 62 N.C. App. 239.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 July 1983.

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

DICKERSON v. JARVIS

No. 183P83.

Case below: 61 N.C. App. 168.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 7 July 1983.

HAIRSTON v. ALEXANDER TANK AND EQUIPMENT CO.

No. 80PA83.

Case below: 60 N.C. App. 320.

Petition by third-party plaintiff for discretionary review under G.S. 7A-31 allowed 7 July 1983.

HESTER v. HANES KNITWEAR

No. 275P83.

Case below: 61 N.C. App. 730.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 July 1983.

IN RE BANKRUPTCY OF SPECTOR-RED BALL

No. 272P83.

Case below: 61 N.C. App. 745.

Petition by Moore for discretionary review under G.S. 7A-31 denied 7 July 1983. Petition by Attorney General for discretionary review under G.S. 7A-31 denied 7 July 1983.

IN RE DAILEY v. BOARD OF DENTAL EXAMINERS

No. 134P83.

Case below: 60 N.C. App. 441.

Petition by Board for reconsideration of the denial of discretionary review under G.S. 7A-31 allowed for the sole purpose of determining whether the Court of Appeals erred in applying the standard of G.S. 90-21.12 to disciplinary proceedings.

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

IN RE ESTATE OF HEFFNER

No. 267P83.

Case below: 61 N.C. App. 646.

Petition by Phillips for discretionary review under G.S. 7A-31 denied 7 July 1983.

LEDFORD v. LEDFORD

No. 181P83.

Case below: 59 N.C. App. 738.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 7 July 1983.

MOORE and VAN ALLEN v. LYNCH

No. 276P83.

Case below: 61 N.C. App. 601.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 July 1983.

N.C. STATE BAR v. FRAZIER

No. 281P83.

Case below: 62 N.C. App. 172.

Petition by defendant for discretionary review under G.S. 7A-31 denied 9 June 1983. Motion by defendant for reconsideration of the denial of discretionary review denied 16 June 1983.

OSCAR MILLER CONTRACTOR v. TAX REVIEW BOARD

No. 242P83.

Case below: 61 N.C. App. 725.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 July 1983.

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

SHIELDS v. NATIONWIDE MUT. FIRE INS. CO.

No. 219P83.

Case below: 61 N.C. App. 365.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 July 1983.

SOUTHLAND ASSOCIATES v. PEACH

No. 262P83.

Case below: 61 N.C. App. 676.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 July 1983.

SPENCER v. SPENCER

No. 250P83.

Case below: 61 N.C. App. 535.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 July 1983.

STATE v. ANDERSON

No. 190P83.

Case below: 61 N.C. App. 168.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 July 1983.

STATE v. HUNT

No. 268PA83.

Case below: 61 N.C. App. 348.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 7 July 1983.

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

STATE v. JEFFERSON

No. 274P83.

Case below: 61 N.C. App. 168.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 July 1983. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 July 1983.

STATE v. JOHNSON

No. 125P83.

Case below: 60 N.C. App. 369.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 7 July 1983.

STATE v. LOCKLEAR

No. 240P83.

Case below: 61 N.C. App. 594.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 July 1983.

STATE v. SANDERSON

No. 105P83.

Case below: 60 N.C. App. 604.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 July 1983.

STATE v. SANDLIN

No. 243P83.

Case below: 61 N.C. App. 421.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 July 1983.

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

STATE v. SETZER

No. 239P83.

Case below: 61 N.C. App. 500.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 7 July 1983.

STATE v. WARD

No. 261PA83.

Case below: 61 N.C. App. 747.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 22 June 1983 for the purpose of remanding the cause to the Court of Appeals for a determination of defendant's appeal on the merits.

STATE v. WARD

No. 233P83.

Case below: 61 N.C. App. 605.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 July 1983.

STATE v. WILLIS

No. 218P83.

Case below: 61 N.C. App. 244.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 July 1983.

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

PETITIONS TO REHEAR

BROWN v. FULFORD

No. 130PA83.

Case below: 308 N.C. 543.

Petition by defendant for reconsideration of the denial of discretionary review under G.S. 7A-31 allowed 7 July 1983.

IN RE ELKINS

No. 601A82.

Case below: 308 N.C. 317.

Petition by Elkins denied 7 July 1983.

STATE OF NORTH CAROLINA v. JOSEPH RALPH FRANKLIN

No. 446A82

(Filed 7 July 1983)

1. **Criminal Law § 75.11— confession—previously invoking right to counsel in connection with other murders—voluntary waiver with respect to murder to which confessed**

In a prosecution for first degree murder, the trial court properly found defendant's confession was voluntarily and understandingly made after he had been fully advised of his constitutional rights and had specifically, knowingly, and intelligently waived his right to remain silent and to have counsel present during questioning. Defendant had been represented by counsel on a plea to a charge of indecent exposure, and his counsel had orally and by letter informed the police department that defendant invoked his right to counsel concerning two murders about which police also wanted to question defendant. Approximately six months later when defendant was arrested on yet another unrelated matter, and police decided to renew efforts to question the defendant concerning the murders to which defendant had previously invoked his right to counsel, prior to any discussion, defendant waived his constitutional rights and indicated that he would answer questions without the presence of an attorney. When asked what he wanted to talk about, defendant began discussing not the two murders to which the police were ready to question him, but rather the murder with regard to the present prosecution.

2. **Constitutional Law § 43— right to counsel prior to confession—critical stage of proceedings not reached**

Although defendant was in custody on an unrelated robbery/rape charge, defendant's Sixth Amendment right to counsel did not arise prior to the time he made a statement about the murder in question on 9 October 1981. An arrest warrant was issued on that date and was executed on 10 October; defendant's first appearance before a judicial officer was on 15 October at which time counsel was appointed and a probable cause hearing was scheduled for 29 October. Defendant was indicted for the first degree murder in question on 26 October 1981. At no time prior to 15 October, when counsel for defendant was appointed, had the State committed itself to prosecute; therefore, defendant's Sixth Amendment right to counsel did not arise before that time.

3. **Homicide § 21.6— felony murder—other than confession, absence of proof of underlying felony**

Independent proof of the underlying felony in a felony murder prosecution is not necessary where a confession, otherwise corroborated as to the murder, includes sufficient facts to support the existence of the felony.

Justice EXUM dissenting in part and concurring in part.

BEFORE *Snepp, J.*, at the 3 May 1982 Criminal Session of Superior Court, CALDWELL County, defendant was convicted of

first degree murder (felony murder) and first degree sexual offense. From a sentence of life imprisonment for first degree felony murder, judgment having been arrested on the first degree sexual offense conviction, defendant appeals as a matter of right, G.S. § 7A-27(a).

Claiming a violation of both his fifth and sixth amendment rights to counsel, defendant assigns as error the admission of his confession into evidence. Claiming that there was no evidence of the corpus delicti of the first degree sexual offense, defendant contends that the evidence was insufficient as a matter of law to prove this offense, and therefore, to prove the offense of first degree felony murder. We reject defendant's claims and affirm his conviction.

On 11 June 1980, the body of Michelle Moody, a fifteen year old girl, was discovered in a small clearing in a wooded area behind the Lenoir Shopping Mall. She was fully dressed. She had been stabbed twenty-three times. Approximately sixteen months later, on 9 October 1981, after being advised of his rights, the defendant gave the following statement to law enforcement officers:

> About June or July 1980 I met Michelle Moody at about 7:30 P.M. at the Lenoir Mall—this was at the rear of the mall. I had never met this girl before. I ask her if she wanted to smoke a joint. She said yes—we walked down into some nearby woods—when we got down to the woods we smoked a joint—I pulled my knife out, put my left arm around her throat and placed the knife which was in my right hand, against her stomach—I was behind her as we walked further down into the woods—we walked for about a 100 yards and stopped. It was my intentions to rape Michelle. I took her upper clothing off first and played around with her breast. I then took the rest of her clothes off—I started to enter her with my penis but Michelle kept talking to me about not coming in her; that she had enough problems as it was and she didn't want to get pregnant. This was when I told her to give me a blow job—She gave me a blow job and I reached a climax in her mouth—I put my clothes on first & I told her to put her clothes on. She put her clothes back on—I was thinking about running at this time—We heard some children or

something walking in the woods—I did see (2) young boys walking nearby earlier as Michelle was giving me a blow job—I didn't see them this 2nd time but I heard them—Michelle screamed and I grabbed her and started stabbing her several times. She was standing up when I first stabbed her and I stabbed her some more after she fell—I stabbed her until she quit moving—I looked around to see if I was leaving anything. I lost my cigarette lighter at this time—I used my hunting knife to stab her—I took my knife to Donald Maxon and he cleaned my knife for me. I wiped some of the blood off and, what blood was left on the knife looked like rust. I was going to take the knife to work and press it into some boards, but I lost it somewhere prior to doing this. I got some blood on my overalls and I took a cigarette and burned holes in my clothes where the blood was—Lenoir took the overalls from me—the above is the truth to the best of my knowledge—

Defendant was again questioned on 10 October 1981. He was fully advised of his constitutional rights and signed a written waiver. The result of this questioning was a second confession, consistent with the first although in more detail. On 13 October 1981 defendant gave a third statement which was recorded, again consistent with the others and with additional detail and again following a waiver of his rights. Finally, on 14 October 1981, defendant was taken to the Lenoir Mall to stage a videotaped reenactment of the crime. He was again advised of his constitutional rights and signed another written waiver. He was orally advised that he could refuse to participate in the videotaped reenactment.

Evidence at trial tending to corroborate defendant's confessions included the following: (1) Virginia Burgess testified that she saw the defendant running from the Lenoir Mall about 8:45 or 9:00 p.m. on the night of the murder. (2) Donald Maxon testified that defendant had asked him to clean a knife which had rust-like stains on it. (3) A cigarette lighter was found near the victim's body. The victim's stepfather testified that he knew the defendant from their employment at the same company. Sometime after 11 June 1980, defendant called to say that because the police had found his cigarette lighter behind the mall, they were trying to charge him with Michelle's murder. (4) It also appears that the

State had possession of defendant's overalls on which there remained a stain that had not been burned. However, there was no direct testimony to this effect at trial.

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

Ann B. Petersen, Assistant Appellate Defender, Office of Appellate Defender, for defendant-appellant.

MEYER, Justice.

[1] Defendant contends that his written and recorded confessions were obtained in violation of his fifth amendment right against self-incrimination and his sixth amendment right to counsel. He bases his argument on the following facts:

In March 1981, defendant had been represented by Assistant Public Defender Lyle Yurko on a plea to a charge of indecent exposure. At that time, defendant was also a suspect in the Mecklenburg County murders of Amanda Ray and Nealy Smith, two young children. The Charlotte police department contacted Mr. Yurko subsequent to defendant's sentencing on the charge of indecent exposure. It was the intent of Charlotte police officers Kirshner and Parker to question defendant concerning the Ray and Smith murders. Presumably pursuant to G.S. § 7A-452(a), Mr. Yurko undertook to represent defendant with respect to police efforts to question defendant concerning these murders. Defendant invoked his right to counsel and the Charlotte police were so informed by Mr. Yurko orally and by letter to the district attorney dated 28 April 1981.

On 8 October 1981, defendant was arrested on yet another unrelated matter in Mecklenburg County. He was charged with rape, kidnapping and robbery and apparently confessed to those crimes. In light of these developments, Charlotte Police Officer Styron determined to renew efforts to question the defendant concerning the Ray and Smith murders. This was the purpose of the 9 October meeting with the defendant. Officer Styron met with defendant at the Mecklenburg County Jail. Prior to any discussion, defendant waived his constitutional rights and indicated that he would answer questions without the presence of an attorney. Officer Styron was not aware that defendant had

earlier requested the presence of counsel during questioning on the Ray and Smith murders. He began the conversation on a sympathetic note, acknowledging defendant's "predicament" arising out of the rape/robbery arrest, his problems with sexual violations involving young children, and his need for psychological treatment. No mention was made of the Ray or Smith murders. Defendant then requested that he be taken "downtown." Officer Styron asked defendant if he wanted "to talk about these cases," and defendant answered yes. At the Law Enforcement Center, defendant was again advised of his rights by Officer Price. When asked what he wanted to talk about, defendant began discussing not the Ray and Smith murders, but rather the murder of Michelle Moody in Lenoir.

With respect to his fifth amendment right, defendant argues that

> once he formally invoked his right to be free from interrogation on the Smith and Ray cases without the presence of counsel, he could not lawfully be interrogated on those matters again in a police initiated encounter. When Officer Styron initiated the encounter on October 9, he violated the defendant's Fifth Amendment right to counsel and the confession in the Moody case that resulted was inadmissible. All of the subsequent confessions obtained from the defendant by officers of the Lenoir Police Department and the SBI agent were fruits of the poisoned tree of the first confession.

It is true that under *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378 (1981), once a suspected criminal invokes his right to counsel, he may not be questioned further until counsel is provided unless the suspected criminal himself initiates the dialogue at which time he may waive his right to have an attorney present. However, in the case sub judice, defendant had never invoked his right to counsel with respect to the Moody murder. He specifically stated, prior to any questioning, that he just wanted "to go ahead and get this over with. I do not want a lawyer." Officer Price further testified on voir dire that he told defendant for his best interest he ought to obtain a lawyer before trial.

We do not decide whether Officers Styron and Price, in good faith, might properly have initiated questioning concerning the Ray and Smith murders in light of defendant's earlier request

that he have an attorney present during questioning on these cases; nor do we decide whether the officers might properly have initiated questioning concerning the Moody murder.[1] These issues aside, we are left with defendant's completely unsolicited confession to a murder about which there had never been any intention to question him.

Prior to the 9 October questioning, defendant was fully advised of his constitutional rights to remain silent and to have counsel present during questioning. We attach no significance to the fact that the officers "did not expand on the defendant's rights or explain them beyond what appeared on the standard *Miranda* rights card that he read from." Nor do we find it significant that the defendant was questioned in a "small, windowless interrogation room." There is no evidence that there were promises given, threats made, or that the confession was coerced or in any way improperly induced. The defendant simply waived his rights and chose to cooperate with the law enforcement authorities. This the law permitted him to do.

It is not the purpose of the fifth amendment constitutional protections to discourage confessions, nor to impede the authorized role of our law enforcement agencies to bring criminals to justice. As Chief Justice Warren stated in *Miranda*, "[c]onfessions remain a proper element in law enforcement." *Miranda v. Arizona*, 384 U.S. at 478, 16 L.Ed. 2d at 726. We therefore hold that under the facts of this case, defendant's confessions were voluntarily and understandingly made after he had been fully advised of his constitutional rights and had specifically, knowingly, and intelligently waived his right to remain silent and to have counsel present during questioning.

[2] Defendant's sixth amendment argument presumes that his "Sixth Amendment right to counsel arose prior to the 9 October statement" because defendant was in custody on an unrelated robbery/rape charge. With respect to the robbery/rape charge,

1. The United States Supreme Court has most recently admitted the possibility of a good faith exception to the exclusionary rule in *Illinois v. Gates*, --- U.S. ---, --- L.Ed. 2d --- (1983). North Carolina's statutory codification of the exclusionary rule would permit such an exception. *See* G.S. § 15A-974(2)(b) and (c). We also find the case of *United States ex rel. Karr v. Wolff*, 556 F. Supp. 760 (N.D. Ill., E.D. 1983) inapposite. In that case defendant invoked his right to counsel in one case after which officers initiated questioning concerning an unrelated case.

the record does not disclose, nor do we find it relevant, whether formal charges had been instituted in this case. At issue is whether defendant's sixth amendment right to counsel in the Moody murder had attached. We hold that it had not. Prior to the 9 October statement, defendant was no more than a suspect in the Moody murder. Investigation had not yet reached the accusatory stage and had certainly not reached the point where adversary judicial proceedings had been initiated in that case. *See Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed. 2d 411 (1972).

In the alternative, defendant claims that his sixth amendment right to counsel arose in the Moody case after his 9 October statement, thus rendering all subsequent statements against him inadmissible. We do not agree.

The record discloses that an arrest warrant was issued in the Moody murder case on 9 October 1981 and was executed on 10 October. Defendant's first appearance before a judicial officer was on 15 October 1981, the day after he agreed to the videotaped reenactment of the crime. Counsel was appointed at this time and a probable cause hearing was scheduled for 29 October 1981. Defendant was indicted for the first degree murder of Michelle Moody at the 26 October 1981 session of Superior Court, Caldwell County. On 18 January 1982, defendant was indicted on the first degree sex offense charge.

It is well-settled that a criminal defendant's sixth amendment right to counsel attaches only at such time as adversary judicial proceedings have been instituted "whether by way of formal charge, preliminary hearing, indictment, information or arraignment." *Kirby v. Illinois*, 406 U.S. at 689, 32 L.Ed. 2d at 417. In *State v. McDowell*, 301 N.C. 279, 289, 271 S.E. 2d 286, 293 (1980), *cert. denied*, 450 U.S. 1025 (1981), *reh. denied*, 451 U.S. 1012 (1981), this Court, while finding that the ivestigation "had narrowed its focus upon [the defendant], it had not so progressed that the state had committed itself to prosecute. It is only when the defendant finds himself confronted with the prosecutorial resources of the state arrayed against him and immersed in the complexities of a formal criminal prosecution that the sixth amendment right to counsel is triggered as a guarantee."

In the present case, following the 9 October statement, investigation into the Moody murder had "narrowed its focus" upon

the defendant. Investigation continued through 14 October, the date of defendant's last statement. On 15 October counsel was appointed for the defendant.[2]

We therefore hold that at no time prior to 15 October, when counsel for defendant was appointed, had the State committed itself to prosecute. *See Tarpley v. Estelle*, 703 F. 2d 157 (5th Cir. 1983) (neither defendant's arrest nor appearances before a magistrate triggered the defendant's sixth amendment right to counsel as no adversary judicial proceedings were commenced prior to the return of the indictment).[3]

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2. We further note that even had defendant retained counsel in the face of investigation into the Moody murder, his sixth amendment *right* to counsel would not have *attached* until adversary judicial proceedings had been instituted against him. A sixth amendment right to counsel is to be viewed "in the context of whether the claimed violation occurred in a critical stage of a prosecution, . . ." *United States v. Craig*, 573 F. 2d 455 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978) n. 14.

3. *See also* Kamisar, *Brewer v. Williams, Massiah*, and *Miranda*: What is "Interrogation"? When Does It Matter? 67 Geo. L.J. 1 (1978), in which the author notes that "The [United States Supreme] Court has extended the sixth amendment right to counsel, as opposed to the *Miranda* right, backwards from the trial through the indictment to the initiation of judicial proceedings, presumably the first appearance before a judicial officer" and "the Court is unlikely to extend the right any further." *Id.* at 83. The United States Supreme Court, in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), reaffirmed the principle that suspects *under interrogation* are entitled to the assistance of counsel, earlier enunciated in *Escobedo v. Illinois*, 378 U.S. 478, 12 L.Ed. 2d 977 (1964). However, *Miranda* effectively displaced *Escobedo's* sixth amendment rationale by assigning the privilege to a newly created fifth amendment right to counsel rather than to the right to counsel secured by the sixth amendment. In *North Carolina v. Butler*, 441 U.S. 369, 60 L.Ed. 2d 286 (1979), the Supreme Court made it clear that a suspect may waive his fifth amendment right to counsel, as did the defendant in the case sub judice, following an express indication of a desire to waive the *Miranda* rights. It is also interesting to note in a historical context that the *Miranda* court, in resolving the right to counsel question in the context of custodial interrogation, cited, at page 440 of the opinion, to Enker and Elsen, Counsel for the Suspect: *Massiah v. United States* and *Escobedo v. Illinois*, 49 Minn. L. Rev. 47 (1964). In that article, the authors wrote: "[T]he presence of counsel at this point may very well result in the suppression of truth rather than its disclosure. This is because counsel, aware of the significance which an accused's admissions may have in building the prosecution's case, would normally tell his client to remain silent as a tactical decision. As a result, not only will coerced confessions be eliminated, but so will voluntary ones which will generally contain the truth. The accused's power is increased, but at the expense of the search for truth. . . . The right to counsel, then, to the extent that it is more than an expensive prophylactic rule designed to protect against coercion, serves to protect no interest than to make prosecution of the guilty more difficult." *Id.* at 66-67. In so creating a fifth amendment right to counsel, the Supreme Court

[3] As his second assignment of error, defendant contends that the evidence is insufficient as a matter of law to support his conviction of felony murder. As a basis for this argument he states that apart from his extrajudicial confession, there was no evidence of the corpus delicti of first degree sexual offense, the underlying felony upon which the murder conviction was based.

As recently as *State v. Brown*, --- N.C. ---, ---, --- S.E. 2d ---, --- (1983), we stated that "[i]n North Carolina, 'a conviction cannot be sustained upon a naked extrajudicial confession. There must be independent proof, either direct or circumstantial, of the *corpus delicti* in order for the conviction to be sustained.' *State v. Green*, 295 N.C. 244, 248, 244 S.E. 2d 369, 371 (1978); *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975)." In his treatise on evidence, Wigmore offers the following insights into the corpus delicti rule:

> The meaning of the phrase *corpus delicti* has been the subject of much loose judicial comment, and an apparent sanction has often been given to an unjustifiably broad meaning. It is clear that an analysis of every crime, with reference to this element of it, reveals three component parts, *first*, the *occurrence* of the specific kind of injury or loss (as, in homicide, a person deceased; in arson, a house burnt; in larceny, property missing); *second*, somebody's criminality (in contrast, e.g., to accident) as the source of the loss—these two together involving the commission of a crime by *somebody;* and, *third*, the accused's *identity* as the doer of this crime.

7 Wigmore on Evidence, § 2072 (Chadbourn rev. 1978). He notes that "the term *corpus delicti* seems in its orthodox sense to signify merely the first of these elements," "[b]ut by most judges the term is made to include the second element also, i.e., somebody's criminality," while the third view is "too absurd indeed to be argued with. . . ." *Id.*

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appeared to strike a balance between the need to protect a criminal defendant from the coercive aspects of custodial interrogation and the legitimate interest of the State in pursuing its investigations.

Although the rule is applied in varying degrees in different jurisdictions,[4] North Carolina has traditionally required corroborative evidence of both the first and second of the components under Wigmore's definition; that is, the occurrence of the specific kind of injury or loss and somebody's criminality as the source of the loss. *See State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971).[5]

Debate as to the degee of corroboration necessary to satisfy the requirements of the corpus delicti rule has centered on two questions: whether corroboration is necessary for all elements established by the confession and whether the corroborating facts may be of any sort whatever, provided only that they tend to produce confidence in the truth of the confession. These questions were addressed by the United States Supreme Court in *Smith v. United States*, 348 U.S. 147, 156, 99 L.Ed. 192, 200-201 (1954), and were answered as follows:

> All elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused.

See Opper v. United States, 348 U.S. 84, 99 L.Ed. 101 (1954); *see also Landsdown v. United States*, 348 F. 2d 405 (5th Cir. 1965).

In the present case, defendant argues that because the State allegedly failed to produce sufficient corroborative evidence of the corpus delicti of the underlying felony, a first degree sexual offense, the evidence was insufficient as a matter of law to sup-

4. *e.g.* Corroboration is not necessary in Massachusetts. *Commonwealth v. Kimball*, 321 Mass. 290, 73 N.E. 2d 468 (1947) (conviction for indecent assault based solely on confession upheld). Florida, on the other extreme, requires independent proof of the accused's identity as the doer of the crime. *Jefferson v. State*, 128 So. 2d 132 (Fla. 1961).

5. Our traditional definition of corpus delicti in a homicide case is (1) the death of a human being (2) by criminal means. As stated by Justice Huskins in *Dawson*: "(1) There must be a corpse, or circumstantial evidence so strong and cogent that there can be no doubt of the death, *State v. Williams, supra* [52 N.C. 446, 78 Am. Dec. 248 (1860)]; and (2) the criminal agency must be shown. *State v. Minton*, 234 N.C. 716, 68 S.E. 2d 844, 31 A.L.R. 2d 682 (1952). 'The independent evidence must tend to point to some reason for the loss of life other than natural causes, suicide or accident.' Rollin M. Perkins, The Corpus Delicti of Murder, 48 Va. L. Rev. 173 (1962)."

port his conviction of felony murder. Thus presented, the question is one of first impression in our State and depends for its resolution on an analysis of the corpus delicti rule including the underlying purposes and policies of the rule, as it applies to our statutory definition of first degree murder under G.S. § 14-17. That statute 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, ...

Thus, G.S. § 14-17 separates first degree murder into four distinct classes as determined by the proof. *See State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983). Whether the murder involves lying in wait, premeditation, rape, arson or the other felonies specified is not the determinative factor in applying the corpus delicti rule. The corpus delicti is established by evidence of the death of a human being by criminal means independent of the confession from which inferences may be drawn that it was feloniously done, without evidence independent of the confession as to the specific class of murder.

We find support for our position in numerous federal court cases which, as noted earlier, permit merely corroborating evidence independent of the confession to be sufficient, if it tends to establish the trustworthiness of the confession. In the present case, defendant does not question the corpus delicti of the murder. Here the corroborating evidence establishes that the victim was found stabbed to death in a wooded area near the Lenoir Mall on 11 June 1982; she was last seen about 8:20 or 8:30 p.m. at the mall on 10 June; a cigarette lighter was found near her body; a witness saw defendant running from the mall between 8:45 and 9:00 p.m. on the night of the murder; and defendant asked another witness to clean his knife which had rust-like stains on it. Thus, the corpus delicti of the murder was shown here by evidence *aliunde* the confession.

The corpus delicti rule is based on the hesitancy of the law to accept, without adequate corroboration, the extrajudicial confession of a defendant and to avoid convicting a person, solely out of his own mouth, of a crime that was never committed or was committed by someone else. Where there is proof of facts and circumstances which add credibility to the confession and generate a belief in its trustworthiness, and where there is independent proof of death, injury, or damage, as the case may require, by criminal means, these concerns vanish and the rule has served its purpose. Elements of the offense may then be proved through the statements of the accused.

Further support for our position comes from other jurisdictions which have addressed this issue. In *State v. Johnson*, 31 N.J. 489, 158 A. 2d 11 (1960), *cert. denied*, 368 U.S. 933, the court held that the state was required to prove only the element of death and could rely on the confession of the defendant to prove the underlying felony of attempted robbery. The court wrote that:

> In a prosecution for felony-murder, proof of the felony replaces proof of the mental elements necessary for conviction of willful, deliberate and premeditated killing. In a prosecution for premeditated murder, the State is not required independently to prove those mental elements if the defendant has given a confession that admits them. By the same token, independent proof of the felony in a felony-murder prosecution is not necessary if proof of the felony can be gathered from a corroborated confession. In our view the State satisfied the burden placed upon it by independently proving the fact of death, and by producing corroborative evidence tending to establish that when the defendants confessed that they participated in the holdup and killing they were telling the truth. We therefore find that the confessions were properly received in evidence and were amply corroborated.

Id. at 505, 158 A. 2d at 19-20. *See Gentry v. State*, 416 So. 2d 650 (Miss. 1982); *Rhone v. State*, 254 So. 2d 750 (Miss. 1971); *see also Jones v. State*, 253 Ind. 235, 252 N.E. 2d 572 (1969), *cert. denied*, 431 U.S. 971 (1977).

We therefore hold that independent proof of the underlying felony in a felony murder prosecution is not necessary where a

confession, otherwise corroborated as to the murder, includes sufficient facts to support the existence of the felony. It was proper to show solely by defendant's confession that the homicide was murder in the *first* degree by showing that the murder was committed in the perpetration of another felony.

Finally, defendant argues that the court erred in permitting the State to ask prospective jurors death qualifying questions, thereby violating his right to an impartial jury and a fair trial. Defendant concedes that this Court decided the issue against him in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980), and most recently affirmed its decision in *State v. Hill*, --- N.C. ---, --- S.E. 2d --- (filed 5/3/1983). Defendant, nevertheless, requests the Court to re-examine its holdings in these cases. As we stated in *Hill*, "we determine that the prior decisions of this Court previously referred to are sound and should be viewed as binding precedent controlling on the issues raised by the defendant appellant." *Id.* at ---, --- S.E. 2d at ---.

No error.

Justice EXUM dissenting in part and concurring in part.

I dissent from the part of the majority's opinion in which it concludes defendant's confession was not obtained in violation of defendant's Fifth and Fourteenth Amendment rights to counsel and to remain silent.

The pertinent facts as found by the trial judge are as follows:

> 2. In January, 1981, the defendant was charged in Mecklenburg County with taking indecent liberties with a minor and with indecent exposure. The Public Defender's office of Mecklenburg County was appointed by the Court to represent him in those cases which were assigned to Lyle Yurko, then an Assistant Public Defender. These cases were finally concluded March 19, 1981.
>
> 3. Sometime before the representation of the defendant by the Mecklenburg Public Defender in those cases ended Officer Kirshner of the Charlotte Police Department talked with Mr. Yurko and told him that the defendant was a suspect in the Smith and Ray cases, which were unsolved

homicides occurring in Mecklenburg County, and was also a suspect in a case in Caldwell County. The Officer asked Mr. Yurko if the defendant was willing to be interrogated about the Smith and Ray cases. There were no charges pending against the defendant in connection with those cases in Mecklenburg County at that time. Mr. Yurko then conferred with Mr. Fritz Mercer, the Public Defender for Mecklenburg County, concerning the matter. Mr. Mercer, without any Court order appointing his office to represent the defendant as to the Smith and Ray cases as required by G.S. 7A-452, nonetheless authorized Mr. Yurko to act as the defendant's attorney as to the Smith and Ray matters.

4. Mr. Yurko then conferred with the defendant who was apparently serving a sentence in the Mecklenburg County jail at the time. *The defendant advised Mr. Yurko that he had been questioned by the police about these cases and did not want to answer any further questions concerning them. Mr. Yurko informed Officer Kirshner of this.* Mr. Yurko had no further contact with the defendant concerning these matters until the time he left the Mecklenburg Public Defender's office on June 30, 1981, to enter private practice. *However, sometime prior to April 28, 1981, Mr. Yurko learned through the news media that the defendant may have been again interrogated by police officers as to the Smith and Ray matters. On April 28, 1981, he wrote a letter to the District Attorney of the Twenty-sixth Judicial District advising him that Mr. Franklin did wish to have an attorney and requesting that if such questioning was desired the Public Defender's office be contacted. A copy of this letter was sent to the Chief of the Charlotte Police Department and the Chief of the Mecklenburg County Police Department.*[1]

5. On October 9, 1981, the defendant was in custody in Mecklenburg County on charges arising there, and unrelated to the instant case or to the Smith and Ray cases. On that date Officer J. F. Styron of the Mecklenburg County Police

1. In a cover letter sent to the Chief of the Charlotte Police Department Mr. Yurko requested that the officers investigating the Smith and Ray murders be given the information that defendant did not want to be questioned without an attorney present. Apparently this was not done since Officer Styron testified he had no actual knowledge of defendant's invocation of his right to silence.

Department, who had on occasions in March, 1981, talked with the defendant concerning the Smith and Ray cases, learned that the defendant was in custody and went to the jail to talk to him about them. Officer Styron knew that the defendant had been a suspect in the instant case, but his sole purpose in going to the jail was to talk to the defendant about the Smith and Ray cases. Officer Styron at the time did not have actual knowledge of the notice given by Mr. Yurko as to the Public Defender's representation of the defendant in the Ray and Smith cases.

6. *At the Mecklenburg County jail Officer Styron advised the defendant that he wanted to talk to him about the Smith and Ray cases.* He then orally advised the defendant that he had a right to remain silent; that anything he said could and would be used against him in court; that he had the right to talk to a lawyer and have him present while being questioned; that if he could not afford to hire a lawyer one would be appointed to represent him before any questioning if he wished one. After the warning the defendant stated that he understood these rights and that he was willing to talk to Officer Styron without an attorney. Thereafter the defendant talked to Officer Styron about the problems as a result of which he was then in custody, about prior sexual offenses for which he had served time in prison, and complained that he had never received any treatment for his problem. The defendant then asked Officer Styron to take him to the police offices. Officer Styron asked him if he wanted to talk about the cases, and the defendant replied that he did.

7. Later in the day the defendant was taken from the Mecklenburg County jail by Officer S. L. Price of the Mecklenburg Police Department to the Charlotte Law Enforcement Center. There Officer Price, in the presence of Officer Styron, in writing and orally advised the defendant that he had a right to remain silent and make no statements; that any statement he made could and would be used as evidence against him; that he had a right to have an attorney present to advise and counsel him at that time; that if he could not afford to hire an attorney one would be provided for him at no cost; that if at any time he should desire to stop making any statement or wish to contact an attorney he would be al-

lowed to do so at once. Officer Price read these rights to the defendant from a printed form, which the defendant followed. The defendant, in writing, stated that he did not wish to have an attorney present; that he was 23 years of age, had attained the 12th grade in school; that he had read the waiver, and having been informed verbally and in writing of his rights and understanding that he could exercise them at any time waived his rights and agreed to answer any questions asked.

8. Immediately after the execution of the waiver form Officer Price asked the defendant what he wanted to talk about. The defendant immediately began to talk about the killing of a girl named Michelle in Lenoir. He stated to the officers that he wanted to get it over with and did not want a lawyer.

9. The information given to Officers Price and Styron on this occasion was reduced to writing and signed by the defendant. [Emphasis added.]

Following his initial confession to the Mecklenburg County officers, defendant was questioned on the same day at the Charlotte law enforcement center by two officers from the Lenoir Police Department. Defendant was given his *Miranda* warnings by the Lenoir officers. Then the officers went over the statement defendant had given about the instant case to Officers Styron and Price, eliciting additional details about the incident. The next day, 10 October 1981, defendant was questioned by an SBI agent who had read the statement given by defendant to the Lenoir police officers and was accompanied during the interview by a Lenoir police officer. On 13 October defendant was brought to the Lenoir Police Department where he was interviewed by an assistant district attorney. The interview was recorded after defendant said he did not object. Finally, on 14 October defendant was taken to the Lenoir Mall by Lenoir police officers where he reenacted for videotaping the events to which he had confessed.

Thus, defendant, had, through his attorney,[2] expressed in writing his desire to deal with police only through counsel in

2. Whether or not Mr. Yurko had the statutory authority to represent defendant to the limited extent he did in the Smith and Ray cases is not a relevant ques-

responding to any questioning about the Ray and Smith murders. The police, not defendant, initiated contact with him for the purpose of questioning him about the Smith and Ray cases. Officer Styron told defendant he wanted to discuss the Smith and Ray murders, then he informed him of his *Miranda [v. Arizona*, 384 U.S. 436 (1966)] rights. A general conversation was held about defendant's problem with committing various sex offenses and the lack of treatment afforded him for his problem. Defendant then requested to be taken from jail to the police headquarters. Styron believed defendant was going to talk about the Smith and Ray cases, but after executing a waiver form at the police offices he began to talk about the killing of a girl named Michelle in Lenoir.

The majority states: "It is true that under *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378 (1981), once a suspected criminal invokes his right to counsel, he may not be questioned further until counsel is provided unless the suspected criminal himself initiates the dialogue at which time he may waive his right to have an attorney present." I agree with the majority's interpretation of *Edwards*. The United States Supreme Court clearly stated:

> (A)lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation, see *North Carolina v. Butler* [441 U.S. 369, 372-76 (1979)], the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. *We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made*

tion in the instant case. As the trial court stated at the suppression hearing, "The evidence is uncontradicted in writing the Police had been notified, whatever the legalities of the appointment, that the defendant invoked his right to remain silent with regard to the Ray and Smith cases, and no interrogation as to those matters were to be carried on by any law enforcement agency in Mecklenburg without the presence of defendant's counsel."

available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484-85 (footnote omitted) (emphasis added). The holding in *Edwards* has subsequently been characterized by the Supreme Court as a "prophylactic rule" requiring "that before a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the 'suspect himself initiates dialogue with the authorities.' " *Oregon v. Bradshaw*, --- U.S. ---, 51 U.S.L.W. 4940 (U.S. June 23, 1983) (No. 81-1857) (quoting *Wyrick v. Fields*, --- U.S. ---, --- (1982) (*per curiam*)).

