NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
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1. Appointed 2 July 1984 to replace Paul M. Wright who resigned 30 June 1984.
2. Appointed 13 July 1984 to replace B. Craig Ellis.
3. Appointed Chief Judge 9 April 1984 to replace Robert L. Cecil who resigned as Chief Judge 9 April 1984.
4. Resigned as Chief Judge 9 April 1984.
5. Appointed 2 July 1984.
6. Appointed Judge 16 April 1984 to replace J. Charles McDarris who retired effective 1 April 1984.

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CASES REPORTED

ORDERS OF THE COURT

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

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

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I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 24th day of March, 1984, and said persons have been issued certificates of this Board:

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SHERRY L. TRAVERS ..... Enon Valley, Pennsylvania
BETTY RUTH TURNER ..... Charlotte
JANET PUCKETT WADE ..... Charlotte
JESSE JAMES WALDON, JR. ..... High Point
JAMESON P. WELLS ..... Charlotte
GARY MILTON WHALEY ..... Columbus, Ohio
OCTAVIS WHITE, JR. ..... Mebane
JAMES ALLAN WHITLOCK ..... Kinston
ANDREW GREY WILLIAMSON, JR. ..... Laurinburg
JOHN LEE WOLFE ..... Columbus, Ohio
STEVEN P. YOVA ..... Winston-Salem

Given over my hand and Seal of the Board of Law Examiners this the 16th day of April, 1984.

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

LICENSED ATTORNEYS

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

On March 24, 1984, the following individuals were admitted:

FRANK R. GAILOR ..... Raleigh, applied from the District of Columbia
GARY PAUL KANE ..... Cary, applied from the District of Columbia

On March 29, 1984, the following individuals were admitted:

JOSCELYN GEORGE COCKBURN ..... Raleigh, applied from the State of Colorado
EDWIN HASSEL DANIELS, SR. ..... Annandale, Virginia, applied from the District of Columbia
TIMOTHY RAY KROBOTH ..... Matthews, applied from the State of Virginia
DAVID ANDREW LOGAN ..... Winston-Salem, applied from the District of Columbia
ANN ELLEN SALITSKY ..... Durham, applied from the District of Columbia
JAMES ANDREW WYNN, JR. ..... Raleigh, applied from the State of Wisconsin
JAMES A. YATES ..... Winston-Salem, applied from the State of West Virginia

Given over my hand and Seal of the Board of Law Examiners this 16th day of April, 1984.

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 May 10, 1984, the following individuals were admitted:

JOHN CURTIS BRADLEY ..... Kitty Hawk, applied from the State of Virginia
ARTHUR VINCENT BUTLER ..... Pinehurst, applied from the District of Columbia
ROBERT ULRICK JOHNSEN, JR. ..... Wilmington, applied from the State of Virginia
VAN H. JOHNSON ..... Elizabeth City, applied from the State of Texas
W. H. JOLLY ..... Roaring Gap, applied from the State of Virginia
WALTER J. MOREY ..... Arden, applied from the State of Ohio
WALTER RUSSELL ROGERS, JR. ..... Raleigh, applied from the State of Virginia

Given over my hand and Seal of the Board of Law Examiners this 15th day of May, 1984.

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 June 14, 1984, the following individuals were admitted:

DENNIS FRANCIS BUTLER ..... Charlotte, applied from the State of Ohio
RICHARD R. CERBONE ..... Greensboro, applied from the State of New York
First Department
VICTORIA DIXON O'ROURKE ... Winston-Salem, applied from the State of New York
Fourth Department

Given over my hand and Seal of the Board of Law Examiners this 26th day of June, 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 EDWARD FINCHER AND TERRY JEROME WRIGHT

No. 453A82

(Filed 9 August 1983)

1. **Constitutional Law § 63; Jury § 7.11— exclusion of jurors for capital punishment views—cross-section of community**

Defendant's Sixth Amendment right to select a jury from a cross-section of the community was not violated when the State was permitted to question prospective jurors regarding their death penalty views and the court excluded certain jurors for cause on the basis of those views.

2. **Searches and Seizures § 14— consent to search—youthful age and mental deficiency**

A 17-year-old defendant with an I.Q. of between 50 and 65 was not incapable of giving a valid consent to search as a matter of law by virtue of his age and mental deficiency.

3. **Searches and Seizures § 14— lawfulness of consent to search**

There was ample evidence of record to support the trial court's findings that defendant understood a consent to search form and that no force or coercion was used against him or any promises made to him to obtain his signature on the form, and those findings supported the trial court's conclusion that defendant voluntarily, willingly and understandingly consented to a search of his bedroom, notwithstanding defendant presented evidence that he was 17 years old at the time of the search, that he had an I.Q. of only 50 to 65, that he suffered from a schizophreniform disorder, that he was more susceptible to fear and intimidation than an average person, that ten police officers were present when he was arrested, and that officers told him that if he refused to sign the form, a warrant would be obtained and "either way we are going to search the apartment."

4. Criminal Law § 75.16; Infants § 17— 17-year-old defendant—in-custody interrogation—right to warnings for juveniles

A 17-year-old defendant was entitled to receive the warnings required for juveniles by G.S. 7A-595(a) prior to his in-custody interrogation, and his in-custody statements were inadmissible in his murder, rape and burglary trial where he was not advised that he had a right to have a parent, guardian or custodian present during questioning. However, defendant was not prejudiced by the erroneous admission of his statements in light of the overwhelming evidence of his guilt where the State presented evidence that the crimes occurred on Halloween night; defendant was seen in the area of the victim's apartment on that night; defendant had in his possession that evening a Halloween mask which was later recovered from the scene of the crimes; defendant told a witness that he thought he had killed someone on Halloween night; a bloodstained coat recovered from defendant's bedroom was identified as the coat defendant was wearing on Halloween night; bloodstains on the coat were inconsistent with defendant's blood type; blood on the coat and blood found on the victim's blouse had a similar PGM reaction; fibers removed from the coat were microscropically consistent with fibers removed from a pillowcase found in the victim's apartment; and defendant's bloody handprint was found on a mattress cover on a bed in the victim's apartment. G.S. 15A-1443(a).

5. Criminal Law § 75.11— interrogation of defendant—no invocation of right to remain silent

Defendant did not invoke his Fifth Amendment right to remain silent when he told officers that he did not wish to give any further written statements until he heard the truth from a codefendant where an officer attempted to ascertain whether defendant intended to invoke his Fifth Amendment right by inquiring as to whether he could ask another question, and defendant immediately and unhesitatingly answered affirmatively, thereby clarifying that his earlier statement was not an expression of an intent to preclude all further questions.

6. Criminal Law § 75.3— statements by codefendant—no deception by officer—no taint on defendant's confession

Where defendant told officers that he would tell the truth if a codefendant would do so and that two people were involved in the crime, an officer's statement to the codefendant that defendant "was going to tell the truth about it" and that defendant said they were both involved was not deceptive or untruthful so as to render the codefendant's confession involuntary and a taint on defendant's subsequent confession.

7. Criminal Law § 75.14— voluntary confession—youthfulness and mental retardation of defendant

Although defendant was youthful and had an I.Q. of only 73, the totality of the circumstances supported the trial judge's conclusions that defendant was capable of making an understanding waiver of his *Miranda* rights and that his confessions were made freely, voluntarily and understandingly.

8. Burglary and Unlawful Breakings § 6.2— instruction on felony intended—error cured

In a burglary case in which the trial court had instructed the jury that in order to convict a codefendant of first degree burglary, it must find that at the time of the breaking and entering the codefendant intended to commit the felony of *rape*, the trial court erred in incorporating such instruction by reference in the instructions as to defendant when the State's evidence related only to defendant's intent to commit the felony of *larceny*, but such error was cured by the court's further correct instruction and by the written verdict form which referred to an intent to commit felonious larceny.

Justice MARTIN concurring in result.

Justice EXUM concurring in part and dissenting in part.

Justice FRYE joins in this concurring and dissenting opinion.

APPEAL by defendants from *Sitton, Judge*, at the 9 March 1982 Criminal Session of MECKLENBURG County Superior Court.

Defendants Michael Fincher and Terry Wright were tried jointly upon bills of indictment charging each of them with the first-degree murder and first-degree rape of Henrietta Wallace, and the first-degree burglary of her home. These offenses were alleged to have been committed on Halloween night, 31 October 1981. Defendants entered pleas of not guilty to each of the offenses charged.

Given the nature of defendants' contentions, an extensive statement of the evidence presented at trial is unnecessary. Those facts pertinent to the issues presented will be hereinafter set forth in this opinion.

The jury found defendant Fincher guilty of first-degree murder on the theory of felony murder, first-degree rape and first-degree burglary. Defendant Wright was found guilty of first-degree burglary and not guilty of murder.[1]

The penalty phase of the trial continued as to defendant Fincher and the jury recommended that he be sentenced to life imprisonment for the first-degree murder of Ms. Wallace. Following a sentencing hearing, Fincher was sentenced to a consecutive term of 50 years on the first-degree burglary charge. Since the

1. The rape charge against defendant Wright was dismissed at the close of the State's evidence.

felony murder conviction was premised upon the commission of the rape, the rape conviction merged with the felony murder conviction and no sentence was imposed on the rape charge.

Defendant Wright was sentenced to 36 years on the first-degree burglary charge.

Defendant Fincher appealed the life sentence directly to this Court as a matter of right pursuant to G.S. 7A-27(a). Defendants' motions to bypass the Court of Appeals on the burglary charges and to consolidate the appeals in this Court were allowed 13 January 1983.

Rufus L. Edmisten, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State.

Edward T. Hinson, Jr. and David M. Kern, for defendant-appellant Michael Edward Fincher.

Paul J. Williams for defendant-appellant Terry Jerome Wright.

BRANCH, Chief Justice.

Appeal of Fincher

[1] By his first assignment of error, defendant contends the trial court committed reversible error in permitting the State to question prospective jurors regarding their views on the death penalty and excluding for cause those who expressed opposition to it. Defendant argues that this process of "death qualifying" a jury eliminates from consideration for jury service an identifiable segment of the population, thereby violating his sixth amendment right to select a jury from a representative cross-section of the community.

Defendant concedes that this argument has been consistently rejected by this Court. *See State v. Ladd*, 308 N.C. 272, 302 S.E. 2d 164 (1983); *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). He cites no new arguments in support of his position that these cases were wrongly decided. We hold that our prior decisions are sound and binding precedent and therefore dispositive of defendant's contention. This assignment is overruled.

We next consider defendant's contention that the trial judge erroneously admitted into evidence a blue coat taken from defendant's bedroom during a warrantless search of his apartment. The coat was identified at trial as the coat defendant Fincher was wearing on the night of Ms. Wallace's death. Jane Burton, a criminalist with the Charlotte-Mecklenburg Crime Laboratory, testified that she found human bloodstains on the coat which had a similar PGM activity to the blood found on the blouse Ms. Wallace was wearing on the night of the murder. According to Ms. Burton, the bloodstains on the coat were inconsistent with defendants' blood types and could not, therefore, have come from either Fincher or Wright. Dr. Louis Portis also identified the coat and testified that he compared fibers which were removed from the coat with fibers taken from a pillowcase found in Ms. Wallace's apartment. He concluded from this comparison that the fibers were microscopically consistent and that each had a similar dye color.

Upon defendant's motion to suppress this evidence, the trial judge found facts and concluded that the search of defendant's apartment was a valid consent search. He therefore ruled that the evidence obtained pursuant to the search was admissible into evidence.

Defendant argues that the search of his apartment was not based upon lawful consent because the totality of the circumstances surrounding his "consent" impels the conclusion that it was not voluntarily and intelligently given.

When the validity of a consent to search is challenged, the trial court must conduct a *voir dire* hearing to determine whether the consent was in fact given voluntarily and without compulsion. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874, 94 S.Ct. 157, 38 L.Ed. 2d 114 (1973). "[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047-48, 36 L.Ed. 2d 854, 862-63 (1973); *accord, State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569 (1982).

Here, the trial court conducted an extensive *voir dire* and heard testimony concerning the events surrounding the signing of

the consent form. The evidence at this evidentiary hearing revealed that defendant's consent to the search was acquired under the following circumstances:

Michael Fincher was arrested at his residence on Friday, 6 November 1981, at approximately 8:30 a.m. At least ten city police officers were then present. The arresting officer immediately advised Fincher of his *Miranda* rights. Fincher stated, in response to direct questions by Officer R. E. Sanders, that he understood the warnings and that he would answer police questions without a lawyer present. The officer did not, however, ask defendant any questions at that time. Defendant was permitted to get dressed and was handcuffed and taken from the apartment to a patrol car.

Officer James Alsbrooks prepared a consent to search form for the apartment. He first discussed the form with Luvenia Montgomery, defendant's mother. After determining that defendant's grandmother, Amanda Johnson, was in fact the lessee of the duplex apartment, Officer Alsbrooks approached Ms. Johnson and asked if she would permit the officers to conduct a search of the residence. Alsbrooks read the consent form to Ms. Johnson and she was afforded an opportunity to examine it. She agreed to permit the search and, according to Officer Alsbrooks, signed the consent form. Ms. Johnson did not remember signing the document, although she admitted that it looked like her signature on the form.

Officer W. D. Starnes then read the consent form to defendant and spoke with him about signing it. Defendant asked the police officers whether his mother had given permission for the officers to search the house. The officers replied that defendant's mother had given her permission but that only defendant could consent to the search of his room. In fact, it was defendant's grandmother who had signed the consent form granting permission to the police officers to search the apartment.

Defendant agreed to sign the consent form but when it was presented to him he stated that he did not understand it. When asked what he did not understand about the form, defendant responded that he wanted to know what would happen if he did not sign it. Fincher was told that although he did not have to give permission to search, if he refused the officers would obtain a

search warrant and conduct a search of his bedroom. Sergeant Starnes said, "Either way, we are going to search the apartment." Defendant thereafter stated that he understood and signed the consent to search form.

Defendant presented psychiatric testimony which tended to show that he is mentally retarded and suffers from a schizophreniform disorder. Dr. Jim Groce, a psychiatrist for the State of North Carolina, testified that Fincher's mental illness causes a disturbance of defendant's mood and behavior, sometimes to the extent that defendant suffers from auditory hallucinations. Dr. Groce testified that if defendant was hallucinating at a particular point in time he might talk to himself and would perhaps respond nonsensically to questions posited to him. The arresting officers testified, however, that defendant was coherent and cooperative and that he responsively answered all questions they asked him.

Further testimony of Dr. Groce indicated that defendant's mental and emotional condition would make him somewhat more susceptible to fear in a given situation than an average individual. Dr. Edwin Harris agreed that Fincher is easily influenced by emotion and that his ability to deal with stress is limited. In response to questioning by the district attorney on *voir dire*, however, Dr. Groce stated that, in his opinion, defendant was capable of telling the police officers that he did not understand the warnings.

Dr. Groce determined defendant's I.Q. to be 50, although Dr. Edwin Harris estimated that defendant has a verbal I.Q. of 65. Dr. Harris testified that, in his opinion, Fincher is functionally illiterate and could not have understood the consent to search form that he signed. Tests performed on defendant at Dorothea Dix Hospital revealed that he reads on a level between second and third grade. Dr. Barbara Edwards, an expert in reading and reading education, stated that an individual would have to read on a tenth grade level or comprehend on an eighth grade level in order to understand the waiver forms. Both she and Dr. Groce stated, however, that repetition, explanations and prior experience could affect the test results and enable an individual to better understand and comprehend.

Defendant bases his argument that the consent to search was not voluntarily and understandingly given primarily on the psychiatric testimony outlined above. He contends that his mental ill-

ness, coupled with the circumstances surrounding his arrest, created a situation that frightened and intimidated him to the extent that he was incapable of giving a voluntary and knowing consent to search.

While most of our cases involving a mentally deficient defendant have been concerned with the voluntariness of an inculpatory statement made during custodial interrogation, the controlling legal principles are equally apposite to situations where the voluntariness of a consent to search is at issue. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 223-27, 93 S.Ct. 2041, 2045-47, 36 L.Ed. 2d 854, 860-62 (1973).

We have consistently held that a defendant's subnormal mental capacity is a factor to be considered when determining whether a knowing and intelligent waiver of rights has been made. *See State v. Jenkins*, 300 N.C. 578, 268 S.E. 2d 458 (1980); *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). Such lack of intelligence does not, however, standing alone, render an in-custody statement incompetent if it is in all other respects voluntary and understandingly made. *State v. Jenkins* at 585, 268 S.E. 2d at 463; *State v. Thompson* at 318, 214 S.E. 2d at 752.

Although age is also to be considered by the trial judge in ruling upon the admissibility of a defendant's confession, the fact that the defendant is youthful will not preclude the admission of his inculpatory statement absent mistreatment or coercion by the police officers. *State v. Thompson, supra; State v. Penley*, 284 N.C. 247, 200 S.E. 2d 1 (1973); *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971).

[2] In *State v. Thompson, supra*, we held that a 19-year-old defendant with an I.Q. of 55 was capable of waiving his rights. Thus, we conclude that defendant is not incapable of giving a valid consent to search as a matter of law by virtue of his age and mental deficiency.

Following *voir dire*, Judge Sitton found facts consistent with the evidence presented and specifically found:

> 1. That on November 6th and 7th, 1981, both defendants appeared to be alert, coherent, were not under the influence

of alcohol or narcotic drugs; that neither defendant was threatened, nor were they promised or offered any reward or inducements by the law enforcement officers to make a statement or to sign the waivers herein.

2. That no threats or suggested violence or show of violence of law enforcement officers to persuade or induce the defendants to waive their rights and make statements existed.

. . . .

7. That the defendant Fincher understood the questions in regard to the non-testimonial form and consent to search form.

[3] Despite the testimony cited by defendant as indicative of his lack of intelligence and comprehensive ability, there is ample evidence of record to support the trial judge's findings that defendant understood the form and that no force or coercion was used against him or any promises made to him. These findings are therefore binding upon this Court. *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038, 102 S.Ct. 1741, 72 L.Ed. 2d 155 (1982); *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975). In turn, these findings support the legal conclusion that defendant voluntarily, willingly and understandingly consented to the search of his bedroom. We hold that the trial court correctly ruled that the blue coat seized pursuant to the search was admissible.

Defendant also assigns as error the denial of his motion to suppress and the admission into evidence of statements given by him to police officers on 6 and 7 November 1981. Defendant contends that the admission of these statements violated his fifth amendment right to be free from self-incrimination, his sixth amendment right to counsel and his right to be advised as a juvenile in accordance with G.S. 7A-595.

[4] We do not reach the constitutional issues raised because we find error in the failure to properly advise defendant as a juvenile pursuant to G.S.7A-595.

G.S. 7A-517(20) defines a juvenile as "[a]ny person who has not reached his eighteenth birthday and is not married, emancipated, or a member of the armed services. . . ." It is un-

disputed that defendant Fincher was seventeen years old at the time he committed the offenses charged and at the time he was interrogated by police officers on 6 and 7 November 1981. He therefore is a juvenile within the statutory definition of that term.

G.S. 7A-595(a) provides that:

> Any *juvenile* in custody must be advised prior to questioning:
>
> (1) That he has a right to remain silent; and
>
> (2) That any statement he does make can be and may be used against him; and
>
> (3) That he has a right to have a parent, guardian or custodian present during questioning; and
>
> (4) That he has a right to consult with an attorney and that one will be appointed for him if he is not represented and wants representation.

(Emphasis added.) The uncontroverted evidence reveals that defendant was never advised of the third warning, that is, that he was entitled to have a parent, guardian or custodian present during questioning.

The trial judge recognized this omission but determined that defendant was not entitled to the statutory protections enumerated in G.S. 7A-595. He concluded as a matter of law "[t]hat the defendant Fincher was not, within the meaning of the law, a minor or a juvenile, requiring any special treatment; but, that he may be treated within the law of the State as an adult."

Although the basis for the trial court's ruling is not entirely clear, the State argues that since "G.S. 7A-517(12) defines a delinquent juvenile for purposes of juvenile court jurisdiction as anyone who has not yet reached his sixteenth birthday," and since Fincher was seventeen years old and "over the age of being a juvenile delinquent," G.S. 7A-595 does not apply.

This position is simply unsupportable. G.S. 7A-517(12) reads:

> *Delinquent Juvenile.*—Any juvenile less than 16 years of age who has committed a criminal offense under State law or

> under an ordinance of local government, including violation of the motor vehicle laws.

Contrary to the State's contention, this statute does not define the age limitations of juvenile court jurisdiction. The word jurisdiction does not even appear in the statute, nor is there a reference to other jurisdictional provisions of the Juvenile Code. Furthermore, whether defendant is a juvenile delinquent is, in our opinion, irrelevant to a consideration of whether he is entitled to the protections of G.S. 7A-595.

The definitional section of the North Carolina Juvenile Code, G.S. 7A-517, is prefaced by the following language: "Unless the context *clearly* requires otherwise, the following words have the listed meanings . . . ." (emphasis added). As previously stated, juvenile is defined in subdivision (20) of G.S. 7A-517 as "[a]ny person who has not reached his eighteenth birthday," with a few exceptions not here applicable. We conclude that the term juvenile as it is used in G.S. 7A-595 must be given this "listed meaning" for the context does not require, nor even suggest, a different interpretation. We therefore hold that, as a juvenile, defendant was entitled to receive all of the warnings set forth in G.S. 7A-595.

We further hold, on the basis of G.S. 7A-595(d), that it was error for the trial judge to admit the 6 and 7 November statements into evidence in light of the fact that defendant was not properly advised.

G.S. 7A-595(d) provides that:

> (d) Before admitting any statement resulting from custodial interrogation into evidence, the judge must find that the juvenile knowingly, willingly, and understandingly waived his rights.

Since the record reflects that defendant was not informed of his right to have a parent, guardian or custodian present during questioning, there can be no finding that defendant Fincher "knowingly, willingly, and understandingly waived" this privilege. In the absence of such a finding, it was error for the trial judge to admit the challenged statements.

We now turn to the question of whether defendant was prejudiced by the erroneous admission of this evidence.

The failure to advise defendant of his right to have a parent, custodian or guardian present during questioning is not an error of constitutional magnitude because this privilege is statutory in origin and does not emanate from the Constitution. Therefore, we apply the standard set forth in G.S. 15A-1443(a) to determine whether the erroneous admission into evidence of defendant's statements to police officers is sufficient to warrant a new trial. G.S. 15A-1443(a) provides, in part, as follows:

> A defendant is prejudiced by errors relating to rights other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant.

We conclude that in light of the overwhelming evidence of defendant's guilt, there is not a reasonable possibility that had defendant's in-custody statements not been admitted, a different result would have been reached at trial.

Several persons testified that they saw defendant in the area of the victim's apartment on Halloween night. Tony Camp and Billy Charles Wright stated that defendant had in his possession that evening a Halloween mask which was later recovered from the scene of the crime. Camp further testified that defendant told him that he thought he had killed someone on Halloween night.

There was also substantial physical evidence which tended to place defendant at the scene of the crime on the night of Ms. Wallace's murder. A bloodstained coat recovered from defendant's bedroom during the search of his apartment was identified as the coat Fincher was wearing on Halloween night. Jane Burton testified that the blood on the coat and blood found on Ms. Wallace's blouse had a similar PGM reaction. She further stated that the bloodstains on the coat were inconsistent with defendants' blood types.

Dr. Louis Portis also testified regarding physical evidence obtained from defendant's coat. He testified that he compared fibers removed from the coat with those removed from a pillowcase found in the victim's apartment. It was his opinion that the fibers were microscopically consistent.

Finally, the State introduced the critical testimony of Kathleen Ramseur, an expert in fingerprint identification and comparison. She testified that she compared the characteristics of a bloody handprint recovered from a plastic mattress cover on a bed in the victim's apartment with Michael Fincher's prints. It was her opinion that the bloody print found in Ms. Wallace's bedroom was that of defendant Fincher.

Although we do not decide the question of whether defendant's constitutional rights were violated by the admission into evidence of his inculpatory statements to police officers, we are satisfied that even if such constitutional error was committed, the substantial evidence of defendant's guilt is sufficient to render such error harmless beyond a reasonable doubt. G.S. 15A-1443(b).

Appeal of Wright

By his first assignment of error, defendant Wright contends the trial court erred in denying his motion to suppress and admitting into evidence inculpatory statements given by him to police officers on 6 and 7 November 1981.

Upon defendant's motion to suppress, the trial judge conducted an extensive *voir dire*. At the close of this evidentiary hearing, Judge Sitton found facts and concluded that "none of [defendant's] constitutional rights, either Federal or State, . . . were violated by [his] arrest, detention, interrogation or confessions." Defendant's motion to suppress was therefore denied and the 6 and 7 November statements were admitted into evidence.

The *voir dire* testimony revealed the following regarding the circumstances surrounding defendant's arrest and interrogation:

On 5 November 1981, Terry Wright was arrested for a probation violation unrelated to this case and was booked into the Mecklenburg County jail. At about 6:00 p.m. the following day, Officer R. D. Sanders brought Wright to the Law Enforcement Center for the purpose of questioning him regarding his involvement in the Wallace murder.

Officer Sanders testified that defendant was advised of his *Miranda* rights. Defendant was afforded an opportunity to read the waiver of rights form. According to Officer Sanders, Wright took about five minutes to read the form, "going over it with his

finger." Defendant stated that he understood the warnings and signed the waiver of rights form.

Officer Sanders then questioned defendant about the Halloween incident. Wright inquired as to whether Michael Fincher had given a statement to police officers. After Sanders responded that he had, Wright said "he would rather not say anything regarding that until he had a chance to read Michael Fincher's statement."

Officer Sanders then retrieved Fincher's statement and read it aloud to defendant. Defendant asked to read it and he was permitted to do so. Sanders testified that defendant took his finger and read from left to right under each line through all the pages.

After he went over the statement, Wright said he did not see his name and inquired as to what Fincher said he had done. Officer Sanders told defendant that he only knew that Fincher said he was involved. Following this exchange, defendant agreed to make an oral statement and, with Wright's permission, Officer Sanders wrote it down.

Officer Sanders told defendant that he didn't believe the statement. Defendant admitted he had not told the truth and stated that Fincher's statement was also untrue. Sanders asked for another written statement and defendant said he would give "a written statement when Michael Fincher tells him, face-to-face, about what happened." At that point, Officer Sanders ceased questioning and took Terry Wright back to jail.

At about 11:00 the next morning, 7 November, Officers Mullis and Sanders brought defendant to the police station for further interrogation. Defendant was again advised of his constitutional rights. Officer Mullis asked defendant to read aloud blocks 1, 2, 3 and 4 of the waiver form. Mullis testified that defendant read the requested paragraphs, stated that he understood the warnings and signed the waiver form.

Officer Sanders then asked Wright if he would give a written statement. Wright reiterated that he would only give a written statement when he heard the truth from Michael Fincher. Officer Sanders asked defendant if he could ask him one more question and Wright said yes. Sanders asked, "How many people were involved Halloween night?" Wright said, "Two."

Sanders then went to where Fincher was being interrogated and informed Officer S. C. Cook that Wright had said that only two were involved. Officer Cook then informed defendant Fincher that Wright would tell the truth if he did. He also told Fincher that Wright said they were both involved. Fincher then said that he might as well tell the truth and offered a confession.

After the police obtained Fincher's statement, they took him to the room where Wright was being interrogated. In the presence of Wright, Fincher related the events as they occurred on Halloween night. After Fincher was taken out of the room, Sanders asked Wright if Fincher had told the truth. Wright stated that he had and agreed to give a truthful written statement outlining his involvement in the Wallace murder.

[5] Defendant first contends the 7 November confession was inadmissible because it was obtained in violation of his fifth amendment right to be free from self-incrimination. He takes the position that he invoked his right to remain silent when he told the police officers that he did not wish to give any further written statements until he heard the truth from Michael Fincher. He argues that Officer Sanders did not scrupulously honor his right to cut off questioning because he asked the "one more question" which triggered the ensuing confessions of Fincher and Wright.

We reject this contention for we are of the opinion that defendant did not invoke his fifth amendment right to remain silent. Defendant twice stated that he did not want to give another *written* statement until after Fincher told the truth. From the cold record, we would not interpret this statement as indicating a desire that all questioning cease. It seems clear to us that defendant merely refused to give another formal statement indicating his involvement in the crime. This is far different from a request for the complete cessation of questioning regarding any aspect of the case.

We will concede, however, that defendant's statement might have been uttered with such intonation that it could reasonably have been interpreted as an expression of a desire to remain silent. The statement is, however, ambiguous in any context for it seems to merely condition the giving of a formal written statement.

In *Nash v. Estelle*, 597 F. 2d 513 (5th Cir.), *cert. denied*, 444 U.S. 981, 100 S.Ct. 485, 62 L.Ed. 2d 409 (1979), the Fifth Circuit Court of Appeals held that where a suspect's desires are expressed in an equivocal fashion, it is permissible for the questioning official to make further inquiry to clarify the suspect's wishes. The court explained the rationale for this holding as follows:

> While the suspect has an absolute right to terminate stationhouse interrogation, he also has the prerogative to then and there answer questions, if that be his choice. Some persons are moved by the desire to unburden themselves to confessing their crimes to police, while others want to make their own assessment of what to say to their custodians. "[A] blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." *Michigan v. Mosley*, 423 U.S. 96, 102, 96 S.Ct. 321, 326, 46 L.Ed. 2d 313 (1975). When, as in the case at bar, a desire for immediate talk clearly appears from the suspect's words and conduct, but he also states he wants a lawyer (i.e., "I would like to have a lawyer, but I would rather talk to you"), it is sound and fully constitutional police practice to clarify the course the suspect elects to choose.
>
> . . . .
>
> The critical factor is whether a review of the whole event discloses that the interviewing agent has impinged on the exercise of the suspect's option to cut off the interview.

597 F. 2d at 517-18. *See also United States v. Riggs*, 537 F. 2d 1219 (4th Cir. 1976).

Here, it is abundantly clear that Officer Sanders indicated at all times a willingness to respect defendant's constitutional privileges should he have chosen to exercise them. The record discloses that Officer Sanders attempted to ascertain whether defendant was intending to invoke his fifth amendment right by *inquiring* as to whether he could ask another question. Defendant immediately and unhesitatingly answered affirmatively, thereby

clarifying that his earlier statement was not an expression of an intent to preclude all further questioning.

We hold that defendant did not invoke his fifth amendment right to remain silent when he stated that he would not give another written statement until Fincher confronted him with the truth. Defendant's assertion that his right to cut off questioning was not scrupulously honored is without merit.

[6] Defendant next asserts that his fifth amendment rights were violated because his 7 November confession was precipitated by an illegal confession by Fincher. Wright contends that Fincher's statement was involuntary because it was made only in response to a lie by Officer Cook as to what defendant had said earlier to police officers.[2] Defendant appears to argue that since his inculpatory statement was occasioned by Fincher's, this primary illegality tainted his statement and rendered it inadmissible at trial.

As stated earlier, the record reveals that a few minutes before Officer Cook spoke to defendant Fincher, Wright told police officers that he would tell the truth if Fincher would truthfully relate what happened. Wright also informed the officers that two people were involved in the perpetration of the crime.

Initially, we note that the record is contradictory on the point of *exactly* what Officer Cook related to Michael Fincher. Officer Jones testified that Officer Cook related to Fincher precisely what Terry Wright actually stated. Officer Cook testified that he told Fincher that Wright said they were both involved and that Wright was going to tell the truth.