Yet the majority, while recognizing the holding in *Edwards*, ignores it in its analysis of the instant case. It begs the question when it states "defendant had never invoked his right to counsel with respect to the Moody murder." The majority states, "We do not decide whether Officers Styron and Price, in good faith, might properly have initiated questioning concerning the Ray and Smith murders in light of defendant's earlier request that he have an attorney present during questioning on these cases . . . ."

But this is precisely the question which must be decided. The *Edwards* Court excluded the defendant's confession to robbery, burglary and first degree murder because his statements were "the fruits" of an interrogation initiated by the police after he had "clearly asserted his right to counsel." 451 U.S. at 485. In *Miranda* the Court had stated: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." 384 U.S. at 474. The Court in *Edwards* built on the statement in *Miranda* that "interrogation must cease until an attorney is present," in holding that defendant could not be reinterrogated once he had asserted his right to counsel. Thus, *Edwards* holds that it is impermissible for the police to initiate a meeting with a defendant to discuss a crime for which he has invoked his right to counsel unless counsel has been made available to him. If the police do initiate such a "meeting," "interrogation," "conversation" or "exchange," then any statements which result from such an impermissible contact must be excluded.

The holding in *Edwards* compels the conclusion that Officers Styron and Price could not have properly initiated questioning

about the Smith and Ray murders, as they did, in light of defendant's express request that an attorney be present during any further questioning about those murders. Had defendant confessed to the Smith and Ray murders to the officers, his confession would have been inadmissible under *Edwards*. That defendant confessed to a murder other than the ones Styron, and later Price, had in mind does not alter the character of Styron's initial contact. That contact was impermissible under *Edwards*.

In addition, defendant's subsequent confessions to the Lenoir officers, the SBI agent, and the assistant district attorney were also inadmissible exploitations of his initial confession. When the *Edwards* Court used the phrase "the fruits of the interrogation," it alluded to a principle most memorably set forth in *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). The *Wong Sun* Court excluded verbal statements made by defendant Toy immediately after an illegal entry and arrest by narcotics officers. Narcotics obtained from defendant Yee pursuant to Toy's illegally-obtained statements were also excluded as "fruit of the poisonous tree" because the "taint" of the original illegal police action had not been purged. 371 U.S. at 487-88.

In the instant case the taint of the police-initiated interrogation[3] was not removed by defendant's being taken at his request from jail to police headquarters where he confessed not to the Smith and Ray murders but to the Moody murder. Defendant's confession was in direct response to and the result of the contact impermissibly initiated by Styron at the jail and followed up by

3. In both *Miranda v. Arizona*, *supra*, 384 U.S. at 450, and *Rhode Island v. Innis*, 446 U.S. 291, 299 (1980), the Supreme Court has recognized that "interrogation" does not mean only "express questioning." Rather, "techniques of persuasion" such as blaming society for the defendant's behavior amount to interrogation when employed "in a custodial setting." The test enunciated in *Innis* for determining whether interrogation has occurred is whether the words or actions of the police are such that "the police should know [they] are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 301 (footnotes omitted). In the instant case Officer Styron told defendant while defendant was in jail that he wanted to talk about the Smith and Ray cases, read defendant his rights, and then discussed with him defendant's psychological problems and the failure of the prison system to provide him with treatment for the problem. Officer Styron also testified he could tell defendant was depressed throughout the time he gave the statement and periodically would become very emotional. Thus, it is difficult to characterize Styron's initial conversation with defendant as anything other than an interrogation.

Price at police headquarters. It was not "completely unsolicited," a characterization given it by the majority.

Furthermore, there is no "good faith" exception to the *Edwards* holding. The officers who questioned Edwards had no actual knowledge that he had invoked his right to counsel,[4] just as Officer Styron had no actual knowledge in the instant case.

I do not reach the question of whether defendant's right to counsel under the Sixth Amendment had been violated because I believe the confession must be excluded under *Edwards* and *Miranda*.

I also dissent from the majority's conclusion that no error was committed in death qualifying the jury for the reasons stated in my dissent in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980).

I concur in the majority's treatment of the corpus delicti issue.

ROY G. DOWDY v. FIELDCREST MILLS, INC.

No. 21PA83

(Filed 7 July 1983)

1. Master and Servant §§ 68, 91— workers' compensation—occupational disease—statute of limitations

The two year time limit under G.S. 97-58(c) for filing claims for occupational diseases with the Industrial Commission is a condition precedent with which a claimant must comply in order to confer jurisdiction on the Industrial Commission to hear the claim, and the burden is on the plaintiff to establish that the claim was timely filed.

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4. It is unclear frm the United States Supreme Court opinion whether the interrogating officers knew of Edwards' previous assertion of his right to counsel. However, the Court expressly stated that it primarily relied upon the statement of facts set forth in the Arizona Supreme Court's opinion in developing its own statement of the facts. 451 U.S. at 478, n. 1. In the state court's opinion it is clear that the officers had no actual knowledge Edwards had requested an attorney. 122 Ariz. 206, 209, 594 P. 2d 72, 75 (1979).

2. Master and Servant § 96.3— workers' compensation—review of jurisdictional findings

Findings of jurisdictional fact by the Industrial Commission are not conclusive upon appeal even though supported by evidence in the record, and when a defendant employer challenges the jurisdiction of the Commission, any reviewing court, including the Supreme Court, has the duty to make its own independent findings of jurisdictional facts from its consideration of the entire record.

3. Master and Servant §§ 68, 91— workers' compensation—occupational disease—statute of limitations

The two year period within which claims for benefits for an occupational disease must be filed under G.S. 97-58(c) begins running when an employee has suffered injury from an occupational disease which renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity by such injury, and the employee is informed by competent medical authority of the nature and work related cause of the disease.

4. Master and Servant § 68— workers' compensation—claim for occupational disease not timely filed

Plaintiff was disabled from an occupational disease within the meaning of G.S. 97-58(c) no later than 1974, and the claim filed by him on 24 February 1978 did not establish timely filing required to confer jurisdiction on the Industrial Commission to hear the claim, where the evidence showed that plaintiff suffered from a chronic obstructive lung disease in 1973; plaintiff's employment with defendant exposed him to a greater risk of contracting this disease than members of the public generally and his exposure to cotton dust in his employment with defendant significantly contributed to and was a significant causal factor in the development of the disease; no later than 1974 plaintiff's occupational disease rendered him incapable of earning the same wages, either in the same or any other employment, that he had received before his injury; and plaintiff was informed by competent medical authority of the nature and work related cause of his occupational disease no later than 1974.

5. Master and Servant § 68— workers' compensation—chronic obstructive lung disease and byssinosis

For purposes of awarding workers' compensation benefits, there is no practical difference between chronic obstructive lung disease and byssinosis.

6. Master and Servant § 68— workers' compensation—occupational disease—information from medical authority on nature and work related cause

Even though one doctor informed defendant that he had chronic obstructive lung disease and another doctor told defendant that he suffered from byssinosis, plaintiff was sufficiently informed by competent medical authority of the nature and work related cause of his disease where both doctors informed plaintiff that his disease severely restricted his ability to breathe and that the disease obstructing his lungs and reducing his ability to breathe was related to cotton dust in his work environment at defendant's mill.

7. Master and Servant §§ 68, 91 — workers' compensation — single claim rule — occupational disease — statute of limitations

The single claim rule applies equally to cases involving injury by accident and cases involving injury by occupational disease, and the two year time limitation for filing claims prescribed in G.S. 97-58(c) does not begin to run anew when an employee's condition changes from permanent partial disability to permanent total disability.

8. Master and Servant §§ 68, 91 — workers' compensation — occupational disease — no estoppel to assert untimely filing of claim

Defendant employer was not equitably estopped from asserting plaintiff's failure to file his claim for an occupational disease within the applicable two year period where the record shows that defendant at no time attempted to conceal the plaintiff's condition from him or to mislead him with regard to his rights under the Workers' Compensation Act, and the evidence shows that a medical employee of defendant specifically advised plaintiff to leave his employment with defendant and file a claim for disability benefits under the Act.

Justice MEYER concurring in result.

Chief Justice BRANCH and Justice COPELAND join in this concurring opinion.

ON discretionary review of the decision of the Court of Appeals, 59 N.C. App. 696, 298 S.E. 2d 82 (1982), affirming the North Carolina Industrial Commission's order and award of compensation for the claimant.

On 24 February 1978, the claimant plaintiff, Roy G. Dowdy, Sr., filed a claim for workers' compensation benefits for an occupational lung disease caused by exposure to cotton dust in his employment. On 30 May 1978, the defendant employer filed a motion to dismiss on the ground that the plaintiff had failed to file his claim within the time allowed under G.S. 97-58. Commission Chairman William H. Stephenson entered an opinion dealing solely with the defendant's motion to dismiss and denying that motion. The defendant's appeal to the Full Commission from this opinion by Chairman Stephenson was found by the Full Commission to be interlocutory and was dismissed.

Deputy Commissioner Ben E. Roney, Jr. entered an opinion and award on 14 April 1981 awarding the plaintiff $20,000 as compensation for damage to his lungs. Both parties appealed to the Full Commission.

On 29 September 1981, the Full Commission entered an order and award in which it adopted certain findings of fact by Deputy Commissioner Roney, but vacated and set aside the remainder of his opinion and award, and awarded the plaintiff compensation for total permanent disability benefits for byssinosis from 1 March 1976, the date of his retirement.

The defendant appealed to the Court of Appeals. The plaintiff filed cross assignments of error. The Court of Appeals affirmed the award of the Industrial Commission. On 8 March 1983, the Supreme Court allowed the defendant's petition for discretionary review.

Michaels and Jernigan, by Leonard T. Jernigan, Jr. and Paul J. Michaels, for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr. and Caroline Hudson, for defendant appellant.

MITCHELL, Justice.

The primary issues presented by this case are whether the plaintiff filed his claim within the time prescribed by G.S. 97-58 and whether the defendant is equitably estopped from raising the plaintiff's failure to file a timely claim as a defense. We hold that the plaintiff's claim was not timely filed and that the defendant may raise this fact as a defense.

The defendant assigns as error the entry of the order and award for the plaintiff by the Industrial Commission. In support of this assignment, the defendant contends that the Industrial Commission was without authority to enter the award as the plaintiff's claim was filed more than two years after his disability arose and was barred by G.S. 97-58(c). We agree.

[1] Subsection (c) of G.S. 97-58 states in pertinent part: "The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be." The two year time limit under G.S. 97-58(c) for filing claims with the Industrial Commission is a condition precedent with which a claimant must comply in order to confer jurisdiction on the Industrial Commission to hear the claim. *Poythress v. J. P. Stevens,*

54 N.C. App. 376, 283 S.E. 2d 573 (1981), *disc. rev. denied*, 305 N.C. 153, 289 S.E. 2d 380 (1982). The burden is on the plaintiff to establish that the claim was timely filed, and a failure to do so creates a jurisdictional bar to the claim. *Id.*

[2] Except as to questions of jurisdiction, findings of fact by the Industrial Commission are conclusive on appeal when supported by competent evidence even though there is evidence to support contrary findings. G.S. 97-86; *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981). Findings of jurisdictional fact by the Industrial Commission, however, are not conclusive upon appeal even though supported by evidence in the record. *Richards v. Nationwide Homes*, 263 N.C. 295, 139 S.E. 2d 645 (1965). A challenge to jurisdiction may be made at any time. *Id.* When a defendant employer challenges the jurisdiction of the Industrial Commission, any reviewing court, including the Supreme Court, has the duty to make its own independent findings of jurisdictional facts from its consideration of the entire record. *Lucas v. Stores*, 289 N.C. 212, 221 S.E. 2d 257 (1976).

Both the Industrial Commission and the Court of Appeals found that the plaintiff was disabled at the time he quit his job with the defendant on 1 March 1976 because of health problems. The Industrial Commission and the Court of Appeals also found that the two year time limit for filing claims under G.S. 97-58(c) was complied with by the plaintiff when he filed his claim with the Industrial Commission on 24 February 1978. These findings are jurisdictional findings of fact fully reviewable by this Court. Having reviewed the entire record, we find that the plaintiff was disabled within the meaning of G.S. 97-58(c) no later than 1974 and that the claim filed by him on 24 February 1978 does not establish timely filing required to confer jurisdiction on the Industrial Commission to hear the claim. Therefore, the Industrial Commission should have dismissed the plaintiff's claim for want of jurisdiction. *Richards v. Nationwide Homes*, 263 N.C. 295, 139 S.E. 2d 645 (1965).

The record before us on appeal reveals, *inter alia*, that the plaintiff was born on 1 April 1921 and completed the sixth grade in public school. He began work in the card room at Dan River Mills in 1936 where he was exposed to cotton dust. He worked continuously in the card room, exposed to thick cotton dust in the

work environment. He worked there until 1968 when he went to work in the defendant's card room. He continued to be exposed to thick cotton dust in the work environment. While working for the defendant, the plaintiff developed breathing problems. He noticed that he had trouble breathing and sleeping at night and was bothered by coughing and shortness of breath. Other facts are set forth hereinafter where pertinent.

[3] In *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980), we indicated that sections (b) and (c) of G.S. 97-58 must be construed *in pari materia.* We further indicated that, when these sections are read *in pari materia*, they establish the factors which commence the running of the two year period within which claims must be filed in cases of occupational disease. The two year period within which claims for benefits for an occupational disease must be filed under G.S. 97-58(c) begins running when an employee has suffered injury from an occupational disease which renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity by such injury, and the employee is informed by competent medical authority of the nature and work related cause of the disease. *Id.* at 98-99 and 102, 265 S.E. 2d at 147 and 149. The two year period for filing claims for an occupational disease does not begin to run until all of these factors exist.

[4] In order to perform our duty of determining necessary jurisdictional facts in this case, it is necessary for this Court to determine at what time *all of the factors* referred to in *Taylor* first existed. In finding these jurisdictional facts, we must now turn to a review of the entire record.

We first must determine when the plaintiff initially "suffered injury from an occupational disease." The defendant sent the plaintiff to Chapel Hill, North Carolina, to be examined by Dr. Mario C. Battigelli in February, 1973. The written report of Dr. Battigelli's examination of the plaintiff reveals *inter alia* the following:

> Impression: Obstructive disease in cigarette smoker with distinct aggravation on cotton dust exposure.
>
> PATIENT: Encouraged to discontinue smoking and dust exposure and follow bronchial drainage treatment a half an hour each day.

Dr. Battigelli also found the plaintiff "presents convincing evidence of obstructive lung disorder . . . ." Dr. Battigelli went on in his report to conclude:

> In conclusion this patient is severely disabled and he should not be exposed any further to air borne irritants namely cigarette smoke and industrial dust. He presents a well documented degree of respiratory impairment of moderate to severe extent, and he is entitled to a total disability rating on respiratory grounds. The etiology of such an impairment is probably due to in part to the cotton dust exposure in spite of the fact that the diagnosis of byssinosis is not warranted in view of the only occasional occurrence of complaints in relation to cotton dust exposure. If this subject has byssinosis this problem appears only an addition rather than the substance of his present impairment.

The defendant himself testified that he had first noticed his breathing problem before 1973, but "I thought it would get better." He also testified that:

> I first noticed that I was experiencing any breathing problem in about 1970. I thought I could shake it off, and again back in 1973 I think they brought the blowing machine through the mill and that's when they really found out that I was bad. I had no breath. Dr. Springer, the company doctor, got me to see Dr. Battigelli.
>
> In the early '70's, on Mondays and Tuesdays I would tighten up. Then it would let off a little. I would push through the week and get out and get a little air and loosen up and go back. By 1973 it got bad. That's why Dr. Springer wanted me to go to Chapel Hill to Dr. Battigelli.

The record reveals that the plaintiff also testified to the following facts:

> Q. Now, Mr. Dowdy, I want to go back to 1973 when you went down to Chapel Hill to see Dr. Battigelli. You remember doing that?
>
> A. Yeah, I remember that.
>
> Q. Okay, were you having problems with your breathing pretty bad at that time?

A. That's right.

Q. Did it cause you to miss some time from work?

A. Yes.

Q. Both before and after you went to the hospital at Chapel Hill to see Dr. Battigelli you were having to miss time from work because of your breathing problems, weren't you?

A. That's right.

It is clear in this case, as it was in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E. 2d 359, 369 (1983), that if the plaintiff had an occupational disease in 1973 it was a chronic obstructive lung disease, which may be an occupational disease under G.S. 97-53(13). In *Rutledge* we stated:

> [C]hronic obstructive lung disease may be an occupational disease provided the occupation in question exposed the worker to a greater risk of contracting this disease than members of the public generally, and provided the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work-related factors also make significant contributions, or were significant causal factors.

Id. at 101, 301 S.E. 2d at 369-70. Dr. Battigelli's report tended to show that the plaintiff's disease was "probably due in part to cotton dust exposure" and that there was "distinct aggravation" of his symptoms when exposed to cotton dust. When viewed in light of the testimony by the plaintiff and others that the plaintiff's condition became substantially worse each time he was exposed to cotton dust, this evidence was sufficient to support a finding that the plaintiff's exposure to cotton dust in his employment significantly contributed to or was a significant causal factor in the disease.

We find that the plaintiff suffered from a chronic obstructive lung disease in 1973. We further find that the plaintiff's employment with the defendant exposed him to a greater risk of contracting this disease than members of the public generally and that his exposure to cotton dust in his employment with the defendant significantly contributed to and was a significant causal

factor in the development of the disease. Therefore, the plaintiff suffered injury from an occupational disease during 1973.

In making our findings in this regard, we have reviewed the entire record and considered the medical evidence, the extent of the plaintiff's exposure to cotton dust during his employment, the manner in which his disease developed with reference to his work history and the other factors which we have indicated may be considered in making such findings. *See generally Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983).

We must next determine when the plaintiff's occupational disease rendered him incapable of earning the wages he was receiving at the time of his incapacity by injury from the occupational disease. We find that the plaintiff was rendered incapable of earning such wages no later than 1974.

The plaintiff testified that both before and after his 1973 visit to Dr. Battigelli he was having to miss time from work because of his breathing problems. The plaintiff also testified that, despite the fact that an ordinary work week for one in his position with the defendant involved forty hours, he was often unable to work forty hours a week. He indicated that during that first quarter of 1974, he sometimes worked sixteen hours a week, sometimes twenty hours a week and sometimes twenty-four hours a week. He indicated that his breathing problems prevented him from working more hours at that time. He was asked, "And those are the breathing problems that we are here about today and is the subject of your claim. Is that right?" The plaintiff answered, "That's right." The plaintiff also specifically stated that he was not paid for the time he missed from work by reason of his breathing problems.

The plaintiff contends that such evidence does not indicate that he was incapable of earning the wages he was receiving at the time of his first incapacity by injury from the occupational disease. He argues that he was at all times still receiving the same hourly wage he had previously received and, therefore, that he had not lost his capacity to earn wages. He also argues that the fact that he was able to work forty hours or more during several weeks in 1974, 1975 and 1976 establishes that he had not lost his capacity to earn wages. Such arguments may be relevant to the question of whether the plaintiff had been rendered totally

incapable of earning wages, but they do not tend to negate the evidence in the record that the plaintiff was incapable of earning the "same wages" he was receiving at the time he first suffered injury from the occupational disease. *See Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E. 2d 682, 683 (1982).

The plaintiff also argues that there was no evidence tending to show that after his injury he was incapable of earning the same wages he had earned before his injury in any other employment. We disagree.

A review of the entire record in the present case reveals that, beginning with the first quarter of 1974, the plaintiff was frequently unable to work a full forty hour week. In 1973, the plaintiff was 52 years old and had a sixth grade education. He had lost his right foot in a streetcar accident early in his life. His only job experience had been working in the card room of a textile mill. When these facts are viewed in light of Dr. Battigelli's conclusion in 1973 that the plaintiff "is entitled to a total disability rating on respiratory grounds," the evidence is sufficient to support a finding that no later than 1974 the plaintiff was incapable of earning the same wages, either in the same or any other employment, that he had received before his injury. *See Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978). Having reviewed the entire record, we so find.

We must next decide when the plaintiff was first informed by competent medical authority of the nature and work related cause of his occupational disease. When Dr. Battigelli examined the plaintiff in Chapel Hill in 1973, he discussed the nature and work related cause of the plaintiff's occupational disease with the plaintiff. The plaintiff testified that, "I don't know whether he said byssinosis there or not, but he told my wife I needed a lot of help." The plaintiff was then asked the following question and gave the following answer:

> Q: Did he tell you your breathing problem was related to the dust at Fieldcrest? Did he tell you not to work and told you your breathing problem was related to the dust at Fieldcrest?
>
> A: Right.

The plaintiff also testified that, "Dr. Battigelli told me it was unwise to work in the card room. He sent a report to Fieldcrest Mills. Dr. Springer wanted me out of the mill." This testimony by the plaintiff was sufficient to establish that in 1973 he was informed by competent medical authority of the nature and work related cause of his occupational disease—chronic obstructive lung disease.

The plaintiff further testified that, sometime after he returned to work in the defendant's mill after seeing Dr. Battigelli in 1973, Dr. Springer advised the plaintiff that he had byssinosis. The plaintiff was uncertain of the date on which this occurred. He testified that Dr. Springer told him "to file a claim; he gave me a leave of absence and he said he didn't think I would be back. He wrote it out for me to give to Fieldcrest." The plaintiff then identified Defendant's Exhibit B as being the paper which Dr. Springer had given him on this occasion. That paper reveals on its face a stamp mark bearing the word "MEDICAL" and a date of June 17, 1974. It reads in its entirety:

JOSEPH G. SPRINGER, M.D.

To Whom it may Concern:

I am recommending that Mr. Roy Dowdy be placed on a medical leave of absence for 3 to 6 months to see if he gets any better out of the cotton dust environment.

In the event that he improves, which I doubt, I have advised him to:

1. Apply for Soc. Sec. disability retirement
2. Dan River—pension
3. Va. Workmen's Comp for byssinosis
4. Fieldcrest disability retirement
5. N. Car. Work Comp disability due to byssinosis

Sincerely,

s/ J. G. Springer, M.D.

This evidence supports a finding that the plaintiff was notified by Dr. Springer in 1974 that he had and was disabled by byssinosis

and that disability due to byssinosis was of a sufficient nature and work related cause to entitle him to worker's compensation disability benefits.

[5] We do not think that the fact that Dr. Springer informed the plaintiff that he had byssinosis rather than chronic obstructive lung disease is determinative. We have indicated that both chronic obstructive lung disease and byssinosis are occupational diseases when the occupation in question exposes the injured worker to a greater risk of contracting the disease than members of the public generally and when the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the development of the disease. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983). Thus, we think it unimportant here to determine whether byssinosis is a particular type of chronic obstructive lung disease or a separate disease often found in conjunction with or evolving from chronic obstructive lung disease. For purposes of awarding worker's compensation benefits, there is no practical difference between chronic obstructive lung disease and byssinosis. The simple fact is that both impair the worker's ability to breathe. Whether either will be compensable depends upon a showing of the factors set forth in *Rutledge*.

[6] Similarly, the fact that Dr. Springer told the defendant that he had byssinosis, when Dr. Battigelli may still have thought the disease was chronic obstructive lung disease not involving byssinosis or involving byssinosis only in addition to the chronic obstructive lung disease already causing the plaintiff's impairment, is not determinative of whether Dr. Springer gave the plaintiff notice of the "nature" and "work-related cause" of his occupational disease in 1974. Both Dr. Battigelli in 1973 and Dr. Springer in 1974 informed the plaintiff that his disease severely restricted his ability to breathe. This informed him of the "nature" of the disease. Both Dr. Battigelli in 1973 and Dr. Springer in 1974 informed the plaintiff that the disease obstructing his lungs and reducing his ability to breathe was related to cotton dust in his work environment at the defendant's mill. This informed the plaintiff of the "work-related cause" of his occupational disease. Therefore, each doctor informed the plaintiff—by whatever name the individual doctor called the disease—of the nature and work related cause of his occupational disease. No

more is required by G.S. 97-58(b) and (c) or *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980). We find that the plaintiff was informed by competent medical authority of the nature and work related cause of his occupational disease no later than 1974.

We have found that the three factors identified in *Taylor* as triggering the onset of the two year period prescribed in G.S. 97-58(c) for filing claims in the case of an occupational disease all came into being no later than 1974. The plaintiff's claim filed on 24 February 1978 was not filed within the two year period prescribed by the statute. The two year time limit for filing claims under G.S. 97-58(c) is a condition precedent which the plaintiff was required to establish in order to confer jurisdiction on the Industrial Commission to hear his claim. *Poythress v. J. P. Stevens*, 54 N.C. App. 376, 382, 283 S.E. 2d 573, 577 (1981), *disc. rev. denied*, 305 N.C. 153, 289 S.E. 2d 380 (1982). As the Industrial Commission was without jurisdiction over the plaintiff's claim, it was without authority to enter a judgment in favor of either party and properly could only dismiss the plaintiff's claim for want of jurisdiction. *Richards v. Nationwide Homes*, 263 N.C. 295, 303, 139 S.E. 2d 645, 651 (1965).

[7] The plaintiff further contends, however, that he was at worst partially permanently disabled prior to 1976, and that he was not totally permanently disabled until he left employment with the defendant during that year. He argues that the two year time limitation for filing claims prescribed by G.S. 97-58(c), which would have controlled a claim by him for partial permanent disability, does not establish the time within which he was required to file a claim for any later developing permanent total disability, even though both arose from the same occupational disease. In other words, the plaintiff contends that G.S. 97-58(c) provides for a separate, independent and additional two year period for filing claims for permanent *total* disability by reason of an occupational disease, even when such permanent *total* disability results from a worsening of the effects of an occupational disease which has previously caused the worker to suffer permanent *partial* disability on which the two year period for filing claims prescribed by G.S. 97-58(c) has begun to run. We do not agree.

We note that the evidence before the Industrial Commission would have justified a determination that the plaintiff was per-

manently totally disabled in 1973. Deputy Commissioner Roney in fact found that the plaintiff "was suffering from moderate to severe ventilatory impairment justifying total disability on respiratory grounds" when he was examined by Dr. Battigelli on 13 February 1973. In its order and award for the plaintiff the Full Commission adopted this and other findings as its own. It is unnecessary in the present case, however, for us to determine whether this finding amounted to a finding of permanent total disability or whether the plaintiff in fact suffered permanent total disability in 1973.

All of the evidence in the record indicates that the plaintiff was at least permanently partially disabled by reason of his occupational disease no later than 1974, and we have so found. An accident or occupational disease resulting in compensable injuries to an employee gives rise to only one right of action or claim. *See Smith v. Red Cross*, 245 N.C. 116, 119, 95 S.E. 2d 559, 561 (1956). The employee is required to file but a single claim, and the amount of compensation payable is predicated on the extent of the disability resulting from the accident or occupational disease. *Wilhite v. Veneer Co.*, 303 N.C. 281, 284, 278 S.E. 2d 234, 236 (1981).

In *Taylor v. Stevens & Co.*, 300 N.C. at 98-99, 265 S.E. 2d at 147, we held that the two year time limitation upon filing claims prescribed in G.S. 97-58(c) begins running when an employee has suffered injury from an occupational disease which renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity by injury and the employee is notified of these facts by competent medical authority. We did not in any way indicate in *Taylor* that only total and permanent disability would trigger the running of the two year period or that a separate, independent and additional two year period would commence under the statute if the employee's disability from the occupational disease evolved from permanent partial disability into permanent total disability.

More to the point, G.S. 97-58(c) specifically provides that "disability or disablement" is one of the triggering factors which begins the running of the two year limitation on filing claims. Had the legislature intended that only total permanent disability or disablement trigger the two year limitation on claims or that a

change in an employee's condition from permanent partial disability to permanent total disability would begin the two year limitation period anew, we believe the legislature would have said so in plain language. We find nothing in the Workers' Compensation Act, however, to indicate that G.S. 97-58(c) was intended to achieve any such result. We conclude that the single claim rule remains in force and requires that we reject this argument by the plaintiff.

The plaintiff correctly notes that *Wilhite v. Veneer Co.*, 303 N.C. 281, 278 S.E. 2d 234 (1981) and *Smith v. Red Cross*, 245 N.C. 116, 95 S.E. 2d 559 (1956) were cases involving claims for injuries by accident. He contends that the single claim rule applied in those cases should not be extended to cases involving injuries by occupational disease. We find nothing in the Workers' Compensation Act tending to indicate that the legislature intended any such distinction, and we conclude that the single claim rule applies equally to cases involving injury by accident and cases involving injury by occupational disease.

The plaintiff additionally contends that *Smith v. American and Efird Mills*, 51 N.C. App. 480, 277 S.E. 2d 83 (1981), *modified and affirmed*, 305 N.C. 507, 290 S.E. 2d 634 (1982) controls the present case and requires a holding that the two year time limitation for filing claims prescribed in G.S. 97-58(c) begins to run anew when an employee's condition changes from permanent partial disability to permanent total disability. We do not agree. It suffices for us to say that neither the Court of Appeals nor this Court attempted to interpret or apply G.S. 97-58 in that case, and accordingly that case does not control here.

The plaintiff was at least suffering from permanent partial disability no later than 1974, and the triggering factors described in *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980) had all occurred at that time. Assuming *arguendo* that he was only partially permanently disabled at that time, he could have filed a valid claim for such partial disability under G.S. 97-30. When his condition worsened by reason of his disability becoming permanent, he would have been entitled under G.S. 97-47 to a review by the Industrial Commission of any award he had received and to an increase in any compensation he had been previously awarded. Instead, the plaintiff chose not to file his single claim within two

years of the time he first became entitled to do so because, as the plaintiff stated, "[W]hile I was working I just tried to hang on until I was sixty-five. I was trying to hang on for sixty-five on account of my Social Security and pension."

The plaintiff chose not to file his single claim within the two years prescribed in G.S. 97-58(c). The plaintiff's failure resulted in the Industrial Commission's being without jurisdiction to hear his claim.

[8] The plaintiff additionally contends that the defendant should be equitably estopped from asserting the plaintiff's failure to file his claim within the two year period for filing claims. In the present case, there is no evidence suggesting that the defendant employer engaged in false representations or in the concealment of material facts reasonably calculated to mislead the plaintiff. To the contrary, the entire record reveals that the defendant at no time attempted to conceal the plaintiff's condition from him or to mislead him with regard to his rights under the Workers' Compensation Act. The evidence in fact reveals that Dr. Springer, an employee of the defendant, specifically advised the plaintiff in 1974 to leave his employment with the defendant and file a claim for disability benefits under the Act. Therefore, we do not reach the question of whether a party can or cannot be estopped to attack the jurisdiction of the Industrial Commission, since the evidence in the present case does not cause the question to arise. *See Hart v. Motors*, 244 N.C. 84, 92 S.E. 2d 673 (1956); *Poythress v. J. P. Stevens*, 54 N.C. App. 376, 283 S.E. 2d 573 (1981), *disc. rev. denied*, 305 N.C. 153, 289 S.E. 2d 380 (1982); *Barham v. Hosiery Co.*, 15 N.C. App. 519, 190 S.E. 2d 306 (1972).

For the foregoing reasons, the decision of the Court of Appeals is reversed and this action is remanded to that Court with instructions that it remand the action to the Industrial Commission with directions to enter an order setting aside its order and award for the plaintiff and dismissing the proceeding on the ground of lack of jurisdiction.

Reversed and remanded.

Justice MEYER concurring in result.

I concur in the result reached by the majority that the claimant's failure to file his claim within the time prescribed by G.S. § 97-58(c) resulted in the Commission's being without jurisdiction to hear the claim. I respectfully disagree that the record before this Court supports the conclusion that the claimant had an "occupational disease" in 1973. The majority concedes that the three factors identified in *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980), "as triggering the onset of the two year period prescribed in G.S. § 97-58(c) for filing claims in the case of an occupational disease all came into being no later than 1974." Completely insignificant to the proper result is, in what essentially amounts to *dicta*, that "plaintiff suffered injury from an occupational disease during 1973." There is absolutely no reason to select the date of 1973 except to fortify the language in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983).

In *1974* Dr. Springer had made a finding of disablement by reason of the occupational disease, byssinosis, and advised claimant to apply for workers' compensation for byssinosis in the State of Virginia. The majority concedes as much by its statement that:

> This evidence supports a finding that the plaintiff was notified by Dr. Springer in 1974 that he had and was disabled by byssinosis and that disability due to byssinosis was of a sufficient nature and work related cause to entitle him to workers' compensation disability benefits.

The majority further concedes that by Dr. Springer's report ". . . the plaintiff was informed by competent medical authority of the nature and work related cause of his occupational disease no later than 1974."

I also believe that on the record before us *1974* was the first year in which the claimant's evidence of inability to work for extended periods of time demonstrates a total disability. The majority so concedes in stating that "the evidence is sufficient to support a finding that no later than 1974 the plaintiff was incapable of earning the same wages, either in the same or any other employment . . . ."

It is clear to me that the majority itself believes that all of the necessary factors came together in 1974 rather than in 1973. The majority says that:

> We have found that the three factors identified in *Taylor* as triggering the onset of the two year period prescribed by G.S. 97-58(c) for filing claims in the case of an occupational disease all came into being no later than *1974*. (Emphasis added.)

In order to find that claimant had an occupational disease (one of the *Taylor* factors) as early as 1973, the majority has found it necessary to rely heavily upon *Rutledge*. Not only is reliance on *Rutledge* ill advised, but in light of the majority's conclusion that the critical date is 1974, it is completely unnecessary. Nevertheless, in view of the majority's inexplicable reliance on the *Rutledge* rationale, I am further compelled to disagree with the majority's reasoning in reaching its conclusion that claimant had an "occupational disease" in 1973.

The only medical evidence of claimant's condition in *1973* was Dr. Battigelli's report. It is clear that his report concludes that the claimant was severely and totally disabled and that he should not thereafter be exposed to "air borne irritants" such as "cigarette smoke and industrial dust." It is likewise clear from that report that claimant's respiratory impairment was probably due "in part" to cotton dust exposure. It is not clear (and the majority in my view is not justified in finding) that the impairment resulted from an "occupational disease." Dr. Battigelli specifically reported in 1973 that "the diagnosis of byssinosis is not warranted" and that "[if] this subject has byssinosis this problem appears only an addition rather than the substance of his present impairment." Dr. Battigelli's diagnosis was "[o]bstructive disease in cigarette smoker with distinct aggravation on cotton dust exposure." I do not find it significant that the claimant's "obstructive disease" was aggravated by exposure to cotton dust. It was clearly also aggravated by cigarette smoke and presumably by other "airborne irritants." Dr. Battigelli clearly "encouraged" the claimant to "discontinue smoking and dust exposure." This limited medical evidence of the *cause* of claimant's disablement does not justify a finding that the claimant had an "occupational disease" in 1973.

The majority contends that Dr. Battigelli's report "[w]hen viewed in light of the testimony by the plaintiff and others" is sufficient to support a finding that "plaintiff's exposure to cotton dust in his employment significantly contributed to or was a significant causal factor in the disease." The majority's conclusion as to the "significance" and "substantiality" of the cotton dust exposure is exactly contrary to the clear words and meaning of Dr. Battigelli's report. The pertinent part of Dr. Battigelli's report concluded:

> The etiology of . . . [claimant's] impairment is probably due to in part to the cotton dust exposure in spite of the fact that the diagnosis of byssinosis is not warranted in view of the only occasional occurrence of complaints in relation to cotton dust exposure. If this subject has byssinosis this problem appears only an addition rather than the substance of his present impairment.

I continue to adhere to my position that there is no basis in law or in fact for the proposition that "for the purposes of awarding workers' compensation benefits, there is no practical difference between chronic obstructive lung disease and byssinosis." There is indeed a vast practical difference in "chronic obstructive lung disease" and "byssinosis." Chronic obstructive lung disease can be due solely to any one or a combination of diseases such as asthma, emphysema, bronchitis, etc., which may be totally unrelated to an individual's occupation. It is correct to say that whether chronic obstructive lung disease is compensable depends upon other factors. In my view those factors are aggravation or extenuation by conditions of the workplace and not, as the majority says, "factors set forth in *Rutledge*."

I find it totally unnecessary to rely on *Rutledge* to justify a finding of "occupational disease" in this case in 1973 when it was so clearly present, in connection with the other factors set forth in *Taylor*, in 1974.

Chief Justice BRANCH and Justice COPELAND join in this concurring opinion.

STATE OF NORTH CAROLINA v. JERRY BYRON STARNES

No. 120A83

(Filed 7 July 1983)

Criminal Law § 53; Rape and Allied Offenses § 4— first degree rape—expert opinion concerning cause of tears in genital area—properly admitted

In a prosecution for first degree rape, the medical opinion expressed by a physician with extensive training in pediatrics and experience in having examined hundreds of female children of the victim's age was well within the bounds of permissible medical expert testimony where the doctor testified to the effect that the tears he observed within the interior of the genital area of the victim were probably caused by a penis.

Justice EXUM concurring in result.

APPEAL as of right pursuant to G.S. § 7A-27(a) from a judgment of *Farmer, J.*, imposing a life sentence upon defendant's conviction of first degree rape entered at the 7 December 1982 Criminal Session of Superior Court, WAKE County.

Upon his plea of not guilty defendant was tried upon a bill of indictment, proper in form, charging him with the first degree rape of Dana Eramo, a child six years of age or less, the defendant being over the age of twelve and four or more years older than Dana Eramo. Defendant was represented at trial by court-appointed counsel Robert L. McMillan and Fred M. Morelock. The jury returned its verdict of guilty of first degree rape and Judge Farmer imposed the mandatory sentence of life imprisonment.

Rufus L. Edmisten, Attorney General, by Thomas G. Meacham, Jr., and Sarah C. Young, Assistant Attorneys General, for the State.

Fred M. Morelock, Attorney for defendant-appellant.

MEYER, Justice.

Only one issue is presented on this appeal—whether, under the particular facts presented, the trial court erred in allowing a State's witness, Dr. Wiegand, to express an opinion in response to a question by the district attorney that the tears he observed in the genital area of the rape victim were probably caused by a penis and in refusing to strike the answer. We hold that under

the particular circumstances presented, the trial court did not err.

The State's evidence may be summarized as follows:

Mrs. Margie Freeman testified that she is the grandmother of the victim, six year old Dana Eramo, whose nickname was "Scooter." Mrs. Freeman's daughter, Donna, the mother of Scooter Eramo, and Scooter's teenage sister Dina, lived with her. On 23 December 1981 Scooter went out to play in the yard at approximately 1:00 p.m. She returned to the apartment about 2:00 p.m. to change shirts because she was too warm. Mrs. Freeman required her to wear a toboggan when she went back out because the weather was breezy. After changing clothes, Scooter went back outside to visit a friend. The grandmother did not see the child again until around 4:00 p.m. that afternoon at Rex Hospital.

Mrs. Freeman's neighbor, Edward B. Patchell, testified that he lived in an apartment located near Mrs. Freeman's. He knew Scooter Eramo as she was a very close friend of his stepdaughter who lived with him and who was the same age as Scooter. The two children played together frequently and Scooter often stayed in his home. On the afternoon of 23 December 1981, he returned home from work a little early due to the Christmas holidays and went upstairs to lie down and rest because he and his wife had plans for that evening. At approximately 2:15 p.m. Scooter came over and knocked on the door. Mr. Patchell went to the window, raised it and told Scooter that his granddaughter would not be home until about 5:00 p.m. He was approximately twelve or fifteen feet from Scooter at that time and noticed a man coming from the apartment complex laundromat which was located only thirty or forty feet away. The man was headed towards his apartment building and towards Scooter. He continued to stand and look out of the window at Scooter and noticed that the man had an unusual walk. The man came between a van and Mr. Patchell's automobile and approached Scooter. The man talked to Scooter and stood within a foot of her for approximately one minute when a second man, who was a close friend from the neighborhood, arrived and started talking to Scooter and the first man. Mr. Patchell testified that he was not concerned because if the three of them were talking, somebody would be there to watch Scooter. Later, on 25 December, Mr. Patchell went down to the detective

offices and identified a picture of the defendant as the first man he saw talking to Scooter. At trial, Mr. Patchell described the man in detail and identified him as the defendant who was seated in the courtroom.

The child, Scooter Eramo, was examined on voir dire for the purpose of establishing her competency to testify. The court ruled that she understood the obligation of the oath which she had taken and had sufficient intelligence to give evidence. She testified that sometime before Christmas of the previous year she went to play with a neighborhood friend. A man asked her to help him find a dog which he described as a white poodle. She testified that she went into the woods with the man to look for the dog and that she "got hurt" in the woods. She testified that she remembered what the man looked like, and she described him as a white man of medium height with curly brown hair. She also described his clothing. From an array, she identified the photograph of the man (later identified as the defendant) in question. She further testified that the man whom she was with in the woods held his hand over her nose and mouth and she could not breathe. She said that the man hurt her nose.

Scooter Eramo further testified that when she left the woods, the man was not with her and she went to get somebody to help her. At the time she left the woods, she was not wearing her toboggan because "the man tore it up." She also testified that she was not wearing her underwear. Upon leaving the woods, she went to a "nice man" who helped her. The man called the police and an ambulance. The police came and she told the police what had happened. She rode in the ambulance to the hospital and saw a doctor, a nurse and her mother. She went with Detective Barbour to his office and picked out a picture of the man who hurt her. She told Detective Barbour what had happened. While on the stand and during her testimony she identified a picture of the defendant as the man who had hurt her.

Douglas E. Joyner, who had lived in Raleigh for fifteen years and was a student at Wake Technical College, testified that on 23 December 1981 he was doing some construction work on a friend's garage and was sitting on the balcony of the two-story garage taking a break. At that time he saw Scooter Eramo and described her as bruised "real bad" under both eyes and across her nose. A

little bit of blood was coming from her nose. He noticed that her clothes were in disarray. He called an ambulance and the police.

Donna F. Eramo, the mother of Scooter Eramo, testified that she worked at her place of employment on 23 December 1981 until midafternoon at which time she went Christmas shopping. She saw her daughter Scooter at Rex Hospital around 4:00 p.m. and described her physical appearance as being "bloody, black and blue, both eyes were filled with blood. She had small blood dots all over her face. Her nose was packed with blood and swollen. She had hand prints on her neck." She stayed with Scooter at the hospital until she took her home. At the hospital and afterwards at home all Scooter would say was that she went to look for a dog and that she hoped they would find the man.

Police officer J. E. DeCatsye of the Raleigh Police Department, the officer who reached the scene where Scooter was found, testified that at the time he saw Scooter she was "very much in disarray as far as her clothing, her shoes were on and they were untied, her shirt was hanging out of her pants, she had soil marks on the back of her shirt and her pants and a portion of her underwear . . . were hanging out the back of the pants and they had signs of defecation on them." He noticed certain physical injuries to her body which consisted of red marks on the left-hand side of her neck, a bruise beneath one eye which extended across the eye and the nose and ended over the other eye. There was some blood around her mouth. When he arrived, the emergency medical service unit was already on the scene and two attendants were treating the little girl. The child told officer DeCatsye that a man had hurt her and upon his inquiry as to what she meant by that she made a statement to him:

> She told me that she had been over at her apartment and had left the apartment where she lives and had gone to a friend's house to play with a friend. When she got there she found out that the friend was not at home so she left that apartment and started walking through the apartment complex. At that point a man approached her and asked her if she would help him look for his lost dog which he described to her as being a white poodle. She agreed to do this with him. After they had looked around for a little bit for the lost dog they walked into some woods for a distance and at this

> point the man started playing some games with her, tried to play some games with her that she didn't understand. And from what she told me she started screaming and crying at that point.

Raleigh Detective L. K. Barbour also investigated the incident and testified that he walked over the wooded area in question and found evidence of a scuffle and what "appeared to be torn clothing, panties, in that area." He interviewed the defendant at approximately 9:30 p.m. on 24 December 1981 at the Raleigh Criminal Investigative Division Offices. He had a picture taken of the defendant and arranged a photographic lineup of eight photographs for the purpose of exhibiting them to Scooter and Mr. Ed Patchell. Upon exhibiting the array to the child, she immediately identified the photograph of the defendant as the man who assaulted her. When asked if she were absolutely certain about the identification, she said that she was. Mr. Patchell was also asked to view the photographic array and he identified the photograph of the defendant as the subject he saw coming from the laundromat and approaching Scooter.

At approximately 11:57 p.m. on the evening of 24 December 1981 the defendant Jerry Starnes gave a statement to Detective Barbour in question and answer form as follows:

> And my question was: Jerry Starnes, did you assault the little girl. And his answer was: Yes. Question: Jerry, where did the assault take place at. The answer: Behind the ball field. The little girl and I were looking for the dog. We went down in the woods about a hundred feet. She had to pee and I just went crazy. Question: Did you hit her with your fist, Jerry. Answer: Yes. Question: How many times. Answer: It's all flaky. I realized what I had done. I got scared and ran. Question: Jerry Starnes, have you given this confession of your own free will and that no threats or promises have been made to you. The answer was: Yes.

Defendant was then taken to the Wake County Jail and formally charged with rape.

Detective Barbour questioned the defendant again on 28 December 1981 and the defendant gave him another statement which is, in pertinent part, as follows:

I came from the laundromat. Shortly thereafter I saw the little girl on the sidewalk. I asked her if she had seen the dog. I asked her to help me look for the dog. I went on one side of the building and she went down the front side towards the woods. I went by the apartment and got some Vaseline and put it in my pocket. The little girl and I met at the end of the apartment near the woods. We then headed in the direction of the ball field, went in the woods behind the ball field. I was calling the dog as we were going into the woods. About a hundred feet in the woods behind the ball field the girl had to stop and pee. She pulled her pants down and was peeing. I squatted down near her and all of a sudden I must have gone crazy. I grabbed her and she began screaming and crying. I pulled the toboggan she was wearing down over her face and tried to shut her up. I put my hand over her mouth and nose. I must have hit her about twice. I ripped her panties off. I unzipped my pants and took my penis out. I took the Vaseline out and put it on my hand and rubbed it around her crotch and in between her legs. I then rubbed some Vaseline on my penis. Things were kind of flaky. I remember seeing blood on her leg. I had ejaculated and I wiped it on her pants' leg. Then I saw where she had shit. I got scared and ran.

Question: Was the little girl crying when you left. Answer: No. She had stopped crying. Question: Was she conscious. Answer: I don't know. I left her lying there. Question: Did you have in mind to have sexual relations with the little girl when you went back to your apartment to get the Vaseline just before you and the little girl went into the woods looking for the dog. Answer: Yes. Question: Did you put your penis in her vagina. Answer: No, I didn't but that part is flaky. Question: Did you put your fingers in her vagina. Answer: I rubbed Vaseline around the vagina with my fingers.

Dr. Steven F. Wiegand, a physician on duty at the Rex Hospital Emergency Room on 23 December 1981, examined Scooter Eramo at approximately 4:30 p.m. Dr. Wiegand testified that he had extensive training in pediatrics and that he had examined hundreds of female children of Scooter's age. When he first observed Scooter, she was upset and scared. He observed that on her neck were abrasions and bruises in the shape of fingerprints. Several blood vessels were ruptured in both eyes and there was

marked swelling of the nose and the area just below the eyes, and there was clotted blood in her nostrils. He also observed that her clothing was in disarray and dirty.

Dr. Wiegand performed a complete examination including the vaginal and rectal areas. He observed a large amount of fecal material around the rectal and lower back area. He found serosanquineous fluid (clear body fluid) present in the vaginal area and around it. He also found a two or three millimeter tear in the skin on the outer part of the genitalia proper and a five to six millimeter superficial tear slightly deeper into the genital area but "still outside the vaginal area right at the border."

Dr. Wiegand also performed an examination of the *interior* of the vagina using a nasal speculum. His testimony concerning this examination was as follows:

> Q. And what did you observe when you examined Dana Eramo's vaginal area?
>
> A. At the lower aspect of the vagina where the hymenal ring was present—is present there was a small three millimeter tear, again with the presence of this fluid as I described before. In addition, there were (sic) some bruising along the lower wall of the vagina or birth canal, as well as some bruising around the upper part of the vagina which borders along the opening of the urethra which is the small tube from which urine passes.
>
> . . . .
>
> A. The tear on the hymenal ring, the area would be at the border between the external vaginal areas, so this would be further in toward the vagina from the other two tears that I described.
>
> Q. Was that tear also at the six to seven o'clock area?
>
> A. That's correct.
>
> Q. Did you notice anything else about the vaginal area of the child when you performed this examination on the 23rd of December of last year?
>
> A. Yes. Also noted were several reddened abraded or scraped areas along the walls of the skin of the vagina. And,

in addition, there were noted some small—about the size of the head of a pin—small bruises present along the skin of the vagina inside of the vagina.

Dr. Wiegand also gave the following testimony which is the basis for the single issue presented on this appeal:

Q. And, Dr. Wiegand, I ask you if you have an opinion based on your experience and based on your training as to what caused the three tears which you have described in the genital area of this child?

MR. MORELOCK: Objection.

THE COURT: Overruled.

A. You want my medical opinion or my own opinion?

Q. If you have an opinion based on your experience and training as a doctor as to what caused these tears in the genital area of a child.

A. I was not there so I cannot say with certainty what did it but my best opinion would be that a penis had probably caused these injuries.

MR. MCMILLAN: Objection and move to strike the answer.

THE COURT: Overruled.

Q. And on what are you basing that opinion?

A. The manner in which the patient's injuries, as best she could tell me, and from my examination, suggested that she had been beaten and had struggled quite violently; further, that there were present secretions which appeared to be seminal fluid.

MR. MORELOCK: Motion to strike, Your Honor.

THE COURT: Motion denied.

Dr. Wiegand also testified on direct examination that:

Q. And, finally, Dr. Wiegand, do you have an opinion based on your education, training as a physician, based on your experience as a physician, and based on your observations of

the physical condition of Dana Eramo on 12-23-81 as to whether or not her, that is, Dana's, vaginal area had been penetrated?

MR. MCMILLAN: Objection.

THE COURT: Overruled.

A. I can answer? Yes, I feel that from the examination that her vaginal area was penetrated.

MR. MCMILLAN: Objection and move to strike the answer.

THE COURT: Motion denied.

Q. And on what have you based that opinion?

MR. MCMILLAN: Objection.

THE COURT: Overruled.

A. I base that on the presence of abrasions, the lacerations that I described, as well as the bruising that occurred around and inside the vaginal area that something caused these injuries.

. . . .

Q. Dr. Wiegand, if I could restate the question. Do you have an opinion based on the presence of these abrasions and lacerations that you observed on Dana Eramo on the 23rd of December, 1981 as to whether or not what caused those injuries penetrated her vaginal opening?

MR. MCMILLAN: Object.

A. I can only say that an object that was larger than the capacity of her vaginal opening to her mid passage was placed there and caused injuries that we have described. I cannot say what object caused those injuries. I can say that because of the number of the injuries and the—the various areas involved that—that more that one penetration or more than one entrance was made but I really cannot say what caused that.

On cross-examination by defendant's counsel, Dr. Wiegand testified:

Q. And you say in your conclusion some foreign object did the damage that you found, some foreign object was inserted?

A. That's correct.

Q. Your opinion is, your conclusion is you can't say what that foreign object was?

A. No, I can't.

Special Agent Jed Taub of the North Carolina State Bureau of Investigation, a specialist in forensic serology, was qualified as an expert and testified concerning the vulvar and vaginal swabs taken from Scooter Eramo. He examined them for the presence of sperm and the tests were positive.

Scott Worsham, a forensic chemist with the North Carolina State Bureau of Investigation, was qualified as an expert in hair comparison and identification and testified that a hair taken from Scooter Eramo's clothing was microscopically consistent with head hair taken from the defendant and could have originated from him.

After Dr. Wiegand had heard the testimony of Special Agent Taub, he was called back to the stand and the following exchange took place:

Q. Have you heard the testimony of Mr. Taub with the State Bureau of Investigation?

A. Yes, I have.

Q. Asking you now as an expert medical witness, based on your experience, education, training and observations what significance—Strike that. Do you have an opinion satisfactory to yourself and based partially on Mr. Taub's testimony that semen was found in the vaginal swabs and vulvar swabs which you prepared from Dana Eramo as to what object, if any, penetrated her vagina?

MR. MCMILLAN: Objection.

Q. On the 23rd of December, 1981.

MR. MCMILLAN: Objection.

THE COURT: Let me see counsel.

(Discussion off the record.)

THE COURT: Objection sustained.

Having summarized all of the pertinent evidence, we now, for the sake of clarity, repeat verbatim the brief exchange between the district attorney, the witness, and the trial judge which forms the basis of this appeal:

Q. And, Dr. Wiegand, I ask you if you have an opinion based on your experience and based on your training as to what caused the three tears which you have described in the genital area of this child?

MR. MORELOCK: Objection.

THE COURT: Overruled. (EXCEPTION #2)

A. You want my medical opinion or my own opinion?

Q. If you have an opinion based on your experience and training as a doctor as to what caused these tears in the genital area of a child.

A. I was not there so I cannot say with certainty what did it but my best opinion would be that a penis had probably caused these injuries.

MR. MCMILLAN: Objection and move to strike the answer.

THE COURT: Overruled. (EXCEPTION #3)

Q. And on what are you basing that opinion?

A. The manner in which the patient's injuries, as best she could tell me, and from my examination, suggested that she had been beaten and had struggled quite violently; further, that there were present secretions which appeared to be seminal fluid.

MR. MORELOCK: Motion to strike, Your Honor.

THE COURT: Motion denied. (EXCEPTION #4)

Defendant submits only one assignment of error (Exceptions 2, 3 and 4 above) for review: the trial court's failure to sustain his

objection to the question by the district attorney and its failure to strike the answer of Dr. Wiegand to the effect that a penis had probably caused the tears inside the genital area of the child which he observed. In light of the overwhelming evidence against the defendant, any error in the admission of this testimony would be harmless. Furthermore, we find no error in these rulings by the trial judge.

A fair characterization of Dr. Wiegand's testimony in this regard is that he could not, with certainty from his personal knowledge, say what caused the tears he observed but his best medical opinion based upon his expertise, training as a doctor, his examination, and the presence of fluid was that they had probably been caused by a penis.

Clearly, Dr. Wiegand could not have testified that the defendant raped Scooter Eramo and clearly he did not so testify. He did testify: "I feel that from the examination that her vaginal area was penetrated." This testimony was properly admitted.

> A physician who is properly qualified as an expert may offer an opinion as to whether the victim in a rape prosecution had been penetrated and whether internal injuries had been caused thereby.

State v. Galloway, 304 N.C. 485, 489, 284 S.E. 2d 509, 512 (1981). *See State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980); *State v. Atkinson*, 278 N.C. 168, 179 S.E. 2d 410, *death sentence vacated*, 403 U.S. 948 (1971).

In his brief, the defendant admits that the evidence tended to show, through Dr. Wiegand and Special Agent Taub, that vaginal swabs indicated the presence of semen and sperm inside as well as outside the vaginal area. Defendant also concedes that "[i]t is clear from the evidence the jury could determine that the victim had been penetrated" and "that the victim's vagina had been injured by an object which was larger than her vaginal opening." From this the defendant further concedes that "[t]hese are facts from which the jury could have inferred that the victim was penetrated by the defendant's sexual organ." Defendant contends, however, that these facts are also consistent with the finding that the victim was penetrated by an object other than a penis and that by allowing Dr. Wiegand's testimony that a penis had "prob-

ably" caused these injuries, the option of finding that some other object could have caused the injuries was taken completely away from the jury. Defendant contends that by overruling his objection to the question and by failing to strike Dr. Wiegand's answer, the court allowed the doctor to testify regarding the very question, *i.e.* penetration, which the jury was to answer. We do not agree.

It is the general rule in this jurisdiction that "a witness may not give opinion evidence when the facts underlying the opinion are such that the witness can state them in a manner which will permit an adequate understanding of them by a jury and the witness is no better qualified than the jury to draw inferences and conclusions from the facts. *State v. Sanders*, 295 N.C. 361, 245 S.E. 2d 674 (1978); *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978)." *State v. Porter*, 303 N.C. 680, 684-85, 281 S.E. 2d 377, 381 (1981). However, despite the general rule prohibiting opinion evidence, "a witness may employ 'shorthand statements of fact' as a means of referring to matters about which he has previously testified. Such shorthand statements are admissible even though the witness must also state a conclusion or opinion in rendering them. *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977); *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968); 1 Stansbury's North Carolina Evidence § 125 (Brandis Rev. 1973)." *Id.*

We do not believe that Dr. Wiegand's testimony in this regard constitutes an impermissible invasion of the province of the jury. In *State v. Wilkerson*, 295 N.C. 559, 567-68, 247 S.E. 2d 905, 910 (1978), a case involving a medical opinion that a child was a victim of the "battered child syndrome" this Court said:

> Defendant relies on the principle that an expert witness should not express an opinion on the very issue to be decided by the jury and thereby invade the jury's province. As this Court has noted before, this principle 'is not inflexible, is subject to many exceptions, and is open to criticism.' *Patrick v. Treadwell*, 222 N.C. 1, 4, 21 S.E. 2d 818, 821 (1942), quoted with approval in *Bruce v. Flying Service*, 234 N.C. 79, 66 S.E. 2d 312 (1951). 'It is frequently relaxed in the admission of evidence as to ultimate facts in regard to matters of science or skill.' *State v. Powell*, 238 N.C. 527, 530, 78 S.E. 2d 248, 251 (1953). . . .

> Expert medical opinion has been allowed on a wide range of facts, the existence or non-existence of which is ultimately to be determined by the trier of fact. *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974) (sanity of the defendant); *State v. Potter*, 285 N.C. 238, 204 S.E. 2d 649 (1974) (sanity of defendant and competence of defendant to stand trial); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971) (probable date of death); *State v. Knight*, 247 N.C. 754, 102 S.E. 2d 259 (1958) (death caused by exertion, fear and anger, rather than blows); *State v. Wilcox*, 132 N.C. 1120, 44 S.E. 625 (1903) (contusion caused by blow with a blunt, covered instrument); . . . .

In *State v. Hunter*, 299 N.C. 29, 36, 261 S.E. 2d 189, 194, this Court held:

> Expert opinion testimony is generally admissible when the proffered witness is better qualified than the jury to form and state an opinion on a particular set of facts in a case. *See* 1 Stansbury's North Carolina Evidence § 132 (Brandis Rev. 1973). 'The test is to inquire whether the witness' knowledge of the matter in relation to which his opinion is asked is such, or so great, that it will aid the trier in his search.' *Hardy v. Dahl*, 210 N.C. 530, 535, 187 S.E. 788 (1936).

Dr. Wiegand, as a physician with extensive training in pediatrics and experience in having examined hundreds of female children of this victim's age, was quite obviously better qualified than the jury to form and state an opinion on the particular facts in this case. His opinion was based upon his training and experience; the history given by the victim; his observations and physical examination of the victim; and his findings with regard to the presence of fluid within the victim's vagina. We therefore hold that the medical opinion expressed by Dr. Wiegand to the effect that the tears he observed within the interior of the genital area were probably caused by a penis falls well within the bounds of permissible medical expert testimony.

We are fortified with respect to our holding by previous decisions of this Court. In *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980), this Court upheld the testimony of a physician who was allowed to testify that bruises on the face of an assault victim looked as if they were made by fingers. This Court observed

that an expert may give an opinion regarding the cause of a condition, including the nature of the instrument producing a particular injury, when he bases that opinion on facts within his own knowledge. In *State v. Atkinson*, 278 N.C. 168, 179 S.E. 2d 410, *death sentence vacated*, 403 U.S. 948, this Court approved the testimony of the examining physician to the effect that the victim had been penetrated and that her injuries could have been caused by a male sex organ. In *State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189, the emergency room doctor examined the victim and found vaginal abrasions. He testified that the abrasion occurred a short time before the examination and that the victim had been sexually penetrated by an "assailant" that day. This Court rejected the defendant's argument that such testimony amounted to an opinion upon a jury question. In *State v. Galloway*, 304 N.C. 485, 284 S.E. 2d 509, the physician testified that he found evidence of "traumatic and forcible penetration" consistent with the alleged rape. This Court held in effect that, because an expert could testify as to penetration, the expert's conclusion of rape was a shorthand statement of the facts. We find our decision in the case at bar consistent with the holding in these prior cases.

While the foregoing testimony of Dr. Wiegand was the sole issue presented on this appeal, we have, nevertheless, examined the entire record on appeal and find that defendant had a fair trial free of prejudicial error.

No error.

Justice EXUM concurring in result.

The facts and the legal issue presented are clearly and accurately expounded in the majority opinion. I disagree with the majority's conclusion that it was not error to admit Dr. Wiegand's opinion that "a penis had probably caused" the tears in the victim's vagina. In light of the substantial evidence, apart from Dr. Wiegand's testimony, that defendant's penis did cause these tears and penetrate the victim's vagina, I am satisfied that the error in admitting Dr. Wiegand's opinion about it is not reversible.

If Dr. Wiegand had had a *medical* opinion about the matter based on his observation and perhaps the characteristics of the vaginal tears themselves, I would agree that he should have been

permitted to express it. His own testimony makes it abundantly clear that he had no *medical* opinion that a penis caused the tears. When asked upon what his opinion was based, he answered:

> The manner in which the patient's injuries, as best she could tell me, and from my examination, suggested that she had been beaten and had struggled quite violently; further, that there were present secretions which appeared to be seminal fluid.

It requires no medical expertise to infer from these facts that a penis probably caused the tears. The physician was in no better position than the jury to make such an inference from the facts which he posited. If this answer were not enough to indicate his lack of a medical opinion, surely the physician's other testimony makes it plain. He said flatly:

> I can only say that an object that was larger than the capacity of her vaginal opening to her mid passage was placed there and caused injuries that we have described. *I cannot say what object caused those injuries.* I can say that because of the number of the injuries and the—the various areas involved that—that more than one penetration or more than one entrance was made *but I really cannot say what caused that.* [Emphasis supplied.]

Then, on cross-examination, he said:

> Q. And you say in your conclusion some foreign object did the damage that you found, some foreign object was inserted?
>
> A. That's correct.
>
> Q. Your opinion is, your conclusion is you can't say what that foreign object was?
>
> A. No, I can't.

It was, of course, proper for the physician to give his medical opinion that the victim's vagina had been penetrated by something. His medical expertise obviously led him to formulate an opinion on this. He was in a better position than the jury to assess the presence or absence of some kind of penetration.

It was improper, however, to take the physician's opinion that the penetrating object was a penis because by his own admission he had no such opinion arising out of his medical expertise.

STATE OF NORTH CAROLINA v. CHARLES T. BLACK

No. 712A82

(Filed 7 July 1983)

1. **Criminal Law § 162— failure to object to evidence at trial—appellate review—plain error rule**

The "plain error" rule applies to permit appellate review of some assignments of error to evidence normally barred under App. Rule 10(b)(1) by appellant's failure to make an objection or a motion to strike at trial. However, cross-examination of a defendant charged with first degree sexual offense about his employment at an adult bookstore did not constitute such "plain error" as would have had a probable impact on the jury's finding that defendant was guilty.

2. **Criminal Law § 99.2— no expression of opinion by trial judge**

The trial judge did not express an opinion on the evidence in violation of G.S. 15A-1232 when, during the selection of the jury, he stated that the State "thinks it can prove its case."

3. **Criminal Law § 169— failure of record to show excluded evidence**

When the court sustains an objection to questions and the record fails to show what the answers would have been, it cannot be determined that the ruling, even if error, was prejudicial.

Justice MARTIN concurring.

Justice COPELAND dissenting.

Justice EXUM joins in this dissent.

APPEAL by defendant from *Saunders, Judge*, at the 13 September 1982 Criminal Session of IREDELL Superior Court.

Upon a plea of not guilty, defendant was tried on a bill of indictment charging that on or about 15 June 1981 he committed a first-degree sexual offense upon Scott Edward Embler, a child seven years old.

Evidence presented by the State tended to show:

Scott's mother, Norma Embler, who was not living with her husband, made arrangements during the early part of June 1981, for Diane Black, defendant's wife, to keep her six children while she was at work. Mrs. Embler understood that defendant would be at the Black home during part of the time that the children were there.

On an occasion during the second week when the Embler children were in the Black home, Scott was in a bedroom alone while his brothers and sisters were in the living room. Defendant went to an adjoining bathroom and when he came out of the bathroom he was dressed only in his undershorts. He then went to where Scott was and forced Scott to perform fellatio upon him. Following the act, defendant told Scott "not to tell nobody or he was going to spank me."

Scott told his mother about the incident three days later. He did not tell her before then because he was afraid defendant would spank him. Defendant had spanked Scott on two previous occasions. Mrs. Embler immediately carried Scott to the police department where he told the police about the incident.

Defendant testified as a witness for himself. He denied the incident in question and declared that he had never "done anything of a sexual nature" to Scott. He admitted that he had spanked Scott on one occasion. He further stated that he and his wife had been separated since 20 March 1982. On cross-examination defendant testified that he had been tried and convicted twice for "harassing and annoying telephone calls."

Defendant also testified that he attended and was a member of a church as well as several other religious organizations. He presented three people who testified that defendant attended services at their church. One of them stated that defendant had a good reputation in the community and that, "He is a Christian man."

Other evidence pertinent to the questions raised on appeal will be set forth in the opinion.

The jury returned a verdict finding defendant guilty as charged. The court entered judgment imposing a minimum and maximum life sentence. Defendant appealed to this Court pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Frank P. Graham, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, and Marc D. Towler, Assistant Appellate Defender, for defendant-appellant.

BRANCH, Chief Justice.

[1] By the first assignment of error argued in his brief, defendant contends the trial court erred in permitting the prosecuting attorney to cross-examine him regarding his previous employment at an adult bookstore.

The trial transcript discloses the following with respect to the cross-examination of defendant:

Q: Do you recall working somewhere on Shelton Avenue?

A: Yes, sir, about four years ago.

Q: And where was that?

MR. BENBOW: Objection, that is not responsive to the question.

COURT: Overruled. Exception No. 7

A: That was the Adult Bookstore in Statesville.

Q: And what did you do there? Exception No. 8

A: I was a clerk.

Q: What kind of things did you sell at the Adult Bookstore? Exception No. 9

A: Books and magazines.

Q: What kind? Exception No. 10

A: Pornography.

Q: Huh? Exception No. 11

A: Pornography.

Q: Sell any films? Exception No. 12

A: Occasionally.

Q: How long did you work there? Exception No. 13

A: About a week and a half.

It will be noted that exceptions 8, 9, 10, 11, 12 and 13 are not supported by objections and there was no motion to strike the testimony now complained of. This Court has held many times that an objection to, or motion to strike, an offer of evidence must be made as soon as the party objecting has an opportunity to discover the objectionable nature thereof; and unless objection is made, the opposing party will be held to have waived it. *State v. Cox*, 303 N.C. 75, 277 S.E. 2d 376 (1981); *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978).

Rules 10(b)(1) and 10(b)(2) of the Rules of Appellate Procedure provide:

> (1) General. Any exception which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be set out in the record on appeal and made the basis of an assignment of error. Bills of exception are not required. Each exception shall be set out immediately following the record of judicial action to which it is addressed and shall identify the action, without any statement of grounds or argumentation, by any clear means of reference. Exceptions set out in the record on appeal shall be numbered consecutively in order of their appearance.
>
> (2) 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 conclu-

> sion 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.

The rule that unless objection is made to the introduction of evidence at the time the evidence is offered, or unless there is a timely motion to strike the evidence, any objection thereto is deemed to have been waived is not simply a technical rule of procedure. Were the rule otherwise, an undue if not impossible burden would be placed on the trial judge. There are those occasions when a party feels that evidence which might be incompetent would be advantageous to him, therefore, he does not object. Since the party does not object a trial judge should not have to decide "on his own" the soundness of a party's trial strategy.

In *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), we considered the effect of our Rule 10(b)(2) when no objection or exception to instructions was made at trial. Noting that Rule 30 of the Federal Rules of Criminal Procedure is virtually the same as North Carolina's Rule 10(b)(2) and the potential harshness of a rigid application of the rule, we adopted the "plain error" rule which has been recognized by our federal courts pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure. Rule 52(b) 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 of the federal courts is 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.), *cert. denied*, --- U.S. ---, 103 S.Ct. 381, 74 L.Ed. 2d 513 (1982). *See also* 3A Wright, Federal Practice and Procedure: Criminal 2d § 856 (1982).

Because of the similarity of the requirements limiting the scope of review in Rules 10(b)(1) and 10(b)(2) and the likeness of the rationale for the adoption of the two rules we conclude, and so hold, that the "plain error" rule as applied in *Odom* to Rule 10(b)(2) applies with equal force to Rule 10(b)(1). Therefore, conceding, *arguendo*, that the challenged evidence in the instant case was objectionable, we hold that the admission of this evidence was not such "plain error" as would have had a probable impact on the jury's finding that the defendant was guilty.

Evidence presented by the State was very convincing. Although the alleged victim was only eight years old at the time of the trial, he unequivocally testified that defendant forced him to "suck his ---." He testified to events occurring before and after the alleged offense and stated that the reason he did not tell his mother sooner was because of defendant's threat to spank him if he told anyone about the incident. Three days later he told his mother and then told the police. Their testimony tended to show that Scott related to them substantially what he testified to on the witness stand.

Defendant admitted that he was in the home where Scott was at the time in question and that he had spanked Scott on one occasion. His credibility was seriously damaged by his admission that he had been convicted twice for making "harassing and annoying telephone calls." We do not believe that there is a reasonable probability that the evidence that defendant worked in an adult bookstore for approximately ten days "tilted the scales" in favor of his conviction by the jury.

[2] Defendant next contends that the trial court expressed an opinion in violation of G.S. 15A-1232. We find no merit in this assignment.

The trial court may not express an opinion upon the evidence in any manner during the course of the trial or in his instructions

to the jury. G.S. 15A-1222; G.S. 15A-1232; *State v. Staley*, 292 N.C. 160, 232 S.E. 2d 680 (1977); *State v. Belk*, 268 N.C. 320, 150 S.E. 2d 481 (1966); *State v. Hudson*, 295 N.C. 427, 245 S.E. 2d 686 (1978).

During the selection of the jury in the case at hand, the trial judge made the following statement:[1]

> COURT: The State has charged the Defendant with a criminal offense, and [it thinks it can prove its case.] Exception No. 1. The burden is on the State to prove its case beyond a reasonable doubt. If the State can't prove its case beyond a reasonable doubt, the Defendant is not guilty.

While appearing in his professional capacity before a tribunal, it is improper for a lawyer to assert his personal opinion as to the justness of a cause, as to the credibility of a witness, or as to the guilt or innocence of an accused; "but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein." Cannon 7, DR7-106(c)(4), Code of Professional Responsibility.

Defendant argues that since it is not proper for the district attorney to interpose his personal opinions before the jury as to the guilt or innocence of an accused before final argument; it is an even greater impropriety for the trial judge to comment upon the prosecutor's personal beliefs. *See State v. Holmes*, 296 N.C. 47, 249 S.E. 2d 380 (1978).

In *Holmes*, the defendant was charged with first-degree murder but the district attorney elected to try him only for second-degree murder. During the cross-examination of a State's witness, defense counsel said to the witness, "I believe he [defendant] is sort of a health nut. . . . jogs and runs?" The district attorney thereupon said: "Objection to what [counsel] believes. I believe he'd hire somebody to kill somebody, too." During the redirect examination of defendant's father, a defense witness, counsel asked: "Mr. Holmes, have you lied for [defendant] at any

1. Since the proceedings relating to the selection of the jury are not included in the record on appeal, we are unable to determine the exact context in which the statement was made. The parties seem to agree that it was made when the prosecutor objected to a question posed to a prospective juror by defense counsel. We have no way of knowing what the objectionable question was.

time?" Thereupon the district attorney said: "Objection, Your Honor, he certainly has." It was in the context of holding that the district attorney's comments were improper that this Court said:

> It is true that at the proper time for argument, the district attorney may argue the evidence and the legitimate inferences that the jury might draw from the evidence, however, it is not proper for the district attorney to interpose his personal opinions before the jury as to the guilt or innocence of an accused during the presentation of evidence and before all the evidence is in. Here the district attorney's statement that he believed defendant would hire somebody to kill was improper.
>
> . . .
>
> The district attorney's statement that the witness had lied for his son exceeded the bounds of propriety.