The trial judge did not resolve this conflict in the evidence by making a specific finding of fact on this point. We are of the opinion that his failure to do so was entirely reasonable. This is so because we are convinced that even if Officer Cook did not repeat Wright's words *verbatim*, he communicated the essence of these statements to Fincher. Saying that "Terry . . . was going

2. Defendant Fincher also raised this issue in his brief before this Court. Because of our disposition of Fincher's appeal on non-constitutional grounds, however, it was unnecessary to address this question in that appeal.

to tell the truth about it" is not a deceitful perversion of Wright's statement that he would tell the truth if Fincher did. Furthermore, when Wright stated that two were involved, it is obvious from the context that Wright was speaking of Fincher and himself. He had just stated that he would tell the truth if Fincher did; the clear import of this statement being that the two of them were the individuals involved. Also, at that point, each of them had already given statements admitting participation in the crime.

Construed contextually, we are of the opinion that Officer Cook's statement to Fincher was not deceptive or untruthful. Officer Cook in fact related to Fincher essentially what Wright had earlier stated. Fincher's 7 November confession was therefore not involuntarily given because it was offered in response to Officer Cook's information regarding Wright's statements. Consequently, defendant's argument that his confession was tainted by Fincher's "induced" confession must fail.

[7] Defendant's final argument with respect to the admissibility of his confessions is that there is insufficient evidence to support the trial judge's finding that defendant knowingly and understandingly waived his *Miranda* rights. Defendant relies primarily upon his youth and subnormal intellectual capacity to support his position that he was incapable of adequately understanding his constitutional rights.

Dr. John Wheeler was qualified as an expert in psychological evaluation and testing and testified on *voir dire* as to defendant's mental capabilities. At the request of defendant's attorney, Dr. Wheeler observed, tested and evaluated Wright on three separate occasions, spending a total of four and one-half hours with him. Dr. Wheeler was permitted to give his opinions concerning defendant's capacity to read, write, understand, reason and function, based on his observations, testing and school records. Dr. Wheeler testified that defendant scored very poorly on all tests, placing in the first or second percentile on each of them. He estimated defendant's I.Q. to be 73.

Dr. Wheeler was asked to evaluate the level of reading required to read and understand the waiver of rights form which the officers used to advise Terry Wright. It was his opinion that one would "at least need to be able to read and comprehend at

the sixth grade, minimum, sixth grade level; to be absolutely confident, more like seventh or eighth grade level, to understand this document." It was further Dr. Wheeler's opinion that defendant could not have read the waiver form and understood it in less than five minutes. Although the officers could easily have read it to him in less than 30 seconds, it was Dr. Wheeler's opinion that defendant could not have understood the consequences and implications of the concepts in the form.

Dr. Wheeler testified that during one of his sessions with defendant, he read the Surgeon General's warning as to the hazards of cigarette smoking to him. It was Dr. Wheeler's opinion that Wright understood the implications of this warning.

Finally, in his analysis of defendant's personality test, Dr. Wheeler stated that the test "did not suggest that he has a significant serious psychological disorder." However, it was Dr. Wheeler's opinion that defendant was a "follower"; that he would be conscious of avoiding the possibility that others would not like him and might therefore say that he understood something even though he did not.

As stated earlier in our discussion of defendant Fincher's appeal, the fact that a defendant is youthful and mentally retarded does not compel a determination that he did not knowingly and intelligently waive his *Miranda* rights. *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). In such cases, however, "the record must be carefully scrutinized, with particular attention to both the characteristics of the accused and the details of the interrogation." *State v. Spence*, 36 N.C. App. 627, 629, 244 S.E. 2d 442, 443, *disc. rev. denied*, 295 N.C. 556, 248 S.E. 2d 734 (1978). The admissibility of the confession must be decided by viewing the totality of the circumstances. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983).

Guided by these principles, we are of the opinion that the totality of the circumstances support the trial judge's conclusion that defendant Wright was capable of making an understanding waiver of his constitutional rights.

The trial judge's findings of fact reflect the following:

Defendant was carefully advised of his *Miranda* rights on more than one occasion and each time unhesitatingly responded that he understood them. At the request of Officer Mullis, defendant read aloud numbered paragraphs 1, 2, 3 and 4 of the waiver of rights form. At one point during the officers' explanation of the warnings, defendant indicated by a facial expression that he did not understand the meaning of the word "leniency." Officer R. E. Sanders then explained the meaning of the word to defendant.

After he gave the first statement to police officers on 6 November, defendant declined to give another written statement until Michael Fincher confronted him with the truth. Defendant *twice* repeated this condition and steadfastly refused to give a written statement until his conditions were satisfied. This is, of course, some indication that defendant was aware of his right to control the timing and subject matter of police questioning and that he was not unduly intimidated by the officers.

The trial judge also found that defendant had prior experience with the criminal justice system, having been arrested and advised of his rights by Officer R. L. Quick on 26 March 1981. This is an important consideration in determining whether an inculpatory statement was made voluntarily and understandingly. *See State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983); *State v. Dawson*, 278 N.C. 351, 362, 180 S.E. 2d 140, 147 (1971).

Finally, the trial judge specifically found:

> 1. That on November 6th and 7th, 1981, both defendants appeared to be alert, coherent, were not under the influence of alcohol or narcotic drugs; that neither defendant was threatened, nor were they promised or offered any reward or inducements by the law enforcement officers to make a statement or to sign the waivers herein.
>
> 2. That no threats or suggested violence or show of violence of law enforcement officers to persuade or induce the defendants to waive their rights and make statements existed.
>
> . . .
>
> 5. That the answers of the defendants were responsive and were reasonable to the questions asked of each.

These findings are amply supported by the *voir dire* testimony and are therefore binding upon this Court. *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038, 102 S.Ct. 1741, 72 L.Ed. 2d 155 (1982); *State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976). These facts, in turn, support the conclusion that defendant Wright's confessions were made freely, voluntarily and understandingly.

After a careful review of the entire record, we hold that the trial judge correctly admitted the inculpatory statements made by defendant on 6 and 7 November 1981.

[8] By his final assignment of error, defendant contends the trial judge committed prejudicial error during his burglary charge to the jury by making a confusing and erroneous comparison to the burglary charge previously given as to defendant Fincher.

When the trial judge instructed the jury on the elements of first-degree burglary as to Michael Fincher, he itemized the seven elements the State was required to prove beyond a reasonable doubt. Defendant directs our attention to that portion of the charge wherein Judge Sitton instructed on the sixth element.

> Sixth, that at the time of the breaking and entering, the defendant intended to commit the felony of rape or larceny.
>
> The Court instructs you that rape is the having [of] vaginal intercourse by force and against the will of the victim, when the perpetrator inflicts serious, personal, bodily injury.
>
> STRIKE THE PORTION ABOUT WHAT I SAID "OR LARCENY."

At this point, the trial judge had informed the jury that in order to convict Fincher of first-degree burglary, they were required to find that at the time of the breaking and entering he intended to commit the felony of *rape*.

When the trial judge began to give the elements of burglary as to defendant Wright, he stated:

> I have previously stated to you the seven things, in—as to the defendant Michael Fincher, as to the crime, that the State must prove, beyond a reasonable doubt. I will not repeat those seven things, at this time. But, they apply here the same as previously given in my instructions.

Obviously, this "incorporation by reference" of the elements necessary to convict Wright of first-degree burglary was erroneous, since the only evidence presented by the State related to defendant Wright's intent to commit the felony of *larceny.*

However, immediately following this erroneous instruction, Judge Sitton gave an accurate charge in his final mandate to the jury as follows:

> So, I charge that if you find, from the evidence, beyond a reasonable doubt, that on or about October 31, 1981, the defendant, Terry Wright, acting either by himself or acting together with Michael Fincher; and, in a common scheme or purpose—plan or purpose to commit the burglary; and, Terry Wright went through a doorway, pushed open by another, and ran or walked into Henrietta Wallace's apartment dwelling, without her consent, in the night-time, *intending at that time to commit the felony of larceny;* and, that he took therefrom, the pocketbook, knowing at the time that he was not entitled to take it, intending at the time to deprive her of its use permanently; and, that Henrietta Wallace was in the house when he broke and entered, it would be your duty to return a verdict of "Guilty of burglary in the first degree" as to the defendant, Terry Wright. (Emphasis ours.)

We are of the opinion that the trial court's earlier misstatement was rectified by this correct instruction and that any misunderstanding or confusion that might have been caused by the error was removed. "Where . . . the inadvertence complained of occurs early in the charge but is not called to the attention of the court at the time, and is later corrected, the occurrence will not be held for prejudicial error when it is apparent from the record that the jury could not have been misled." *State v. Wells,* 290 N.C. 485, 498, 226 S.E. 2d 325, 334 (1976).

As further evidence that the jury could not have been misled by this error, we note that the written verdict form also clarified the jury instructions. The relevant portion reads:

> 1. Guilty of first degree burglary (felonious larceny).
>
> ANSWER: Guilty

This verdict form would clearly have indicated to the jurors that they could find defendant Wright guilty of first-degree burglary on the theory that at the time of the breaking and entering he intended to commit the felony of *larceny.*

For these reasons, we find the trial judge's misstatement wholly lacking in prejudicial effect. This assignment of error is overruled.

For the reasons set forth in this opinion, we hold that defendants Michael Edward Fincher and Terry Jerome Wright received a fair trial free of prejudicial error.

No error.

Justice MARTIN concurring in result.

Although I concur in the result reached by the majority, I dissent from the holding that N.C.G.S. 7A-595(a)(3) (1981) is applicable to defendant Fincher. This statute applies only to juvenile delinquency proceedings. I find no case in which this statute has been applied to *criminal* proceedings. *In re Horne,* 50 N.C. App. 97, 272 S.E. 2d 905 (1980), discussed the waiver of a juvenile's rights under the statute in a *juvenile* proceeding.

In effect, the majority seeks to engraft an additional requirement upon officers before interrogating persons under the age of eighteen by requiring that they be advised that they have a right to have a parent or guardian present during questioning. This result is reached by reasoning that the statute defines a juvenile as one who has not reached his eighteenth birthday; defendant is only seventeen years old, so he is entitled to the benefit of the statute.

While it is true that the statute defines a juvenile as one who has not reached his eighteenth birthday, the same subsection defines a juvenile for the purposes of being a juvenile delinquent as being one who has not reached his sixteenth birthday. N.C.G.S. 7A-595(a)(3) only applies to persons who are juveniles subject to a juvenile delinquency proceeding. N.C.G.S. 7A-517, the definitional section of the North Carolina Juvenile Code, states that the defined terms have the listed meanings "[u]nless the context clearly requires otherwise"; the word "juvenile" in N.C.G.S. 7A-595 clear-

ly means delinquent juvenile, as N.C.G.S. 7A-595 falls under Article 48, Law-Enforcement Procedures in Delinquency Proceedings. A person cannot be the subject of a juvenile delinquency proceeding if the act complained of occurred after the person reached his sixteenth birthday. N.C. Gen. Stat. § 7A-524 (1981). Where a person has been adjudged a juvenile delinquent and commits a criminal offense after reaching the age of sixteen, he must be prosecuted as an adult on that offense, even though he is still under the jurisdiction of the district court. *Id.* Likewise, if any other person over the age of sixteen and under the age of eighteen commits a criminal offense, he must be tried as an adult for that offense.

In short, this defendant, being over the age of sixteen, could not be subjected to a juvenile delinquency proceeding. N.C.G.S. 7A-595, a part of Article 48, "Law-Enforcement Procedures in Delinquency Proceedings," is applicable only to juvenile delinquency proceedings, not criminal prosecutions. A delinquency proceeding is not a criminal prosecution. *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879 (1969), *aff'd*, 403 U.S. 528, 29 L.Ed. 2d 647 (1971). The case at bar is a criminal prosecution.

It may seem that if a person is entitled to have a parent present in a delinquency proceeding, he should be so entitled in the more serious situation of a criminal prosecution. But there are cogent reasons to have a parent present in a delinquency proceeding: the family is involved, the juvenile may be taken from the home, the principal interest to be served is to rehabilitate the juvenile and save him from a life of crime. The court must consider the welfare of the juvenile as well as the best interests of the state. *In re Hardy*, 39 N.C. App. 610, 251 S.E. 2d 643 (1979). The state has a *greater* duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution. *In re Meyers*, 25 N.C. App. 555, 214 S.E. 2d 268 (1975). For this reason, the right to have a parent present is appropriate.

To the contrary, however, in criminal prosecutions a person over the age of sixteen and under the age of eighteen is treated as an adult. Family considerations are not so relevant or important, the interests of the victim and society in general must be considered. Here, all defendants are to be accorded the same rights. If the legislature had intended that persons under the

age of eighteen should be given additional rights in criminal prosecutions, it would have expressed that intent in Chapter 15A of the General Statutes. This the legislature can still do.

For these reasons, I respectfully dissent from what I perceive to be an unwarranted extension of the juvenile delinquency statute to criminal prosecutions. I concur in the well-reasoned remainder of the majority opinion.

Justice EXUM dissenting in part and concurring in part.

I concur with the majority's conclusion that Fincher's confession was inadmissible. In my view, however, Fincher's blue coat was unlawfully seized from his bedroom on the morning of his arrest and should not have been admitted into evidence against him. The majority assumes, and I agree, that only Fincher could have consented to the search of his bedroom. Applying the totality of circumstances test, I am satisfied that all the evidence demonstrates as a matter of law that Fincher was coerced into signing the consent form. Fincher was surrounded in his home by at least ten police officers. He told the police he did not understand the form they asked him to sign. The form was not explained. Fincher was not advised that he had a right not to consent and to insist that a warrant be obtained. Instead, the officers told him if he refused to sign, a warrant would be obtained and "either way, we are going to search the apartment." These actions, coupled with the uncontradicted evidence of Fincher's mental retardation, functional illiteracy, mental illness, and unusual susceptibility to fear and intimidation, compel me to conclude that Fincher was coerced. "Where there is coercion there cannot be consent." *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968).

Neither can I conclude that the admission of both the coat and Fincher's confession were harmless error. Therefore, I think Fincher is entitled to a new trial.

With regard to Wright's appeal, the questions whether Wright unconditionally asserted his right to remain silent and, if so, whether the officers honored the assertion are close. After careful study, I conclude the majority has dealt with these issues correctly. I likewise concur in the majority's treatment of the

jury instruction question. I concur, therefore, in the majority's conclusion that no reversible error was committed as to Wright.

Justice FRYE joins in this dissenting and concurring opinion.

STATE OF NORTH CAROLINA v. HENRY LOUIS JACKSON

No. 598A82

(Filed 9 August 1983)

1. **Criminal Law § 98.2— sequestration of witnesses prior to trial—discretionary matter**

Defendant failed to show that the trial judge abused his discretion in denying defendant's motion to sequester two witnesses who were housed in the same jail cell.

2. **Criminal Law § 92.4— consolidation of multiple charges against defendant proper**

Defendant failed to show the trial court abused its discretion in consolidating for trial the charges of kidnapping, robbery with a dangerous weapon, and murder in the first degree where all the evidence showed that defendant's acts were part of a single scheme or plan to take the victim's money by force. G.S. 15A-926(a).

3. **Constitutional Law § 62; Criminal Law § 135.3; Jury § 7.11— "death qualification" of prospective jurors—no denial of constitutional rights—death penalty not cruel and unusual punishment**

There was no merit to defendant's arguments that "death qualification" of prospective jurors denied him his right to a fair trial; that the death penalty is cruel and unusual punishment; and that the court erred in denying his motion to empanel different juries for the guilt determination phase and the sentencing phase of his trial.

4. **Bills of Discovery § 6; Constitutional Law § 30— disclosure of State's evidence**

Where the prosecution gave defense counsel the pretrial statements of two of the State's witnesses at trial, before the witnesses took the stand, the State satisfied the requirements of due process and G.S. 15A-904(a). Further, the substance of the witnesses' statements were incorporated in affidavits used to support the State's application for search warrants of defendant's residence and were a part of the public record.

5. **Jury § 6— capital case—denial of individual voir dire—sequestration**

Defendant failed to establish that the trial court abused its discretion in denying defendant's motion for sequestration of potential jurors and individual voir dire of prospective jurors. G.S. 15A-1214(j).