296 N.C. at 51-52, 249 S.E. 2d at 383.

Nevertheless, this Court held that due to curative instructions by the trial court to the jury, and the strong evidence of the defendant's guilt, a new trial would not be awarded.

Defendant also cites *State v. Smith*, 279 N.C. 163, 181 S.E. 2d 458 (1971). In that case the defendant was convicted of rape and given a life sentence. This Court ordered a new trial because of the prosecutor's inflammatory and prejudicial argument to the jury, including the assertion that he (the prosecutor) knew when and when not to ask for the death penalty, his characterization of defendant as being "lower than the bone belly of a cur dog" and a "liar," and that he did not believe "a living word" that the defendant said about the case.

Defendant also cites other cases including *State v. Davis*, 272 N.C. 102, 157 S.E. 2d 671 (1967) and *State v. Pillow*, 234 N.C. 146, 66 S.E. 2d 657 (1951), all of which we have reviewed. Suffice to say that the statement complained of here in no way approaches the level of the statements held to be prejudicial error in the cases cited by defendant.

Although it would have been better if the trial judge had not said that the State "thinks it can prove its case," we perceive no prejudice to defendant.

In the case at hand, as is usually true in criminal cases, the State was in the position of having to prove beyond a reasonable doubt that defendant was guilty of the offense with which he was charged. We see nothing improper in a prosecutor stating in his opening remarks to the jury that the State *will*, or he *thinks* it will, carry that burden. We do not believe that the fact that the challenged language came from the trial judge provided such emphasis that it prejudicially influenced the verdict of the jury.

The assignment of error is overruled.

By his final assignment of error, defendant contends that the trial court erred in sustaining the State's objections to testimony relating to statements defendant made to witnesses about the alleged offense. We find no merit in this assignment.

Mary Bostian and Barbara Radcliffe were called as witnesses for defendant, primarily as character witnesses. Each of them stated that defendant had talked to her about the case. When each witness was asked what defendant told her, the State objected and the court sustained the objection. The record does not disclose what the answers of the witnesses would have been if allowed to answer.

[3] It is well established in this jurisdiction that when the court sustains an objection to questions and the record fails to show what the answers would have been, it cannot be determined that the ruling, even if error, was prejudicial. *State v. Adams*, 299 N.C. 699, 264 S.E. 2d 46 (1980); *State v. Martin*, 294 N.C. 253, 240 S.E. 2d 415 (1978). We cannot speculate that the answer might have been favorable to defendant.

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

No error.

Justice MARTIN concurring.

I concur in the opinion of the majority and the result reached, except as herein set forth. I dissent from the holding of the majority which applies the "plain error" rule established in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983), to the admission of evidence. Evidentiary matters are entirely different from

instructions by the court on matters of law. The plain error rule is appropriate for application to jury instructions by the court. It should not be applied to evidentiary matters.

Rule 10 was adopted to limit the scope of appellate review to those questions properly presented. The commentary to the rule points to the necessity of a "sifting process" to determine the issues for resolution upon appellate review. I am fearful that applying the "plain error" rule to evidentiary matters constitutes the first step in abrogating the necessity for objections at trial as the basis for building assignments of error. An open invitation is extended to the bar to raise issues on appeal which were not properly raised or preserved at the trial level. Our law has consistently been to the contrary. *State v. Foddrell*, 291 N.C. 546, 231 S.E. 2d 618 (1977). The admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered. This is true even though it involves rights under the state and federal constitutions. *Id.; State v. Lowery*, 286 N.C. 698, 213 S.E. 2d 255 (1975), *death sentence vacated*, 428 U.S. 902, 49 L.Ed. 2d 1206 (1976). This Court held in *State v. Ballard*, 79 N.C. 627, 629 (1878), that a defendant in a criminal case cannot

> be silent and acquiesce in the introduction of any evidence which on objection made in apt time would have been ruled out, and permit it to be heard and acted on by the jury and then complain of its admission. In such case he must abide the result, and can not complain after conviction.

Although this has long been the rule, this Court has never been derelict in its duty to see justice done, and where there is unobjected error of such fundamental nature that a defendant has been deprived of a fair trial, the Court will on its own motion review such error. *State v. Cochran*, 230 N.C. 523, 53 S.E. 2d 663 (1949). It will continue to do so.

Justice COPELAND dissenting.

I must respectfully dissent from that part of the majority's opinion which holds that the admission of testimony concerning the defendant's employment in an adult bookstore four years before the trial was not prejudicial. I first would like to point out that the majority is correct in asserting that the failure to object

to, or move to strike, immediately upon discovery of the objectional nature of the evidence, is a waiver of an objection to that evidence. *State v. Cox*, 303 N.C. 75, 277 S.E. 2d 376 (1981). However, in our recent decision in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) we adopted the "plain error" rule to allow review of some assignments of error which are banned by waiver rules. While the "plain error" rule must be applied in only exceptional cases, it may be applied when the error results in the defendant being denied a fair trial. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). I believe the evidence concerning the defendant's employment in an adult bookstore did deny him a fair trial.

The case against the defendant was built around the testimony of an eight year old child. It was simply a question of who the jury would believe; and as a result the defendant's credibility was a crucial aspect of the jury's final decision. The introduction into evidence of the defendant's employment in an adult bookstore made him, a person charged with a deviant sex act, appear to be a peddler of deviant sexual material. It would be difficult to conceive of evidence more damaging to defendant's case than this. The majority shrugs this off by stating that the defendant's credibility was already seriously damaged by his admission that he was convicted for making "harassing and annoying telephone calls." The record does not indicate whether the harassing and annoying calls were of a sexual nature. As a result, I feel the evidence which depicted defendant as a man who had worked with deviant sexual material was so prejudicial that it made a large contribution to his conviction.

The majority seems to assume, and I agree, that the evidence was incompetent. Upon motion, the evidence would have properly been stricken. This is so because operating an adult bookstore and selling pornographic material, absent a showing that the material sold was obscene, is not an act of misconduct. Although not an act of misconduct and therefore not legally available for impeachment, this kind of activity would nevertheless weigh heavily on the minds of the jurors.

For these reasons I vote for a new trial.

Justice EXUM joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. JOHNNY RAY ZIGLAR

No. 588A82

(Filed 7 July 1983)

1. **Criminal Law § 134.4— finding of no benefit from treatment as youthful offender—no error**

There was no error in the trial court's determination that the defendant would not benefit from treatment and supervision as a committed youthful offender for his first degree kidnapping conviction, but the "no benefit" finding was not applicable to his conviction for first degree rape for which a like sentence was the mandatory punishment. G.S. 14-1.1(a)(2) and G.S. 148.49.14.

2. **Criminal Law § 112.1— instructions—reasonable doubt**

The trial court's instructions on "reasonable doubt" did not preclude the jury from finding a reasonable doubt based on an insufficiency of the evidence where the trial judge instructed that the jury should not "go outside the evidence to imagine doubt to justify an acquittal" since the trial judge instructed the jury in clear and concise terms that a reasonable doubt can be based upon an insufficiency of the evidence in the two sentences above the objected to statement.

3. **Criminal Law § 88.1— scope of cross-examination—proper**

There was no abuse of discretion concerning the trial judge's rulings on the State's cross-examination of defense witnesses.

4. **Criminal Law § 33— evidence of victim's habits—properly admitted**

The trial judge properly allowed a victim to testify as to her habits when she was suffering from a migraine headache since evidence of habit is admissible to show that an actor did the same thing under the same conditions on the occasion which is in issue and since the evidence was relevant because the victim had previously testified that she had not gone to work on the night in question due to a migraine headache which kept her in bed all day during the day prior to the assault.

5. **Criminal Law § 50— questions within knowledge of witness—answer properly admitted**

Questions concerning things like what was the temperature, how far was one object from another, and what did certain persons look like called for answers which were within the knowledge of the witness and were properly admitted.

6. **Criminal Law § 52— opinion of expert properly admitted**

Where a review of the record indicated that the State established a witness as an expert in forensic serology and tendered him as such to the court, where the transcript was silent on this point but was clear that no objection was lodged by the defense at the time the State tendered the witness, the trial court did not err in allowing the State's witness to testify to the percentage of the population of the United States that possesses a certain blood type as the witness was qualified to give such an opinion.

7. **Criminal Law § 43— use of map to illustrate testimony of deputy sheriff proper**

Testimony by a deputy sheriff of the county involved was competent to authenticate a map of that county and the map was properly used to illustrate the testimony of the deputy sheriff.

8. **Criminal Law § 73— objection to hearsay testimony properly sustained**

An objection to testimony was properly sustained where the trial judge allowed the witness to testify to what she knew but not to what she had heard.

9. **Criminal Law § 43.4— photographs of victim and defendant properly admitted**

In a prosecution for first degree rape, the trial court properly allowed the use of photographs illustrating the wrist of the victim and the defendant's face and hands on the day of his arrest since the photographs were properly authenticated and used to illustrate the testimony of the State's witnesses.

10. **Criminal Law § 97.1— recall of witness—no error**

The trial judge did not err in allowing the State to recall a witness where the witness was recalled prior to the defendant presenting any evidence and before the State rested its case. G.S. 15A-1226(b).

11. **Criminal Law § 90— refusal to declare defense witness hostile—no error**

Where defendant requested that one of his witnesses be declared a hostile witness prior to any testimony having been given by the witness, the trial court did not err in refusing to allow the witness to be examined by the defense as a hostile witness.

12. **Criminal Law § 88— scope of cross-examination**

In this jurisdiction cross-examination is not confined to the subject matter of the direct examination but may extend to any matter relevant to the issues in the case. Further, the scope of the cross-examination rests within the discretion of the trial judge.

13. **Criminal Law § 86.2— prior convictions—questions not asked in bad faith**

Where there was no indication that questions concerning defense witnesses' prior criminal convictions and mental commitment were asked in bad faith, there was no error in permitting them.

DEFENDANT appeals as a matter of right from judgments of *Albright, J.*, entered during the 1 June 1982 Criminal Session of Superior Court, FORSYTH County.

Defendant was tried upon indictments, proper in form, issued 19 April 1982, charging him with first degree rape, first degree kidnapping and larceny of an automobile. On 3 June 1982 the jury found defendant guilty of first degree rape, first degree kidnapping and misdemeanor larceny. Judge Albright imposed a sen-

tence of life imprisonment for the first degree rape conviction; a twelve year sentence for the first degree kidnapping conviction, to run consecutively to the life sentence; and a prayer for judgment continued on the misdemeanor larceny conviction. The defendant's motion to bypass the Court of Appeals on the convictions for first degree kidnapping and misdemeanor larceny was allowed 2 October 1982.

The evidence for the State tended to show that the victim, Ms. Nellie Joann Bowling, age 31, was living at 2244 Barry Road, in Kernersville, North Carolina on 19 February 1982. The evidence also showed that the defendant, Johnny Ziglar, lived with his family across the street from the victim and the victim had known the defendant by sight for over a year. In the early morning hours of 19 February 1982 the victim left her residence and drove to a Pantry convenience store approximately one mile from her home. After purchasing some items at the Pantry the victim returned to her car and began to return home. At that point the defendant stepped from the vicinity of a telephone booth and waved for her to stop. The defendant asked for a ride home and since the victim recognized him as her neighbor she permitted him to ride with her. As the victim and the defendant reached the road on which they lived the defendant slid across the seat, stuck a gun in the victim's side and ordered her to drive the car as he instructed. At the defendant's command the victim stopped the car at an area near Highway 158 and Rail Fence Road more than three miles from the victim's residence. At this time the victim attempted to persuade the defendant to let her go but he became angry and began beating her with his fist and with the pistol. After this beating the victim agreed to take her slacks off. During the struggle the defendant had taken off the victim's blouse and bra. Once again the victim resisted and the defendant beat her with the butt of his gun, choked her and threatened to kill her. At this point the victim was forced to have sexual intercourse with the defendant. However, when the defendant attempted further sexual acts with the victim, she grabbed his wrist and did not turn loose until he bit her on the arm. Once again the defendant began choking the victim until she allowed him to have sexual intercourse with her a second time.

Afterwards, the defendant dragged the victim from the car and tried to open the trunk, intending to place the victim inside.

When the defendant failed to open the trunk he began beating the victim with a pipe and kicked her as she was lying in the mud. The victim got up and attempted to run but the defendant hit her in the head with some object resulting in near unconsciousness for the victim. The defendant took the victim's money (three to eight dollars) and her automobile, leaving her with only her pants and coat which she secured as she was dragged from the car by the defendant. This entire episode lasted for more than one hour.

After the defendant left the scene the victim remained in a nearby cornfield for approximately thirty minutes until she had determined that the defendant had left. She managed to find her way to the home of Mr. and Mrs. J. B. Vanhoy and informed them that she had been assaulted by the youngest Ziglar boy although she did not know his name. The victim did identify the defendant at trial as her assailant.

The defendant, a 17 year old boy, presented evidence of an alibi. His evidence tended to show that he and some friends drank beer at his home during the afternoon on the day before the assault. The defendant and several friends went to three different bars in the Kernersville area. Around 1:30 a.m. the defendant's evidence shows that he and Robbie Stevens caught a ride on a train to Varco Pruden, when they were told to get off the train, which they did. The defendant and Robbie Stevens then went to Robbie's house, arriving there about 2:10 a.m. The defendant stated that he left Robbie's house around 2:20 a.m. and went directly home arriving there between 3:00 and 3:30 a.m. He further stated that he did not go to the Pantry convenience store in question that evening.

At the close of all the evidence, the jury found the defendant guilty of first degree rape, first degree kidnapping and misdemeanor larceny. The sentences were ordered as previously indicated.

Additional facts pertinent to understanding the defendant's assignments of error will be incorporated into the opinion.

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

Gordon H. Brown, for the defendant.

COPELAND, Justice.

In this appeal the defendant argues that he is entitled to a new trial because of errors committed by the trial court. In considering the defendant's contentions we have carefully reviewed the briefs, the record and the transcript and have determined that the defendant received a fair trial, free of prejudicial error. Accordingly, we affirm the judgments entered by the trial court.

In his first assignment of error the defendant argues that the trial court erred in denying his motions to dismiss and set aside the verdicts due to an insufficiency of the evidence. Each of these motions raises a question as to whether the evidence is sufficient to submit the case to the jury and sustain a verdict of guilty. Such motions are tantamount to a motion for judgment as in case of nonsuit. *State v. Greer*, No. 560PA82 (N.C. S.Ct., 31 May 1983); *State v. Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969).

It is elementary that in considering a trial court's denial of a motion for judgment of nonsuit, the evidence must be considered in the light most favorable to the State and the State must be given the benefit of every reasonable inference to be drawn from the evidence. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978). In viewing the evidence in the light most favorable to the State the trial court must only determine whether "there is reasonable basis upon which the jury might find that an offense charged in the indictment has been committed and the defendant is the perpetrator. . . ." *State v. Price*, 280 N.C. 154, 157, 184 S.E. 2d 866, 868 (1971). The record in this case reveals plenary evidence that each of the crimes charged in the indictments was committed and that the defendant perpetrated each crime. As a result the trial court did not err in denying the defendant's motions which challenged the sufficiency of the evidence and this assignment of error is overruled.

[1] As part of the judgment entered the court determined that the defendant would not derive benefit from treatment and supervision as a committed youthful offender. The defendant contends that this determination by the trial court was error because there was no competent evidence in the record to support the court's conclusion. G.S. 148-49.14 does not require a sentencing judge to supply reasons for his finding, only that he place his finding into the record. As a result we find no error in the trial court's deter-

mination that the defendant would not benefit from treatment and supervision as a committed youthful offender for his first degree kidnapping conviction, with the exception that G.S. 148-49.14 which requires the "no benefit" finding is not applicable to convictions where a life sentence is mandatory punishment. *State v. Niccum*, 293 N.C. 276, 238 S.E. 2d 141 (1977). The defendant was convicted of first degree rape which carries a mandatory life sentence as a Class B felony. See G.S. 14-1.1(a)(2). The trial judge did not err in finding that the defendant would derive "no benefit" as a committed youthful offender. This assignment of error is overruled.

[2] In his second assignment of error the defendant maintains that the trial court's instructions on "reasonable doubt" precluded the jury from finding a reasonable doubt based on an insufficiency of the evidence. The record reveals that the complained of instructions are as follows:

> Now, members of the jury, the phrase reasonable doubt means just what the words imply. It is a doubt based on reason arising from a thorough and impartial consideration of all the evidence in the case, or lack or insufficiency of the evidence, as the case may be. It is that state of mind in which you do not feel an abiding conviction amounting to a moral certainty of the truth of the charge. While you cannot convict the defendant on mere surmise or conjecture, *neither should you go outside the evidence to imagine doubt to justify an acquittal.* If, after careful deliberation you are convinced to a moral certainty that the defendant is guilty of the crime charged, then you are satisfied beyond a reasonable doubt. Otherwise, not. (Emphasis added.)

The defendant argues that the words "neither should you go outside the evidence to imagine doubt to justify an acquittal" negates the proposition that an acquittal is appropriate if there is an insufficiency of the evidence. "It is well established in this jurisdiction that a charge is to be construed as a whole and isolated portions of a charge will not be held prejudicial where the charge as a whole is correct and free from objection." *State v. Poole*, 305 N.C. 308, 324, 289 S.E. 2d 335, 345 (1982). Even if the complained of statement might have been erroneous, we need only to look two sentences above that statement to find where

the trial judge instructed the jury in clear and concise terms that a reasonable doubt can be based upon an insufficiency of the evidence. We find no error in the trial judge's instructions concerning "reasonable doubt" and overrule this assignment of error.

In his third assignment of error the defendant has grouped thirty-three exceptions wherein he challenges the admissibility of testimony because it was in response to leading or suggestive questions which amounted to allowing the prosecutor to testify. Of the thirty-three exceptions within this assignment of error, all but five concern questions posed by the prosecutor on direct examination and only a few of the twenty-eight exceptions concerning the direct examination by the State are in fact leading. "Rulings by the trial judge on the use of leading questions are discretionary and reversible only for abuse of discretion." (Citations omitted.) *State v. Smith*, 290 N.C. 148, 160, 226 S.E. 2d 10, 18 (1976), *cert. denied*, 429 U.S. 932, 50 L.Ed. 2d 301, 97 S.Ct. 339 (1976). We have reviewed each exception relating to the direct examination by the State and find no abuse of discretion on the part of the trial judge.

[3] The remaining five exceptions under assignment of error number three concern questions asked the defendant and his witnesses by the prosecutor on cross-examination. Specifically the defendant contends that the prosecutor's questions on cross-examination did not relate to the direct testimony of the witness and in at least one instance attempted to manufacture evidence via his questions. First, we note that the cross-examination of a witness may extend to any matter relevant to the action. *State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975), death sentence vacated, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3211 (1976). Secondly, the scope of a cross-examination rests largely within the discretion of the trial judge, and his ruling thereon will not be disturbed in the absence of a showing that the verdict was improperly influenced by the ruling. *State v. Williams*, 296 N.C. 693, 252 S.E. 2d 739 (1979). We fail to see an abuse of discretion concerning the trial judge's rulings on the State's cross-examination of defense witnesses. As a result we overrule this assignment of error.

[4] The defendant next argues that the trial judge erred by allowing the victim to testify to her habits when she is suffering

from a migraine headache because such testimony in this case is irrelevant. First, we note that evidence of habit is admissible to show that an actor did the same thing under the same conditions on the occasion which is in issue in the case. *State v. Simpson*, 299 N.C. 335, 261 S.E. 2d 818 (1980); 1 Brandis on North Carolina Evidence § 95 (1982). Secondly, this evidence is relevant because the victim had previously testified that she had not gone to work on the night in question due to a migraine headache which kept her in bed all during the day prior to the assault. We overrule this assignment of error.

Also in assignment of error number four, the defendant contends that it was error for the trial court to allow the victim to testify to the time her husband got home from work on the day before the assault. We fail to see the error since the victim testified that she was at home at the time her husband arrived there from work. This assignment of error is meritless.

[5] The defendant further maintains under assignment of error number four that the trial court erred by allowing answers to hypothetical questions asked by the State without a proper basis in evidence. We have reviewed each of the defendant's ten exceptions set out in this argument and do not find one hypothetical question, proper or improper. It appears that the defendant is complaining that the questions asked by the State called for answers not within the knowledge of the witnesses. The questions concerned things like what was the temperature, how far was one object from another and what did certain persons look like. The transcript reveals that each question called for an answer that was within the knowledge of the witness. We overrule this contention.

[6] The defendant next asserts, once again under assignment of error number four, that the trial court committed prejudicial error by allowing State's witness Mark Nelson to testify to the percentage of the population of the United States that possesses a certain blood type. The defendant asserts that Mr. Nelson was not accepted by the court as an expert in any field and therefore his testimony cannot be treated as expert opinion testimony. Upon review of the record it is clear that the State established Mr. Nelson as an expert in forensic serology and tendered him as such to the Court. The transcript is silent on this point but it is

clear that no objection was lodged by the defense at the time the State tendered Mr. Nelson. The record indicates that the court could have found Mr. Nelson to be an expert in forensic serology and we, therefore, must assume that the trial judge found him qualified since the judge allowed him to testify. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). However, the defendant further maintains that an expert like Mr. Nelson is not qualified to give an opinion concerning what percentage of the population has a certain blood type. We disagree with this assertion. The record indicates that Mr. Nelson was qualified to give such an opinion. In addition, the defendant failed to object to the question concerning Mr. Nelson's opinion and did not make a motion to strike his answer. Therefore, any objection is waived. *State v. Goss*, 293 N.C. 147, 235 S.E. 2d 844 (1977); *State v. Mitchell*, 276 N.C. 404, 172 S.E. 2d 527 (1970). This assignment of error is overruled.

In his fifth assignment of error the defendant contends, among other things, that the court permitted the introduction of inadmissible hearsay evidence at eight different times during the course of the trial. Upon review of these eight exceptions we find that all of the statements were non-hearsay because they were neither offered to prove the truth of the matter asserted in the statement by the non-witness nor did they depend on the competency and credibility of some person other than the witness. 1 Brandis on North Carolina Evidence § 138 (1982). These eight exceptions are overruled.

[7] The defendant also maintains that the trial court improperly allowed a State's witness to testify by using an unauthenticated map of the Winston-Salem/Forsyth County area. The transcript reveals that the witness, Officer R. L. Russ, a deputy sheriff for Forsyth County, testified that he was familiar with Forsyth County, that the map was in fact of the Winston-Salem/Forsyth County area, that it portrayed the area around Kernersville and would aid him in illustrating his testimony. We feel that testimony by a deputy sheriff of the county involved is competent to authenticate a map of that county. Although the defendant argues that the map was used for non-illustrative purposes and was improperly passed to the jurors, a review of the transcript indicates that it was used to illustrate the location of various areas testified to by Deputy Sheriff Russ. It is an unchallenged principle that an authenticated map may be used to illustrate testimony and may

be subject to inspection by the jurors. 1 Brandis on North Carolina Evidence § 34 (1982).

[8] Finally in his fifth assignment of error the defendant argues that the trial court erred in sustaining the State's objection to the following testimony:

> Q. You said that Vincent had a dog. Where is that dog now, do you know?
>
> A. Well, all I could say is what I have heard, but it disappeared. State's objection (hearsay).

The objection was properly sustained since the trial judge allowed the witness to testify to what she knew but not to what she had heard. This assignment of error and each of its fifteen exceptions is overruled.

[9] The defendant next asserts that the trial court erred by allowing into evidence three photographs which were not properly authenticated. In addition, the defendant argues that the witnesses were allowed to testify while using the photographs for non-illustrative purposes. One of the photographs depicts the wrist of the victim and she testified that the photograph accurately represented the condition of her wrist shortly after the attack. The victim testified, using this photograph to illustrate, that she was bruised when the defendant grabbed and bit her arm. The second and third photographs depict the defendant's face and the other his hands on the day of his arrest. The photographs were authenticated by State's witness Stoltz and she used the photographs to illustrate her testimony concerning the appearance of the defendant's face and hands on the day of his arrest. These photographs were properly authenticated and were used to illustrate the testimony of the State's witnesses. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980); *State v. Mays*, 225 N.C. 486, 35 S.E. 2d 494 (1945). This assignment of error is overruled.

The defendant next complains that the trial judge committed prejudicial error by not permitting him to adequately cross-examine several of the State's witnesses. In this regard the defendant has set out thirty-one exceptions to the trial judge's rulings. The scope of cross-examination rests in the discretion of the trial judge and his rulings will not be reversed absent a showing of an abuse of that discretion. *State v. McPherson*, 276 N.C.

482, 172 S.E. 2d 50 (1970). We have reviewed each of these exceptions and find that the trial judge did not abuse his discretion in limiting the defendant's cross-examination of the State's witnesses. Many of the questions were improperly argumentative, some were repetitive, some irrelevant and some were simply in an improper form. These exceptions are overruled.

The defendant next contends under assignment of error number seven that the trial court erred by preventing him from adequately examining his own witnesses. We have reviewed the eight exceptions taken by the defendant concerning the direct examination of his witnesses and find that the questions were either leading or irrelevant or not within the witnesses' knowledge. This assignment of error is meritless and overruled.

[10] The defendant next assigns as error the trial judge's ruling which allowed the State to recall a witness. Under G.S. 15A-1226(b) the trial judge may in his discretion "permit any party to introduce additional evidence at any time prior to verdict." The witness involved was recalled prior to the defendant presenting any evidence and before the State rested its case. We see no abuse of discretion by the fine trial judge and overrule this contention.

[11] Defendant also contends under assignment of error number eight that the trial judge erred when he refused to allow Vincent Ziglar, a defense witness to be examined by the defense as a hostile witness. The defendant requested that Vincent Ziglar be declared a hostile witness prior to any testimony having been given by the witness. In *State v. Austin*, 299 N.C. 537, 263 S.E. 2d 574 (1980) we held that a defendant, like the State, may not impeach his own witness unless he has been misled, surprised or entrapped, to his prejudice by the testimony of the witness. In addition such a request is addressed to the judge's discretion. *State v. Austin, supra.* We find no abuse of discretion and overrule this assignment of error.

[12] In his final assignment of error the defendant contends that the State was allowed to cross-examine defense witnesses concerning irrelevant matters and matters not within the personal knowledge of the witnesses. In this jurisdiction cross-examination is not confined to the subject matter of the direct examination but may extend to any matter relevant to the issues in the case.

State v. Waddell, 289 N.C. 19, 220 S.E. 2d 293 (1975), death sentence vacated, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3211 (1976). In addition, the scope of a cross-examination rests within the discretion of the trial judge and the judge's rulings will not constitute error unless it can be shown that the verdict was improperly influenced by those rulings. *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970). We have carefully reviewed the defendant's exceptions concerning this contention and find that no error was committed by the trial judge.

[13] The defendant also asserts under his final assignment of error that it was improper for the State to question defense witnesses about prior criminal convictions and mental commitment. It is an established rule in this jurisdiction that a witness may be cross-examined about crimes for which he has been convicted. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971); *Ingle v. Transfer Corp.*, 271 N.C. 276, 156 S.E. 2d 265 (1967). However, the questions must not be asked in bad faith. *State v. Hunt*, 297 N.C. 131, 254 S.E. 2d 19 (1979). There is no indication that the questions concerning criminal convictions were asked in bad faith and we find no error. As for the question concerning whether a defense witness was ever committed to a mental institution we find no indication that the question was asked in bad faith. In any event, the witness made a swift, unequivocal denial and therefore we find no prejudice to the defendant. *State v. Hunt*, 297 N.C. 131, 254 S.E. 2d 19 (1979). We overrule this final assignment of error.

We have carefully reviewed each of the defendant's exceptions and assignments of error and find that this trial was free of prejudicial error.

No error.

HAZEL WHITE, BEATRICE McCOY, ARTIS CHADWICK, LINWOOD CHADWICK AND MARY H. WHITE v. DOROTHY PATE, CLERK OF SUPERIOR COURT OF CRAVEN COUNTY; S. W. McCOY, FLETCHER McCOY AND CARLTON WARD, COMMISSIONERS OF THE CORE CREEK DRAINAGE DISTRICT

No. 511PA82

(Filed 7 July 1983)

1. **Clerks of Court § 1; Courts § 3— jurisdiction—challenge to statute involving authority of clerk**

The General Assembly did not intend that exclusive original jurisdiction of an action to enjoin enforcement of an unconstitutional statute be vested in the clerk of superior court simply because the subject matter of the statute so challenged involves the authority of the clerk. Therefore, the trial court erred in determining that the clerk of superior court had exclusive jurisdiction of plaintiffs' action challenging the constitutionality of the provisions of G.S. 156-81(a) and (i) giving clerks of superior court discretionary authority to appoint drainage commissioners in lieu of such commissioners being elected as otherwise provided by law and in ruling that such action could not be adjudicated in the superior court.

2. **Rules of Civil Procedure § 19— absence of necessary parties—dismissal not warranted**

The absence of parties who are necessary parties under G.S. 1A-1, Rule 19 does not merit a dismissal. Rather, when the absence of a necessary party is disclosed, the trial court should refuse to deal with the merits of the action until the necessary party is brought into the action, and any such defect should be corrected by the trial court *ex mero motu* in the absence of a proper motion by a competent person.

3. **Appeal and Error § 45.1— constitutionality of statute—abandonment of contentions**

Appellants' contentions that the statute in question creates separate emoluments and privileges contrary to Art. I, § 32 of the N.C. Constitution and denies them due process in violation of Art. I, § 19 of the N.C. Constitution are deemed abandoned where appellants brought forward no reasons or arguments concerning those two alleged defects in the statute nor cited any authority concerning them in their brief.

4. **Appeal and Error § 3— review of constitutional questions**

The Supreme Court will not decide constitutional questions which have not been presented in the courts below.

5. **Constitutional Law § 20— equal protection—strict scrutiny standard—rational basis**

The upper tier of equal protection analysis requiring strict scrutiny of a governmental classification applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class and requires that the government demonstrate

that the classification it has imposed is necessary to promote a compelling governmental interest. When a governmental classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the lower tier of equal protection analysis requiring that the classification be made upon a rational basis must be applied, and the governmental act is entitled to a presumption of validity.

6. **Constitutional Law § 20— equal protection—constitutionality of statute—standard to be applied**

The rational basis standard, not the strict scrutiny standard, applies in determining whether provisions of G.S. 156-81(a) and (i) giving clerks of superior court discretionary authority to appoint drainage commissioners in lieu of such commissioners being elected as otherwise provided by law constitutes a violation of equal protection as guaranteed by Art. I, § 19 of the N.C. Constitution, since the statute does not burden a "suspect class" or the exercise of the fundamental right to participate in elections on an equal basis with other citizens in the drainage district.

7. **Drainage § 4— appointment of drainage commissioners—discretion of clerk—constitutionality of statute**

Provisions of G.S. 156-81(a) and (i) giving clerks of superior court discretionary authority to appoint drainage commissioners in lieu of the election thereof bear a rational relationship to a conceivable legitimate governmental purpose and do not constitute a violation of equal protection of the laws guaranteed by Art. I, § 19 of the N.C. Constitution since the experimentation of permitting commissioners to be elected in some drainage districts and appointed in others satisfies the requirement that the classification be made upon a rational basis.

ON discretionary review of the decision of the Court of Appeals reported at 58 N.C. App. 402, 293 S.E. 2d 601 (1982) affirming the 17 June 1981 Order of Dismissal entered by *Brown, Judge*, Superior Court, CRAVEN County.

Smith, Patterson, Follin, Curtis, James and Harkavy, by Norman B. Smith and John A. Dusenbury, Jr., for plaintiff appellant.

Rufus L. Edmisten, Attorney General, Millard R. Rich, Jr., Deputy Attorney General, for defendant appellee Dorothy Pate, Clerk of Superior Court of Craven County.

Ward and Smith, P.A., by William Joseph Austin, Jr., for defendant appellees S. W. McCoy, Fletcher McCoy and Carlton Ward, Commissioners of the Core Creek Drainage District.

MITCHELL, Justice.

The principal question presented is whether the provisions of G.S. 156-81(a) and (i) giving Clerks of Superior Court discretionary authority to appoint drainage commissioners, in lieu of such commissioners being elected as otherwise provided by law, deny the plaintiffs the equal protection of the laws guaranteed by Article I, § 19 of the Constitution of North Carolina. We hold that they do not.

The plaintiffs are landowners in the Core Creek Drainage District [hereinafter "drainage district"]. They brought this action by the filing of a complaint in Superior Court on 27 February 1981 in which they alleged that the provisions of G.S. 156-81(a) and (i) giving the Clerk of Superior Court the discretionary authority to appoint drainage commissioners in lieu of their election by eligible voters within the drainage district denies the plaintiffs their right to vote in a manner which deprives them of the equal protection of the laws guaranteed by the Constitution of North Carolina. The plaintiffs specifically prayed for relief in the form of an injunction permanently prohibiting the defendant Pate from appointing commissioners and the other defendants from accepting appointments as commissioners for the drainage district and ordering that commissioners of the drainage district henceforth be elected and not appointed.

The plaintiffs alleged *inter alia* in their complaint that the drainage district is constituted pursuant to the requirements of Chapter 156 of the General Statutes of North Carolina and is located entirely within Craven County. The plaintiffs are residents and owners of land in the drainage district. The defendants, S. W. McCoy, Fletcher McCoy and Carlton Ward, are commissioners of the drainage district who have been appointed and reappointed to successive terms of office by the defendant, Honorable Dorothy Pate, Clerk of Superior Court of Craven County.

The drainage district consists of approximately 8,884.30 acres. This land is benefited by the public works located in the drainage district which drain the land and make it suitable for cultivation. An additional 28,852.62 acres adjoin the drainage district and are also drained, made fit for cultivation and otherwise benefited by the public works of the drainage district.

Each of the plaintiffs pays an annual assessment upon his or her land for the purpose of paying for the public works of the drainage district and providing for their maintenance and upkeep. Owners of benefited land lying beyond the boundaries of the drainage district are not required to pay any such assessments or other charges.

The sole method for enlarging the boundaries of a drainage district is by a proceeding instituted by the drainage commissioners pursuant to G.S. 156-93.3. The plaintiffs have repeatedly requested the defendant commissioners to take action to enlarge the district boundaries to include lands adjoining the drainage district which are benefited by the drainage district's public works. The defendant commissioners have failed to do so. The plaintiffs also allege that the defendant commissioners have failed to file annual reports regularly or to have those reports that they have filed audited and that such failures are contrary to law.

The plaintiffs allege that the acts or failures to act by the defendant commissioners are due at least in part to the fact that the defendant Pate has appointed and reappointed the defendant commissioners without regard to their failure to properly perform their duties. The plaintiffs allege that the appointment and reappointment of the defendant commissoners has made them unresponsive to the legitimate needs of the landowners in the drainage district and has caused and will cause the plaintiffs irreparable injury of a type not adequately compensable by money damages. They further allege that their only adequate remedy is injunctive relief permanently enjoining the appointment of commissioners of the drainage district and ordering that commissioners henceforth be elected by the qualified voters of the drainage district. In their complaint, the plaintiffs specifically pray such relief.

None of the defendants filed an answer to the complaint. Instead, each defendant filed a motion to dismiss asserting that the complaint failed to state a claim upon which relief could be granted, that exclusive original jurisdiction of the action lay with the Clerk of Superior Court, and that the complaint failed to join certain necessary parties. On 17 June 1981, the trial court dismissed the action for each of the reasons asserted by the defendants and for the further reason that the injunctive relief sought

by the plaintiffs would deprive the defendants of privileges of citizenship without due process of law. The plaintiffs appealed to the Court of Appeals which affirmed the order of the trial court dismissing the action. We allowed the plaintiffs' petition for discretionary review under G.S. 7A-31.

In reaching its decision affirming the order of the trial court dismissing the plaintiffs' action, the Court of Appeals proceeded directly to the question of the constitutionality of G.S. 156-81. Having decided that the statute was constitutional, the Court of Appeals did not reach the plaintiffs' other assignments of error. In addition to the single constitutional question involving the equal protection of the laws which was brought forward to the Court of Appeals and to this Court, we undertake to address the plaintiffs' remaining assignments of error.

[1] The plaintiffs assign as error the trial court's determination that exclusive jurisdiction of their claim for relief rests with the Clerk of Superior Court and that their claim for relief may not be adjudicated in the Superior Court. The plaintiffs contend that jurisdiction was properly vested in the Superior Court and that the trial court erred in dismissing their claim on the ground that the Clerk of Superior Court had exclusive jurisdiction. We agree.

The powers and functions of Clerks of Superior Court with regard to drainage districts are set forth in Chapter 156 of the General Statutes of North Carolina. Some of these powers and functions are executive in nature and some are judicial. We find nothing in Chapter 156 or elsewhere, however, tending to indicate that the General Assembly intended that exclusive original jurisdiction of an action to enjoin enforcement of an unconstitutional statute be vested in the Clerk of Superior Court simply because the subject matter of the statute so challenged involves the authority of the Clerk. Quite to the contrary, the General Assembly has specifically provided that civil actions are brought properly in Superior Court when the principal relief prayed is enforcement of a claim of constitutional right or injunctive relief against the enforcement of a statute. G.S. 7A-245. The trial court erred to the extent that it based its order of dismissal upon the ground that exclusive original jurisdiction over this action was in the Clerk of Superior Court.

[2] The plaintiffs also assign as error that portion of the order of the trial court dismissing the plaintiffs' action for failure to join necessary parties. The trial court determined that the remaining landowners in the drainage district and the Board of Drainage Commissioners as an entity were necessary parties to the plaintiffs' action. The trial court specifically made the failure to join these parties a ground for its order of dismissal. The plaintiffs contend that this was error by the trial court. We agree.

The absence of parties who are necessary parties under Rule 19 of the Rules of Civil Procedure does not merit a dismissal. *Booker v. Everhart*, 294 N.C. 146, 240 S.E. 2d 360 (1978). *Cf. Carding Developments v. Gunter & Cooke*, 12 N.C. App. 448, 183 S.E. 2d 834 (1971) (dismissal under Rule 41 for failure to comply with a court order to join necessary parties). When the absence of a necessary party[1] is disclosed, the trial court should refuse to deal with the merits of the action until the necessary party is brought into the action. Any such defect should be corrected by the trial court *ex mero motu* in the absence of a proper motion by a competent person. *Booker v. Everhart*, 294 N.C. at 158, 240 S.E. 2d at 367. Therefore, the trial court erred to the extent that it based the order of dismissal upon the ground that necessary parties had not been made parties to the action.

[3] By their complaint, the plaintiffs also alleged that the statute under review creates separate emoluments and privileges contrary to Article I, § 32 of the Constitution of North Carolina. They further alleged in their complaint that the statute denies them the due process of law embodied in the term "law of the land" as used in Article I, § 19 of the Constitution of North Carolina. The plaintiffs have brought forward no reasons or arguments concerning these two alleged defects in the statute nor cited any authority concerning them in their brief before this

1. Our determination in this opinion concerning the sole constitutional issue brought forward by the plaintiffs makes it unnecessary for us to determine whether the remaining landowners in the drainage district and the Board of Drainage Commissioners were necessary or proper parties. Likewise, the manner in which we have addressed the constitutional challenge to the statute, makes it unnecessary for us to determine whether this was an action challenging the constitutionality of a statute brought under the Declaratory Judgment Act, G.S. 1-253 *et seq.* requiring that the Attorney General be served and given an opportunity to be heard in the trial court. *See e.g.* G.S. 1-260.

Court. Therefore, any contentions by the plaintiffs that the statute under challenge violates these specific constitutional provisions are deemed abandoned and will not be reached or discussed by this Court. *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980); *Sykes v. Clayton*, 274 N.C. 398, 163 S.E. 2d 775 (1968).

[4] Additionally, the plaintiffs contend for the first time in their brief before this Court that G.S. 156-81 denies them equal protection of the laws in violation of the Constitution of the United States. The plaintiffs did not attempt in any way to present this question in the Court of Appeals[2] or in the trial court. This Court will not decide questions which have not been presented in the courts below, and this is especially true with regard to questions concerning the constitutionality of a statute. *See Plemmer v. Matthewson*, 281 N.C. 722, 190 S.E. 2d 204 (1972); *Lane v. Insurance Co.*, 258 N.C. 318, 128 S.E. 2d 398 (1962). For this reason we neither reach nor decide this question arising under the Constitution of the United States which the plaintiffs attempt to raise for the first time here.

The single question presented, preserved and brought forward for our review under this assignment of error is whether G.S. 156-81(a) and (i) deny the plaintiffs the opportunity to vote for commissioners of the drainage district in a manner which denies them the equal protection of the laws guaranteed by Article I, § 19 of the Constitution of North Carolina. We hold that they do not.

The decisions of the Supreme Court of the United States concerning the construction and effect of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States are, of course, authoritative and binding upon this Court. *Watch Co. v. Brand Distributors*, 285 N.C. 467, 474, 206 S.E. 2d 141, 146 (1974). It is also true that the Equal Protection Clause of Article I, § 19 of the Constitution of North Carolina is functionally equivalent to the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. *Kresge Co.*

2. The Court of Appeals held that G.S. 156-81(a) and (i) "do not violate plaintiffs' equal protection rights under the United States and North Carolina Consitutions." 58 N.C. App. at 404, 293 S.E. 2d at 602. The federal question was not presented in the trial court or in the Court of Appeals and should not have been passed upon. *Lane v. Insurance Co.*, 258 N.C. 318, 128 S.E. 2d 398 (1962).

v. Davis, 277 N.C. 654, 660, 178 S.E. 2d 382, 385 (1971). "However, in the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court." *Watch Co. v. Brand Distributors*, 285 N.C. at 474, 206 S.E. 2d at 146; *see Missouri v. Hunter*, --- U.S. ---, 74 L.Ed. 2d 535, 103 S.Ct. 673 (1983). In addressing the question of whether the statute under attack here violates the Equal Protection Clause of the Constitution of North Carolina, we undertake to review prior decisions of the Supreme Court of the United States and lower Federal Courts as well as the prior decisions of this Court. We emphasize, however, that our decision and holding are based upon our interpretation of the Equal Protection Clause of Article I, § 19 of the Constitution of North Carolina, upon which the plaintiffs specifically relied in the trial court and the Court of Appeals.

[5] Courts traditionally have employed a two-tiered scheme of analysis when evaluating equal protection claims. *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E. 2d 142 (1980); *see generally* L. Tribe, American Constitutional Law §§ 16-2, 16-6 (1978). The upper tier of equal protection analysis requiring strict scrutiny of a governmental classification applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 49 L.Ed. 2d 520, 524, 96 S.Ct. 2562, 2566 (1976); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16, 36 L.Ed. 2d 16, 33, 93 S.Ct. 1278, 1288 (1973). The "strict scrutiny" standard requires that the government demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest. *Texfi Industries v. City of Fayetteville*, 301 N.C. at 11, 269 S.E. 2d at 149.

When a governmental classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the lower tier of equal protection analysis requiring that the classification be made upon a rational basis must be applied. *Vance v. Bradley*, 440 U.S. 93, 59 L.Ed. 2d 171, 99 S.Ct. 939 (1979); *Texfi Industries v. City of Fayetteville*, 301 N.C. at 11, 269 S.E. 2d at 149. The "rational basis" standard merely requires that the governmental classification bear some

rational relationship to a conceivable legitimate interest of government. Additionally, in instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity. *Vance v. Bradley,* 440 U.S. at 97, 59 L.Ed. 2d at 176, 99 S.Ct. at 942-43.

[6] Bearing these principles in mind, we turn to a consideration of the appropriate standard of review to be applied to the statute under attack in the present case. In so doing, we first consider whether G.S. 156-81(a) and (i) place a burden upon a "suspect class." The allegations and contentions of the plaintiffs make it clear that the class involved is comprised of all of the landowners in drainage districts in which commissioners are appointed, since all of them are denied the right to vote for commissioners by a Clerk of Court's exercise of the authority under the statute to appoint commissioners in lieu of their being elected. The only discrimination the plaintiffs allege is that landowners in this drainage district are not allowed to elect their commissioners while landowners in drainage districts in some but not all other counties are permitted to elect such commissioners. Such allegations and contentions do not present the indicia necessary to show that the statute places a burden upon a suspect class.

In *McGowan v. Maryland,* 366 U.S. 420, 6 L.Ed. 2d 393, 81 S.Ct. 1101 (1961), Maryland's Sunday Closing Laws were held constitutional. One of the grounds of attack on those laws was that they permitted retailers in one county to sell certain goods on Sunday but forbade retailers in other counties from doing the same. In rejecting the argument that such laws denied equal protection, the Court applied the rational basis standard and Mr. Chief Justice Warren pointed out for the Court that: "[W]e have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite." 366 U.S. at 427, 6 L.Ed. 2d at 400, 81 S.Ct. at 1106.

The class which the plaintiffs allege is discriminated against by the statute is a large, diverse and amorphous class unified only by the common factor of residence in counties in which the Clerk of Court has appointed commissioners of drainage districts rather than their being elected. We believe that, in the words of the Supreme Court of the United States, the present case presents a situation in which:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

San Antonio School District v. Rodriguez, 411 U.S. at 28, 36 L.Ed. 2d at 40, 93 S.Ct. at 1294. Therefore, we conclude that the plaintiffs have not shown that G.S. 156-81(a) and (i) burden any suspect class.

We must next consider whether the challenged portions of the statute burden the exercise of a fundamental right. We hold that they do not.

We have previously stated that "the right to vote has been identified as a fundamental right . . . ." *Texfi Industries v. City of Fayetteville*, 301 N.C. at 12, 269 S.E. 2d at 149. Nothing in our prior decisions, however, should be taken as indicating that the right to vote, per se, is constitutionally protected. The Supreme Court of the United States has recently stated:

> [T]his Court has often noted that the Constitution "does not confer the right of sufferage upon any one," *Minor v. Happersett*, 21 Wall 162, 178, 22 L.Ed. 627 (1875), and that "the right to vote, per se, is not a constitutionally protected right," *San Antonio School District v. Rodriguez*, 411 U.S. 1, 35 n. 78, 36 L.Ed. 2d 16, 93 S.Ct. 1278 (1973). See *McPherson v. Blacker*, 146 U.S. 1, 38-39, 36 L.Ed. 869, 13 S.Ct. 3 (1892). Moreover, we have previously rejected claims that the Constitution compels a fixed method of choosing state or local officers or representatives.

Rivera-Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9, 72 L.Ed. 2d 628, 635, 102 S.Ct. 2194, 2199 (1982).

The fundamental right protected by the Constitution of the United States is the "equal right to vote" and not the right to vote per se. *Dunn v. Blumstein*, 405 U.S. 330, 336, 31 L.Ed. 2d 274, 280-81, 92 S.Ct. 995, 1000 (1972). Specifically, "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. at 336, 31 L.Ed. 2d at 280, 92 S.Ct. at 1000,

quoted with approval in Rivera-Rodriguez v. Popular Democratic Party, 457 U.S. 1, 10, 72 L.Ed. 2d 628, 635-36, 102 S.Ct. 2194, 2200 (1982). We conclude that Article I, § 19 of the Constitution of North Carolina guarantees the "equal right to vote" guaranteed by the Constitution of the United States.

Clearly, the statute does not burden the right of the plaintiffs to participate in elections on an equal basis with other citizens in the drainage district, which is the "jurisdiction" in which the defendant commissioners are chosen. This is so because the exercise by the Clerk of Superior Court of Craven County of the unfettered discretion[3] given her by the statute to appoint the commissioners applies equally to all citizens in the drainage district and denies all of them the opportunity to vote for commissioners of their choice. Therefore, the fundamental "equal right to vote" is not burdened by the statute.

[7] Since the statute burdens neither a fundamental right nor a suspect class, we do not apply the strict scrutiny standard in determining its constitutionality. Instead, we must apply the rational basis standard and determine whether G.S. 156-81(a) and (i) bear a rational relationship to a conceivable legitimate governmental purpose. We hold that they do.

In *Sailors v. Board of Education* the Supreme Court noted that the science of government is "the science of experiment" and held that: "At least as respects nonlegislative officers, a State can appoint local officials or elect them or combine the elective and appointive systems as was done here." 387 U.S. 105, 111, 18 L.Ed. 2d 650, 655, 87 S.Ct. 1549, 1553 (1967). In *Sailors*, the need to experiment seems to have been the only basis relied upon to satisfy the "rational basis" standard.

3. As we have previously pointed out, the plaintiffs have not presented a due process argument before this Court, and we do not reach the question of whether the statute denies due process of law. Similarly, we do not reach or decide the question of whether the unfettered discretion granted Clerks of Court by G.S. 156-81(a) and (i) to decide whether there will be elections involves a delegation of legislative power without providing adequate standards for its exercise in violation of Article II, § 1 of the Constitution of North Carolina. Although we have previously held that conferring the power to establish a drainage district upon the Clerk of Superior Court is not an invalid delegation of legislative power, *Sanderlin v. Luken*, 152 N.C. 738, 68 S.E. 225 (1910), we have never been called upon to decide whether an act granting the Clerk the unfettered discretion to determine whether there will be elections is an invalid delegation of such power.

Although the General Assembly in enacting G.S. 156-81 did not specifically mandate that certain named counties would choose commissioners of drainage districts by elections and others would do so by appointment,[4] they consciously provided a system whereby such experimentation could be conducted and thereby achieved the same result. Such experimentation, in and of itself, satisfies the "rational basis" standard and requires the rejection of the plaintiffs' assignment and contention that the statute denies equal protection of the laws in violation of Article I, § 19 of the Constitution of North Carolina. Therefore, the trial court did not err in basing its order of dismissal upon this ground.

The plaintiffs additionally assign as error the conclusion of the Court of Appeals that the trial court was without authority to issue a mandatory injunction against the defendants in this case. As we have determined that the statute does not deny the plaintiffs equal protection of the laws as guaranteed by the Constitution of North Carolina—the sole constitutional challenge properly before this Court—it is unnecessary for us to consider whether the plaintiffs made the extraordinary showing which must be made before the enforcement of even an unconstitutional statute will be enjoined. *See generally* 7 Strong's North Carolina Index 3d, Injunctions § 5.1.

The decision of the Court of Appeals, as modified herein, is affirmed.

Modified and affirmed.

4. In reaching its holding that G.S. 156-81(a) and (i) are constitutional, the Court of Appeals stated by way of *obiter dictum* that: "The result would be different if the statute mandated election of commissioners in some districts and appointment in other districts, since all counties would not be treated the same." 58 N.C. App. at 404, 293 S.E. 2d at 602. That question was not before the Court of Appeals and is not before this Court. In affirming the result reached by the Court of Appeals, we do not approve its statement on this point.

In re Moore

IN THE MATTER OF: JERRY BANKS MOORE, APPLICANT TO THE 1978 BAR EXAMINATION

No. 40A83

(Filed 7 July 1983)

1. **Attorneys at Law § 2— Board of Law Examiners—quorum of members—sufficiency of evidence**

A letter sent by counsel for the Board of Law Examiners asserting that a quorum was present and offering to provide affidavits of sworn testimony before the trial judge was sufficient to establish that a quorum of the Board was present and participating when a decision was made on appellant's case.

2. **Attorneys at Law § 2— evidence of quorum of Board members—unanimous vote**

Where six members of the eleven members of the Board of Law Examiners participated in a decision of 30 June 1982 concerning appellant and were also present when testimony was heard concerning appellant in July of 1978 and in August of 1981, and where the decisions of August 1981 and June 1982 were taken upon a unanimous vote, any action by the Board was proper.

3. **Attorneys at Law § 2— findings of Board supported by substantial evidence**

There was substantial competent evidence to support the Board of Law Examiners' findings that: (1) appellant threatened to kill a man named Barney Adler in 1966; (2) appellant made belligerent statements to the secretary of a man with whom his wife was having a dispute; (3) appellant lied under oath while testifying before the Board and (4) appellant purposefully omitted a conviction for assault on a female from his application and registration forms in an attempt to mislead the Board. These findings in turn constituted a reasonable basis from which the Board could determine that appellant had not been completely rehabilitated and that he did not possess the moral character necessary to stand for the 1978 Bar Examination.

ON appeal pursuant to Section .1405 of the Rules Governing Admission To The Practice of Law from the judgment of *Hobgood, R. H., J.*, entered 28 September 1982 in Superior Court, WAKE County, which affirmed the 30 June 1982 decision of the Board of Law Examiners of the State of North Carolina denying the applicant's request to stand for the 1978 bar examination.

On 27 December 1978 the Board of Law Examiners determined that the applicant, Jerry Banks Moore, failed to establish that he was of good moral character and as a result denied his application to stand for the 1978 bar examination and ordered that the results of the examination which he took be permanently sealed. This determination by the Board was affirmed by the Superior Court, Wake County on 5 February 1980. The applicant

then appealed the decision to this Court pursuant to Section .1405 of the Rules Governing Admission to Practice Law. In an opinion written by Justice Exum filed 6 January 1981 and reported at 301 N.C. 634, 272 S.E. 2d 826 (1981), we reversed the Board's final determination and remanded the cause to the Board for further proceedings. Specifically, we instructed that the Board make findings of fact concerning specific statements the Board found to have been falsely made by the applicant. In addition, we instructed that the Board make findings of fact as to whether the applicant in fact committed specific acts of misconduct and whether the applicant's failure to disclose a criminal conviction on either his registration or his application was purposeful or inadvertent. Such findings of fact are necessary in order for a reviewing court to determine the propriety of the Board's action.

On remand from this Court the Board received new evidence, made new findings of fact and decided on 21 August 1981 to deny Mr. Moore's application to stand for the 1978 bar examination. However, on 25 May 1982 Judge Battle, in Superior Court, Wake County, remanded the cause to the Board due to the Board's failure to fully comply with the directives of this Court set out in *In re Moore*, 301 N.C. 634, 272 S.E. 2d 826 (1981). On 30 June 1982 the Board withdrew its prior order dated 21 August 1981 and issued an amended decision which also denied Mr. Moore's application to stand for the 1978 bar examination. Judge Hobgood affirmed the Board's decision, as amended, on 28 September 1982 in Superior Court, Wake County.

The facts as set out by Justice Exum in *In re Moore*, 301 N.C. 634, 272 S.E. 2d 826 (1981) are as follows:

> In 1963 Moore secured employment as a pharmaceutical representative and moved to Cary, North Carolina. He became a citizen of good standing in the community and was involved in a number of civic and church activities. In 1966, however, Moore and his wife began experiencing marital difficulties. On 20 July 1966 Moore discovered his wife with another man; and, after his wife brandished a handgun, struck her in the face. This incident led to Moore's subsequent trial and conviction for assault upon a female, whereupon he paid eleven dollars in court costs and a fifty dollar fine. Several weeks later, in mid-August, 1966, Moore and his wife separated. On 29 August 1966 Moore shot and killed a Mr. Barney Adler, Moore's estranged wife's paramour. Moore was tried for first degree murder in Wake Superior Court

and, despite his contention of self-defense, was convicted of second degree murder. Moore was incarcerated for over six years during which time he participated in work-release and college study-release programs. He graduated from the University of North Carolina at Charlotte (UNC-C) with honors in religion, and subsequently attended and graduated from South Texas Law School. Moore's parole was terminated unconditionally in 1975 and his rights of citizenship were restored at that time.

In response to a question asking for a listing of all arrests and convictions other than parking violations Moore failed to list his conviction for assault on a female either on his application or registration forms filed, respectively, on 5 January 1978 and 10 February 1978. He did ultimately disclose this incident by an amendment to his application filed 1 July 1978.

The central factual dispute in the record arises out of a conflict between Moore's testimony and that given by Mr. Sam Adler, father of Barney Adler, and Ms. Ira Myers, secretary to Dean William S. Mathis at UNC-C. Both Adler and Ms. Myers testified at the 18 October 1978 hearing. Mr. Adler testified that on or about 13 August 1966 Moore came to the Adler residence and warned Barney that "I don't want you to see my wife, if you do I'll kill you." Ms. Myers testified that Moore, in a conversation with her during the summer of 1970, made a statement to the effect that "My government took me into service, they taught me how to kill, and the more people I killed, the more medals and pay I received, but when I came home and did what my government taught me, they punished me." She further testified that during either the summer of 1973 or the summer of 1974 Moore made a statement to the effect that "I don't like to see anyone hurt the woman I love. I have already killed one man and I have paid for it; it did me no harm and I would not hesitate to kill another man who hurt the woman I love." Ms. Myers intimated that Moore's remark was in reference to Dean Mathis who was then involved in a tenure dispute with Moore's second wife. Applicant Moore repeatedly denied that he threatened to kill Barney Adler or that he made any such statements to Ms. Myers. The issue thus becomes whether

Moore did in fact make these belligerent statements or any of those attributed to him.

Another factual issue arose when Moore explained that he had not originally listed the assault on a female conviction because "it was a part of a chain of events which led up to the second degree murder of Mr. Barney Adler. . . . There's no desire on my part to hide anything from the bar. I'm quite aware that the bar has the power to check FBI records." This issue thus became whether Moore inadvertently omitted this incident because he had ceased to recall it as an incident separate and apart from the murder itself or whether the omission was willful and intended to mislead the Board.

In addition the Board of Law Examiners, on 21 May 1981, allowed Mr. Moore to introduce for consideration three items of written evidence: (a) A Pardon of Forgiveness signed by Governor James B. Hunt, Jr. on 19 October 1979; (b) four letters written by persons acquainted with the applicant; and (c) the applicant's transcript from the University of North Carolina at Charlotte where Mr. Moore graduated with honors.

In concluding that the applicant, Jerry Banks Moore, does not presently possess the good moral character necessary for admission to the Bar, the Board made the following findings of fact and conclusions in its amended decision filed 30 June 1982:

FINDINGS OF FACT

(1) In July, 1966, the applicant was convicted of assault and battery on a female in Durham County, North Carolina. The female was his then wife. (At that time the applicant was not aware of one Barney Adler.) This criminal conviction did not appear on the applicant's registration or application form filed with the Board on February 10, 1978 and January 5, 1978, respectively. This record of conviction was first disclosed to the Board by the applicant by amendment to his application filed with the Board on July 1, 1978, shortly before the Board's hearing on applicant's character fitness set for July 6, 1978, notice of such hearing having been given to the applicant on June 22, 1978.

(2) On or about August 13, 1966, the applicant told Barney Adler that if Adler ever saw applicant's wife again, he (the applicant) would kill him (Adler).

(3) On August 19, 1966, the applicant shot and killed Barney Adler.

(4) In 1966, the applicant was charged with murder in the first degree of Barney Adler and later convicted of murder in the second degree of Barney Adler in the Superior Court of Wake County, North Carolina. The applicant was duly sentenced to confinement in the prison system of the State and was paroled after serving a portion of the term to which he was sentenced. On October 19, 1979, the applicant was granted a Pardon of Forgiveness by Governor James B. Hunt, Jr.

(5) In a conversation with Mrs. Ira Myers in 1970, the applicant stated to Mrs. Myers in substance that ("My government took me into service; they taught me how to kill; and, the more people I killed the more medals and pay I received, but when I came home and did what my government taught me, they punished me)."

(6) In 1973 or 1974, the applicant stated to Mrs. Ira Myers that ("I don't like to see anyone hurt the woman I love. I have already killed one man and I have paid for it and it did me no harm. I would not hesitate to kill another man who hurt the woman I love)."

(7) In July 1978 the applicant testified under oath that (he (the applicant) did not threaten Barney Adler and did not tell Barney Adler that he (the applicant) would kill him). Such testimony was false and given with the deliberate intent to deceive and mislead the Board.

(8) In July 1978 the applicant testified under oath before the Board that he ((the applicant) did not tell Mrs. Ira Myers that "I don't like to see anyone hurt the woman I love. I have already killed one man and paid for it and it did me no harm. I would not hesitate to kill another man who hurt the woman I love,") and that if Mrs. Myers so testified, she was lying. Such testimony was false and given with the deliberate intent to deceive and mislead the Board.

(9) In July 1978 (the applicant testified under oath before the Board that he (the applicant) never made the statement to Mrs. Myers that "My government took me into service; they taught me how to kill; and, the more people I killed the more medals and pay I received, but when I came home and did what my government taught me, they punished me,") and that her statement to that effect was not true. Such testimony was false and given with the deliberate intent to deceive and mislead the Board.

(10) The applicant perjured himself before the Board in the three instances of false testimony specified in Findings of Fact (7), (8) and (9) above.

(11) (The Board finds that the applicant attempted to wilfully mislead the Board by failing to list on his application to the Board his conviction of assault and battery on a female (his wife),) because said crime was an offense separate and distinct from the murder of Barney Adler, and because a person trained in the law would not reasonably equate an assault on a female with a murder, regardless of the proximity in time of the offenses.

(12) The Board finds that the acts of misconduct occurring in 1966 (the murder and the assault), *by themselves*, do not continue to constitute evidence that the applicant is presently morally unfit to practice law.

(13) Because of the incidents of perjury specified in Findings of Fact (7), (8) and (9), the failure of the applicant to disclose the assault conviction as specified in Findings of Fact (1) and (11), and the applicant's belligerent statements specified in Findings of Fact (2), (5) and (6), the Board finds and concludes that the applicant has not been fully rehabilitated from the acts of misconduct occurring in 1966.

(14) The Board finds and concludes that the applicant is presently morally unfit to practice law because of the incidents of perjury specified in Findings of Fact (7), (8) and (9), the failure of the applicant to disclose the assault convictions as specified in Findings of Fact (1) and (11), and the applicant's belligerent statements specified in Findings of Fact (2), (5) and (6). The Board's findings of perjury on the

part of the applicant are given the greatest weight in this conclusion.

(15) The applicant does not presently possess the good moral character prerequisite for admission to the Bar.

Based on the foregoing Findings of Fact, the Board concludes as a matter of law that Jerry Banks Moore does not possess the qualifications of character and general fitness requisite for an attorney and counsellor at law, and is not of such good moral character as to be entitled to the high regard and confidence of the public, and therefore to take the 1978 North Carolina Bar Examination.

As a result of these findings of fact and conclusions the Board ordered that the application by Mr. Moore to stand for the 1978 bar examination be denied and that the results of the 1978 bar examination taken by the applicant be permanently sealed.

Vaughan S. Winborne, for the applicant appellant.

Rufus L. Edmisten, Attorney General, by Assistant Attorney General, Harry H. Harkins, Jr., for the Board of Law Examiners, appellee.

COPELAND, Justice.

[1] In his first argument the applicant, Mr. Moore, maintains that the decision of the Board of Law Examiners dated 30 June 1982 is in violation of established procedural rules. The basis of this contention is that there was not a quorum of the members present and participating when critical decisions concerning his cause were made. In the alternative Mr. Moore asserts that the record lacks sufficient evidence from which a determination can be made that the Board was meeting and acting with a quorum of its members present.

The record indicates that the Board decided to restrict review of the applicant's cause on remand from this Court to those members of the Board who were present when the testimony was heard in July of 1978. This decision was noted in the Board's order of 21 August 1981 but the applicant did not contest the decision until the action was pending in Superior Court, Wake County after the Board's decision of 30 June 1982. Although the

applicant argues that the record does not adequately show that a quorum of the Board was present when decisions critical to his cause were made, we hold that a letter sent by counsel for the Board asserting that a quorum was present and offering to provide affidavits of sworn testimony before Judge Hobgood is sufficient to establish that a quorum of the Board was present and participating when a decision was made on Mr. Moore's application.

[2] The applicant contends that even if the record is sufficient to establish which members of the Board participated in the decision in his cause, those members of the Board which were present in July of 1978 at the original hearings do not constitute a quorum of the Board as it existed in June of 1982. The law in this State is that in the absence of a statutory rule to the contrary, a quorum is constituted when a majority of the membership is present. *Edwards v. Board of Education*, 235 N.C. 345, 70 S.E. 2d 170 (1952). The Board of Law Examiners is comprised of eleven members of the Bar elected by the council of the North Carolina State Bar. G.S. 84-24. Any six of the eleven members of the Board may constitute a quorum. In reviewing the record we find that there were six members of the Board who participated in the decision of 30 June 1982 who were also present when testimony was heard in July of 1978. In addition, those same six members were present in August of 1981 when the Board denied Mr. Moore's request to offer several letters of reference written during May of 1981. Each of these actions, the decision of 30 June 1982 and the decision of 21 August 1981, were taken upon the unanimous vote of six members of the Board. As a result these actions were proper.

However, the record indicates that at a meeting of the Board on 15 May 1981, while eight members were present, only four of those members participating in Mr. Moore's case were present. Clearly any action taken by these four members would not be an action of the Board since four is neither a quorum nor a majority of the membership. Although any action taken by the Board in Mr. Moore's case on 15 May 1981 was not an official decision of the Board, it is not prejudicial since all rulings made on 15 May 1981 were favorable to the applicant.

We hold that the Board's decision to restrict review of Mr. Moore's application to those members who heard the live testi-

mony was reasonable in light of the circumstances in this case where the credibility of the various witnesses was crucial to a fair determination. We also hold that a unanimous vote by six members of the eleven member Board constitutes an action by a quorum and a majority of the membership and any action by such a majority is proper.

[3] The applicant next attacks the Board's findings of fact and conclusions as not being supported by substantial evidence. Specifically the applicant asserts that there was not substantial evidence to support the Board's findings: (1) that he threatened to kill a man named Barney Adler in 1966; (2) that he made belligerent statements to the secretary of a man with whom his wife was having a dispute; (3) that he lied under oath while testifying before the Board and (4) that he purposefully omitted a conviction for assault on a female from his application and registration forms in an attempt to mislead the Board. In reviewing the applicant's challenges to the Board's findings and conclusions we employ the "'whole record' test to determine if they are supported by substantial evidence." *In re Elkins*, --- N.C. ---, 302 S.E. 2d 215, 217 (1983); see also *In re Rogers*, 297 N.C. 48, 253 S.E. 2d 912 (1979). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 229, 83 L.Ed. 126, 140, 59 S.Ct. 206, 217 (1938); accord, *Commissioner of Insurance v. Automobile Rate Office*, 287 N.C. 192, 214 S.E. 2d 98 (1975). Under the "whole record" test we must review all the evidence, that which supports as well as that which detracts from the Board's findings, and determine whether a reasonable mind, not necessarily our own, could reach the same conclusions and make the same findings as did the Board. *In re Elkins*, --- N.C. ---, 302 S.E. 2d 215 (1983); *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). The whole record indicates that there is substantial evidence to support the Board's findings and conclusions.

The Board found that the applicant, Mr. Moore, threatened to kill Mr. Barney Adler on or about 13 August 1966. Aside from the fact that Mr. Moore killed Barney Adler on 29 August 1966, the Board heard testimony from the father of Barney Adler who stated under oath that he overheard Mr. Moore threaten the life

of his son because his son, Barney Adler, was having an affair with Mr. Moore's wife. The Board also found that Mr. Moore made belligerent statements to Ms. Ira Myers in 1970 and again in 1973 or 1974. Ms. Myers testified under oath before the Board that the applicant told her in 1970 "My government took me into service; they taught me how to kill; and, the more people I killed the more medals and pay I received, but when I came home and did what my government taught me, they punished me." She also testified that Mr. Moore told her in the summer of 1973 or 1974, while his wife was involved in a tenure dispute with Ms. Myers' boss, that, "I don't like to see anyone hurt the woman I love. I have already killed one man and I have paid for it and it did me no harm. *I would not hesitate to kill another man who hurt the woman I love.*"

The applicant, Mr. Moore, testified under oath that he did not make any of the statements sworn to by Mr. Adler or Ms. Myers. This created a factual dispute between the testimony of Mr. Moore and the testimony of Mr. Adler and Ms. Myers. "It is the function of the Board to resolve factual disputes." *In re Elkins*, --- N.C. ---, 302 S.E. 2d 215, 217 (1983); *In re Rogers*, 297 N.C. 48, 253 S.E. 2d 912 (1979). In the case *sub judice* the Board found that Mr. Moore made the threatening statements which Mr. Adler and Ms. Myers testified he had made. In reviewing the entire record and considering all evidence which detracts from the Board's findings we conclude that the sworn testimony of Mr. Adler and Ms. Myers constitutes "substantial evidence" and is sufficient to support the decision of the Board.

The Board also found that Mr. Moore perjured himself before the Board when he denied making the three statements testified to by Mr. Adler and Ms. Myers. The applicant contends that the Board did not have "substantial evidence" on which to base its finding that he lied under oath during his testimony to the Board in 1978. This finding by the Board is supported by the sworn testimony of Mr. Adler and Ms. Myers. In addition the Board, unlike a reviewing court, had the opportunity to observe each witness's demeanor during both direct and cross-examination. Although a different Board could have found contrary to the Board's finding that the applicant perjured himself, the Board's conclusion is reasonable under the evidence and therefore must

stand. *Thompson v. Board of Education,* 292 N.C. 406, 233 S.E. 2d 538 (1977).

The Board of Law Examiners also found that the applicant attempted to mislead the Board and its investigation by purposefully failing to disclose a criminal conviction of assault on a female. Once again the applicant maintains that there is no "substantial evidence" in the record to support the Board's finding. The record indicates that Mr. Moore failed to disclose his assault on a female conviction on two separate occasions. The first failure to disclose occurred when the applicant failed to make a notation of the conviction on his application to take the 1978 bar examination filed 5 January 1978. The second failure to disclose occurred when no notation concerning the conviction was made on his registration form filed 10 February 1978. Both the application form and the registration form specifically required the applicant to disclose separately each prior criminal conviction. In fact disclosure was not made until 1 July 1978 when Mr. Moore amended his application. The amendment was made five days before the Board's hearing on Mr. Moore's character and eight days after the applicant received notice of the hearing which suggested that his failure to disclose his prior conviction would be addressed at the hearing.

Mr. Moore did not contest the fact that he failed to disclose the assault on a female conviction. However, he did assert that the omission was a product of a faulty memory. He maintains that he was very busy at the time he filled out the application and registration and that because his murder conviction arose from an incident occurring one month after the assault on a female charge, his memory of the assault conviction was overshadowed. Mr. Moore was a law student at the time he filled out the application and registration forms. The murder and assault on a female convictions were completely separate in all respects and there was no legitimate reason why he would have been confused. Therefore, the Board had substantial evidence on which to base its decision that Mr. Moore purposely failed to disclose his conviction of assault on a female.

Finally the applicant asserts that there was not substantial evidence to support the Board's conclusion that he, Jerry Banks Moore, did not presently possess good moral character. The

Board stated that Mr. Moore's 1966 murder conviction was not determinative of his moral character in 1978. However, the Board was particularly interested in finding out whether Mr. Moore, a convicted murderer, had been sufficiently rehabilitated within the twelve year period between the murder and his application to take the 1978 Bar Examination. The Board found that applicant Moore made threatening and belligerent statements as late as 1973 or 1974. In addition, the Board found that he purposely omitted a criminal conviction from both his application form and registration form. The Board also found that Mr. Moore lied under oath during his testimony before the Board in 1978. These findings constitute a reasonable basis from which the Board could determine that applicant Moore had not been completely rehabilitated and that he did not possess the moral character necessary to stand for the 1978 Bar Examination. It shall be noted that the applicant's moral character to stand for any future Bar Examination is not determined by this opinion.

We, therefore, affirm the Order of the Superior Court, Wake County, which affirmed the Board of Law Examiners' decision of 30 June 1982 denying the applicant's request to stand for the 1978 Bar Examination.

Affirmed.

STATE OF NORTH CAROLINA v. JAMES CALVIN ROTHWELL

No. 655A82

(Filed 7 July 1983)

1. **Criminal Law § 79.1— evidence of co-defendant's guilty plea**

While evidence of a co-defendant's guilty plea is not competent as evidence of the guilt of the defendant standing trial, evidence of a testifying co-defendant's guilty plea is admissible when introduced for a legitimate purpose.

2. **Criminal Law § 79.1— evidence of guilty pleas by testifying co-defendant—harmless error**

The trial court erroneously admitted testimony by one co-defendant that he pleaded guilty to the offense growing out of the events for which defendant was being tried since a legitimate purpose had not been established for the ad-

mission of such testimony, but the error was not prejudicial to defendant where the co-defendant thereafter testified to facts which clearly disclosed his own participation in the crimes for which defendant was being tried.