6. Criminal Law § 43— map—used to illustrate testimony

The trial court properly allowed a map depicting the rivers and roads in an area in which the crimes occurred into evidence where testimony provided sufficient foundation to permit the map to be introduced for illustrative purposes, and where the map's probative value outweighed any prejudicial effect it might have had. Further, the court properly instructed the jury concerning the use it might make of the map.

7. Searches and Seizures § 10— search warrant supported by probable cause

The trial court properly introduced into evidence items seized from defendant's residence by authority of two search warrants where one warrant was based on information provided to agents from two accomplices, the accounts were based on firsthand knowledge, were given four days after the commission of the crimes, and were consistent with one another. As to the second warrant dealing with .22-caliber projectiles at defendant's residence, under the totality of the circumstances, there were probable cause to believe that projectiles might have been found at defendant's residence.

8. Kidnapping § 1.2— insufficient evidence—judgment and sentence arrested

Where the State's evidence tended to show that defendant entered the victim's automobile on the pretext of getting a ride to town, and there was no evidence allowing more than mere conjecture that defendant used his misrepresentation to confine, restrain or remove the victim against his will during their ride together, the Court must rule that the State failed to prove beyond a reasonable doubt that defendant restrained, confined or removed the victim within the meaning of G.S. 14-39 and the judgment and sentence for the kidnapping charge must be arrested.

9. Robbery § 4.3— armed robbery—sufficiency of the evidence

The trial court properly denied defendant's motion to dismiss an armed robbery charge against him where the evidence tended to show that defendant thought the victim had $1,000 or $2,000 on him; that defendant entered the victim's automobile with a .22-caliber pistol; that within hours of entering the victim's vehicle defendant told two accomplices that he had to kill the victim because he did not give him any money; that defendant, who had no money before his encounter with the victim, gave his accomplices cash shortly after leaving the victim, keeping some for himself; and that the victim's body was found the day of the crimes, shot through the head twice, with his wallet missing.

10. Homicide § 21.6— murder in the first degree—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss the charge of murder in the first degree where the evidence tended to show that defendant, armed with a .22-caliber pistol, entered the victim's car with the intent to rob him; that the victim was found dead, his wallet missing; and that shortly after leaving the victim, defendant told two accomplices that he had killed the victim, and defendant gave the two some cash. Because the killing was committed in the perpetration of robbery with a dangerous weapon, the crime was murder in the first degree. G.S. 14-17, G.S. 15A-1227.

11. Robbery § 6; Homicide § 31.1— robbery merged with conviction of murder in first degree—sentence for robbery error

Where defendant was convicted of the charge of murder in the first degree based on a theory of felony murder, with armed robbery constituting the underlying felony, the trial court erred in sentencing defendant separately for the robbery since the armed robbery conviction was merged with his conviction of murder in the first degree.

12. Criminal Law § 135.4— conviction under felony-murder rule—instructions during sentencing phase proper

The trial court did not commit error in instructing the jury during the sentencing phase of defendant's trial that it would be required to consider the evidence offered during the guilt or innocence phase of the trial where the only evidence the jury could consider was that presented during the guilt phase of the trial since no new evidence was submitted during the sentencing proceeding, and where the instructions did not suggest that the armed robbery could be considered an aggravating circumstance.

13. Homicide § 31.1— first degree murder conviction—death sentence—proportionality review—death sentence disproportionate

Upon review as required by G.S. 15A-2000(d)(2), the Court found that the jury did not impose the death sentence under the influence of passion, prejudice or any other arbitrary factor; however, after reviewing the facts of the previous life sentence and death sentence cases in the proportionality pool, the Court found that although the killing of the victim was a senseless, wanton murder, it did not rise to the level of those murders in which the Court has approved the death sentence upon proportionality review. Therefore, the sentence imposed was disproportionate within the meaning of G.S. 15A-2000(d)(2), and the Court imposed a sentence of life imprisonment in lieu of the death sentence.

APPEAL by defendant from judgments entered by *Kivett, J.*, at the 30 August 1982 Special Criminal Session of Superior Court, UNION County. Heard in the Supreme Court 6 June 1983.

Defendant was charged in indictments proper in form with murder in the first degree, kidnapping, and robbery with a dangerous weapon. He was convicted of each charge and, for the murder, was sentenced to death.

Evidence for the state tended to show the following. On 24 March 1982 at 9:00 a.m., Joseph Lilly went to defendant's house, just north of Mt. Gilead, North Carolina. The two men then went to Charles Dunn's sawmill in Exway and purchased some wood. Before he and Lilly left the mill, defendant, who was unemployed at the time, asked Dunn about a job. Defendant and Lilly unloaded some of the wood at defendant's house and the remainder

at Lilly's. At Lilly's they joined James Pemberton, who was en route to a fishing excursion at a pond at the C.C. Camp one and one-half miles away.

After fishing at the C.C. Camp pond for some time, the three men decided to go to a pond in Exway. Lilly, who had driven them to the first pond, said that his truck did not have enough gasoline to go to and from Exway. Defendant volunteered to pawn a chain saw he had at his house so that the group could purchase some gasoline. The trio went back to defendant's house, picked up the chain saw, and pawned it for twenty-two dollars, five dollars of which was used to purchase gasoline. The remaining seventeen dollars was used to purchase two six-packs of beer, a twelve-pack of beer, and a bag of pork skins.

Lilly later testified that when defendant got out of the truck to take his chain saw into the store where it was pawned, Lilly observed him take a .22-caliber pistol out of his pocket and put it on the seat of the truck. Later, defendant placed this weapon in the glove compartment of the truck.

Lilly, Pemberton, and defendant proceeded to a pond in Exway, where they fished and drank beer. When they stopped fishing, they left the pond and proceeded west on N.C. highway 73 in Lilly's truck. Near the Little River bridges they passed George Thomas McAulay's car. McAulay, who lived in Mt. Gilead, was driving a tan and green Lincoln Continental automobile at the time. Defendant recognized McAulay and told his companions that McAulay might have one or two thousand dollars on his person. Defendant got out his gun, ordered Lilly to turn the truck around, and threatened to shoot Lilly and Pemberton if they said anything. They crossed the Little River bridges again, but by then McAulay was out of sight. They turned off N.C. 73 onto a secondary road that went to Exway by one Lonnie Green's house. When they passed the house, they observed McAulay's car parked in front of it. Defendant ordered Lilly to drive into Exway, turn left at the intersection, and drive down the secondary road to a place known as the "ant hill," where a bend in the Little River came near the road. There defendant ordered Lilly to stop and defendant got out of the truck.

George Thomas McAulay arrived at Lonnie Green's house around 3:00 p.m. on Wednesday, 24 March 1982. He was seventy-

one years of age, overweight, and had recently suffered both a heart attack and a stroke, so that he used a cane with which to walk. McAulay left Lonnie Green's house about 5:00 p.m. and headed back to Mt. Gilead. As he passed the stopped truck, Lilly waved him down. When he stopped, Lilly told him the truck had stalled and they needed jumper cables. McAulay replied that he did not have any jumper cables, but he would be glad to give one of the three men a ride to town. Defendant, who had his pistol in his pocket, got into McAulay's car, and he and McAulay drove off.

Lilly and Pemberton drove around for some time after defendant departed. Finally, they returned to N.C. 73 and headed west toward Mt. Gilead. When they arrived in the vicinity of a store owned by one Harris, they saw defendant get out of a blue and white car and come into the center of the road. He waved them down and got into the truck. Defendant gave Lilly and Pemberton thirty-five dollars each and said he had killed McAulay after he asked McAulay for money and he refused to give him any.

About 6:00 p.m. on Wednesday, 24 March 1982, the body of George Thomas McAulay was discovered in his car on a secondary road about three-tenths of a mile south of N.C. 73, near the Little River bridges. He had been shot twice in the head with a .22-caliber weapon at close range. His wallet was gone and some change was found scattered on the ground near his car.

At trial defendant testified on his own behalf and denied any involvement in the crimes.

Rufus L. Edmisten, Attorney General, by Charles M. Hensey, Assistant Attorney General, for the state.

Donald M. Dawkins for defendant appellant.

MARTIN, Justice.

Defendant brings forth forty-three questions for review.[1] For clarity, some of them will be grouped together in this opinion

1. Attention is called to *Jones v. Barnes*, --- U.S. ---, 77 L.Ed. 2d 987 (1983), in which the Court held that defense counsel assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant. As the Court stated, "[a] brief that raises every

when appropriate. For reasons stated below, judgment must be arrested as to the kidnapping charge and the robbery charge, and the death sentence for murder is vacated and replaced with a sentence of life imprisonment.

[1] Defendant alleges that the trial court erred in its rulings on a number of pretrial motions. Defendant first claims that the trial court erred in denying his 12 July 1982 motion to separate and sequester Joseph Lilly and James Pemberton until trial. Lilly and Pemberton were arrested 24 March 1982 and were charged with murder in the first degree, kidnapping, and robbery with a dangerous weapon of George McAulay. On 28 March 1982, Lilly and Pemberton made statements to authorities about the events of 24 March 1982. Sometime in April 1982, they were placed in the same cell in the Richmond County jail, where they remained until trial. On 12 July 1982, defendant moved to separate the two, arguing that their presence together allowed them to collaborate to produce a version of the events of 24 March which would prejudice defendant at trial.

A trial judge has the discretion to exclude and sequester witnesses during the course of trial. N.C. Gen. Stat. § 15A-1225 (1978); *State v. Cross*, 293 N.C. 296, 237 S.E. 2d 734 (1977); *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). Similarly, for good reason and at his discretion, a trial judge may order the separation before trial of witnesses who are in the custody of the state. In the present case, defendant has failed to show that the trial judge abused his discretion in denying defendant's motion. By the time defendant made this motion, 12 July, Pemberton and Lilly had been housed together for many weeks. When moving for their separation, defendant presented no evidence that the two men were collaborating or had collaborated to devise a false account of the events of 24 March. Further, as all parties present at the motion hearing were aware, if Lilly and Pemberton were called to testify at trial, defendant would have the opportunity to cross-examine them to bring out any inconsistencies between

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colorable issue runs the risk of burying good arguments—those that, in the words of the great advocate John W. Davis, 'go for the jugular,' Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 897 (1940)—in a verbal mound made up of strong and weak contentions. See generally, *e.g.* Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 Sw. L. J. 801 (1976)." *Id.* at ---, 77 L.Ed. 2d at 994 (footnote omitted).

their trial testimony and the statements they had given 28 March. As Justice Ruffin stated: "The separation of witnesses . . . is not founded on the idea of keeping the witnesses from intercourse with each other. That would be a vain attempt. The expectation is not to prevent the fabrication of false stories, but by separate cross-examination to detect them." *State v. Silver*, 14 N.C. 332, 333 (1832). Defendant's assignment of error is without merit.

[2] Defendant next argues that the trial court erred in granting the state's motion to consolidate for trial the charges of kidnapping, robbery with a dangerous weapon, and murder in the first degree. Defendant argues that the consolidation of the three charges against him hindered his defense at the sentencing phase of his trial because the jury was then able to consider all of the evidence presented at the guilt phase.

N.C.G.S. 15A-926(a) provides that "[t]wo or more offenses may be joined . . . for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." The granting of a motion to consolidate is reviewable only for abuse of discretion. *E.g., State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977). If there was no abuse of discretion, the fact that in hindsight the court's ruling adversely affected defendant's defense will not convert the court's ruling into error. *Cf. State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983) (defendant's trial strategy irrelevant to propriety of court's ruling).

In the present case defendant has failed to show that the trial court abused its discretion in granting the state's motion to consolidate. All of the evidence shows that defendant's acts were part of a single scheme or plan to take the victim's money by force. Had the offenses been severed, the murder could have been prosecuted on a theory of felony murder, in which case evidence supporting the charges of kidnapping and armed robbery could have been presented before the jury during that trial. The trial court's decision to consolidate the charges for trial under N.C.G.S. 15A-926(a) was not error. In addition, the trial court did not err in denying defendant's subsequent motion to sever the offenses.

[3] Next, defendant contends that the trial court erred by denying his pretrial motion to exclude the death penalty as a possible sentence on grounds that the so-called "death qualification" of

prospective jurors denied him his right to a fair trial. *See generally Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776 (1968); *State v. Pinch*, 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). Defendant also argues that for this reason the trial court erred in denying his pretrial motion to empanel different juries for the guilt determination phase and the sentencing phase of his trial. Finally, defendant argues that because a sentence to death is cruel and unusual punishment, it should have been excluded from consideration at his trial.

This Court has held consistently that the death qualification of jurors is not error, and for this reason, defendant's assignment of error is overruled. *See, e.g., State v. Hill*, 308 N.C. 382, 302 S.E. 2d 202 (1983); *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983). Defendant's argument that the death penalty is cruel and unusual is also without merit. In *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980), this Court held that the death penalty is not per se cruel and unusual punishment. *See also, e.g., Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859 (1976); *State v. Kirkley, supra.*

[4] Defendant contends that the trial court erred by denying his pretrial motions for discovery of statements made by state's witnesses James Pemberton and Joseph Lilly to law enforcement officers. Under N.C.G.S. 15A-904(a), the state is not required to give to defendant before trial any statements made by witnesses of the state. If such evidence is material and favorable to the defendant, the state is required to disclose it to defense counsel *at* trial. *State v. Hardy, supra*, 293 N.C. 105, 235 S.E. 2d 828 (1977); *United States v. Agurs*, 427 U.S. 97, 49 L.Ed. 2d 342 (1976); *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215 (1963). In the instant case, the prosecution gave defense counsel the pretrial statements of Pemberton and Lilly at trial, before Lilly and Pemberton took the stand. Standing alone, this satisfies the requirement of due process explained in *Hardy, Agurs*, and *Brady, supra.* However, we also note that the substance of Lilly's and Pemberton's pretrial statements were incorporated into affidavits used to support the state's application for search warrants of defendant's residence. As these warrants were of public record, defendant could have examined them before trial to discover the

substance of Lilly's and Pemberton's statements. Defendant's assignment of error is overruled.

[5] Defendant next contends that the trial court erred in denying his pretrial motion for sequestration of potential jurors and individual voir dire of prospective jurors. Defendant argues that "[i]ndividual voir dire and sequestration of jurors during voir dire would have eliminated some of the embarrassment caused by jurors sitting in exposure before other potential jurors during jury selection."

N.C.G.S. 15A-1214(j) provides that "[i]n capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection." A trial court is not required to permit individual voir dire of jurors in a capital case. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 642 (1982). Whether to allow sequestration and individual voir dire of prospective jurors is a matter for the trial court's discretion, and its ruling will not be reversed absent a showing of abuse of discretion. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). Defendant's argument fails to establish that the trial court abused its discretion in denying his motion. Accordingly, we have determined that the trial court's ruling was not error.

The defendant next argues that the trial court erred in denying his pretrial motion to dismiss all three charges against him. Defendant claims that the indictments for each offense were defective and further, that because the trial judge erred in consolidating the offenses for trial, all indictments should have been quashed. As explained above, the trial court did not err in consolidating for trial the charges against defendant. On that score, defendant's claim of error is without merit. We now consider defendant's argument that the indictments for each offense were defective.

In general, when an indictment charges a crime in plain, intelligible and explicit language in the words of the statute, it is proper. *State v. Norwood*, 289 N.C. 424, 222 S.E. 2d 253 (1976); *State v. Penley*, 277 N.C. 704, 178 S.E. 2d 490 (1971). We have examined each of the indictments and the statutes upon which they are predicated. The indictments are all proper in form and lawful.

The trial court properly denied defendant's motion to quash the indictments.

[6] Defendant next assigns as error the admission into evidence of State's Exhibit 14, a map depicting the rivers and roads in the area in which the crimes occurred. Defendant argues that the exhibit "bolstered and embellished the State's otherwise weak case against him." He also contends that the court's instructions to the jury concerning the map were erroneous and prejudiced his defense.