3. **Criminal Law § 79.1— evidence of testifying co-defendant's guilty pleas—absence of prejudice**

Defendant was not prejudiced by the trial court's failure to strike a co-defendant's testimony that he "pleaded guilty of riding in the car" after the court sustained defendant's objection to such testimony where the co-defendant testified that he stayed in the car while the murder and robbery in question were committed by others, and where defense counsel elicited testimony on cross-examination of the co-defendant that he pleaded guilty to second degree murder, conspiracy to commit robbery and armed robbery in connection with the events for which defendant was being tried.

4. **Criminal Law § 46.1— discovery of gun by police—evidence of flight by defendant**

In a prosecution for murder and armed robbery, testimony by officers concerning defendant's flight after he was informed that a gun which had been used in the crimes but was not the murder weapon had been removed from his car by the police was admissible even though it may have disclosed the commission of a separate crime by defendant.

5. **Criminal Law § 33.3— defendant's association with criminal—irrelevancy—harmless error**

Although an officer's testimony tending to show that, at the time he saw defendant's car leaving a trailer park, he had gone to the trailer park to arrest a man with whom defendant had associated was irrelevant, the admission of such testimony was not prejudicial error.

DEFENDANT was tried before *Judge Preston Cornelius* during the 25 August 1980 Session of Superior Court, SCOTLAND County. A jury found defendant guilty of murder in the second degree, robbery with a firearm and conspiracy to commit robbery with a firearm. *Judge James H. Pou Bailey* gave defendant consecutive life sentences for the second-degree murder conviction and the robbery with a firearm conviction, those sentences to be served at the expiration of the ten-year prison term given for the conspiracy to commit robbery with a firearm conviction. Defendant appeals his second-degree murder conviction and robbery with a firearm conviction to this Court as a matter of right under N.C.G.S. § 7A-27(a) (1981); this Court allowed on 3 December 1982 defendant's motion to bypass the Court of Appeals on the conspiracy to commit robbery with a firearm conviction in order to consolidate for review all of defendant's convictions in this case.

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

Angus B. Thompson, II, Attorney for defendant-appellant.

FRYE, Justice.

The primary issue in this case is whether the introduction of testimony by two co-defendants that they pleaded guilty to charges growing out of the same events for which defendant was being tried constitutes prejudicial error. Having examined the context in which the jury heard this testimony at trial, we hold that the admission of this evidence was not prejudicial error in defendant's case. We also hold that with respect to defendant's contentions that the trial court erroneously allowed the State to pursue two irrelevant lines of questioning there was no prejudicial error.

I.

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

On 8 August 1979, defendant, together with Edward Allen, John McNeill and Eddie "C" Crawford, met at Crawford's home in the Ebony Trailer Park and planned to rob Roscoe Grice of some money and drugs. Allen testified that the next day defendant handed him a gun as defendant drove to Crawford's residence to pick up McNeill and Crawford. All four men then went to Grice's residence in defendant's car, a blue Camaro. McNeill testified that on the way to Grice's home, defendant passed him a gun and told him "if the man sees anything, kill him or bump him off." Allen and Crawford got out of the car and walked down a little road to Grice's home; defendant and McNeill stayed in the car, drove around for a period, and then returned to pick up Allen and Crawford. When Allen and Crawford got back into the car, McNeill testified that the following conversation took place:

> "C" Crawford told Eddie Allen, "You didn't have to kill him, you could have tied him up." Eddie Allen said, "When I tell a white punk to shut up that is what I mean." We went back onto the main Highway 401, and turned left and went past a rest home. There was also a black billfold which "C" Crawford got. Mr. Crawford said that he was going to keep

the gun [that he had taken from the victim] for a souvenir, or something or other.

At trial, defendant testified as follows:

On 8 August 1979 defendant asked Crawford where he could buy some "reefer." Crawford indicated that he might be able to buy some for him from Grice. That evening defendant and Crawford periodically went by Grice's residence to see if he was home so they could buy the marijuana. At about 9 p.m. Crawford told defendant that Grice was at home. Defendant then gave Crawford some money to buy the "reefer." Crawford later returned and said that Grice did not have any marijuana, but that Grice would call him about it in the morning. The next day, defendant drove the other three to Grice's residence. McNeill and Allen got out of the car and walked down a path toward Grice's residence. Defendant and Crawford drove around for a while and then came back. Upon returning to the car, Allen stated that he did not get the "reefer" because Grice would not open the door to him.

The jury convicted defendant of murder in the second degree, robbery with a firearm and conspiracy to commit robbery with a firearm.

II.

As noted previously, defendant contends that the introduction of testimony by two co-defendants, Edward Allen and John McNeill, that they pleaded guilty to charges growing out of the same events for which defendant was being tried constitutes prejudicial error. We do not agree.

In *State v. Campbell*, 296 N.C. 394, 250 S.E. 2d 228 (1979), this Court reiterated the "clear rule" that "neither a conviction, nor a guilty plea, nor a plea of *nolo contendere* by one defendant is competent as evidence of the guilt of a codefendant on the same charges." *Id.* at 399, 250 S.E. 2d at 230. The rationale underlying this "clear rule" is twofold. This Court has recognized that a defendant's guilt must be determined solely on the basis of the evidence presented *against him. Id.; State v. Cameron*, 284 N.C. 165, 168, 200 S.E. 2d 186, 189 (1973), *cert. denied*, 418 U.S. 905, 94 S.Ct. 3195, 41 L.Ed. 2d 1153 (1974); *State v. Kerley*, 246 N.C. 157, 159, 97 S.E. 2d 876, 878 (1957). The second reason for the rule is that the introduction of such a plea by a co-defendant,

when he or she has not testified at defendant's trial, would also deprive the defendant of his constitutional right of confrontation and cross-examination. *State v. Jackson,* 270 N.C. 773, 155 S.E. 2d 236 (1967). *See also State v. Cameron, supra.*

[1] As we stated above, evidence of a co-defendant's guilty plea is not competent as evidence of the guilt of the defendant standing trial. Thus, if such evidence is introduced for that illegitimate purpose—solely as evidence of the guilt of the defendant on trial—it is not admissible. Our case law indicates, however, that if evidence of a *testifying* co-defendant's guilty plea is introduced for a *legitimate* purpose, it is proper to admit it. In *State v. Potter,* 295 N.C. 126, 244 S.E. 2d 397 (1978), this Court held that it was not error to admit into evidence a co-defendant's testimony concerning his guilty plea when the State elicited that testimony on redirect examination in order to bolster the witness' credibility after the defendant, on cross-examination, had called the witness' credibility into question. In writing for a unanimous Court, Justice Exum reasoned as follows:

> Defendant on cross-examination brought out that [the witness] had been treated leniently by the court in return for his plea of guilty 'to a lesser offense' and, defendant sought to imply, for his testimony against defendant. It was proper then for the state to place before the jury in bolder relief that crime to which [the witness] had pleaded and for which he had been sentenced in order to show, or at least to be in a position to argue that, under the circumstances, the sentence imposed did fit the crime.

Id. at 136, 244 S.E. 2d at 404.

Thus, the holding in *Potter* demonstrates that evidence of a testifying co-defendant's guilty plea is admissible if introduced for a legitimate purpose.

[2] In the case at bar, defendant has not been deprived of his right of confrontation because both co-defendants testified at trial; defendant had ample opportunity to cross-examine both witnesses. We must determine, therefore, only whether the two co-defendants' testimony that they pleaded guilty to offenses growing out of the same events for which defendant was being tried was introduced for a legitimate purpose or whether it was

erroneously admitted because its introduction violates the rationale that a defendant's guilt must be determined solely on the basis of the evidence presented *against him.* If such testimony was erroneously admitted, we must then examine the events at trial to decide whether this error was prejudicial to defendant.

In the case at bar, Edward Allen, one of the co-defendants, testified on direct examination as follows:

> Q. Mr. Allen, with regard to the death of Mr. Roscoe Grice would you state whether or not you have been charged with anything to that case?
>
> A. Yes, I have.
>
> Q. What were you charged with?
>
> A. I was charged with murder, conspiracy to commit armed robbery and armed robbery.
>
> Q. Have you entered any sort of plea with regard to that case, and if so, when did you make any entry of that plea?
>
> MR. THOMPSON: OBJECTION.
>
> THE COURT: OVERRULED.
>
> DEFENDANT'S EXCEPTION NO. 1.
>
> BY MR. WEBSTER:
>
> What plea did you make?
>
> A. I made a guilty plea.

From the record it appears that this was the first information about the case that the State elicited from Allen on direct examination. Thus, this part of Allen's testimony, standing alone, was erroneously admitted into evidence because a legitimate purpose had not yet been established for its introduction at trial. This was not a situation, as was the case in *Potter,* where such testimony was elicited *after* the witness' credibility had been attacked by the defendant. However, as the events at trial unfolded in the case at bar, it is clear that this erroneous admission into evidence was not prejudicial to defendant. After stating that he pleaded guilty to several charges, Allen then testified, as did the witness in *State v. Bryant,* 236 N.C. 745, 73 S.E. 2d 791 (1953), to

facts which clearly disclosed his own participation in the crimes for which defendant was being tried. In *Bryant*, this Court held that it was not prejudicial to defendant for the jury to be apprised of the fact that the testifying witness was pleading guilty to charges arising out of his participation in the crimes for which another defendant was being tried. The Court in *Bryant* noted that because the witness had testified to his own participation in the crime, "[t]he jury was already fully apprized of [the testifying witness'] guilt." *Id.* at 747, 73 S.E. 2d at 792. We hold that the same result must be reached here. This is not a situation, as was the case in *State v. Kerley, supra*, 246 N.C. 157, 97 S.E. 2d 876, where the prosecutor used as evidence the non-testifying co-defendant's guilty plea to support his argument to the jury that the defendant on trial was also guilty.

[3] Defendant's arguments concerning the testimony of the second co-defendant, John McNeill, are more tenuous. On cross-examination McNeill testified that he "pleaded guilty of riding in the car." Defendant apparently contends that although the trial court sustained his objections to McNeill's testimony that he pleaded guilty to "riding in the car," he was prejudiced by the court's failure to grant his motion to strike this answer. We fail to see any prejudicial error here. McNeill testified to his particular role in the Grice murder: he stayed in the car while two others went to Grice's home. The jury, thus, was fully aware of the import of McNeill's comment that he pleaded guilty to "riding in the car." Indeed, at the outset of his cross-examination of McNeill, defense counsel elicited from McNeill the admission that "I plead guilty to second degree murder, to conspiracy to commit robbery, and armed robbery" for the events which occurred at Grice's home. In sum, we find no prejudicial error with respect to the challenged testimony of either co-defendant.

III.

Defendant also contends that he is entitled to a new trial because the trial court erroneously allowed two irrelevant lines of questioning to be pursued which resulted in prejudice to him. We disagree.

A.

[4] The first line of questioning concerns the direct examination of Officer L. E. Smith who testified that on 31 August 1979 a

silver Monte Carlo, driven by defendant's mother, was stopped because an "alert" had been put out for it in the course of an investigation. The car was then impounded because it was not properly registered. In conducting an inventory of the contents of the car, a gun was found underneath the front seat of the car. Defendant later arrived at the police department driving a gold El Dorado Cadillac. Officer Smith testified that defendant got out of the El Dorado, "went to the Monte Carlo and opened the door on the passenger side, stooped over and looked into the floorboard of the car, immediately stood back up, closed the door and went very quickly to the El Dorado." After Smith and another officer called to defendant to tell him they needed to talk to him, he jumped into the El Dorado and left the parking lot. The police then chased defendant for several blocks, after which defendant returned to the municipal building. Another officer, Franklin Poe, testified that defendant "was sweating heavily" when he was informed that the weapon had been removed from the car.

Defendant complains that the above testimony was not competent—that it was introduced to show defendant was guilty of a crime separate and distinct from the crimes for which he was currently being tried, and thus, prejudiced the jury against him. We hold, however, for the reasons discussed below, that this evidence concerning defendant's flight from the parking lot was competent.

In *State v. Jones*, 292 N.C. 513, 234 S.E. 2d 555 (1977), this Court stated that "[i]n North Carolina it has long been held that '[s]ubsequent acts, including flight . . . are competent on the question of guilt. [Citations omitted.] The basis of this rule is that a guilty conscience influences conduct.' " *Id.* at 525, 234 S.E. 2d at 562. (Citations omitted.) This Court also stated that evidence of flight is admissible even though that evidence may disclose the commission of a separate crime by the defendant. *Id.* at 526, 234 S.E. 2d at 562. (Citations omitted.) At trial, defendant admitted to owning State's Exhibit 10, the gun found in his car. Edward Allen also identified State's Exhibit 10 as the weapon defendant gave him while driving to Crawford's residence to pick up the other two men before they proceeded to Grice's home on 9 August 1979. He also testified that this was the same weapon which he returned to defendant after they left Grice's home. Although the evidence at trial indicated that defendant's weapon was not the murder weapon, the officers' testimony was competent and rele-

vant to show the existence of the weapon which Allen took with him when he went to Grice's home on the day Grice was murdered. *See State v. Carnes*, 279 N.C. 549, 553, 184 S.E. 2d 235, 237-38 (1971) (defendant's loaded pistol which was available but not used during robbery would seem to be relevant evidence at trial). *See also Moore v. Illinois*, 408 U.S. 786, 798-800, 92 S.Ct. 2562, 2570, 33 L.Ed. 2d 706, 715-16 (1972). The officers' testimony also corroborates Allen's testimony that he returned to defendant the gun which defendant had given him on the day of Grice's murder. Thus, under this Court's holding in *Jones*, the officers' testimony about defendant's flight—defendant's reaction after he was informed that this gun, which apparently had been used in the commission of the crimes committed at Grice's home, had been removed from his car by the police—clearly was admissible.

B.

[5] Defendant also contends that a second line of questioning which elicited testimony by Deputy Sheriff Charles Buffkin that he saw a gold El Dorado Cadillac leaving the Ebony Trailer Park about 5 p.m. on 8 August 1979 while he was there to serve a warrant on a man who was with Crawford and another male constitutes prejudicial error. We cannot agree.

Defendant admitted at trial that he was at Crawford's home at the trailer park on that day, but that he left at about 4:30 in another car, his silver Monte Carlo. Defendant essentially claims that the officer's statements concerning his reason for being at the trailer park—that the officer was at the trailer park to "serve a warrant"—were admitted only to show "by innuendo the defendant's association with another criminal." We agree that the officer's statement as to his reason for being at the trailer park was irrelevant and therefore should not have been admitted. However, we do not find that this error was prejudicial to defendant such that there is a reasonable possibility that a different result would have been reached at trial had the jury not heard this comment. N.C.G.S. § 15A-1443(a) (1978). As this Court stated in *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969), "[w]here there is abundant evidence to support the main contentions of the state, the admission of evidence, even though technically incompetent, will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the

admission of the evidence could have affected the result." *Id.* at 89, 165 S.E. 2d at 489, *quoting* 3 Strong's, North Carolina Index 2d, Criminal Law § 169, p. 135. We are confident that, given the substantial evidence of defendant's guilt, the jury was not prone to convict defendant simply on the basis of this cursory reference to defendant's possible association with a man being sought for arrest. Thus, we hold that this error was not prejudicial to defendant.

In conclusion, therefore, we find that defendant's trial was free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. BOBBY GENE WHISENANT

No. 72A82

(Filed 7 July 1983)

1. **Criminal Law § 86.5— questions insinuating other crimes by defendant—proper—explaining witness's acts**

A prosecutor's line of questioning which suggested that defendant had given a witness stolen property was proper where defense counsel had attacked the witness's credibility by referring to a gas station incident, a specific act, and the prosecution was free to "sustain the character of the witness by eliciting from him evidence explaining those acts, or mitigating their effect."

2. **Criminal Law § 169.2— objections sustained—mere asking of question not prejudicial**

Where the trial court properly sustained defendant's objection to a question asked of a witness as to whether he knew that defendant was a "convicted felon," the mere asking of this question was not sufficiently prejudicial since there was no "reasonable possibility" that had this question not been asked a different result would have been reached at trial. G.S. 15A-1443(a).

3. **Criminal Law § 102.6— argument to jury concerning statistical percentages—proper**

In a prosecution for first degree murder, the trial court did not err in failing to sustain defendant's objection to a prosecutor's argument concerning the percentage of people with an A blood type who secrete and who smoke Salem cigarettes since (1) the prosecutor made his statistical argument to the jury after defense counsel had raised the issue, (2) the prosecutor made it clear to the jury that he was "assuming" some of the percentages and that he was using another percentage "as an example," and (3) he was using assumed per-

centages merely as a way of demonstrating that it was more likely than not that defendant was the perpetrator of the murders.

DEFENDANT'S trial began during the 30 November 1981 Session of Superior Court, BURKE County, before *Judge Forrest A. Ferrell.* A jury convicted defendant of the first-degree murder of George William Leonhardt, Sr., and the second-degree murder of Lura Shuping Campbell. Judge Ferrell imposed consecutive life sentences upon the defendant for the two convictions after the jury was unable to agree on the recommendation for punishment. Under N.C.G.S. § 7A-27(a) (1981), defendant appeals to this Court as a matter of right.

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

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

FRYE, Justice.

Defendant presents on appeal two issues to this Court. First, he contends that certain questions by the prosecutor which "put before the jury irrelevant and prejudicial insinuations that the defendant had committed other serious crimes" denied him a fair trial. For the reasons articulated below we do not agree. Defendant also argues that the trial court committed reversible error by failing to strike one of the prosecutor's arguments which defendant claims "travelled outside the record." We have examined this contention as well and find that the trial court's exercise of discretion was well within the bounds of good judgment.

I.

Defendant was found guilty of the 28 June 1981 murder of George William Leonhardt, Sr., an elderly man who was found dead in the hallway of his large stone house in Morganton. Defendant also was convicted of the murder of Mr. Leonhardt's live-in housekeeper, Lura Shuping Campbell, a 66-year-old woman who was found dead in the middle bedroom of Mr. Leonhardt's house. A recitation of the facts in this case is not necessary for an understanding of the issues defendant raises in this appeal.

II.

[1] As noted above, defendant contends that he was denied a fair trial because of the prosecutor's propounding of a line of questions which put before the jury "insinuations that the defendant had committed other crimes." The series of questions about which defendant complains indicated that at one time defendant had stolen a weapon from a service station and given it to the witness. Having examined the context in which this line of questioning was pursued, we hold that it was entirely proper, and thus that defendant is not entitled to a new trial on this issue.

As this Court noted in *State v. Patterson*, 284 N.C. 190, 195, 200 S.E. 2d 16, 20 (1973), "it is a general rule of evidence that in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." The application of this rule, however, is tempered by another rule which holds such evidence admissible under certain circumstances. That is, "[a]fter a litigant brings out on cross-examination specific acts of an adverse witness for the purpose of impeachment, the party by whom the witness is called may sustain the character of the witness by eliciting from him evidence explaining those acts, or mitigating their effect" even though such evidence would not be competent otherwise because it tends to show as well the defendant's involvement in those specific acts. *State v. Minton*, 234 N.C. 716, 724, 68 S.E. 2d 844, 849-50 (1952). In *Minton*, defense counsel had elicited from a State's witness on cross-examination the admission that at one time the witness had tried to strike the defendant with a pipe. This Court held that it was proper for the witness to testify on re-direct examination that he had used the pipe merely to repel an unprovoked assault made on him by the defendant. A similar result was reached in *State v. Patterson, supra.* After defense counsel elicited on cross-examination the admission from a State's witness that she disliked the defendant and harbored a feeling of ill will toward him, this Court held in *Patterson* that it was proper for the State to elicit during its re-direct examination of the witness the reason for the witness' dislike of the defendant: the witness testified that the defendant had raped her.

In the case at bar, defense counsel cross-examined the State's witness, Billy Carlos Cook, about his criminal record. In par-

ticular, he inquired into Cook's convictions for breaking and entering and receiving stolen goods, convictions which grew out of events that occurred at a Mobil gas station. During that cross-examination, defense counsel sought to imply that Cook had received favorable penal treatment for the Mobil gas station crimes in return for his testimony against defendant in this case. After Cook's credibility had been attacked in this manner, the prosecution, on re-direct examination, attempted to show that the property for which Cook was convicted of having unlawfully received was a rifle that defendant himself had given Cook. Thus, the prosecution apparently was attempting to bolster Cook's credibility when it asked a series of questions designed to show the nature of Cook's participation in the Mobil gas station incident.

The prosecutor's line of questioning which suggested that defendant had given Cook stolen property, therefore, was entirely proper under this Court's holding in *Minton* because after defense counsel had attacked Cook's credibility by referring to the Mobil gas station incident, a specific act, the prosecution was free to "sustain the character of the witness by eliciting from him evidence explaining those acts, or mitigating their effect." *State v. Minton, supra,* 234 N.C. at 724, 68 S.E. 2d at 849-50. *See also State v. Patterson, supra,* 284 N.C. at 195-96, 200 S.E. 2d at 20. Defendant's assignment of error is, therefore, overruled.

[2] Defendant also contends that he is entitled to a new trial because during the cross-examination of one of the defense witnesses, the prosecutor asked the witness whether he knew that defendant was a "convicted felon." We note, however, that the trial court sustained defendant's objection to this question. In essence, then, defendant argues that the mere asking of this question alone was sufficiently prejudicial to warrant a new trial. We cannot agree. As this Court stated in *State v. Campbell,* 296 N.C. 394, 250 S.E. 2d 228 (1979), "[o]rdinarily, the asking of the question alone will not result in prejudice to the defendant." *Id.* at 399, 250 S.E. 2d at 231 (citations omitted). Even assuming that the mere asking of this question might be prejudicial in a given case, we hold that in light of the overwhelming evidence of defendant's guilt in this case, there is no "reasonable possibility" that had this question not been asked a different result would have been reached at trial. G.S. 15A-1443(a) (1978). There was abundant circumstantial evidence tying defendant to the scene of the crime

and with some of the property that was stolen from Leonhardt's home. Further, several witnesses testified that defendant had discussed with them his intention to rob the Leonhardt home; at least one of the witnesses testified that defendant asked him if he wanted to take part in the murders and robbery there.

III.

[3] Defendant finally contends that he is entitled to a new trial because the trial court failed to sustain his objection and strike an argument by the prosecutor because he contends the prosecutor's argument "travelled outside the record." We hold, however, that the trial court did not err here.

The State introduced evidence at trial that Salem cigarette butts were found in the hallway and on the front porch of Leonhardt's home; that an empty Salem cigarette pack was found in the trash can in defendant's master bedroom; and that while defendant was at the Burke County Sheriff's Department he had smoked several cigarettes, leaving eight Salem cigarettes butts in the ashtray. Saliva and blood samples were taken from defendant. A forensic serologist, SBI Agent W. E. Weis, analyzed blood samples taken from the bodies of the victims and from defendant; Weis also analyzed the cigarette butts sent to him by police investigating this case. In so doing, Weis ascertained that Leonhardt had blood of ABO group "O," that Campbell had ABO group "B," and that defendant had ABO group "A." Weis also determined that defendant was a "secretor" who left traces of his blood group in other body fluids, such as saliva. Furthermore, Weis testified that the cigarette butts found in Leonhardt's house and the eight cigarette butts retrieved from the sheriff department's ashtray were all Salem cigarette butts from which Weis obtained a group "A" secretor reaction, a reaction consistent with defendant's blood group. Weis also stated that in his opinion the victims could not have smoked the cigarettes found at the crime scene.

Based on this evidence, one of the prosecutors, Mr. Greene, argued, in essence, that defendant was the perpetrator of the murder of Leonhardt and his housekeeper because defendant was a member of a group of less than one percent of the general population who had the same characteristics as the person who

had left the Salem cigarette butts at the murder scene. Mr. Greene's statistical argument to the jury was as follows:

> And what did the serologist say about that? Well, he said that the ABO grouping, and that's what the defendant, Bobby Gene Whisenant's blood was, was ABO grouping, and that blood grouping, that thirty percent of the population had an ABO grouping. And then he said that of that thirty percent that eighty percent were secretors. That would be, if you're going to figure it out, Mr. Vanderblomen, and I'm not saying this I'm just using this as an example, twenty four percent, and how many of those twenty four percent would you say were nonsmokers? Well, it wouldn't be fifty percent, but assuming that there were fifty percent, that would be twelve percent. And how many of those twelve percent were Salem smokers? And you're reducing it on down of the hundreds of the types of cigarettes that you have, you're going to come up with something about six-tenths of one percent.
>
> MR. VANDERBLOMEN: OBJECTION and motion to stike. There is no evidence of that, Your Honor, EXCEPTION NO. 29.
>
> MR. GREENE CONTINUES: The reasonable and logical deductions from what the serologist testified about secretors, and what the ABO grouping was, and you can take your own collective notice about, smokers and nonsmokers. Say I'm wrong. Say it's seventy five percent. You know. Then how many of those when you put it down, then, it wouldn't be but about twenty-five percent. What I'm saying is Mr. Vanderblomen is wanting to say that eighty percent of the population are secretors, and eighty percent of the people put that cigarette out there in the house. And I say that's ridiculous, and the evidence don't show that. The credible evidence from this case don't show that. That he testified that the ABO grouping was only thirty percent of the population, and I say that if you reasonably deduce from that that eighty percent of those and then subtract whatever you say would be the smokers and the nonsmokers, and then reduce that to what that would be, and then say how many of those hundreds of brands of cigarettes would be Salem cigarette smokers? And that would reduce it on down to where it wouldn't be anything like no eighty percent. It would be closer to less than

one percent than it would eighty percent that Mr. Vanderblomen wants you to believe was putting those cigarettes out there—

MR. VANDERBLOMEN: OBJECTION. He's testifying outside the evidence. Move to strike.

THE COURT: Members of the jury, you will be guided by your recollection of the testimony and evidence in the case. EXCEPTION NO. 30.

When the above portion of the closing arguments is read in context, however, it is clear that the trial court's handling of the matter was entirely proper. We note that in his closing argument, defense attorney Vanderblomen was the first to raise the issue of statistical percentages. In part, Vanderblomen argued as follows:

> What do the cigarette butts show? I don't know how many of you are type A blood. And there is no evidence as to how many people with type A blood there are. But people who know, O is most common, and there is O [sic] and B and there is AB. In this case the person who smoked the Salem cigarettes and Mr. Whisenant are Type A secretor [sic]. That means of the A type 80 percent are secretors. What that means is that cigarette butts were most likely smoked by somebody, 80 percent, type A people could have been that person. That's assuming that the cigarettes were smoked by somebody and then dropped there.

Thus, it appears that the prosecutor only made his statistical argument to the jury after defense counsel had raised the issue. Further, a close reading of the prosecutor's argument shows that the prosecutor made it clear to the jury that he was "assuming" some of the percentages and that he was using another percentage "as an example" in his statistical analysis of the evidence. In short, the record indicates the prosecutor, in addressing the defense attorney's statistical argument, was using assumed percentages merely as a way of demonstrating that it was more likely than not that defendant was the perpetrator of the murders. Mr. Greene stated, in part, that "[i]t would be closer to less than one percent than it would eighty percent that Mr. Vanderblomen wants you to believe was putting those cigarettes out there—".

As this Court has stated many times, "argument of counsel must be left largely to the control and discretion of the presiding judge and [that] counsel must be allowed wide latitude in the argument of hotly contested cases." *State v. Monk*, 286 N.C. 509, 515, 212 S.E. 2d 125, 131 (1975) (citations omitted). We hold, therefore, that when the prosecutor's statistical argument is read in context, it is clear that the trial court's exercise of discretion in not striking the prosecutor's argument but instead warning the members of the jury to be guided by their recollections of the testimony and the evidence in the case was well within the bounds of sound judgment.

In sum, therefore, we hold that defendant received a trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. BENNIE CARSELL WILHITE, JOHN EDGAR RANKIN AND RALPH WAYNE RANKIN

No. 569A82

(Filed 7 July 1983)

1. **Rape and Allied Offenses § 7 — sentence for first degree rape**

The trial judge was not authorized to sentence defendants to minimum and maximum terms of years for first degree rape since first degree rape was punishable only by a mandatory life sentence when the crimes were committed in November and December 1980 and under the Fair Sentencing Act which became effective 1 July 1981. G.S. 14-1.1(a)(2); G.S. 14-27.2(b).

2. **Criminal Law § 169 — exclusion of testimony — failure of record to show answers of witness**

Where the trial court sustained objections to the cross-examination of a State's witness and the record failed to show what the answers of the witness would have been, it cannot be determined that the court's ruling, even if error, was prejudicial.

3. **Criminal Law §§ 89.9, 89.10 — impeachment of victim — acts of misconduct — inconsistent statements on collateral matter — testimony of other witnesses**

Testimony by a defense witness in a kidnapping case that about a month after the incident in question, the victim "left with a perfect stranger at 2:00 or 3:00 a.m. and that at a later point he had sex with the lady, and she made statements to him that she had sex for hire" was not admissible to impeach

the victim's testimony and to show that she might have consented to go, instead of being forced to go, with defendants, since specific acts of misconduct may be inquired about for impeachment purposes only on cross-examination of the witness to be impeached and may not be proved by other witnesses. Furthermore, testimony by the witness that he was told by the victim that she was put out of the house by her mother and had to live with a friend for having sex with her stepfather was not admissible to impeach the victim's contrary testimony since a witness's prior inconsistent statements about a collateral matter may be inquired about only on cross-examination of the witness to be impeached and may not be proved by other witnesses.

BEFORE *Judge Rousseau* and a jury at the 30 March 1981 Criminal Session of GUILFORD Superior Court defendants Rankin were found guilty of first degree rape and kidnapping. John Rankin was sentenced to forty to sixty years' imprisonment for the kidnapping conviction and sixty to seventy years' imprisonment for the rape conviction, the sentences to run consecutively. Ralph Rankin was sentenced to sixty to seventy years' imprisonment for the rape conviction and sixty to seventy years' imprisonment for the kidnapping conviction, the sentences to run concurrently. Defendant Wilhite was found guilty of first degree rape and received a sentence of sixty to seventy years' imprisonment.[1]

The Court of Appeals found no error in any of the defendants' rape convictions in an opinion written by Judge Becton and joined by Judges Hill and Hedrick. The majority of the panel, however, awarded the Rankin defendants new trials on the kid-

1. Although neither the state nor defendants have raised this point and the cases are not actually before us, we note that the sentences in the rape cases are not authorized by statute. These crimes were committed in November and December 1980. At that time first degree rape convictions were punishable only by a mandatory sentence of life imprisonment. Law of May 29, 1979, ch. 682, § 1, 1979 N.C. Sess. Laws, 1st Sess. 725 (amended by Law of June 25, 1980, ch. 1316, § 4, 1979 N.C. Sess. Laws, 2d Sess. 247, 248) (current version at G.S. 14-27.2). Even under the Fair Sentencing Act, which became effective on 1 July 1981, first degree rape is a Class B felony which is punishable by a mandatory life sentence. G.S. 14-1.1(a)(2) & 14-27.2(b). The trial judge, therefore, in the rape convictions, was not authorized to sentence these defendants to minimum and maximum terms of years. The same sentencing error occurred in Wilhite's case. We have, therefore, determined, in the exercise of our supervisory powers and by separate order, to direct the Court of Appeals to remand all the rape cases to the superior court for the imposition of sentences of life imprisonment. *See State v. Woods*, 307 N.C. 213, 224, 297 S.E. 2d 574, 581 (1982). All defendants and their counsel shall be present in open court when the new sentences are pronounced.

napping charges over the dissent of Judge Hedrick. 58 N.C. App. 654, 294 S.E. 2d 396 (1982). The state appeals, pursuant to G.S. 7A-30(2), the award of new trials on the kidnapping charges to the Rankin defendants.[2]

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General; John F. Maddrey, Assistant Attorney General; and Michael Rivers Morgan, Associate Attorney, for the State appellant.

Pinkney J. Moses, for defendant appellee John Rankin; Joel G. Bowden, for defendant appellee Ralph Wayne Rankin.

EXUM, Justice.

The questions presented are whether the trial court committed reversible error in not permitting defendants Rankin in the kidnapping cases (1) to cross-examine the prosecuting witness about specific acts of misconduct and (2) to prove these acts by the testimony of other witnesses. A majority of the Court of Appeals concluded that error was committed. We disagree. As to the first question, the answers the witness might have given to the questions were not proffered for the record. As to the second question, the rulings were correct under well-established evidence rules governing proof of character. We reverse the Court of Appeals' decision awarding defendants Rankin a new trial in the kidnapping cases. We also remand, for the reasons set forth below, all three defendants' rape cases for resentencing.

The state's evidence at trial tended to show the prosecuting witness, Karen Siler, age 16, went with friends to the H & H Grill in Greensboro about 11 p.m. on 30 November 1980. Defendants entered the grill sometime after Siler and friends did. When Siler was returning from the restroom defendant John Rankin touched her private parts; defendant Ralph Rankin grabbed and kissed her. He asked her if he could go home with her, then he threatened her with a gun if she began crying. He also threatened to

2. Defendant Wilhite was acquitted of the kidnapping charge and there was no dissent from the majority's treatment of his rape conviction, so he has no right of appeal to this Court for review of the Court of Appeals' decision affirming his conviction. G.S. 7A-30(2). Wilhite filed a notice of appeal, however, and a petition for a writ of certiorari in this Court on 14 October 1982. His appeal was dismissed and his petition denied on 3 November 1982.

harm her friends if she told them of their conversation. Fearful for her friends, she told them to leave the grill without her. Defendants put Siler in their car and drove her to an apartment where they forced her to have sexual intercourse with them.

Defendant John Rankin did not testify at trial. Defendant Ralph Rankin testified he gave his brother, John, defendant Wilhite and Siler a ride to an apartment from the H & H Grill during the early morning hours of 1 December 1980. He went home after dropping them off. He denied kissing Siler, threatening her or having sexual intercourse with her.

[2] During the testimony of Siler defendant John Rankin's counsel sought to cross-examine her about what counsel said were "prior acts of misconduct"; specifically, the alleged act of misconduct was "that she used to live with Mr. Marshall and that she worked for Mr. Marshall as a prostitute." The trial court sustained the state's objection to this kind of cross-examination. No questions were put to this witness on this subject nor did she ever indicate what her answers would have been had the questions been put. Since we cannot know what the witness's answers to this line of inquiry would have been, we cannot say that the trial court's ruling was reversible error, even if it was error to preclude the cross-examination. *State v. Banks*, 295 N.C. 399, 409-10, 245 S.E. 2d 743, 750 (1978); *State v. Miller*, 288 N.C. 582, 593-94, 220 S.E. 2d 326, 334-35 (1975); *State v. Davis*, 284 N.C. 701, 716, 202 S.E. 2d 770, 780-81, *cert. denied*, 419 U.S. 857 (1974); 4 N.C. Index 3d, Criminal Law § 169.6 (1976). "Where the record fails to show what the answer would have been had the witness been permitted to answer, the exclusion of such testimony cannot be held prejudicial. [Citations omitted.] This rule applies not only to direct examination but to questions on cross-examination as well." *State v. Miller, supra*, 288 N.C. at 593, 220 S.E. 2d at 335; *accord, State v. Banks, supra*, 295 N.C. at 410, 245 S.E. 2d at 750.

Also during the testimony of state's witness Deborah Wilson, defendant John Rankin through counsel attempted to cross-examine her about an incident when Siler allegedly "had approximately 18 men waiting on the stairwell to visit her in her room." The trial court sustained the state's objection. The matter was not pursued, and what the witness's answer might have been does not appear. For reasons already given, we cannot say that the trial court's ruling, even if error, warrants a new trial.

[3] Finally defendant Ralph Rankin sought to offer the testimony of Thomas Braswell. This testimony, according to defendant Ralph Rankin's counsel, would have shown that Siler "had prior sexual activities that are inconsistent with what she told on the witness stand." Specifically, Bowden said Braswell would testify, "That on the occasion he met this young lady, she left with a perfect stranger at 2:00 or 3:00 a.m. and that at a later point he had sex with the lady, and she made statements to him that she had sex for hire. This happened about a month after this incident took place." Defendant John Rankin's counsel also stated, "This witness' testimony will also indicate that he was told by Miss Siler that she was put out of the house by her mother and had to live with Deborah Wilson for having sex with her stepfather." Siler had earlier testified, "My mother said it would be up to me if I wanted to stay with Deborah. She didn't send me over there to stay."

The trial court sustained the state's objection to the proffered testimony of Braswell. Defendants argue Braswell's testimony should have been admitted to impeach Siler because it shows both prior acts of misconduct and a prior inconsistent statement on her part. They also argue that, as prior acts of misconduct, the evidence was admissible in the kidnapping case on the issue of whether Siler was taken by force and against her will or whether she consented to go with defendants from the grill to the apartment.

Well-established evidence rules make it clear the trial court correctly sustained the state's objection to Braswell's proffered testimony. Siler's character was not directly in issue. This testimony's only possible relevance in the kidnapping cases was to disparage, or impeach, her testimony, or to show that she might have consented to go, instead of being forced to go, with defendants. For purpose of impeachment, specific acts of misconduct may be inquired of only on cross-examination of the witness to be impeached; they may not be proved by other witnesses. *State v. Finch*, 293 N.C. 132, 143, 235 S.E. 2d 819, 825 (1977); *State v. Monk*, 286 N.C. 509, 517-18, 212 S.E. 2d 125, 132 (1975). The same rule holds for prior inconsistent statements about collateral matters. As stated in *State v. Green*, 296 N.C. 183, 192-93, 250 S.E. 2d 197, 203 (1978):

> A witness may be cross-examined by confronting him with prior statements inconsistent with any part of his testimony, but where such questions concern matters collateral to the issues, the witness's answers on cross-examination are conclusive, and the party who draws out such answers will not be permitted to contradict them by other testimony. *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972); *State v. Long*, 280 N.C. 633, 187 S.E. 2d 47 (1972); 1 Stansbury, N.C. Evidence § 46 (Brandis rev. 1973).

In the instant case, Siler's relationship with her mother and stepfather was clearly collateral to the issue of her consent to accompany defendants.

The character of the prosecuting witness in a *rape* case, however, has traditionally been allowed to be shown by testimony of other witnesses as bearing on the issue of consent.[3] *State v. Goss*, 293 N.C. 147, 235 S.E. 2d 844 (1977); *State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976); *State v. Stegmann*, 286 N.C. 638, 213 S.E. 2d 262 (1975), *death penalty vacated*, 428 U.S. 902 (1976). But even in rape cases the rule has been that these other witnesses are limited to testifying only about the general reputation of the prosecuting witness; they were not allowed to testify regarding her specific acts of misconduct, sexual or otherwise, to prove her character. *State v. Banks, supra*, 295 N.C. at 409-10, 245 S.E. 2d at 750; *State v. Grundler*, 251 N.C. 177, 191-92, 111 S.E. 2d 1, 11-12 (1959), *cert. den.*, 362 U.S. 917 (1960).[4] Defendants argue that they should have been allowed to prove the allegedly bad character of

3. *But see* the Rape Victim Shield Statute, G.S. 8-58.6, which prohibits evidence of certain "sexual behavior" even for purposes of impeachment on cross-examination. *State v. Fortney*, 301 N.C. 31, 269 S.E. 2d 110 (1980).

4. We need not address whether the Rape Victim Shield Statute would now permit other witnesses to testify to evidence of complainant's specific acts of misconduct under subsections (b)(1), (2), (3) and (4) for the limited purposes there set out. *See* 1 Brandis, North Carolina Evidence § 105 (2d rev. ed. of Stansbury's N.C. Evidence, 1982), for a suggestion that it might. Even if the Rape Victim Shield Statute makes admissible evidence that under our cases would have been inadmissible, it would seem to apply by its terms only to "rape or sex offense cases." We have before us only the kidnapping cases. Furthermore, how Braswell would have actually testified does not appear in the record. Counsel's descriptions of what Braswell might have said are too cryptic and ambiguous for us to say that Braswell's testimony would have been admissible under the Rape Victim Shield Statute.

Siler in the kidnapping cases on the issue of whether she consented to go with them from the grill to the apartment, even if the Rape Victim Shield Statute might have precluded such evidence in the rape cases—an argument with which a majority of the Court of Appeals agreed. But the evidence defendants sought to offer through the testimony of Braswell was of specific acts of misconduct. That is what makes the evidence inadmissible.[5]

For the reasons given the Court of Appeals' decision insofar as it ordered new trials in the kidnapping cases against defendants John Rankin and Ralph Rankin is

Reversed.

STATE OF NORTH CAROLINA v. WALTER RUSHING

No. 192A83

(Filed 7 July 1983)

APPEAL by the State pursuant to N.C. 7A-30(2) from the decision of the Court of Appeals (*Judges Wells* and *Whichard* concurring, *Chief Judge Vaughn* concurring in part and dissenting in part), reported in 61 N.C. App. 62, 300 S.E. 2d 445 (1983), which vacated the judgment entered by *Collier, Judge*, at the 23 March 1982 Session of Superior Court, STANLY County. The Court of Appeals remanded this case for sentencing for assault on a female and non-felonious breaking or entering.

Rufus L. Edmisten, Attorney General, by Assistant Attorney General Harry H. Harkins, Jr., for the State-appellant.

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

PER CURIAM.

Affirmed.

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5. For a concise, accurate summary of the rules in this area, which ought to be thoroughly familiar to every trial lawyer, see 1 Brandis, North Carolina Evidence, §§ 105, 107, 110, and 111 (2d rev. ed. of Stansbury's N.C. Evidence, 1982).

APPENDIXES

AMENDMENT TO CODE OF
JUDICIAL CONDUCT

AMENDMENTS TO CODE OF
PROFESSIONAL RESPONSIBILITY

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE
NORTH CAROLINA STATE BAR

AMENDMENT TO CODE OF JUDICIAL CONDUCT

Canon 6C of the Code of Judicial Conduct, first published in 283 NC 771, 779, as amended 286 NC 729, is hereby again amended so that, as amended, it reads as follows:

C. **Public Reports.** A judge shall report the name and nature of any source or activity from which he received more than $1,000 in income during the calendar year for which the report is filed. Any required report shall be made annually and filed as a public document as follows: The members of the Supreme Court shall file such reports with the Clerk of the Supreme Court; the members of the Court of Appeals shall file such reports with the Clerk of the Court of Appeals; and each Superior Court Judge, Regular, Special, and Emergency, and each District Court Judge, shall file such report with the Clerk of the Superior Court of the County in which he resides. For each calendar year, such report shall be filed not later than May 15th of the following year.

Adopted by the Court in conference this 3rd day of November 1983, to be effective with the reports covering calendar year 1983 which are to be filed not later than 15 May 1984.

FRYE, J.
For the Court

AMENDMENTS TO CODE OF PROFESSIONAL RESPONSIBILITY

The following amendment to the Code of Professional Responsibility 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 20, 1983.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article X, Canon 7 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 NC 865 and as amended in 283 NC 838 be amended by deleting the current DR 7-107 and rewriting the same to read as follows:

DR 7-107 TRIAL PUBLICITY.

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication where there is a reasonable likelihood of interference with a fair jury proceeding. A lawyer may state:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense, and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any danger.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until conclusion of jury proceedings, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication where there is a reasonable likelihood of interference with a fair jury proceeding and relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examination or tests or the refusal or failure of the accused to submit to examination or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107 (B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of the investigation.

(7) The nature, substance, or text of the charge.

(8) Quotations from or references to public records of the court in the case.

(9) The scheduling or result of any step in the judicial proceedings.

(10) That the accused denies the charges made against him.

(D) (a) A lawyer shall neither make nor cause another person to make an extrajudicial statement regarding a civil jury proceeding (or administrative proceeding from which or ancillary to which the right to a civil jury trial exists) that a reason-

able person would expect to be disseminated by means of public communication and that the lawyer knows or reasonably should know will have a reasonable likelihood of materially prejudicing such jury proceeding and impairing the integrity of the judicial process. An extrajudicial statement will likely have such an effect when the statement relates to:

(1) the character, credibility, reputation, or criminal record (including arrests, indictments or other charges of crime, whether past, present or forthcoming) of a party, witness, prospective party or witness, or the expected testimony of the aforesaid, unless such information would be clearly admissible at the proceeding;

(2) a companion criminal case or proceeding (in which there is a common core of facts in the criminal case or proceeding and the civil jury action) that could result in incarceration, the possibility of a guilty plea to the offense or the existence or contents or any confession, admission, or statement given by a party, witness or prospective party or witness or that person's refusal or failure to make a statement, unless such information would be clearly admissible at the proceeding;

(3) the performance or results of any examination or tests, or the refusal of a person to submit to an examination or test or the identity or nature of physical evidence expected to be presented at trial unless such information would be clearly admissible at the proceeding;

(4) any opinion as to the guilt or innocence of a party, witness, or prospective party or witness in a companion criminal case or proceeding (in which there is a common core of facts) that could result in incarceration;

(5) the details of a settlement offer or the failure of the other party to accept a settlement offer;

(6) information the lawyer knows or reasonably should know is likely to be inadmissible at trial and would, if disclosed, create a substantial risk of prejudicing an impartial proceeding;

(7) any statement of law or fact which the lawyer knows to be false and which would, if stated, create a substantial risk of prejudicing an impartial proceeding;

(8) any opinion as to the merits of the claims or defense of a party, except as required by law or administrative rule;

(b) Any word, phrase, or sentence in paragraph (a) above which may be found by a court to be in violation of the Constitution of the United States or North Carolina shall be deemed severable from all other words, phrases and sentences of that paragraph.

(c) A lawyer involved in the investigation or litigation of a civil jury matter may state without elaboration:

(1) the general nature of the claim or defense;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress, including the general scope of the investigation, the offense or claim or defense involved and, except when prohibited by law, the identity of the persons involved;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is a reason to believe that such danger exists; and

(7) in a companion criminal case:

(i) The name, age, residence, occupation, and family status of the accused.

(ii) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(iii) A request for assistance in obtaining evidence.

(iv) The identity of the victim of the crime.

(v) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(vi) The identity of investigating and arresting officers or agencies and the length of the investigation.

(vii) The nature, substance, or text of the charge.

(viii) Quotations from or references to public records of the court in the case.

(ix) The scheduling or result of any step in the judicial proceedings.

(E) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(F) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

(G) A lawyer, in the representation of a client, shall not knowingly make a false statement of fact, state or allude to any matter or any person not reasonably related to the client's case, or use the public record or the processes of the courts to knowingly convey false statements of fact or other information regarding any matter or any person not reasonably related to the client's case.

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 15th day of November, 1983.

B. E. JAMES
Secretary-Treasurer

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 6th day of December, 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 6th day of December, 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 NC 865 and as amended in 283 NC 798, 293 NC 777, 299 NC 747 and 301 NC 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 employment 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

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and 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 13, 1984.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IX, Sections 5(A)(5); 6(6); 13(11); 23(A)(2) and 29 as appear in 205 NC 861 and as amended in 288 NC 747, 748, 754, 765 & 771 and 293 NC 750 be and the same are hereby amended as follows:

§ 5(A)(5) is rewritten to read as follows:

§ 5. Chairman of the Grievance Committee, Powers and Duties

(A)(5) to issue, at the direction and in the name of the Grievance Committee, a Letter of Caution, a Private Reprimand, or a Public Censure to an accused attorney.

§ 6(6) is rewritten and existing paragraph (6) is renumbered (7) as follows:

§ 6. Grievance Committee, Powers and Duties

(6) to issue a public censure of an accused attorney in cases wherein a complaint and hearing are not warranted but the conduct warrants more than a private reprimand.

(7) to direct that petitions be filed seeking a determination whether a member of the North Carolina State Bar is disabled from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants.

§ 13(11) is rewritten and existing paragraph (11) is renumbered (12) as follows:

§ 13. Preliminary Hearing

(11) If probable cause is found and it is determined by the Grievance Committee that a complaint and hearing are not warranted but the conduct warrants more than a Private Reprimand, the Committee may issue a notice of proposed public censure to the accused attorney. A copy of the proposed public censure shall be served upon the accused attorney as provided in G.S. § 1A-1, Rule 4. The accused at-

torney must be advised that he may accept the public censure within fifteen days after service upon him or a formal complaint will be filed before the Disciplinary Hearing Commission. The accused attorney's acceptance must be in writing, addressed to the Grievance Committee and filed with the Secretary. Once the public censure is accepted by the accused, the discipline becomes public and must be filed as provided by § 23(A)(2).

(12) Formal complaints shall be issued in the name of the North Carolina State Bar as plaintiff, signed or verified by the Chairman of the Grievance Committee.

§ 23(A)(2) is amended by adding the following after the words "Disciplinary Hearing Commission" in the second line: "or the Chairman of the Grievance Committee" to read as follows:

(A)(2) public censure, suspension or disbarment. The Chairman of the Disciplinary Hearing Commission *or the Chairman of the Grievance Committee* shall file the order of public censure, suspension or disbarment with the Secretary. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disciplined member and filed with the Clerk of the Supreme Court of North Carolina. A judgment of suspension or disbarment shall be effective throughout the State.

§ 29 is amended by placing a comma at the end of the first sentence and adding the following: "except the previous issuance of a Private Reprimand to an accused attorney may be revealed in any subsequent disciplinary proceeding" to read as follows:

§ 29. Confidentiality.

All proceedings involving allegations of misconduct by an attorney shall remain confidential until the complaint against an accused attorney has been filed with the Secretary of the North Carolina State Bar as a result of the Grievance Committee of the North Carolina State Bar having found that there is probable cause to believe that said accused attorney is guilty of misconduct justifying disciplinary action, or the accused attorney requests that the matter be public prior to the filing of the aforementioned complaint, or the investigation is predicated upon a conviction of the accused attorney of a crime, *except the previous issuance of a private repri-*

mand to an accused attorney may be revealed in any subsequent disciplinary proceeding. In matters involving alleged disability, all proceedings shall be kept confidential unless and until the Council or a hearing committee of the Disciplinary Hearing Commission enters an Order transferring the member to inactive status.

This provision shall not be construed to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, or to other jurisdictions investigating qualifications for admission to practice or to law enforcement agencies investigating qualifications for government employment. In addition, the Secretary shall transmit notice of all public discipline imposed, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association.

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 29th day of February, 1984.

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 is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of March, 1984.

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 6th day of March, 1984.

FRYE, J.
For the Court

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 January 13, 1984.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, Standing Committees of the Council, k. Board of Legal Specialization, as appear in 221 NC 587 and as amended in 268 NC 734, 274 NC 608, 277 NC 742, 302 NC 637 and 307 NC --- be and the same is hereby amended by adding a new section 7.6 to read as follows:

7.6 All information contained in the application and supporting documents submitted for certification under this section and for re-certification under section 8 shall be confidential and shall be available for use only, by either the Board, the appropriate Specialty Committee, or any appropriate body in event of an appeal, to determine the qualifications of the applicant for certification. Any scores on any examinations required under these Rules shall likewise be confidential and used under the same circumstances; however, the score may be released to the applicant.

NORTH CAROLINA
WAKE COUNTY

I, B. E. JAMES, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar has been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said 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 27th day of February, 1984.

B. E. JAMES
Secretary

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 6th day of March, 1984.

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 it be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of March, 1984.

FRYE, 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

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

The denial of plaintiff's motion for a preliminary injunction to restrain defendant from breaching a covenant not to compete was immediately appealable. *A.E.P. Industries v. McClure*, 393.

§ 14. Appeal and Appeal Entries

Plaintiff's purported appeal is dismissed where the record shows that plaintiff neither gave oral notice of appeal in open court nor filed and served written notice of appeal within ten days of the entry of the judgment. *Booth v. Utica Mutual Ins. Co.*, 187.

§ 20. Appellate Review of Nonappealable Interlocutory Orders by Certiorari

The Court of Appeals erred in reviewing the trial judge's denial of some of the defendants' motions for summary judgment since negligence claims are rarely susceptible to summary adjudication and should ordinarily be resolved by trial of the issues. *Lamb v. Wedgewood South Corp.*, 419.

Where defendants' motion for summary judgment was based solely on their contention that G.S. 1-50(5) barred a crossclaim as a matter of law, it was appropriate for the Court of Appeals to treat the defendants' purported appeal from denial of the motion as a petition for certiorari and, in its discretion, to review the trial court's order. *Ibid.*

§ 45. Form and Contents of Brief

Whenever a stenographic transcript is used in lieu of narrating the evidence into the record, App. Rule 28(b)(4) does not require that all verbatim reproductions of segments of the transcript be placed in an appendix to the brief but requires that relevant portions be reproduced in either the brief or its appendix. *S. v. Edmonds*, 362.

Whenever a stenographic transcript is used in lieu of narrating the evidence, App. Rule 28(b)(4) only requires setting out in an appendix to the brief the verbatim portions of the transcript necessary for an understanding of each question presented and does not require the appellant to include all of the evidence necessary for a determination of the questions presented. App. Rule 28(b)(4) only pertains to testimonial evidence given at trial, and other items such as jury instructions should be contained in the record on appeal. *S. v. Nickerson*, 376.

ARCHITECTS

§ 3. Liability for Defective Conditions

G.S. 1-50(5) barred plaintiff's claim against architects since it was brought more than six years after the architects performed and furnished their services. *Lamb v. Wedgewood South Corp.*, 419.

Through G.S. 1-50(5), the legislature intended to prohibit all claims and crossclaims against designers and builders filed beyond the six-year period even if these claims or crossclaims are filed by persons in possession and control. The second sentence is meant to preserve claims brought against persons in possession and control of an improvement to real property who might also have designed or built the improvement. *Ibid.*

G.S. 1-50(5) does not create a special emolument or privilege within the meaning of the constitutional prohibition. *Ibid.*

G.S. 1-50(5) does not violate Art. I, § 18 of our state's constitution by barring a claim before the injury giving rise to the claim occurs. *Ibid.*

ARCHITECTS — Continued

G.S. 1-50(5) does not violate the equal protection provisions of either our state or the federal constitutions. *Ibid.*

ARSON AND OTHER BURNINGS

§ 4.2. Cases Where Evidence Was Insufficient

The State's evidence was insufficient for the jury in a prosecution for burning a mobile home where the State failed to establish, independent of defendant's confession, that the fire had a criminal origin. *S. v. Brown*, 181.

ATTORNEYS AT LAW

§ 2. Admission to Practice

There was substantial evidence to support findings by the Board of Law Examiners that an applicant to take the Bar Examination entered the attic above the adjoining apartment of three women and drilled holes from the attic through the ceiling of the women's apartment for the purpose of secretly peeping into the bathroom and a bedroom of the apartment, and that specific statements in the applicant's answers to interrogatories in a prior civil suit instituted by the women against defendant and in his testimony before the Board were untrue and given by him with intent to deceive the court and the Board, and such findings were sufficient to support the Board's conclusion that the applicant lacked such good moral character as to be entitled to take the Bar Examination. *In re Elkins*, 317.

A letter sent by counsel for the Board of Law Examiners asserting that a quorum was present and offering to provide affidavits of sworn testimony before the trial judge was sufficient to establish that a quorum of the Board was present and participating when the decision was made on appellant's case. *In re Moore*, 771.

There was substantial competent evidence to support the findings of the Board of Law Examiners which in turn constituted a reasonable basis from which the Board could determine that appellant had not been completely rehabilitated and that he did not possess the moral character necessary to stand for the 1978 Bar Examination. *Ibid.*

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions Available

The trial court did not commit prejudicial error in refusing to permit defendant to discover during trial the contents of certain police records and statements of prospective witnesses. *S. v. Waters*, 348.

The State was not required to disclose a witness's statements prior to trial. *S. v. Williams*, 339.

Statutes prohibited pretrial discovery of a rape victim's oral and written statements to law officers. *S. v. Williams*, 357.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence; Generally

There was sufficient evidence of a constructive breaking to support defendant's conviction of first degree burglary. *S. v. Williams*, 357.

CONSTITUTIONAL LAW — Continued

§ 43. What is the Critical Stage of Proceedings

Although defendant was in custody on an unrelated robbery/rape charge, defendant's Sixth Amendment right to counsel did not arise prior to the time he made a statement about the murder in question. *S. v. Franklin*, 682.

§ 58. Number of Jurors

Defendant was not denied his right to a unanimous verdict in a felony murder prosecution by the trial court's submission of the underlying felonies of kidnapping and attempted rape in the disjunctive. *S. v. McDougall*, 1.

CONTRACTS

§ 7.1. Contracts Restricting Business Competition Between Employers and Employees

The trial court should have allowed plaintiff's motion for a preliminary injunction to restrain defendant from breaching a covenant not to compete in an employment agreement. *A.E.P. Industries v. McClure*, 393.

COURTS

§ 1. Nature and Function of Courts in General

G.S. 1-50(5) does not violate Art. I, § 18 of our state's constitution by barring a claim before the injury giving rise to the claim occurs. *Lamb v. Wedgewood South Corp.*, 419.

§ 3. Original Jurisdiction of Superior Court

The trial court erred in determining that the clerk of superior court had jurisdiction of plaintiffs' action challenging the constitutionality of statutory provisions giving clerks discretionary authority to appoint drainage commissioners in lieu of the election thereof. *White v. Pate*, 759.

§ 9.1. Restraining Orders; Rulings Affecting Conduct of Litigation

The trial judge in a first degree murder case was not bound by a pretrial order entered by another judge which provided for individual voir dire of the prospective jurors. *S. v. Stokes*, 634.

CRIMINAL LAW

§ 6. Mental Capacity as Affected by Intoxicating Liquor or Drugs

The trial court in a first degree murder case did not err in failing to instruct the jury to consider evidence of defendant's mental condition as well as evidence of his intoxication in determining his ability to premeditate and deliberate and form a specific intent. *S. v. Kirkley*, 196.

§ 13. Jurisdiction in General

The fact that a person accused of a crime is improperly or illegally brought to this State after being apprehended in another jurisdiction does not affect the right of the State to try and imprison him for the crime. *S. v. Freeman*, 502.

§ 15.1. Prejudice, Pretrial Publicity or Inability to Receive Fair Trial as Ground for Change of Venue

The trial court did not err in the denial of defendant's motion for a change of venue of a murder, robbery and assault trial in which various accounts of the inci-

CRIMINAL LAW — Continued

dent suggested that it resulted from the perpetrator's disapproval of a group of people he thought were homosexuals who were swimming and sunning along a river. *S. v. Richardson*, 470.

The trial court did not err in the denial of defendant's motion for a change of venue because of pretrial publicity. *S. v. Dellinger*, 288.

§ 22. Arraignment and Pleas Generally

The trial court erred in arraigning defendant when his name failed to appear on the arraignment calendar, but such error was not prejudicial. *S. v. Richardson*, 470.

§ 23.4. Revocation or Withdrawal of Guilty Plea

Defendant was not entitled to withdraw pleas of guilty and no contest entered pursuant to a plea bargain in which he agreed to testify truthfully against a third party because the State failed to call defendant to testify against the third party. *S. v. Taylor*, 185.

§ 33. Facts in Issue and Relevant to Issues in General

The trial judge properly allowed a victim to testify as to her habits when she was suffering from a migraine headache. *S. v. Ziglar*, 745.

§ 34.5. Admissibility of Evidence of Other Offenses to Show Identity of Defendant

In a prosecution for burglary, kidnapping and rape, evidence that defendant was arrested for secretly peeping into the window of a home occupied by a female a block from the crime scene three days after the crimes charged was admissible to establish the identity of defendant as the perpetrator of the crimes charged and to establish a common plan or scheme. *S. v. Williams*, 357.

§ 34.7. Admissibility of Evidence of Other Offenses to Show Knowledge or Intent

Testimony by a witness in a first degree murder case that defendant said, "I done killed one damn man and I will blow your damn head off," and that defendant then shot a mirror was admissible to show that defendant intentionally and with malice killed the victim. *S. v. Dellinger*, 288.

§ 42. Articles and Clothing Connected with the Crime

Grocery items found in defendant's possession at the time of his arrest were relevant to corroborate a rape and kidnapping victim's testimony and to strengthen her testimony identifying defendant as one of her assailants. *S. v. Newman and S. v. Newman*, 231.

§ 42.2. Sufficiency of Foundation for Admission of Articles Connected with Crime

The State established a sufficient chain of custody of grocery items taken from defendant's possession at the time of his arrest for the items to be admitted into evidence, and such items were not inadmissible because there was no direct testimony to show that there was no material change in the condition of the items between the date of the alleged crime and the time of the trial. *S. v. Newman and S. v. Newman*, 231.

§ 42.6. Chain of Custody or Possession

A rifle bolt found near a murder victim's body was not inadmissible because the State failed to show a proper chain of custody. *S. v. Dellinger*, 288.

CRIMINAL LAW — Continued

§ 43. Maps, Diagrams and Photographs

Testimony by a deputy sheriff of the county involved was competent to authenticate a map of that county and the map was properly used to illustrate the testimony of the deputy sheriff. *S. v. Ziglar*, 745.

§ 43.4. Gruesome, Inflammatory or Otherwise Prejudicial Photographs

In a prosecution for first degree rape, the trial court properly allowed the use of photographs illustrating the wrist of the victim and the defendant's face and hands. *S. v. Ziglar*, 745.

§ 46.1. Competency and Sufficiency of Evidence of Flight of Defendant as Implied Admission

Testimony by officers concerning defendant's flight after he was informed that a gun which had been used in a robbery-murder but was not the murder weapon had been removed from his car by the police was admissible. *S. v. Rothwell*, 782.

§ 48. Silence of Defendant as Implied Admission

The trial court did not err by allowing a State's witness to testify concerning certain statements made by defendants since the statements were at least implied admissions by the defendants. *S. v. Craig and S. v. Anthony*, 446.

§ 50. Expert and Opinion Testimony in General; What Constitutes Opinion Testimony

Questions concerning things like what was the temperature, how far was one object from another, and what did certain persons look like called for answers which were within the knowledge of the witness and were properly admitted. *S. v. Ziglar*, 745.

§ 52. Examination of Experts; Hypothetical Questions

The trial court did not err in allowing the State's witness to testify to the percentage of the population of the United States that possess a certain blood type as the witness was qualified to give such an opinion. *S. v. Ziglar*, 745.

§ 53. Medical Expert Testimony in General

In a prosecution for first degree rape, a physician with extensive training in pediatrics and experience in having examined hundreds of female children of the victim's age could properly testify that tears he observed within the interior of the victim's genital area were probably caused by a penis. *S. v. Starnes*, 720.

§ 55. Blood Tests Generally; Tests for Presence of Alcohol or Drugs

The trial court properly permitted testimony by an expert who analyzed during trial a blood sample taken from defendant shortly after his arrest some nine months earlier that there were no signs of cocaine or its metabolites in the blood. *S. v. McDougall*, 1.

§ 62. Lie Detector Tests

Defendant failed to demonstrate how the trial court's denial of his motion for a polygraph examination to be conducted by the State Bureau of Investigation at the expense of the State was error. *S. v. Craig and S. v. Anthony*, 446.

§ 63. Evidence as to Sanity of Defendant

A psychologist's opinion testimony as to defendant's mental status one week after the shootings in question was improperly excluded, but such error was not prejudicial. *S. v. Kirkley*, 196.

CRIMINAL LAW — Continued

§ 66.1. Competency of Witness's Identification; Opportunity for Observation

A rape victim's in-court identification of defendant was not tainted because the victim was hypnotized several months before the trial. *S. v. Waters*, 348.

A rape victim's identification of defendant as her assailant was not inherently incredible and unworthy of belief. *S. v. Ricks*, 522.

§ 66.6. Suggestiveness of Lineup

Pretrial photographic and lineup identification procedures were not impermissibly suggestive because the victim was told that the police had a suspect, the victim had only a short time to view her assailant, the victim was unable positively to identify defendant from the photographs but narrowed her choice to two, one of which was defendant, the individual in the second photograph was not present in the lineup, and no other individual in the lineup had the same hairline as the defendant. *S. v. Chatman*, 169.

§ 66.7. Identification from Photographs

A pretrial photographic identification procedure was not improper because defendant was in custody and available for a lineup absent a showing of prejudice. *S. v. Williams*, 357.

§ 66.9. Suggestiveness of Photographic Identification Procedure

A pretrial photographic identification procedure will not be deemed impermissibly suggestive because the mug book had been disassembled before trial. *S. v. Harris*, 159.

A photographic identification procedure was not impermissibly suggestive because the mug book shown to a rape and robbery victim contained a photograph of defendant wearing a cap and scarf similar to the ones the victim had previously described her assailant as wearing at the time of the crimes. *Ibid.*

The fact that a rape victim incorrectly fixed the date when a pretrial photographic identification was made did not render the pretrial photographic procedure improper. *S. v. Newman and S. v. Newman*, 231.

A victim's in-court identification of defendant was not tainted by a pretrial photographic showup where the victim stated that the person in the photograph was not defendant. *S. v. Waters*, 348.

The mere fact that a rape victim was told that the police had arrested a suspect will not vitiate an otherwise legally valid photographic identification procedure. *S. v. Williams*, 357.

A pretrial photographic identification of defendant by a rape victim was not unnecessarily suggestive. *S. v. Williams*, 339.

A pretrial procedure at which photographs of seven black males wearing caps or toboggans were displayed to a rape victim was not impermissibly suggestive because the victim's assailant had been described as wearing a dark colored coat and toboggan and defendant was the only person in the photographs wearing a dark coat. *S. v. Ricks*, 522.

§ 66.12. Confrontation in Courtroom

The evidence supported the trial court's determination that a courtroom confrontation between the victim and defendant was not suggestive and that the victim's in-court identification of defendant was not tainted by the courtroom confrontation. *S. v. Waters*, 348.

CRIMINAL LAW — *Continued*

§ 66.15. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Lineups

The evidence supported the trial court's determination that a rape victim's in-court identification of defendant was of independent origin and not tainted by pretrial photographic and lineup identifications. *S. v. Chatman*, 169.

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

Even if a pretrial photographic identification procedure was impermissibly suggestive, the evidence supported the trial court's decision that a rape and robbery victim's in-court identification of defendant was admissible as being of independent origin. *S. v. Harris*, 159.

Even if a photographic procedure was impermissibly suggestive, the evidence supported the trial court's determination that a rape victim's in-court identification of defendant was of independent origin. *S. v. Ricks*, 522.

§ 70. Tape Recordings

The trial court did not err in the deletion of an incompetent portion of a prosecution witness's tape recorded statement which was admitted for corroboration. *S. v. Griffin*, 303.

§ 73. Hearsay Testimony in General

An objection to testimony was properly sustained where the trial judge allowed the witness to testify what she knew but not to what she had heard. *S. v. Ziglar*, 745.

§ 75.2. *Confessions*; Effect of Promises, Threats or Other Statements of Officers

Defendant's confession was voluntary and not the result of intoxication or promises by the investigating officers that defendant would receive a shorter sentence. *S. v. Williams*, 47.

Defendant was not coerced into confessing by threats that he would go to the gas chamber unless he admitted his participation in the crimes charged. *S. v. Stokes*, 634.

§ 75.3. Confessions; Effect of Confronting Defendant with Statements of Others or with Evidence

Defendant's confession was not rendered involuntary as a result of his being advised that a comparison of his tennis shoes with shoeprints at the crime scene revealed similarities. *S. v. Williams*, 47.

Confronting an accused with statements of his codefendants which implicate him in a crime does not render an ensuing confession involuntary. *S. v. Stokes*, 634.

The North Carolina test to determine the admissibility of a confession is whether the confession is voluntary under the totality of the circumstances of the case. *Ibid.*

§ 75.4. Confessions Obtained Prior to Appointment of, or in Absence of, Counsel

The trial court erred in admitting testimony concerning defendant's statement that he would reveal the location of the rest of the money after consulting with counsel. *S. v. Ladd*, 272.

CRIMINAL LAW — Continued

§ 75.7. Requirement that Defendant be Warned of Constitutional Rights; Form and Sufficiency of Warning

A deputy's reply to defendant's inquiry as to why he was being arrested that defendant knew why did not constitute interrogation, and defendant's subsequent statement that he did know why the police were there was properly admitted although defendant had not been given the Miranda warnings. *S. v. Ladd*, 272.

An officer's question to defendant during the booking process as to the location of his driver's license constituted continued custodial interrogation after a request for counsel where the officer knew that defendant's wallet containing his driver's license had been found at the crime scene and was in police custody. *Ibid.*

§ 75.9. Volunteered and Spontaneous Statements

Defendant's confession was not rendered inadmissible by officers' actions in deceiving and lying to the defendant. *S. v. Jackson*, 549.

The North Carolina test to determine the admissibility of a confession is whether the confession is voluntary under the totality of the circumstances of the case. *S. v. Jackson*, 549.

§ 75.11. Waiver of Constitutional Rights; Sufficiency of Waiver

In a prosecution for first degree murder, the trial court properly found defendant's confession was voluntarily and understandingly made after he had been fully advised of his constitutional rights and had specifically, knowingly, and intelligently waived his right to remain silent and to have counsel present during questioning. *S. v. Franklin*, 682.

§ 75.14. Defendant's Mental Capacity to Confess or Waive Rights; Generally; Insanity; Retardation

A subnormal mental condition standing alone will not render an otherwise voluntary confession inadmissible. *S. v. Stokes*, 634.

§ 76.10. Review of Trial Court's Determination Concerning Confession

Where defendant failed to attack his confession at trial on the theory that it was coerced because he had been advised by the investigating officers that a comparison of his tennis shoes with shoeprints at the crime scene revealed similarities, he could not attempt to do so for the first time on appeal. *S. v. Williams*, 47.

Defendant cannot attack the admissibility of his confession in the appellate division upon a theory entirely different from that relied upon at trial. *S. v. Ricks*, 522.

§ 79.1. Acts or Declarations Subsequent to Commission of Crime

The trial court erroneously admitted testimony by one codefendant that he pleaded guilty to the offense growing out of the events for which defendant was being tried, but such error was not prejudicial to defendant. *S. v. Rothwell*, 782.

§ 83.1. Actions in Which Husband or Wife May Testify Against Spouse

The trial court properly permitted defendant's wife to testify for the State in a criminal case where the wife's testimony did not concern confidential communications. *S. v. Waters*, 348.

§ 86.2. Impeachment of Defendant; Prior Convictions

Where there was no indication that questions concerning defense witness's prior criminal convictions and mental commitment were asked in bad faith, there was no error in permitting them. *S. v. Ziglar*, 745.

CRIMINAL LAW — Continued

§ 92.1. Consolidation Held Proper for Some Offenses

The trial court's consolidation of kidnapping, robbery and rape charges against two defendants was not error. *S. v. Newman and S. v. Newman*, 231.

§ 92.4. Consolidation Proper for Multiple Charges Against Same Defendant

The trial court did not err in the consolidation for trial of charges against defendant for kidnapping, first degree burglary and second degree rape on 2 October and charges for second degree burglary and second degree rape on 29 October. *S. v. Williams*, 339.

§ 96. Withdrawal of Evidence

Where the trial judge sustained an objection and instructed the jury to strike a statement of a witness from their recollection of the evidence, the court properly withdrew the incompetent evidence from the jury, cured any possible prejudice, and properly denied defendant's motion for a mistrial. *S. v. Craig and S. v. Anthony*, 446.

§ 97.1. No Abuse of Discretion in Permitting Additional Evidence

The trial judge did not err in allowing the State to recall a witness where the witness was recalled prior to the defendant presenting any evidence and before the State rested its case. *S. v. Ziglar*, 745.

In a prosecution for armed robbery, rape and sexual offense, the trial court did not abuse its discretion in permitting the State to question the victim on redirect examination about items missing from her home after the district attorney had failed to establish during the direct examination of the victim that any property had been taken from the home, person or presence of the victim as required for a conviction of armed robbery. *S. v. Waters*, 348.

§ 99.2. Expression of Opinion by Court in Remarks and Conduct During Trial

The trial court did not express an opinion in reading to the jury a written statement a rape and robbery victim had given to an officer the day after she was assaulted. *S. v. Harris*, 159.

A remark by the trial judge during the jury selection process which indicated defendant had entered a plea of guilty was merely a *lapsus linguae* not constituting prejudicial error. *S. v. Craig and S. v. Anthony*, 446.

The trial judge did not express an opinion on the evidence when, during selection of the jury, he stated that the State "thinks it can prove its case." *S. v. Black*, 736.