In North Carolina, if properly authenticated, maps, diagrams, photographs, movies, sketches, and composite pictures are admissible to illustrate a witness's testimony. *State v. Lee*, 293 N.C. 570, 238 S.E. 2d 299 (1977); *State v. Johnson*, 280 N.C. 281, 185 S.E. 2d 698 (1972); *State v. Rogers*, 168 N.C. 112, 83 S.E. 161 (1914). A properly authenticated map need not be drawn to scale to be admissible. *Rogers, supra. See generally* 9 A.L.R. 2d 1044 (1950). In the present case, while on the stand Detective Sergeant Harold Napier of the Richmond County Sheriff's Department identified State's Exhibit 14 as a map of rivers and roads in the general area where the crimes were committed. He testified that the exhibit correctly and accurately displayed the roads and the general area of northwestern Richmond County as they existed on 24 March 1982; that the exhibit was prepared from a Richmond County map; that he did not know whether the exhibit was drawn to scale; and that he could use the map to illustrate his testimony. This testimony provided sufficient foundation to permit the map to be introduced for illustrative purposes. *Cf. Williams v. Bethany Fire Dept.*, 307 N.C. 430, 298 S.E. 2d 352 (1983). The map's probative value outweighed any prejudicial effect it might have had. The trial court did not abuse its discretion in allowing the map into evidence.

Further, before instructing the jury concerning the use it might make of the map, the court conferred with the state and defense counsel, asking each whether they had any objections to the instructions the court proposed to give. Neither side did. As to the map, the court then instructed the jury as follows:

> Members of the jury, as you know, photographs were introduced into evidence during the course of the trial and a map or drawing was introduced into evidence during the

> course of the trial. These were allowed into evidence for the purpose of illustrating and explaining the testimony of various witnesses who were on the witness stand and testified at the time that they were used. They may not be considered by you for any purpose other than to illustrate and explain the testimony of those witnesses.

These instructions were not error. Defendant's assignment of error is overruled.

[7] Defendant next assigns as error the introduction into evidence of items which were seized from defendant's residence by authority of search warrants issued 28 March 1982 and 4 April 1982. Defendant argues that these search warrants were based upon affidavits which were purely conclusory and which did not adequately state circumstances upon which the affiant's belief of probable cause was founded. *See Nathanson v. United States*, 290 U.S. 41, 78 L.Ed. 159 (1933). Defendant also contends that there was insufficient probable cause to believe that the evidence sought would be found at his residence.

"[T]he traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." *Illinois v. Gates*, --- U.S. ---, ---, 76 L.Ed. 2d 527, 547 (1983) (quoting *Jones v. United States*, 362 U.S. 257, 271, 4 L.Ed. 2d 697, 708 (1960)). *See also State v. Jones*, 299 N.C. 298, 261 S.E. 2d 860 (1980); *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976).

State Bureau of Investigation agent K. R. Snead supported his 28 March 1982 request for a warrant to search defendant's house with the following affidavit:

> On Wednesday, March 24, 1982 at about 5:00 P.M. on a rural road in Richmond County George T. McAulay was shot to death. Mr. McAulay was shot two times in the head and was robbed of his wallet and an undetermined amount of money. This applicant further swears that on March 28, 1982 he interviewed James Marion Pemberton and Pemberton told applicant that he, Joseph Lilly and Henry Jackson were in Richmond County on Wednesday 3-24-82 and had planned be-

tween the three of them to rob Mr. George McAulay of his money. Pemberton further said that the three of them flagged down Mr. McAulay on a rural road and that Henry Jackson got into McAulay's vehicle and forced McAulay to drive down a road and robbed him. Pemberton further told applicant that Henry Jackson has told him that he, Jackson, told him on 3-24-82 he robbed McAulay and shot him two times in the face with his, Jackson, 22 cal pistol. Pemberton further told applicant that Jackson told him he robbed McAulay of his money and wallet, and left him in his car. Pemberton said that on 3-24-82 Jackson was wearing a gray or white shirt and blue jeans.

Pemberton said that Jackson was carrying a .22 cal pistol, silver and black in color on 3-24-82.

Applicant further swears that on March 28, 1982, Deputy Harold Napier interviewed Joseph David Lilly and Lilly told him, that he along with Henry Jackson and Pemberton planned to rob George McAulay in Richmond County and that Henry Jackson got into McAulay Continental and went down a rural road and robbed McAulay. Lilly further told Napier that Jackson told him on 3-24-82 he shot McAulay 2 times in the face with his, Jackson's, 22 cal pistol and took his money and wallet. Lilly furthered told Napier that on 3-24-82 that Jackson was wearing a vaze [sic] shirt and blue jeans.

An informant's "'veracity,' 'reliability' and 'basis of knowledge' are all highly relevant in determining the value of his report [and] . . . should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." *Illinois v. Gates, supra*, --- U.S. at ---, 76 L.Ed. 2d at 543. "[E]ven if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case." *Id.* at ---, 76 L.Ed. 2d at 545. Moreover, an affidavit relying on hearsay "is not to be deemed insufficient on that score, so long as a substan-

tial basis for crediting the hearsay is presented." *Jones v. United States, supra*, 362 U.S. 257, 269, 4 L.Ed. 2d 697, 707 (1960).

In the present case, Agent Snead's application for a search warrant was based on the information provided to him on 28 March 1982 by Pemberton and by Deputy Napier's account of statements given to him by Lilly on 28 March 1982. The accounts of Lilly and Pemberton were based on firsthand knowledge, were given four days after the commission of the crimes, and were consistent with one another. We hold that under the totality of the circumstances, there was sufficient probable cause to believe that evidence of the crimes would be found at the residence of defendant. The issuance of the 28 March 1982 warrant to search defendant's house was not error. Therefore, the trial court did not err in admitting into evidence items seized as a result of the search conducted pursuant to the 28 March warrant. *See State v. Jones, supra*, 299 N.C. 298, 261 S.E. 2d 860 (1980); *State v. Riddick, supra*, 291 N.C. 399, 230 S.E. 2d 506 (1976).

On 4 April 1982 Agent Snead applied for a second warrant to search defendant's house for .22-caliber projectiles. Supporting his application was an affidavit which stated the following:

> On March 24, 1982, Wednesday that George Thomas McAulay was shot to death at about five o'clock pm. McAulay was shot with a 22 caliber weapon in the head, was robbed of his wallet and an undetermined amount of money. Applicant further swears that on March 28, 1982 he interviewed Joseph Lilly and Lilly told applicant that he, Lilly, James Pemberton and Henry Louis Jackson had made plans to and did rob George McAulay in Richmond County at about 5:00 PM on 3-24-82. Lilly furthered applicant that Henry Louis Jackson has told him he, Jackson, did shoot McAulay, in the face two times with his, Jackson, silver with black handles 22 caliber pistol, revolver. Lilly told applicant that he has seen Henry Jackson's 22 caliber pistol and it is fact silver in color with black handles. Applicant swears that on March 28, 1982 he interviewed James Marion Pemberton and James Marion Pemberton told applicant that he was also involved in the robbery of George McAulay on 3-24-82 along with Lilly and Henry Louis Jackson. Pemberton furthered told applicant that Jackson told him he shot McAulay two times in the face with his, Jackson, 22 caliber pistol silver with black handles.

> Pemberton furthered told applicant that he has personally seen Henry Louis Jackson's 22 pistol and it is in fact silver in color with black handles.
>
> Applicant swears that he talked with Reggie Patterson on 4-1-82 and Patterson told him he was a friend of Henry Louis Jackson. Patterson told applicant that he has had in his possession Jacksons 22 caliber pistol about 30 days ago and that the pistol is silver in color and has black handles. Patterson stated that he returned Jackson's pistol to Jackson on the same day he had it. Patterson told applicant that on Wednesday he was not involved in the robbery of Mr. McAulay. Patterson told applicant that he was at Henry Jackson's house on Tuesday 3-23-82 and that Jackson shot his silver with black handles 22 caliber pistol in the ground in his Jackson's front yard. Patterson told applicant that he saw Jackson shot the pistol at about 5:00 PM on that day.

We hold that under the totality of the circumstances, on 4 April 1982 there was probable cause to believe that .22-caliber projectiles might be found at defendant's residence. Thus, the search warrant was valid, and the trial court did not err in admitting into evidence casings which were found at defendant's residence. *See State v. Jones, supra; State v. Riddick, supra.*

Defendant next contends that the trial court erred in denying his motions for severance of the offenses, made at the close of the state's evidence and at the close of all of the evidence. As explained above, defendant's pretrial motion for severance was denied. N.C.G.S. 15A-927(a)(1) provides in part that if a defendant's pretrial motion for severance is overruled, he may renew the motion before or at the close of all of the evidence if based on a ground not previously known. Motions of this type are addressed to the sound discretion of the trial court and its ruling will not be disturbed on appeal unless defendant shows an abuse of discretion which deprived defendant of a fair trial. *See State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977).

At the conclusion of the state's case, the evidence introduced showed that the events giving rise to the crime were as predicted by the parties before trial. This evidence showed a connected series of events supporting all three charges; in fact, these events were so interwoven that if the charges had been severed, evi-

dence of the other crimes charged would have been admissible at each trial. No new basis for the motions made during trial was presented. Consolidation of the three charges in no way prevented defendant from presenting his defense nor otherwise prevented him from receiving a fair trial. Defendant's assignments of error are overruled.

[8] Defendant next assigns as error the trial court's denial of his motions to dismiss the kidnapping charge at the close of all of the evidence and after the jury's verdict of guilty was returned. He further assigns as error the denial of his motion for appropriate relief after judgment was entered on the kidnapping charge. *See* N.C. Gen. Stat. § 15A-1227 (1978). Defendant contends that there was insufficient evidence as a matter of law to support entry of a judgment of guilt.

Upon defendant's motion for dismissal, the question for the trial court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) that defendant was the perpetrator of the offense. *State v. Williams*, 307 N.C. 452, 298 S.E. 2d 372 (1983). If there is such substantial evidence, the motion must be denied. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). However, if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the perpetrator, the motion should be allowed. *Id.* In considering a motion to dismiss, the evidence must be considered in the light most favorable to the state, and the state is entitled to every reasonable inference to be drawn therefrom. *Id.*

The state's evidence tends to show that defendant entered Mr. McAulay's automobile on the pretext of getting a ride to town in order to obtain jumper cables for Lilly's truck. In fact, defendant entered the automobile for the purpose of robbing Mr. McAulay. Under a case arising under the predecessor statute of N.C.G.S. 14-39, this court stated that "where false and fraudulent representations or fraud amounting substantially to a coercion of the will of the kidnapped person are used as a substitute for force in effecting kidnapping, there is, in truth and in law, no consent at all on the part of the victim." *State v. Gough*, 257 N.C. 348, 356, 126 S.E. 2d 118, 124 (1962). In the present case the state argues that because defendant misrepresented his intent to McAulay

upon entering the car, this fraud resulted in McAulay's not consenting to drive defendant anywhere. Therefore, defendant must have unlawfully confined, restrained, or removed him. We cannot, on these facts, agree.

There is no evidence allowing more than mere conjecture that defendant used his misrepresentation to confine, restrain or remove Mr. McAulay against his will during their ride together. Mr. McAulay was the driver of the car at all times. Defendant is blind in one eye and has vision of only 12 over 400 in the other eye. For all we know, defendant may have kept his intent to rob McAulay to himself until the car stopped where McAulay's body was found. All the evidence shows is that defendant entered McAulay's automobile and that McAulay was later found in his car, which was three-tenths of a mile off N.C. highway 73. Without more, this would permit an inference that, for his own reasons, McAulay drove to the place where he was shot and that it was then and there that defendant first revealed his intent to rob Mr. McAulay. By this account of events, defendant would have restrained McAulay for the first time only after the car had stopped. In this situation, such restraint would have been an inherent, inevitable feature of the armed robbery, and thus judgment for kidnapping could not be entered based on this restraint. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). Because of the total lack of evidence regarding the events occurring between the time defendant entered McAulay's automobile and the time McAulay was shot, we must rule that the state has failed to prove beyond a reasonable doubt that defendant restrained, confined, or removed Mr. McAulay within the meaning of N.C.G.S. 14-39 during that period. Accordingly, the judgment and sentence for the kidnapping charge must be arrested.

[9] Defendant next argues that the trial court erred in denying his motion to dismiss the armed robbery charge (1) at the close of all of the evidence and (2) after the jury verdict was returned and before entry of judgment. The criteria for granting a motion to dismiss are set forth above. In this case, the evidence most favorable to the state showed that defendant thought McAulay had one or two thousand dollars on him; that defendant entered Mr. McAulay's automobile with a .22 caliber pistol concealed on his person; that within hours of entering McAulay's vehicle defendant told Pemberton and Lilly that he had to kill McAulay be-

cause he didn't give him any money; that defendant, who had no money before his encounter with the victim, gave Lilly and Pemberton cash shortly after leaving McAulay, keeping some for himself; and that Mr. McAulay's body was found the day of the crimes, shot through the head twice, with his wallet missing. We hold that the trial court did not err in denying defendant's motions to dismiss the charge of robbery with a dangerous weapon.

[10] Defendant next contends that the trial court erred in denying his motions to dismiss the charge of murder in the first degree, which motions were made at the close of all of the evidence and after jury verdict but before entry of judgment. *See* N.C. Gen. Stat. § 15A-1227 (1978); N.C. Gen. Stat. § 14-17 (1981).

Again, the evidence in the present case shows that defendant, armed with a .22-caliber pistol, entered McAulay's car with the intent to rob him. McAulay was found dead, his wallet missing, three-tenths of a mile from N.C. highway 73. Shortly after leaving McAulay, defendant told Lilly and Pemberton that he had killed McAulay, and defendant gave the two some cash. Although no one saw defendant shoot McAulay, it is a reasonable inference from this evidence that defendant was the perpetrator of the homicide. Because the killing was committed in the perpetration of robbery with a dangerous weapon, the crime was murder in the first degree. N.C. Gen. Stat. § 14-17 (1981). The trial court did not err in denying defendant's motions to dismiss the charge of murder in the first degree.

Defendant next argues that the trial court erred in denying his motion for a new trial on all charges. N.C. Gen. Stat. § 15A-1411 (1978); N.C. Gen. Stat. § 15A-1417(a)(1) (1978). N.C.G.S. 15A-1420(c)(6) provides that "[a] defendant who seeks relief by motion for appropriate relief must show the existence of the asserted ground for relief. Relief must be denied unless prejudice appears, in accordance with G.S. 15A-1443." When defendant made his motion for a new trial, he did not state any grounds for supporting it. Defendant's argument before this court that the trial court erred in denying this motion is set forth in its entirety as follows: "For Assignments of Error heretofore made, defendant would argue that there was not sufficient evidence to warrant denial of this motion."

We ruled above that the only error committed by the trial court prior to entry of judgment for the three charges was its failure to grant defendant's motion to dismiss the kidnapping charge. Defendant has failed to demonstrate how this error so prejudiced his trial that a retrial on the other charges must be ordered. N.C. Gen. Stat. § 15A-1443 (1978). The trial court did not err in denying defendant's motion for a new trial.

[11] Defendant next argues that the trial court should have granted his post-trial motion for appropriate relief on grounds that the court erroneously entered judgment on his armed robbery conviction. Defendant was convicted of the charge of murder in the first degree based on a theory of felony murder, with the armed robbery constituting the underlying felony. The trial court sentenced defendant to fourteen years' imprisonment for the robbery. Defendant argues that the entry of judgment and sentence for armed robbery must be arrested because the armed robbery was merged with his conviction of murder in the first degree. Defendant's argument has merit. "When a defendant is convicted of first degree murder pursuant to the felony murder rule, and a verdict of guilty is also returned on the underlying felony, this latter conviction . . . merges into the murder conviction, and any judgment imposed on the underlying felony must be arrested." *State v. Silhan*, 302 N.C. 223, 261-62, 275 S.E. 2d 450, 477 (1981). *See also, e.g., State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563, *cert. denied*, 434 U.S. 998 (1977); *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). Judgment entered for defendant's conviction of armed robbery is arrested, and sentence for it is vacated.