§ 99.7. Expression of Opinion in Admonitions to Witnesses

The trial court did not err in ordering a hostile witness to answer a question within his knowledge. *S. v. Griffin*, 303.

§ 101. Conduct or Misconduct Affecting Jurors

The trial court did not err in failing to give the jury the full admonishments set forth in G.S. 15A-1236(a) prior to each recess. *S. v. Richardson*, 470.

§ 101.4. Conduct During Jury Deliberation

The trial court did not abuse its discretion in permitting the jury to re-examine a photographic array previously admitted into evidence after the jury stated that it was deadlocked. *S. v. Dover*, 372.

CRIMINAL LAW – Continued

§ 102.3. Objections to Jury Argument

Defendant's exceptions to remarks by the prosecutor in his jury argument are deemed waived for purposes of appellate review where defendant failed to object to such remarks at trial. *S. v. Harris*, 159.

§ 102.5. Improper Questions in Examining Witnesses

Impropriety in the prosecutor's reference to the subject as the defendant on three occasions when the subject had not been identified as defendant by the witness was cured by the trial court's action. *S. v. Griffin*, 303.

§ 102.6. Particular Comments in Argument to Jury

The prosecutor's jury argument that defense counsel "will have the last argument because they did not put on any evidence" and that particular pieces of evidence had not been contradicted was not improper. *S. v. Griffin*, 303.

Statements by the prosecutor concerning the level of intoxication necessary to negate premeditation and deliberation were not grossly improper. *S. v. Kirkley*, 196.

Where defendants failed to object to the closing argument of the prosecutor, the standard of review was one of "gross impropriety." *S. v. Craig and S. v. Anthony*, 446.

Defendants were not denied a fair trial when the district attorney referred to them as "wolves" during his closing argument. *Ibid.*

The trial judge did not err in allowing the prosecutor to make reference in his argument to the jury to a witness who was not called to testify by either the State or the defendant. *Ibid.*

The defendant was not denied a fair trial when the prosecutor argued to the jury that they should compare a picture of the circular wounds on the victim's body and the soles of the defendant's shoes. *Ibid.*

In a prosecution for first degree murder, the trial court did not err in failing to sustain defendant's objection to a prosecutor's argument concerning the percentage of people with an A blood type who secrete and who smoke Salem cigarettes. *S. v. Whisenant*, 791.

§ 102.7. Jury Argument on Character or Credibility of Witnesses

Disparaging remarks about defendant's expert psychiatrist made by the prosecutor in his jury argument were not so grossly improper as to require the trial court to intervene ex mero motu. *S. v. Kirkley*, 196.

The prosecutor was properly allowed to argue that there was no evidence presented at trial which would suggest that the State's principal witness had a prior record. *S. v. Craig and S. v. Anthony*, 446.

§ 102.10. Jury Argument Concerning Defendants' Character and Credibility

Any error caused by the prosecutor commenting on the existence of a statutory mitigating circumstance was harmless. *S. v. Craig and S. v. Anthony*, 446.

§ 102.12. Jury Argument Concerning Sentence or Punishment

The prosecutor's argument that the jury should impose the death sentence as a deterrent was not so grossly improper as to warrant intervention by the trial court ex mero motu. *S. v. Kirkley*, 196.

CRIMINAL LAW — Continued

§ 106.4. Sufficiency of Evidence to Overrule Nonsuit; Confession of Defendant

The State's evidence was insufficient for the jury in a prosecution for burning a mobile home where the State failed to establish, independent of defendant's confession, that the fire had a criminal origin. *S. v. Brown*, 181.

§ 111.1. Particular Miscellaneous Instructions

The trial court did not err in suggesting that the jurors "start at the top of the verdict sheet and move down" in their deliberations or in telling the jurors that "it is best not even to think about this case between now and in the morning." *S. v. Griffin*, 303.

The trial court did not express an opinion in its initial statement to prospective jurors that it was their duty to determine "whether the defendant is guilty of the crime charged, or any lesser included offense, about which you are instructed" and in failing to mention that they could find defendant not guilty. *Ibid.*

§ 112.1. Instructions on Reasonable Doubt

The trial court's instruction that a reasonable doubt is a substantial misgiving "generated by the insufficiency of the proof" referred to insufficiency of the proof arising from the evidence as well as insufficiency of the proof arising from the lack of evidence and was not improper. *S. v. Williams*, 47.

The trial court's instructions on "reasonable doubt" did not preclude the jury from finding a reasonable doubt based on an insufficiency of the evidence. *S. v. Ziglar*, 745.

§ 120. Instructions on Consequences of Verdict

The jury was made fully aware that they could find the defendant not guilty even though the trial judge gave detailed instructions on how to proceed if they found the defendant guilty and failed to instruct on what the jury should do if they found the defendant not guilty. *S. v. Craig and S. v. Anthony*, 446.

§ 122.2. Additional Instructions Upon Jury's Failure to Reach Verdict

The trial court did not coerce a verdict in stating to the jury after over ten hours of deliberation, "All right, I'm going to leave you in there for 10 minutes. Let the jury go back to the jury room for 10 minutes." *S. v. Griffin*, 303.

§ 124.5. Inconsistency of Verdict

It was not inconsistent for the jury to determine that defendant broke into a mobile home with the intent to commit larceny and then to find defendant not guilty of larceny. *S. v. Brown*, 181.

§ 126. Unanimity of Verdict

Defendant was not denied his right to a unanimous verdict in a felony murder prosecution by the trial court's submission of the underlying felonies of kidnapping and attempted rape in the disjunctive. *S. v. McDougall*, 1.

§ 134.4. Sentencing Youthful Offenders

There was no error in the trial court's determination that the defendant would not benefit from treatment and supervision as a committed youthful offender for his first degree kidnapping conviction, but the "no benefit" finding was not applicable to his conviction for first degree rape for which a life sentence was the mandatory punishment. *S. v. Ziglar*, 745.

CRIMINAL LAW — Continued

§ 135.3. Exclusion of Veniremen Opposed to Death Penalty

The trial court did not err in excusing for cause a prospective juror who stated that she didn't "feel" like she would or didn't "think" she could vote for the death penalty under appropriate circumstances. *S. v. Kirkley*, 196.

Defendant was not deprived of a jury composed of a fair cross-section of the community by the exclusion of seven jurors who indicated they could not impose the death penalty under any circumstances. *Ibid.*

§ 135.4. Capital Cases Under G.S. 15A-2000

The involvement of the use of threat or violence to the person in commission of a prior felony as an aggravating circumstance may be proven or rebutted by the testimony of witnesses notwithstanding defendant's stipulation of the record of conviction. *S. v. McDougall*, 1.

The trial court did not err in listing only the statutory mitigating circumstances on the verdict form and failing to list thereon the additional mitigating circumstances submitted to the jury. *Ibid.*

The form of the fourth issue submitted to the jury as to whether the jury found beyond a reasonable doubt that the aggravating circumstances it found were sufficiently substantial to call for the death penalty were not erroneous when considered with the trial court's instructions. *Ibid.*

The order and form of the issues to be submitted to the jury in a sentencing hearing in a capital case are set forth in this opinion. *Ibid.*

A sentence of death imposed upon defendant for a first degree murder committed in the perpetration of a rape and kidnapping was not disproportionate. *Ibid.*

The trial court's instruction that "the law in North Carolina specifies the mitigating circumstances which might be considered by you, and only those circumstances created by statute . . . may be considered by you" was not erroneous when the phrase "only those circumstances created by statute" is interpreted to include "any other circumstances arising from the evidence which the jury deems to have mitigating value" pursuant to G.S. 15A-2000(f)(9). *Ibid.*

The pool of cases to be used in determining whether a sentence of death is excessive or disproportionate to the penalty imposed in other cases is to be composed of all capital cases tried after the effective date of our capital punishment statute in which there were convictions of murder in the first degree, regardless of the sentences imposed, and which have been reviewed by the N.C. Supreme Court. *Ibid.; S. v. Williams*, 47.

In a sentencing hearing in which the court submitted the aggravating circumstance as to whether the murder was committed while defendant was engaged in the commission of first degree burglary, the trial court did not err in failing to instruct the jury concerning evidence of defendant's intoxication as affecting his ability to form the intent to commit larceny at the time he broke into the victim's home. *Ibid.*

The trial court did not err in failing to instruct the jury that a sentence of life imprisonment would be imposed if the jury was unable to reach unanimous agreement on the proper sentence. *Ibid.*

The trial court's instructions on the issue as to whether the aggravating circumstances found by the jury were sufficiently substantial to call for the death penalty were sufficient where the court instructed that the jury must answer such issue based upon their findings concerning both aggravating and mitigating circumstances. *Ibid.*

CRIMINAL LAW — Continued

Where defendant was convicted of first degree murder on both the theory of premeditation and deliberation and the theory of murder in the perpetration of felonies, the underlying felonies could properly be considered as aggravating circumstances. *Ibid.*

While the form of the submission of the mitigating circumstance, "Does the defendant have a significant history of prior criminal activity?" is disapproved, the submission of this statutory mitigating circumstance in this form was not error under the circumstances of this case. *Ibid.*

Sentence of death imposed upon defendant for the murder of a 100-year-old victim was not disproportionate. *Ibid.*

It is not unconstitutional for the State to try, convict and sentence a defendant for a series of crimes and then submit those same crimes as aggravating factors during the sentencing hearing in a capital case. *S. v. Kirkley*, 196.

The statutory procedure for death qualifying a jury prior to the guilt phase and the requirement that the same jury hear both the guilt and penalty phases of the trial are constitutional. *S. v. Hill*, 382; *S. v. Ladd*, 272; *S. v. Kirkley*, 196.

Defendant was not prejudiced by the prosecutor's remarks concerning the weight several mitigating factors should be afforded and suggesting that one mitigating factor was really aggravating. *Ibid.*

The "course of conduct" aggravating circumstance is not unconstitutionally vague. *Ibid.*

The death penalty was not unconstitutional in defendant's case because the practice of requiring the trial court to instruct on second degree murder in all first degree murder cases in which the State relied on premeditation and deliberation was in use at the time of defendant's trial where defendant's evidence supported the trial court's submission of an issue of the lesser offense of second degree murder. *Ibid.*

The form of the fourth issue submitted to the jury as to whether the jury found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances was not erroneous. *Ibid.*

The jury must unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing, and the trial court did not err in instructing the jury that a mitigating circumstance must be deemed not to exist in the absence of unanimous agreement on its existence. *Ibid.*

The trial court did not err in refusing to impose a life sentence in two capital cases on the ground that the jury had not reached a unanimous sentence recommendation within a reasonable time. *Ibid.*

The trial court did not err in submitting an issue as to whether the jury found that the aggravating circumstance found by it was sufficiently substantial to call for imposition of the death penalty as issue number two which was to be decided prior to the consideration of any mitigating circumstances. *Ibid.*

The trial court erred in instructing the jury that it could find the factor of no significant history of prior criminal conduct not to be mitigating. *Ibid.*

The trial court properly placed upon the defendant the burden of proving the existence of each mitigating factor. *Ibid.*

The mere fact that a defendant desires to take a polygraph test is not, standing alone, evidence of a mitigating circumstance. *S. v. Craig and S. v. Anthony*, 446.

CRIMINAL LAW — Continued

The trial court did not err in allowing the prosecutor to refer to defendants as "human animals" and members of a "wolfpack" during his closing argument at the sentencing phase of the trial. *Ibid.*

The trial judge properly instructed the jury that they could find from the evidence that the murder of the victim was especially heinous, atrocious and cruel. *Ibid.*

Where the evidence in a felony murder case was conflicting as to whether defendant himself robbed the victim and delivered the fatal blows or whether defendant participated in the crime only as a lookout, and the jury's verdict contained no indication as to the theory upon which defendant was convicted, the trial court erred in failing to instruct during the penalty phase of the trial that, in order to impose the death penalty, the jury would have to find that defendant killed, attempted to kill or intended or contemplated that the victim would be killed. *S. v. Stokes*, 634.

The trial court erred in failing to submit to the sentencing jury in a first degree murder case the mitigating factors as to whether defendant was under the influence of a mental or emotional disturbance and whether defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. *Ibid.*

The trial court in a capital case did not err in refusing to submit as a mitigating circumstance that defendant had no significant history of prior criminal activity. *Ibid.*

The trial court erred in failing to submit the mitigating circumstance as to whether defendant was an accomplice to the capital felony committed by another and whether his participation was relatively minor. *Ibid.*

The evidence was insufficient to require the trial court to submit mitigating circumstances as to whether defendant was subjected in his formative years to physical and mental abuse by his parents and whether defendant was an illegitimate child who never experienced a relationship with his natural father. *Ibid.*

§ 138. Sentencing Under the Fair Sentencing Act

The evidence supported the trial court's findings as aggravating factors in a first degree burglary case that defendant was armed with a deadly weapon and that the offense was planned. *S. v. Chatman*, 169.

The trial court erred in finding as aggravating factors in a first degree burglary case that the sentence imposed was necessary to deter others and that a lesser sentence would unduly depreciate the seriousness of the crime. *Ibid.*

The trial court properly found as an aggravating circumstance in a first degree burglary case that defendant is a dangerous sex offender. *Ibid.*

Where defendants pled guilty to only one act of fellatio (second degree sexual offense), repeated acts of fellatio and insertion of a finger into the victim's rectum were properly considered as aggravating factors in imposing sentence upon defendants. *S. v. Abee*, 379.

The evidence was sufficient to support the trial court's finding as an aggravating factor that a murder was committed for pecuniary gain where it showed that defendant snatched a purse and was running away when he shot the victim. *S. v. Griffin*, 303.

§ 146.5. Appeal from Sentence Imposed on Guilty Plea

Defendant had no right of appeal where he entered pleas of guilty and no contest pursuant to a plea bargain. *S. v. Taylor*, 185.

CRIMINAL LAW — Continued

§ 158.2. Conclusiveness of Record

Where the record is silent as to whether the trial judge conducted a jury instruction conference as required by Superior and District Court Rule 21, it will be presumed that he did so. *S. v. Bennett*, 530.

§ 162. Necessity for Objections to Evidence; Plain Error Rule

The "plain error" rule applies to permit appellate review of some assignments of error to evidence normally barred under App. Rule 10(b)(1) by appellant's failure to make an objection or a motion to strike at trial. *S. v. Black*, 736.

§ 162.5. Motion to Strike

Failure to move to strike the unresponsive part of a witness's answer to a question by opposing counsel, even though the answer was objected to, resulted in a waiver of the objection. *S. v. Chatman*, 169.

§ 163. Necessity for Objections to the Charge

Defendant was given a sufficient opportunity to object to the jury instructions out of the hearing of the jury as required before a waiver of the right to assert an assignment of error based on instructions can be found where the court asked if there was "anything further from either the State or the defendant" and defendant responded negatively. *S. v. Bennett*, 530.

If either party to the trial desires a recorded instruction conference, G.S. 15A-1231(b) requires that party to make such a request to the trial judge, and absent such a request, Superior and District Court Rule 21 supplements the statute by requiring the trial court to hold an unrecorded conference. *Ibid.*

The provisions of G.S. 15A-1446(d)(13) permitting appellate review of errors in the charge "even though no objection, exception or motion has been made in the trial division" and of G.S. 15A-1231(d) stating that "failure to object to an erroneous instruction or to the erroneous failure to give an instruction does not constitute a waiver of the right to appeal on that error" are inconsistent with App. Rule 10(b)(2) and must yield thereto. *Ibid.*

The trial court's instructions on defendant's failure to testify did not contain "plain error" such as to require a new trial despite defendant's failure to object to the instructions given. *Ibid.*

§ 166. The Brief; Necessity for Appendix

Whenever a stenographic transcript is used in lieu of narrating the evidence into the record, App. Rule 28(b)(4) does not require that all verbatim reproductions of segments of the transcript be placed in an appendix to the brief but requires that relevant portions be reproduced in either the brief or its appendix. *S. v. Edmonds*, 362.

Whenever a stenographic transcript is used in lieu of narrating the evidence, App. Rule 28(b)(4) only requires setting out in an appendix to the brief the verbatim portions of the transcript necessary for an understanding of each question presented and does not require the appellant to include all of the evidence necessary for a determination of the questions presented. App. Rule 28(b)(4) only pertains to testimonial evidence given at trial, and other items such as jury instructions should be contained in the record on appeal. *S. v. Nickerson*, 376.

§ 169.2. Harmless Error in Admission of Evidence

The mere asking of whether defendant was a "convicted felon" was not sufficiently prejudicial since there was no "reasonable possibility" that had this question

Injury from flooding may properly be found to be a foreseeable direct result of government structures when it is shown that the increased flooding causing the injury would have been the natural result of the structures at the time their construction was undertaken. *Ibid.*

The holding in *Midgett v. Highway Commission*, 260 N.C. 241 (1963) that, in order to recover damages for an easement for flooding, the plaintiff must show that the flood in question was not an Act of God is overruled. *Ibid.*

§ 14.1. Nature and Extent of Rights Obtained by Condemnor

If the jury finds that the diversion of water by plaintiff condemnor's highway construction project caused permanent injury to defendant landowners' remaining property, plaintiff would acquire a permanent drainage easement over the property of defendants, but if the jury finds that the injury is not permanent, defendants would be entitled to compensation for the taking of a temporary drainage easement. *Dept. of Transportation v. Bragg*, 367.

EVIDENCE

§ 45. Evidence as to Value

The trial court erred in excluding the testimony of three property owners concerning the damaging effect of a municipal flood plain ordinance on the value of their property, but such error was not prejudicial. *Responsible Citizens v. City of Asheville*, 255.

§ 47.1. Necessity for Statement of Facts as Basis of Opinion

The trial court did not err in requiring defendant's expert witness to relate the underlying facts he used in making calculations and computations upon which he based his opinion before giving his opinion. *Lea Co. v. N.C. Board of Transportation*, 603.

FALSE PRETENSE

§ 1. Nature and Elements of Crime

The crime of uttering worthless checks is not a lesser included offense of obtaining property under false pretense. *S. v. Freeman*, 502.

§ 2.1. Indictment and Warrant Sufficient

Defendant was properly indicted and convicted under G.S. 14-100 for aiding and abetting in obtaining money by false pretense where the evidence showed that defendant created a fictional business for the purpose of inducing merchants to cash worthless checks purportedly issued to employees of the business, and defendant furnished a worthless check on the business account to a payee who was permitted to cash the check at a supermarket. *S. v. Freeman*, 502.

FORGERY

§ 1. Nature and Elements of Crime

The crime of uttering worthless checks is not a lesser included offense of obtaining property under false pretense. *S. v. Freeman*, 502.

GRAND JURY

§ 2. Nature and Functions of Grand Jury

The trial court did not err in failing to declare a mistrial because of an officer's testimony with respect to his appearance before the grand jury. *S. v. Dellinger*, 288.

HOMICIDE

§ 8.1. Evidence of Intoxication; Drugs

The trial court in a first degree murder case did not err in failing to instruct the jury to consider evidence of defendant's mental condition as well as evidence of his intoxication in determining his ability to premeditate and deliberate and form a specific intent. *S. v. Kirkley*, 196.

§ 16. Dying Declarations; Apprehension of Death

Statements made by deceased were properly admitted as dying declarations where the court found that deceased made statements to the effect that he knew he was dying. *S. v. Richardson*, 470.

§ 20.1. Real and Demonstrative Evidence; Photographs

Five photographic slides portraying the body of the deceased shortly after she was killed were properly admitted to illustrate the testimony of a pathologist. *S. v. Williams*, 47.

§ 21.5. Sufficiency of Evidence of Guilt of First Degree Murder

The trial court properly permitted the jury to consider the question of defendant's guilt of first degree murder of an elderly victim based upon premeditation and deliberation. *S. v. Williams*, 47.

The trial court did not err in submitting the charge of first degree murder to the jury. *S. v. Judge*, 658.

§ 21.6. Homicide by Poisoning or Lying in Wait or in Perpetration of Felony

The State's evidence was sufficient to support conviction of defendant of first degree murder on the theory that the murder was committed in the perpetration of a rape and on the theory that it was committed in the perpetration of a kidnapping. *S. v. McDougall*, 1.

The State's evidence of defendant's intent to commit larceny at the time he broke into and entered a murder victim's home was sufficient to justify submission to the jury of the question of defendant's guilt of murder committed in the perpetration of first degree burglary, although the State introduced defendant's confession in which he stated that he broke into and entered the home with the intent to find a place to sleep. *S. v. Williams*, 47.

The trial court properly permitted the jury to consider the question of defendant's guilt of first degree murder in the perpetration of a sex offense by forcing a mop handle into the vagina of a 100-year-old victim. *Ibid.*

The State's evidence was sufficient to support defendant's conviction of larceny and first degree murder in the perpetration of armed robbery. *S. v. Stokes*, 634.

Independent proof of the underlying felony in a felony murder prosecution is not necessary where a confession, otherwise corroborated as to the murder, includes sufficient facts to support the existence of the felony. *S. v. Franklin*, 682.

§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder

The jury's verdict of guilty of murder in the second degree in the perpetration of a felony must be set aside since there is no offense of felony murder in the sec-

ond degree, but the jury's verdict also finding defendant guilty of murder in the second degree was supported by the evidence. *S. v. Griffin*, 303.

§ 28.1. Sufficiency of Evidence of Guilt of Second Degree Murder Where Defendant Enters Plea of Self-Defense

The evidence did not require the trial court to instruct the jury on self-defense. *S. v. Griffin*, 303.

§ 30.2. Submission of Guilt of Lesser Degrees of Crime; Manslaughter

Even assuming the evidence in a trial for first degree murder supported an instruction on manslaughter, the court's failure to give the requested instruction was harmless error. *S. v. Judge*, 658.

§ 31.1. Punishment for First Degree Murder

Where the evidence in a felony murder case was conflicting as to whether defendant himself robbed the victim and delivered the fatal blows or whether defendant participated in the crime only as a lookout, and the jury's verdict contained no indication as to the theory upon which defendant was convicted, the trial court erred in failing to instruct during the penalty phase of the trial that, in order to impose the death penalty, the jury would have to find that defendant killed, attempted to kill or intended or contemplated that the victim would be killed. *S. v. Stokes*, 634.

§ 31.3. Constitutionality of Death Penalty

The death penalty was not unconstitutional in defendant's case because the practice of requiring the trial court to instruct on second degree murder in all first degree murder cases in which the State relied on premeditation and deliberation was in use at the time of defendant's trial where defendant's evidence supported the trial court's submission of an issue of the lesser offense of second degree murder. *S. v. Kirkley*, 196.

§ 31.7. Punishment for Second Degree Murder

Where the jury found defendant guilty of second degree murder and also of second degree murder in the perpetration of a felony, and it is unclear whether for sentencing purposes the trial court treated defendant's conviction of second degree murder as a single conviction under two theories or as two separate convictions, the case must be remanded to the superior court for resentencing on the valid second degree murder conviction. *S. v. Griffin*, 303.

§ 32.1. Appeal and Review; Harmless or Prejudicial Error and Cure by Verdict

Any error in the trial court's submission of an issue as to defendant's guilt of first degree murder because the evidence was insufficient to show premeditation and deliberation was not prejudicial where the jury convicted defendant of second degree murder. *S. v. Griffin*, 303.

INDICTMENT AND WARRANT

§ 4. Validity of Proceedings Before Grand Jury as Affected by Competency and Sufficiency of Evidence

The trial court did not err in failing to declare a mistrial because of an officer's testimony with respect to his appearance before the grand jury. *S. v. Dellinger*, 288.

INJUNCTIONS

§ 6. Injunctions to Enforce Personal Contractual Obligations

The trial court should have allowed plaintiff's motion for a preliminary injunction to restrain defendant from breaching a covenant not to compete in an employment agreement. *A.E.P. Industries v. McClure*, 393.

JUDGES

§ 7. Misconduct in Office; Proceedings Before Judicial Standards Commission

A proceeding before the Judicial Standards Commission to remove a district court judge from office was not rendered moot by the judge's resignation from office. *In re Hunt*, 328.

Each act of a district court judge in accepting cash bribes in exchange for his promise to use his judicial office to protect criminal activities constituted a separate act of willful misconduct in office, and the persistent and repeated nature of these acts by the judge also represented a course of conduct prejudicial to the administration of justice to such an extreme degree as to comprise a separate act of willful misconduct in office. *Ibid.*

JUDGMENTS

§ 4. Definiteness of Judgment; Construction and Operation

An order which stated that plaintiff's action will be dismissed if plaintiff fails to comply with a discovery order before a certain date was conditional and therefore void. *Cassidy v. Cheek*, 670.

§ 51.1. Lack of Jurisdiction as Defense to Judgment

A default judgment rendered by a Florida court was void and subject to collateral attack because the defendant did not receive adequate notice in compliance with the Florida standard of reasonable notice. *Boyles v. Boyles*, 488.

JURY

§ 6. Voir Dire Examination of Jury Generally; Practice and Procedure

The trial judge in a first degree murder case was not bound by a pretrial order entered by another judge which provided for individual voir dire of the prospective jurors. *S. v. Stokes*, 634.

The trial court did not err in denying defendant's motion for individual voir dire in jury selection and to sequester the jury venire because of pretrial publicity of defendant's case. *Ibid.*

§ 7.11. Scruples Against, or Belief in, Capital Punishment

The statutory procedure for death qualifying a jury prior to the guilt phase and the requirement that the same jury hear both the guilt and penalty phases of the trial are constitutional. *S. v. Hill*, 382.

The trial court did not err in excusing for cause a prospective juror who stated that she didn't "feel" like she would or didn't "think" she could vote for the death penalty under appropriate circumstances. *S. v. Kirkley*, 196.

Defendant was not deprived of a jury composed of a fair cross-section of the community by the exclusion of seven jurors who indicated they could not impose the death penalty under any circumstances. *Ibid.*

JURY — Continued

§ 7.12. What Constitutes Disqualifying Scruples or Beliefs

The trial court properly sustained the State's challenge for cause of a prospective juror who indicated that she did not think she could vote for the death penalty. *S. v. Craig and S. v. Anthony*, 446.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

The State's evidence was sufficient to support a verdict finding defendant guilty of kidnapping of a convenience store employee. *S. v. Dover*, 372.

The State's evidence was sufficient to support conviction of defendant for kidnapping a victim who was removed from a grocery store parking lot and raped. *S. v. Newman and S. v. Newman*, 231.

There was ample evidence of restraint unconnected with the rape of the victim to support defendant's conviction of kidnapping. *S. v. Williams*, 339; *S. v. Williams*, 357.

LARCENY

§ 7. Weight and Sufficiency of Evidence Generally; Circumstantial Evidence

The State's evidence was sufficient to support defendant's conviction of larceny and first degree murder in the perpetration of armed robbery. *S. v. Stokes*, 634.

LIMITATION OF ACTIONS

§ 4.2. Negligence Actions

G.S. 1-50(5) barred plaintiff's claim against architects since it was brought more than six years after the architects performed and furnished their services. *Lamb v. Wedgewood South Corp.*, 419.

Through G.S. 1-50(5), the legislature intended to prohibit all claims and crossclaims against designers and builders filed beyond the six-year period even if these claims or crossclaims are filed by persons in possession and control. The second sentence is meant to preserve claims brought against persons in possession and control of an improvement to real property who might also have designed or built the improvement. *Ibid.*

G.S. 1-50(5) does not create a special emolument or privilege within the meaning of the constitutional prohibition. *Ibid.*

G.S. 1-50(5) does not violate Art. I, § 18 of our state's constitution by barring a claim before the injury giving rise to the claim occurs. *Ibid.*

G.S. 1-50(5) does not violate the equal protection provisions of either our state or the federal constitutions. *Ibid.*

MASTER AND SERVANT

§ 7.5. Discrimination in Employment

Standards for determining an employment discrimination case are set forth in this opinion. *Dept. of Correction v. Gibson*, 131.

Plaintiff, a black correctional officer at a youthful offender prison, established a prima facie case of employment discrimination because of race by showing that even though he and several white employees failed to make proper checks to en-

MASTER AND SERVANT — Continued

sure the presence of two inmates who had escaped, only he was discharged, but defendant employer rebutted such prima facie case. *Ibid.*

In an employment discrimination suit brought by a discharged black correctional officer, the State Personnel Commission erred by placing an improper burden of proof upon defendant employer to show an absence of discrimination, in reviewing the correctness of defendant employer's business judgment, and in failing to resolve the ultimate question of whether plaintiff was the victim of intentional discrimination. *Ibid.*

§ 11.1. Competition with Former Employer; Covenants Not to Compete

The trial court should have allowed plaintiff's motion for a preliminary injunction to restrain defendant from breaching a covenant not to compete in an employment agreement. *A.E.P. Industries v. McClure*, 393.

§ 67.1. Workers' Compensation; Other Injuries or Disabilities

In seeking to recover workers' compensation for occupational loss of hearing, an employee does not have the burden of proving as part of his prima facie case that the workplace sound which caused his hearing loss was of intensity of 90 decibels, A scale, or more. *McCuiston v. Addressograph-Multigraph Corp.*, 665.

§ 68. Occupational Diseases

It is not necessary that a claimant show that the conditions of her employment with her last employer caused or significantly contributed to her occupational disease but only that she was last injuriously exposed to the hazards of such disease in such employment. *Rutledge v. Tultex Corp.*, 85.

A textile worker's chronic obstructive lung disease may be an occupational disease when it is caused in part by the worker's on-the-job exposure to cotton dust and in part by exposure to other substances such as cigarette smoke, and when the disease has other components like bronchitis and emphysema which are not work-related, provided (1) the occupation in question exposed the worker to a greater risk of contracting this disease than members of the public generally and (2) the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development. *Ibid.*

Plaintiff was disabled from an occupational disease no later than 1974, and the claim filed by him on 24 February 1978 did not establish timely filing required to confer jurisdiction on the Industrial Commission to hear the claim. *Dowdy v. Fieldcrest Mills*, 701.

Defendant employer was not equitably estopped from asserting plaintiff's failure to file his claim for an occupational disease within the applicable two year period. *Ibid.*

Even though one doctor informed defendant that he had chronic obstructive lung disease and another doctor told defendant that he suffered from byssinosis, plaintiff was sufficiently informed by competent medical authority of the nature and work related cause of his disease. *Ibid.*

For purposes of awarding workers' compensation benefits, there is no practical difference between chronic obstructive lung disease and byssinosis. *Ibid.*

The single claim rule applies to cases involving injury by occupational disease, and the two year time limitation for filing claims prescribed in G.S. 97-58(c) does not begin to run anew when an employee's condition changes from permanent partial disability to permanent total disability. *Ibid.*

MASTER AND SERVANT — Continued

§ 93.3. Proceedings Before Commission; Expert Evidence

A medical expert's opinion testimony that plaintiff's exposure to cotton dust for 25 years in her employment was probably a cause of her chronic obstructive lung disease was admissible even though claimant's counsel made no reference in the assumed facts to claimant's having smoked cigarettes for most of her life. *Rutledge v. Tultex Corp.*, 85.

A workers' compensation proceeding is remanded to the Industrial Commission for a determination as to whether plaintiff's chronic obstructive lung disease is an occupational disease for which plaintiff is entitled to benefits for total incapacity for work. *Ibid.*

§ 96.3. Review of Jurisdictional Findings

Findings of jurisdictional fact by the Industrial Commission are not conclusive upon appeal even though supported by evidence in the record. *Dowdy v. Fieldcrest Mills*, 701.

MUNICIPAL CORPORATIONS

§ 30.10. Particular Requirements and Restrictions in Zoning

A municipal flood plain ordinance constituted a valid exercise of the police power. *Responsible Citizens v. City of Asheville*, 255.

NEGLIGENCE

§ 1.1. Elements of Actionable Negligence

The statement in *Midgett v. Highway Commission*, 260 N.C. 241 (1963) that the term "Act of God" in its legal sense "applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them" is disapproved, since such statement incorrectly implies that an "Act of God" is by definition an unforeseeable event. *Lea Co. v. N.C. Board of Transportation*, 603.

The holding in *Midgett v. Highway Commission*, 260 N.C. 241 (1963) that, in order to recover damages for an easement for flooding, the plaintiff must show that the flood in question was not an Act of God is overruled. *Ibid.*

NUISANCE

§ 1. Nuisance Distinguished from Negligence

The doctrine of "moving to the nuisance" or "priority of occupation" has no applicability in an action against the State for a taking by flooding caused by permanent structures constructed by the State. *Lea Co. v. N.C. Board of Transportation*, 603.

PUBLIC OFFICERS

§ 11. Criminal Liability of Public Officers

The legislature did not intend to exempt magistrates from indictment and criminal prosecution under G.S. 14-230 when it included magistrates under the sanctions of G.S. 7A-173 and G.S. 7A-376. *S. v. Greer*, 515.

There was substantial evidence that the defendant, a magistrate, corruptly violated his oath by placing a person in jail without any charge and by keeping him there until he paid $200.00. *Ibid.*

RAPE AND ALLIED OFFENSES

§ 4. Relevancy and Competency of Evidence

In a prosecution for first degree rape, a physician with extensive training in pediatrics and experience in having examined hundreds of female children of the victim's age could properly testify that tears he observed within the interior of the victim's genital area were probably caused by a penis. *S. v. Starnes*, 720.

§ 4.3. Character or Reputation of Prosecutrix

The rape victim shield statute, G.S. 8-58.6, which prohibits a defendant from cross-examining a rape victim about prior acts of sexual misconduct, does not violate a defendant's rights to equal protection and due process. *S. v. Waters*, 348.

§ 5. Sufficiency of Evidence

The State's evidence was sufficient to support a verdict finding defendant guilty of a first degree sexual offense perpetrated on a convenience store employee. *S. v. Dover*, 372.

The State's evidence was sufficient to support defendant's conviction of first degree rape as an aider and abettor after abducting the victim from a grocery store parking lot. *S. v. Newman and S. v. Newman*, 231.

§ 7. Verdict; Sentence and Punishment

The trial judge was not authorized to sentence defendants to minimum and maximum terms of years for first degree rape. *S. v. Wilhite*, 798.

ROBBERY

§ 4.3. Armed Robbery Cases Where Evidence Sufficient

The State's evidence was sufficient to show that a gun possessed by defendant was used to commit a robbery so as to support his conviction for armed robbery. *S. v. Waters*, 348.

§ 4.4. Attempted Robbery Cases Where Evidence Sufficient

The State's evidence was sufficient to support conviction of defendant for attempted armed robbery of a convenience store employee. *S. v. Dover*, 372.

§ 4.7. Cases Where Evidence Insufficient

The State's evidence was insufficient to support conviction of defendant for armed robbery where the victim threw his duffel bag at defendant in self-defense when defendant struck him with a stick. *S. v. Richardson*, 470.

RULES OF CIVIL PROCEDURE

§ 19. Necessary Joinder of Parties

The absence of parties who are necessary parties does not merit a dismissal. *White v. Pate*, 759.

§ 55.1. Setting Aside Default

Where defendants moved to set aside and vacate entry of default under Rule 55(d) and coupled that motion with a motion to enlarge the time in which to file answer under Rule 6(b), the trial judge erred by failing to exercise his discretion and ruling as a matter of law that defendants had not demonstrated "good cause" to justify setting aside the entries of default against him. *Byrd v. Mortenson*, 536.

SEARCHES AND SEIZURES

§ 44. Voir Dire Hearing Generally; Findings of Fact

The necessary factual findings were implied by the trial judge's ruling denying defendant's motion to suppress items seized from defendant's trailer at the time of his arrest. *S. v. Ladd*, 272.

STATE

§ 12. State Employees

Standards for determining an employment discrimination case are set forth in this opinion. *Dept. of Correction v. Gibson*, 131.

Plaintiff, a black correctional officer at a youthful offender prison, established a prima facie case of employment discrimination because of race by showing that even though he and several white employees failed to make proper checks to ensure the presence of two inmates who had escaped, only he was discharged, but defendant employer rebutted such prima facie case. *Ibid.*

In an employment discrimination suit brought by a discharged black correctional officer, the State Personnel Commission erred by placing an improper burden of proof upon defendant employer to show an absence of discrimination, in reviewing the correctness of defendant employer's business judgment, and in failing to resolve the ultimate question of whether plaintiff was the victim of intentional discrimination. *Ibid.*

WORD AND PHRASE INDEX

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