[12] Next, defendant argues that the trial court erred when instructing the jury during the sentencing proceedings conducted for his conviction of murder in the first degree. *See* N.C. Gen. Stat. § 15A-2000(a) (Cum. Supp. 1981). Defendant claims that the trial judge erred when he instructed the jury that it would be required to consider the evidence offered during the guilt or innocence phase of the trial. Defendant argues that by telling the jury that it would have to consider the evidence presented during the guilt/innocence phase of the trial, the trial court was allowing the jury to find that the robbery charge was an aggravating circumstance. Defendant was convicted of murder in the first degree based on felony murder, with armed robbery constituting the underlying felony. We have ruled that it is error to submit the

underlying felony as an aggravating circumstance during the sentencing phase of the trial for a capital crime when felony murder is the theory under which defendant was convicted. *State v. Silhan, supra*, 302 N.C. 223, 275 S.E. 2d 450 (1981); *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980).

During the sentencing hearing in the present case, no additional evidence was offered by either the state or defendant. After summarizing some of the evidence for the jury, the trial court instructed as required by N.C.G.S. 15A-2000(b). The only aggravating circumstance submitted to the jury was whether the circumstance listed in N.C.G.S. 15A-2000(e)(6) existed: "The capital felony was committed for pecuniary gain." The mitigating circumstances submitted were:

(1) Henry Jackson has no significant history of prior criminal activity.

(2) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

The jury was not instructed to determine whether the murder was committed while defendant was engaged in robbing the victim. *See* N.C. Gen. Stat. § 15A-2000(e)(5) (Cum. Supp. 1981).

The trial court did not commit error in instructing the jury during the sentencing phase of defendant's trial. No new evidence was submitted during this proceeding. Therefore, the only evidence the jury could possibly consider was that presented during the guilt phase of the trial. The instructions did not suggest that the armed robbery could be considered an aggravating circumstance; this aggravating circumstance was not even submitted to the jury for a finding.[2] Defendant's assignment of error is without merit.

2. The submission of the pecuniary gain aggravating circumstance, N.C.G.S. 15A-2000(e)(6) is not error when defendant's conviction was based on felony murder with armed robbery the underlying felony. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981).

[13] We now turn to the review required of this Court by N.C.G.S. 15A-2000(d)(2).[3] We must determine whether "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or [whether] the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." After careful and thorough review, we have determined that the record reveals that the jury did not impose the death sentence under the influence of passion, prejudice, or any other arbitrary factor. The evidence supports the aggravating circumstance found by the jury. Thus, we now turn to what has become known as a "proportionality review." *See generally Solem v. Helm*, --- U.S. ---, 77 L.Ed. 2d 637 (1983).

In *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335 (1983), we set forth the class of cases to which the imposition of a death sentence in a given case will be compared as

> *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.

Id. at 79, 301 S.E. 2d at 355. We take this opportunity to clarify that this class includes only those cases which have been affirmed by this Court. As we stated in *State v. Goodman*, 298 N.C. 1, 35, 257 S.E. 2d 569, 591 (1979), a proportionality review is to be undertaken "only in cases where both phases of the trial of a defendant have been found to be without error. Only then can we have before us the true decision of the jury to which we feel great deference should be accorded." It would be incongruous for us to compare the facts of the present case with those of cases in which prejudicial error has been found. In *Williams, supra*, we also stated that:

> [T]his Court will not necessarily feel bound during its proportionality review to give a citation to every case in the pool of

3. It is noted that upon the verdict returned the trial judge had no alternative to imposing the death sentence. The trial judge does not conduct a proportionality review of the sentence. That duty is reserved exclusively for this Court.

> "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.

308 N.C. at 81-82, 301 S.E. 2d at 356.

The purpose of proportionality review is to serve as a check against the capricious or random imposition of the death penalty. *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981). We repeat that we consider the responsibility placed upon us by N.C.G.S. 15A-2000(d)(2) to be as serious as any responsibility placed upon an appellate court. *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982). In carrying out our duties under the statute, we must be sensitive not only to the mandate of our legislature but also to the constitutional dimensions of our review. *Id.* We have, therefore, carefully reviewed the record, briefs, and oral arguments presented.

There are now approximately fifty-one life sentence cases and thirteen death sentence cases in the proportionality review pool. After reviewing the facts in these cases, we find that although the killing of McAulay was a senseless, wanton murder, it does not rise to the level of those murders in which we have approved the death sentence upon proportionality review. *E.g.*, *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308 (1983); *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. Rook*, *supra*; *State v. Barfield*, *supra*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980). A primary reason for this result is that there is no evidence of what occurred after defendant left with McAulay. The crime was heinous, but there is no evidence to show that it was "especially heinous" within the meaning of the statute. *See State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (1981). Murder for pecuniary gain is an outrageous crime; however, when this case is compared with the cases in the proportionality pool, we cannot hold that this death sentence is not disproportionate.

We, therefore, hold as a matter of law that the death sentence imposed in this case is disproportionate within the meaning of N.C.G.S. 15A-2000(d)(2). Upon this holding, the statute requires that this Court sentence defendant to life imprisonment

in lieu of the death sentence. The language of the statute is mandatory. This Court has no discretion in determining whether a death sentence should be vacated. The death sentence is vacated and defendant is hereby sentenced to imprisonment in the state's prison for the remainder of his natural life. The defendant is entitled to credit for days spent in confinement prior to the date of this judgment. The Clerk of the Superior Court of Union County shall issue a commitment accordingly.

No. 82CRS5199—first degree kidnapping—jugment arrested.

No. 82CRS5201—robbery with a firearm—judgment arrested.

No. 82CRS5200—murder in the first degree—no error in guilt phase; death sentence vacated and sentence of life imprisonment imposed.

STATE OF NORTH CAROLINA v. WILLIAM ECTOR COPE, JR.

No. 127A81

(Filed 9 August 1983)

1. Criminal Law § 90— impeachment of State's witness through use of prior inconsistent statements—reversible error

In a prosecution for second degree murder, the trial court committed reversible error in allowing the State to impeach its own witness by use of her prior inconsistent statements. Insofar as the original record showed, the state did not move to have the witness declared a hostile witness; no voir dire took place on the issue of the state's surprise; the trial judge failed to specify the extent to which the prior inconsistent statements could be offered; and the state used the witness's prior statements to another witness who was not an official investigator nor someone designated by the district attorney to take a statement. Further, no limiting instructions were requested or given to inform the jury that the prior inconsistent statements could not be considered as substantive evidence of guilt. Because of these omissions from the record, the Court, on motion of defendant for appropriate relief, ordered a hearing on the issue of whether "the prosecutor who tried this case was surprised at trial by the testimony of state's witness so as to be entitled under the rule of *State v. Pope*, 287 N.C. 505 (1975) to impeach the witness's trial testimony by offering evidence of prior inconsistent statements allegedly made by her." The testimony at the hearing showed that the prosecutor "could not have been genuinely surprised" by the witness's testimony. The court found "a rea-

sonable possibility" that had the error in admitting the statements not occurred a different result might have been reached at trial. G.S. 15A-1443(a).

2. **Homicide § 30.2— failure to instruct on voluntary manslaughter proper**

In a prosecution for second degree murder, the trial court properly failed to instruct on voluntary manslaughter where there was no evidence to support such an instruction.

Justices MARTIN and FRYE did not participate in the consideration or decision of this case.

BEFORE *Judge Maurice Braswell* at the 18 May 1981 Criminal Session of DURHAM Superior Court defendant was found guilty of second degree murder and received a sentence of life imprisonment. Defendant appealed pursuant to G.S. 7A-27(a). During the pendency of this appeal defendant moved for appropriate relief, in which motion he asked this Court to remand the case to superior court for a hearing on the issue of the admissibility of certain pretrial statements made by a witness for the state. The state did not object to such proceedings, and we allowed the motion on 3 March 1982 pursuant to G.S. 15A-1453(b)(2). On 22 March 1982 *Judge D. M. McLelland* conducted the hearing and made findings and conclusions. A transcript of the hearing, Judge McLelland's order, and addenda to the briefs were subsequently filed with this Court.

Rufus L. Edmisten, Attorney General, by Lucien Capone III, Assistant Attorney General, for the state.

Clayton & Myrick by Jerry B. Clayton, Ronald G. Coulter and Robert D. McClanahan, for defendant appellant.

EXUM, Justice.

Defendant argues in his appeal that the trial court committed reversible error in permitting the state to impeach its own witness, in sustaining the state's objections to questions asked of a character witness for defendant, in failing to submit voluntary manslaughter as a possible verdict, and in omitting the proximate cause element from his instructions on involuntary manslaughter. We conclude defendant is entitled to a new trial on the ground the trial court erred in allowing the state to impeach its own witness.

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

Between midnight and 2:30 a.m. on 1 January 1980, sixteen-year-old Henry Cotton was driving a pickup truck with three passengers on Liberty Street in Durham. The group was on its way home from celebrating New Year's Eve at a local discotheque when Cotton told the others, "A car is right on my tail." One of the passengers noted a headlight on the following car was out. When the truck turned onto Hardee Street, a shot was fired; one of the passengers told the others to duck because someone was shooting at them. Other shots followed. The truck ran off the road and struck a tree. Investigating officers administered first aid to Cotton but could not feel a pulse. In the opinion of the forensic pathologist who performed an autopsy on Cotton, he died from a gunshot wound to the head. A specialist in firearms identification testified the bullet retrieved from Cotton's body was either a .38 caliber or .357 magnum bullet.

Nan Carr was traveling on Hardee Street on 1 January 1980 when she saw the pickup truck hit the tree. Before the truck wrecked she heard three loud noises, which she thought were caused by firecrackers because it was New Year's Eve. She saw a small station wagon with a very long antenna screech away from the intersection. She later saw the same car when it passed by after circling the block. The car had been wrecked and was missing a headlight. The driver of the car "had a long face, very long hair, and a long beard." She saw a passenger in the front seat of the car but could not tell if the person was a man or a woman. Ms. Carr testified she had been hypnotized to help her recall details of the incident.

Johnny Mason testified he was riding with Cathy Teasley and defendant, who was driving Teasley's automobile, in the early morning hours of 1 January 1980. Teasley's automobile was a brown Subaru station wagon that had a long antenna and one headlight burned out. They were leaving the "Midnight Special," a nightspot in Durham. Defendant became angry when a pickup truck pulled in front of him and then made a turn without signaling. As the truck turned defendant rolled down his window; Mason ducked because he thought defendant was going to yell. He heard a shot from inside the car and then heard Teasley scream at defendant. They circled the block and defendant commented the truck had wrecked.

Cathy Teasley testified she was living with defendant in January 1980. They celebrated New Year's Eve at the Midnight Special, where defendant worked. Teasley and Johnny Mason left the Midnight Special with defendant about three or four in the morning. Defendant was driving Teasley's Subaru and Mason was a passenger in the back seat. Although Teasley sometimes had a .357 Magnum in the car, there were no guns in the car that night. Teasley testified that the group went to Randy Mason's house from the Midnight Special, via East Geer Street, and never went to Hardee Street. At that point in her testimony the prosecutor introduced, over defendant's objection, a prior inconsistent statement given to the police by Teasley in which she implicated defendant as the one who fired the fatal shot at Cotton. The rest of her testimony dealt with her relationship to defendant and her explanation of why her testimony at trial differed from her previous statements.

Nan Carr was reexamined, over defendant's objection, about conversations she had with Teasley regarding this case, including one in which Teasley said "she was in the car with the man who shot the deceased." Detective Parham of the Durham Police Department testified about statements regarding this case made by Teasley and Mason. Finally, members of Teasley's family testified about conversations they had with her regarding this case.

Defendant's evidence at trial was primarily directed at establishing an alibi defense. Defendant denied any involvement in the shooting. He testified he worked as a bartender at the Midnight Special on New Year's Eve from approximately 8 p.m. until 4 a.m. He left the bar with Teasley and Johnny Mason and went directly to Randy Mason's house, where they stayed until 10 a.m. Nine other people who were either at the Midnight Special or Mason's home, or both, testified and corroborated defendant's testimony about where he was on New Year's Eve, 1979-80.

[1] The most significant question presented by defendant's appeal is whether the trial court erred in permitting the state to impeach its witness Cathy Teasley by her prior inconsistent statements. We conclude the impeachment was impermissible and constitutes reversible error.

It is our general rule that the state may not impeach its own witness through the use of prior inconsistent statements or

evidence that the witness's character is bad. *State v. Anderson*, 283 N.C. 218, 224-25, 195 S.E. 2d 561, 565 (1973); 1 Brandis, North Carolina Evidence § 40 (2d rev. ed. of Stansbury's N.C. Evidence 1982). An exception to this rule, recognized in *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975), allows the state to impeach its own witness when the prosecutor "has been misled and surprised by the witness, whose testimony as to a material fact is contrary to what the State had a *right* to expect." *Id.* at 513, 215 S.E. 2d at 145 (emphasis original). "Surprise" means more than "mere disappointment"; rather it means *"taken unawares."* *State v. Smith*, 289 N.C. 143, 158, 221 S.E. 2d 247, 256 (1976) (emphasis original).

The Court in *Pope*, in an opinion by then Chief Justice Sharp, suggested a procedure for invoking the "surprise" exception: (1) The state should move "to be allowed to impeach its own witness by proof of his prior inconsistent statements"; (2) the motion should be made as soon as the prosecutor is surprised; (3) the motion "is addressed to the sound discretion of the trial court"; (4) the preliminary questions of whether the prosecutor is surprised and misled as to the witness's expected testimony on a material fact is to be determined in a *voir dire* hearing in the absence of the jury; and (5) "[i]f the trial judge finds that the State should be allowed to offer prior inconsistent statements, his findings should also specify the extent to which such statements may be offered." 287 N.C. at 512-13, 215 S.E. 2d at 145. The Court in *Pope* further noted that prior inconsistent statements are not substantive evidence and are only admitted to show the prosecutor was surprised by the witness's testimony at trial and to explain why the witness was called by the state. *Id.* at 514, 215 S.E. 2d at 146. Finally, in keeping with the limited purpose for which the prior inconsistent statements may be offered, *Pope* said only statements "made . . . to the State's attorney or to some person whom he specifically instructed to communicate the statement to the attorney" or statements taken in writing by official investigators and furnished to the state's attorney may be used to impeach the witness. *Id.* at 513, 215 S.E. 2d at 145.

The original record on appeal did not show whether the prosecutor, Michael Nifong, was surprised by Teasley's testimony at trial. The record sets forth the following exchange which occurred during Teasley's testimony:

I came to the Midnight Special in my car that night. It was a brown Subaru station wagon. I am not exactly sure, but I believe the car was in a wrecked condition as of that night. The wreck damage would have been in the front of the car. I am not sure if I just had one headlight working that night or not. My father and I have discussed it and neither one of us can remember. I did not have a CB antenna on the car that night. I did have a radio antenna that comes up right over the front. When we left the Midnight Special that night, Billy was driving. I was in the passenger seat and Johnny Mason was in the backseat.

I own a 22 caliber pistol that I got from my grandfather's estate when he died. I have never owned a 357 Magnum, but my father has owned one before. I used to take his 357 Magnum with me when I went out of town. I would put it in the car but it was not in the car on this night. I did not have my .22 pistol in the car that night either. There were no guns in the car.

After we left the Midnight Special we went down East Geer Street to Randy Mason's house on Ferrell Road. We never went to Liberty Street or Hardee Street.

MR. NIFONG: Ms. Teasley, you have talked with me about this case before, of course, haven't you?

MS. TEASLEY: And I have told you a lot of stuff.

MR. NIFONG: Have you always told me what you are telling me right now, ma'am?

MS. TEASLEY: I don't know what you mean.

MR. NIFONG: Have you told me from the beginning exactly what you are telling me right now?

MS. TEASLEY: No, sir, but I tried to, and you wouldn't talk to me about it.

. . . .

MR. NIFONG: Would you read the statement please, that you have in front of you marked State's Ex. No. 13.

MS. TEASLEY: It says 'The following is a voluntary statement by Catherine Emma Teasley—

MR. MANSON: OBJECT to reading the statement that she says is not now true.

OVERRULED.

EXCEPTION NUMBER THREE

MR. NIFONG: Go ahead.

Teasley then read a lengthy statement in which she placed defendant at the scene of the shooting and identified him as the one who fired the gun at the truck. After Teasley's examination was completed Nan Carr was recalled to testify about conversations she had had with Teasley. Teasley had stated on cross-examination that she knew the details in her original statement because Carr had told her what some witnesses had said about the case. It was not until the prosecutor attempted to question Carr about her conversations with Teasley that the following exchange was had out of the presence of the jury:

MR. MANSON: Your Honor, please, I feel at this time that the State is attempting to impeach their own witness Cathy Teasley, who has already testified under direct examination. Miss Teasley gave a written statement which is now in the record, which we know what she said at one time and what she testified to. She testified that she had a great deal to lose by giving the testimony that she gave today, but that was the truth, and she was going to give it, and I don't believe that it is proper for the State to be allowed to impeach one of the State's witnesses who doesn't testify the way the State thinks she should testify. She also testified that she came to Mr. Nifong and tried to tell him what the situation was, but that he did not discuss it with her, and very basically instead of being redundant, I think they are impeaching their own witness, and we OBJECT to it.

MR. NIFONG: The testimony of Miss Teasley was of more than one variety. She indicated that she had in fact made a statement earlier and read that statement into the record. She then also indicated that she was now saying that statement had been fabricated, that the information that she got from which to fabricate that statement came from this witness. I think that the jury has a right to hear evidence from

which they can determine which of the statements made by Cathy Teasley is true and impeaching one's statement. We are giving credence to the other statement. Her testimony was in fact that she made the written statement earlier. She has made two statements in front of the jury. I think the State has a right to prove to the jury which one of these statements they should believe.

MR. MANSON: May it please the Court, I would like to point out the statement says that 'The above statement is true and correct to the best of my knowledge,' and she signed it on the 13th of February, 1981, not notarized.

COURT: I hold on all of the evidence that is of record to this point that the State's witness, Catherine Emma Teasley, has today by her change of story on direct testimony to become a witness hostile to the State, and that the State had been genuinely surprised by her testimony today in court. . . .

Given the facts and circumstances of this case, it is competent for this witness to now answer the last question which was asked by the State. . . .

[It] is lawful under the Rules of Evidence to overrule the objection, and it is now OVERRULED and she may answer in the presence of the jury.

EXCEPTION NUMBER FOUR

Thus, insofar as the original record shows, the state did not move to have Teasley declared a hostile witness; no *voir dire* took place on the issue of the state's surprise; the trial judge failed to specify the extent to which the prior inconsistent statements could be offered; and the state used Teasley's prior statements to Nan Carr who was not an official investigator nor someone designated by the district attorney to take a statement. In short, the procedure suggested in *Pope* was not followed. Finally, we note that no limiting instructions were requested or given to inform the jury that the prior inconsistent statements could not be considered as substantive evidence of guilt.[1]

1. Indeed, it appears that the prosecutor erroneously believed Teasley's prior inconsistent statements could be offered as substantive evidence of what actually happened, rather than merely to impeach Teasley's in-court testimony.

Because of these omissions from the record, this Court, on motion of defendant for appropriate relief filed during the pendency of the appeal and in which the state acquiesced, ordered a hearing on the issue of whether "the prosecutor who tried this case was surprised at trial by the testimony of state's witness Cathy Teasley so as to be entitled under the rule of *State v. Pope, supra,* to impeach Teasley's trial testimony by offering evidence of prior inconsistent statements allegedly made by her." Judge D. M. McLelland conducted the hearing at which Mr. Nifong, two investigators for the state, defendant's trial counsel, and Teasley's counsel in a perjury charge arising out of this case testified.

Nifong testified that Teasley came to see him on the Thursday before trial was to begin on Monday. Teasley told Nifong, without being asked, that she had not been completely honest with him. When he asked her what she meant she responded, "Billy didn't kill that boy." Nifong's first thought was that she was going to confess to the crime; if so, he did not want to become a witness to her confession. He called in an officer to question her further.

The detective, Steve Hall, testified he and another officer accompanying him could not get her to say anything other than that defendant did not kill Cotton, and that her statement was a lie. He told Nifong she had told him she lied about the whole statement. Detective Parham, the investigator assigned to the case, also arrived to question her. Teasley began crying when he walked in, and said something like: "Billy didn't kill the boy, I made it up." He could not get her to change any other specific points in her statement. He also told Nifong he could not get her to say anything other than that defendant did not kill Cotton. Parham told Nifong he did not know what she would say at trial. Finally, Nifong questioned her in the presence of Parham but she would not respond when asked if she wanted to change her statement.

Nifong explained why he called Teasley as a witness even though he anticipated she might not testify that defendant fired the fatal shot. He anticipated an alibi defense in the case, with the defense offering eight or nine witnesses placing defendant somewhere other than at the scene of the shooting during the

relevant time. He believed Teasley's testimony was important to the extent it established the material fact that she, defendant, and Johnny Mason were "at the place where the killing occurred at the time that it happened." Nifong testified he was very surprised by her testimony indicating she and defendant and Mason had not gone near Liberty or Hardee Streets that night. He also testified a conference at the bench was held after Manson's objection in which the question of the state's surprise was discussed. He did not recall making a formal motion for the record to have Teasley declared a hostile witness. He did not recall exactly what was made known to the trial judge about the background of Teasley's change in her testimony but he knew that "in general terms the Judge was apprised of what had occurred."

William Manson, defendant's attorney at trial, testified Teasley came to his office before she went to Nifong's. She told him she had made up the whole story. He advised her to go to Nifong and the police and tell them the truth. He did not know whether she had talked with Nifong or not when the trial began, but he assumed she had not when Nifong listed her among the state's witnesses.

Finally, Thomas F. Loflin, III, who at the time he testified was defending Teasley with regard to a perjury charge brought against her arising from this case, stated that in the course of preparing Teasley's case he asked Nifong why he called her to the stand when she had told him "Billy didn't shoot that man." Nifong said "he knew it was a gamble and taking a risk, but he hoped . . . that she would go back to the written statement that she had originally given Barry Parham, and which she had reiterated to Mr. Nifong."

From the evidence presented at the hearing, Judge McLelland made the following findings:

> 2. That on Thursday before trial on the following Monday, Teasley told Nifong that she had not been totally honest; that the 'defendant did not kill that boy'; that Nifong then had police investigators Hall and Parham question Teasley, first advising her of her Constitutional rights, as he anticipated the possibility of her confessing that she had fired the shot.

3. That Teasley told police investigators that defendant did not kill that boy, that *she had made up the statement, and that the statement was a lie.*

4. That the investigators asked Teasley to go over the statement and to change what was not true, and that she declined to do so.

5. That Nifong was told by Parham that he did not know what Teasley would say, that she would not tell him anything other than that the defendant did not kill that boy, *that her statement was a lie, and that she had made it up.*

. . . .

8. That Nifong, anticipating the defense of alibi, thereafter called Teasley, *expecting her to corroborate Mason's testimony that the defendant was at the scene of the shooting, but to deny that defendant had fired the shot.*

9. That Teasley testified that she, defendant and Mason were not at the scene of the shooting.

10. That upon defendant's objection to Nifong's request that Teasley read into evidence her pre-trial statement, the Trial Judge at a bench conference determined that Nifong was surprised and overruled the objection. [Emphases supplied.]

From these findings Judge McLelland concluded: "[T]he District Attorney was genuinely surprised by the testimony of the witness Teasley and was properly allowed to impeach her testimony by use of her pre-trial statement."

The prosecutor did testify that he expected Teasley to put defendant at the scene of the crime even if she would not say defendant fired the fatal shot. This testimony forms the basis of Judge McLelland's finding No. 8 and apparently his conclusion that the prosecutor was surprised. Our cases make it clear, however, that the test for prosecutorial surprise is not what the prosecutor actually anticipated; the test is what, under all the circumstances, the prosecutor should reasonably have anticipated.

The appropriate test for determining whether the prosecutor is surprised is whether "the prosecuting attorney knows at the

time the witness is called that he has retracted or disavowed his statement, or has reason to believe he will do so if called upon to testify." *State v. Pope, supra*, 287 N.C. at 514, 215 S.E. 2d at 146. This test and subsequent applications of it in *State v. Moore*, 300 N.C. 694, 268 S.E. 2d 196 (1980); *State v. Lovette*, 299 N.C. 642, 263 S.E. 2d 751 (1980); and *State v. Smith, supra*, 289 N.C. 143, 221 S.E. 2d 247, compel the conclusion that Nifong was not surprised by Teasley's testimony and that Judge McLelland erred in concluding that he was.

In *State v. Smith, supra*, 289 N.C. at 152, 221 S.E. 2d at 252, the prosecutor called as a witness James Thomas, who had testified for the state at the defendant's first trial and who was serving time for an unrelated crime. The day before Thomas was scheduled to testify in the second trial, he told the district attorney he wanted his prison sentence reduced in exchange for his testimony. The district attorney told Thomas he could only write a letter to the Department of Corrections; Thomas at that point apparently became uncooperative. The prosecutor nevertheless called Thomas to the stand; when Thomas began changing his testimony from that given at the first trial the prosecutor asked the trial court to declare Thomas a hostile witness. The district attorney then asked Thomas a number of questions which caused this Court to conclude "that the State was seeking not only to impeach the credibility of its own witness but was also attempting to force the witness to give the jury the same account of events he had given at the first trial. Failing this, the prosecutor intended to accomplish his efforts at impeachment by placing the previous testimony of this witness before the jury." *Id.* at 157, 221 S.E. 2d at 255. Justice Huskins, writing for the Court, concluded:

> In the instant case there can be no doubt that, *sometime prior to calling the witness Thomas*, the district attorney had substantial reason to believe that Thomas would repudiate or disavow his prior testimony if called upon to testify. This being so, the prosecutor could not have been genuinely surprised or taken unawares by the testimony of Thomas. To the contrary, he had every reason to believe that Thomas would retract his previous testimony or feign a loss of memory. Under these circumstances, the district attorney

should have marked Thomas off the list of the State's witnesses.

Id. at 158-59, 221 S.E. 2d at 256 (emphasis original). The Court found the trial court's error in permitting the district attorney to impeach his own witness was sufficiently prejudicial to require a new trial of double murder charges against the defendants. *Id.*

In *State v. Lovette, supra*, 299 N.C. 642, 263 S.E. 2d 751, the Court was again confronted with the question whether the state should be allowed to impeach one of its witnesses, Clifford Johnson, in the defendant's trial on charges of second degree murder and attempted armed robbery. The state was allowed at trial, over defendant's objection, "to read from Johnson's pretrial statement . . . and then ask not only about statements made to him by defendant but also about accusatory statements made to defendant by [two other people]." *Id.* at 646, 263 S.E. 2d at 754. Three weeks after Clifford Johnson made his pretrial statement, he informed an officer " 'that he did not want to testify due to the fact that it might get the three people some time and he did not want to be responsible for that.' " *Id.* at 649, 263 S.E. 2d at 756. Before trial Johnson met with the officer and the district attorney. Nevertheless, the district attorney called Johnson and moved to have him declared a hostile witness when Johnson testified, contrary to his pretrial statement, that he had not discussed the incident with the defendant. The trial court found, following a *voir dire*, that the state could cross-examine Johnson based on "surprise." 299 N.C. at 650, 263 S.E. 2d at 756. Justice Huskins, writing for the Court, quoted the rule in *Pope* that before the prosecutor's motion to treat his witness as hostile is granted " 'the court must be satisfied that the State's attorney has been misled and surprised by the witness, whose testimony as to a material fact is contrary to what the state had a *right* to expect.' " 299 N.C. at 649, 263 S.E. 2d at 756 (quoting *State v. Pope, supra*, 287 N.C. at 513, 215 S.E. 2d at 145) (emphasis original). This Court concluded:

> [P]rior to calling the witness Johnson, the district attorney had substantial reason to believe that Johnson would likely repudiate his pretrial statement if called upon to testify. The record strongly suggests that the prosecutor could not have been genuinely surprised or taken unawares by the testi-

> mony of Johnson. To the contrary, he knew, or had every reason to believe, that Johnson would not testify consistent with his pretrial statement. Under these circumstances the district attorney was not entitled to impeach his own witness and the court erred to defendant's prejudice in permitting him to do so. *See State v. Pope, supra; State v. Anderson, supra.*

299 N.C. at 650, 263 S.E. 2d at 756.

Finally, in *State v. Moore, supra*, 300 N.C. 694, 268 S.E. 2d 196, an opinion written for the Court by Justice Copeland, defendant was charged with felonious burning of a dwelling house. Glenda Moore was called as a witness for the state. When she was called the trial judge stated the following for the record:

> '[I]t is my understanding that the district attorney has been advised and the defense attorney is aware of the fact that there was a statement made by this witness to Captain Reams at some time following the fire. That there is some information in the possession of both the district attorney and the defense attorney that the witness intends to repudiate in whole or in part the statement which she made to Sheriff Reams . . . .'

Id. at 699, 268 S.E. 2d at 200. Nevertheless, the trial court declared the witness to be hostile and allowed the state to impeach her. This Court concluded the state clearly "was not misled, surprised or entrapped by the witness'[s] trial testimony and the witness was improperly declared to be a hostile witness in violation of the rule as set forth in *Smith* and *Pope.*" *Id.* at 699, 268 S.E. 2d at 200-01.

The evidence before Judge McLelland tended to show and he found as facts that before trial: Teasley told the prosecutor "defendant did not kill that boy." Teasley told investigators she "had made up" her pretrial statement and "the statement was a lie." One investigator told the prosecutor "he did not know what Teasley would say" and that Teasley had told him "her statement was a lie, and that she had made it up." Armed with this information, the prosecutor clearly "had reason to believe" and should reasonably have anticipated that if Teasley were called she would disavow her pretrial statement. The prosecutor had no reasonable

basis for anticipating that Teasley's trial testimony would place defendant at the scene of the crime, but would deny defendant fired the shot. The prosecutor, therefore, "could not have been genuinely surprised" by Teasley's testimony, *State v. Lovette, supra; accord, State v. Moore, supra.* "Under these circumstances, the district attorney should have marked [Teasley] off the list of the State's witnesses." *State v. Smith, supra,* 289 N.C. at 159, 221 S.E. 2d at 256.

Further, the district attorney should not have been permitted to offer Nan Carr's testimony about prior statements Teasley made to Carr.

These errors entitle defendant to a new trial. The case against defendant is largely circumstantial. Even if the circumstances are considered to point strongly in the direction of his guilt, his alibi defense is likewise strong. Teasley's pretrial statements not only place defendant at the scene of the shooting, they unequivocally identify him as the one who fired the gun at the truck. Even if admissible, the statements could only be used for purposes of impeachment, not as substantive evidence against defendant. *State v. Pope, supra,* 287 N.C. at 514, 215 S.E. 2d at 146. The trial court, however, did not instruct the jury on the limited purpose for which these statements could be used. It is likely that in the absence of such instructions the jury accepted the statements as substantive evidence of what happened.[2] We believe there is "a reasonable possibility" that had the error in admitting these statements not occurred a different result might have been reached at trial. G.S. 15A-1443(a) (1978). Therefore the error is reversible.

We decline, as the state urges, to abolish or modify our anti-impeachment rule. Although we recognize the rule has been criti-

2. Had the pretrial statements been admissible for impeachment only, whether failure to so instruct the jury in the absence of a request would have been error is a question not now before us and one we do not now decide. *See State v. Watson,* 294 N.C. 159, 240 S.E. 2d 440 (1978) (limiting instruction on impeaching evidence adduced by *adverse* party's cross-examination must be requested in order to complain on appeal of instruction's absence). Since, however, it was error to admit the statements for any purpose, it is proper to consider the absence of limiting instructions in our assessment of the statement's probable impact on the jury. *State v. Pope, supra,* 287 N.C. at 514, 215 S.E. 2d at 146 (trial court's giving limited instruction on impeaching evidence considered in deciding that error in admission of evidence was not reversible).

cized, it is "accepted as sound law in this State," *State v. Tilley*, 239 N.C. 245, 249, 79 S.E. 2d 473, 476 (1954), and is not lightly to be altered. The rule has been recently applied in *Moore*, *Lovette*, and *Smith*. We need not now address whether Rule 607[3] of our newly enacted Code of Evidence, H.B. 96, 1983 N. C. Gen. Assem., ch. 701, § 1 (ratified July 7, 1983), will alter our present rules on this subject. Suffice it to say that the new Code does not take effect until 1 July 1984, *id.* at § 3, and has no application to this trial.

[2] Defendant presents several other questions for review but only one is likely to arise on retrial. Defendant argues the trial court erred in refusing to charge the jury on voluntary manslaughter as a permissible lesser-included offense of second degree murder. We conclude there is no evidence to support such an instruction. The distinction between murder and voluntary manslaughter was set forth in *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E. 2d 905, 916 (1978) (emphasis added):

> Generally, *voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation* or in the exercise of self-defense where excessive force under the circumstances is employed or where the defendant is the aggressor bringing on the affray. Although a killing under these circumstances is both unlawful and intentional, the circumstances themselves are said to displace malice and to reduce the offense from murder to manslaughter. *See generally State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978); *State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407 (1974), *death penalty vacated*, 428 U.S. 903 (1976); *State v. Wrenn, supra*, 279 N.C. 676, 185 S.E. 2d 129 (Sharp, J., now C.J., dissenting).

"Adequate provocation" may be defined as provocation "of such nature as the law would deem adequate to temporarily dethrone reason and displace malice." *State v. Montague*, 298 N.C. 752, 756-57, 259 S.E. 2d 899, 903 (1979); *State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407 (1974), *death sentence vacated*, 428 U.S. 903 (1976).

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3. The Rule provides: "*Who May Impeach.* The credibility of a witness may be attacked by any party, including the party calling him." H.B. 96, 1983 N. C. Gen. Assem., ch. 701, § 1 (ratified July 7, 1983).

The only evidence of provocation that defendant can point to is testimony about Cotton's pulling his truck out in front of the car defendant was driving and Cotton's failure to signal before turning. There is ample evidence that these acts made defendant angry. But neither act is of such a nature as "would naturally and reasonably arouse the passions of an ordinary man beyond his power of control." *State v. McLawhorn*, 270 N.C. 622, 628, 155 S.E. 2d 198, 203 (1967) (quoting 26 Am. Jur., Homicide § 22 (1940)). The refusal of the trial court to instruct on voluntary manslaughter was proper since there is no evidence to support such an instruction. *State v. Wilkerson, supra*, 295 N.C. at 583, 247 S.E. 2d at 918.

For the reasons given, the verdict and judgment of the superior court are vacated and the case is remanded for a

New trial.

Justices MARTIN and FRYE did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. AMEEN KAREEM ABDULLAH

No. 552A82

(Filed 9 August 1983)

1. Constitutional Law § 28— alleged coerced testimony—no violation of due process

Although the prosecutor sought tenaciously to encourage a witness's identification of defendant as the man who sold him a slain police officer's service revolver, defendant's murder conviction was not obtained in violation of due process because of the witness's identification testimony at trial where there was no evidence to suggest that the witness's testimony was perjured; the jury was fully apprised of the prosecutor's alleged coercive action and the witness was subjected to a vigorous and searching cross-examination; and the witness's testimony was cumulative and not vital to the State's case.

2. Criminal Law § 102.7— jury argument—vouching for credibility of witnesses

Where defense counsel argued to the jury that the State had deliberately attempted to conceal evidence by refusing to call two named persons as witnesses, the prosecutor's jury argument that a lawyer vouches for the credibility of his witness and that a lawyer may not ethically put up a witness

who he believes will lie was not grossly unfair or calculated to prejudice the jury since (1) the evidence showed that the State had justifiable reason for not calling the two witnesses, (2) the State was justified in explaining to the jury its failure to call these witnesses in the face of defense counsel's argument, and (3) the prosecutor's argument was supportable as a legally accurate general proposition.

3. **Criminal Law § 102.7— jury argument—necessity for testimony by co-conspirators**

Where defense counsel in a robbery-murder case argued that the testimony of three co-conspirators was highly suspect because each had testified in order to save his life, it was not improper for the prosecutor thereafter to argue that six people were involved in the crimes and that, while the three co-conspirators could easily be convicted on their confessions, their testimony, in return for sentence concessions, would ensure the conviction of the other three.

4. **Criminal Law § 102.6— misstatement in jury argument—absence of prejudice**

The prosecutor's misstatement in his jury argument that a co-conspirator's girlfriend testified that the co-conspirator took part in splitting the money from a robbery was not prejudicial error, although the girlfriend actually testified that the co-conspirator was not present when the proceeds were divided, since the misstatement had little bearing on defendant's guilt and was a mere perpetration of an inaccuracy already before the jury by way of defense counsel's argument.

5. **Criminal Law § 118— contention that testimony was false—refusal to instruct**

The trial judge did not err in refusing to give defendant's requested instruction on his contention that he had presented evidence tending to show that three co-conspirators who were State's witnesses had testified falsely.

6. **Criminal Law § 113.1— impeachment testimony—refusal to summarize**

The trial court in a robbery-murder case did not err in refusing to give defendant's requested instruction that defendant's evidence tended to show that a State's witness could not identify defendant in a lineup "after having stated [to the police] that she would know the person with the gun if she ever saw him again," since such evidence tended only to impeach other State's witnesses, and testimony which merely tends to impeach or show bias is not substantive in nature and need not be summarized.

7. **Criminal Law § 138— Fair Sentencing Act—pecuniary gain aggravating factor**

Since pecuniary gain was not an essential element of armed robbery or conspiracy to commit armed robbery, G.S. 15A-1340.4(a)(1) did not prohibit the trial court from considering the fact that the offenses were committed for pecuniary gain in imposing sentences for such offenses. However, pecuniary gain could not be considered as an aggravating circumstance in imposing sentences for such offenses where there was no evidence that defendant was hired or paid to commit the offenses.

8. **Criminal Law § 138— Fair Sentencing Act—armed with deadly weapon aggravating circumstance**

The trial judge improperly relied on G.S. 15A-1340.4(a)(1)(i), *i.e.*, that the defendant was armed with a deadly weapon at the time of the crime, in enhancing his sentence for armed robbery, since the possession, use or threatened use of a firearm or other dangerous weapon is an essential element of the offense of armed robbery, and the use of such factor is thus proscribed by G.S. 15A-1340.4(a)(1). However, the trial court could rely on the fact that defendant was armed with a deadly weapon in imposing a sentence for conspiracy to commit armed robbery since such factor was not an element of conspiracy.

FROM judgments entered by *Ferrell, J.*, at the 7 June 1982 Criminal Session of Superior Court, MECKLENBURG County, defendant appeals his convictions of first degree murder, robbery with a firearm, and felonious conspiracy to commit robbery with a firearm. Pursuant to G.S. § 15A-2000(b), the jury recommended a sentence of life imprisonment on the first degree murder conviction. Upon findings of four aggravating factors pursuant to G.S. § 15A-1340.4(a)(1), defendant was sentenced to the maximum of forty years imprisonment on the armed robbery conviction and to the maximum of three years imprisonment on the conspiracy conviction. Defendant appeals as of right from the sentence of life imprisonment. G.S. § 7A-27(a). Motion to bypass the Court of Appeals on the robbery and conspiracy convictions was allowed 15 March 1983.

Defendant's assignments of error fall into two categories. With respect to the guilt determination phase of the trial, he alleges improper coercion of a State's witness to testify; prosecutorial misconduct in the State's closing argument to the jury; and failure of the trial judge to properly summarize the evidence. We find no error sufficiently prejudicial to warrant the granting of a new trial on these issues. Defendant further contends that the trial judge erred, under the Fair Sentencing Act, in imposing the maximum sentence upon the defendant for the armed robbery and conspiracy convictions. We agree that the trial judge improperly relied on two aggravating factors in imposing the maximum sentence for these convictions and remand that case for purposes of resentencing.

The facts necessary to resolve the issues presented will, for the most part, be discussed under the pertinent assignments of error. For purposes of background information, we add here only

that defendant's convictions arose out of the fatal shooting of police officer Edmond Cannon during the armed robbery of a Charlotte convenience store on 23 November 1981. Involved were the defendant and Mark Owens, who rode in one car driven by Charlie Brown, and John Martin and Antonio Randolph, who rode in a second car driven by Richard Washington. The evidence tended to show that the defendant, together with Owens and Randolph, entered the store after determining that the store clerk, Wendy Jenkins, was alone. After taking money from her, defendant forced Jenkins into a food cooler. During the course of the robbery, Officer Cannon entered the store. The defendant shot Officer Cannon twice, immobilizing him. After the officer had fallen, the defendant shot him three more times in the back. Defendant took the officer's service revolver.

Mark Owens, Antonio Randolph and Richard Washington testified for the State. Other witnesses for the State included Wendy Jenkins, the store clerk, several of defendant's acquaintances and relatives who heard him admit to the shooting, and a number of individuals who were in the area of the convenience store during and shortly after the robbery.

Defendant's evidence consisted of the testimony of twelve witnesses, the thrust of which was to impeach the credibility of the State's witnesses and to draw inconsistencies from, and inject uncertainty into the State's case.

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

Adam Stein, Appellate Defender, by James H. Gold and Ann B. Petersen, Assistant Appellate Defenders, for defendant-appellant.

MEYER, Justice.

[1] Defendant first contends that he is entitled to a new trial because of the prosecutor's actions in allegedly coercing a witness, Clarence Buchanan, to identify the defendant as the man who sold him Officer Cannon's service revolver.

The evidence at trial tended to show that defendant, after killing Officer Cannon and taking the officer's revolver, together

with Owens and Randolph, fled the scene in the car driven by Washington. A short distance from the store, defendant threw Officer Cannon's revolver from the car window. The following day, 24 November 1981, Martin apparently retrieved the revolver and he, Owens, and the defendant traveled to Chester, South Carolina, for the purpose of selling both Officer Cannon's revolver and the murder weapon. In Chester, the three men met with Clarence Buchanan to whom defendant sold the weapons for $70.00. Buchanan gave the money to the defendant and an ounce of marijuana to Owens.

Police officers retrieved the two weapons from Buchanan on 23 December 1981 following confessions by Owens, Randolph and Washington, and took a statement from him on 30 December. Buchanan did not mention defendant by name in this statement. Police interviewed Buchanan again on either 13 or 14 January 1982, at which time Buchanan picked out only Owens' photograph from an array which also included a photograph of the defendant. On 26 January 1982 Buchanan failed to pick the defendant out of a corporeal lineup. In early March, Buchanan was interviewed by Charlotte Police Officer Crowell and Mecklenburg County Assistant District Attorney Richard Gordon. Buchanan reviewed his earlier statement and viewed a photograph of the 26 January corporeal lineup which included the defendant. He first stated that he did not recognize anyone in the lineup photograph. Gordon then pointed to the defendant in the photograph and identified him as Abdullah. He reminded Buchanan that he would be called upon to testify and asked him how he would respond when asked if that particular man in the photograph had sold him the guns. Buchanan then admitted that he recognized everyone in the photograph, including the defendant. He explained his earlier reluctance to identify the defendant by stating, "I didn't want to get involved. I have to live in the streets down here, and I just didn't want to get involved."

During voir dire, Gordon testified as follows:

> I said, 'Well, are you picking him out just because I'm pointing him out to you?' He said, 'No, I recognize him.' I said, 'Are you picking him out just because you want to make me happy?' He said, 'No, I recognize him.' I said, 'Has anybody pointed him out to you before today and told you he's the man you're supposed to identify?' And he said, 'No.' I said, 'How come you didn't point him out to me on this picture

> when I showed it to you a few minutes ago?' He said, 'I just didn't want to get involved. I didn't want to have to testify.' And I asked him at least twice more whether he was identifying this man because I pointed him out to him or whether he was identifying him from his house that day, from his kitchen, the twenty-fourth of November. He said, 'I recognize him from being in the kitchen that day.' I said, 'Do you feel like anybody has suggested to you this man should be identified and is that the reason why you're doing it?' I pressed him on that very closely because I knew this issue was going to come up, and he said, 'No, I'm identifying him because I recognize him.'

After hearing this evidence, the trial court found that Buchanan's identification was the result of his own observations on 24 November. Defendant's motion to suppress Buchanan's in-court identification of the defendant was denied.

Defendant argues that by his actions, Assistant District Attorney Gordon improperly interfered with Buchanan's "choice of whether or not to testify and with the content of his testimony." He asserts that Gordon's "interference" infringed upon his constitutional right to present witnesses to establish his defense. In support of his argument, defendant cites two cases in which the prosecutor or trial judge attempted to intimidate or otherwise discourage a *vital defense* witness from testifying on behalf of the defendant. These cases are inapposite. Correct analysis of this issue turns, rather, on the legal principles set forth in *State v. Montgomery*, 291 N.C. 235, 229 S.E. 2d 904 (1976); *accord State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437; *cert. denied*, 456 U.S. 932, 72 L.Ed. 2d 450 (1982). In *Montgomery*, this Court said:

> It is self evident that a denial of due process occurs when the State contrives a conviction by the knowing use of perjured testimony. However, when a witness testifies as to facts earlier obtained by coercive police action and all of the circumstances surrounding the alleged coercive acts are before the jury, the requirements of due process are met. It is then for the jury to determine the weight, if any, to be given to the testimony. *United States v. West*, 170 F. Supp. 200; 3 Wigmore, Evidence § 815 (Chadbourne rev. 1970); Annot., 3 L.Ed. 2d 1991, *Due Process—Perjured Testimony.*

291 N.C. at 240, 229 S.E. 2d at 907.

In *Montgomery*, the only evidence of police coercion was that police officers questioned several of the State's witnesses on several occasions and told them that they "could get ten years" if they lied under oath. The Court concluded:

> The evidence in this case reveals a tenacious investigation by the police officers but shows little evidence of coercive action against the witnesses, Dula, Shuford and Richards. Even had there been strong evidence of coercion, this record does not disclose that defendant's conviction resulted from the use of known perjured testimony. A full disclosure of the alleged coercive police action was before the jury. Under vigorous and searching cross-examination each witness steadfastly asserted the truth of the material facts.
>
> Under these circumstances, we hold that the evidence was admissible. Evidence of any police coercion or of contradictory statements and withholding of information on the part of the witnesses goes to their credibility. This, of course, is a jury question.

291 N.C. at 241, 229 S.E. 2d at 908.

Defendant concedes, and we are in agreement, that there is no evidence on this Record to suggest that Buchanan's testimony was perjured. While the State sought "tenaciously" to encourage Buchanan's identification of the defendant, as in *Montgomery*, the jury was fully apprised of the alleged coercive action and Buchanan was subjected to "vigorous and searching" cross-examination. Furthermore, Buchanan's testimony was cumulative and not vital to the State's case as it merely corroborated the testimony of Mark Owens that the defendant had accompanied Owens to South Carolina where they had sold the two weapons the day after the murder. We find no error.

We find further that Buchanan's in-court identification of the defendant as one of the men who sold him the guns was of independent origin based solely on what Buchanan saw at the time of the transaction. *See State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983).

Defendant next challenges portions of the prosecutor's remarks to the jury during closing argument, alleging that the

prosecutor personally vouched for the credibility of the State's witnesses and misstated the evidence bearing on the credibility of a State's witness. No objection was taken during the argument to these allegedly improper remarks. As we recently stated in *State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E. 2d 752, 761 (1979):

> It is well settled in North Carolina that counsel is allowed wide latitude in the argument to the jury. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970), *rev'd on other grounds*, 403 U.S. 948. Even so, counsel may not place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). The control of the arguments of counsel must be left largely to the discretion of the trial judge, *State v. Britt, supra; State v. Monk, supra*, and the appellate courts ordinarily will not review the exercise of the trial judge's discretion in this regard unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations. *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976). 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. *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978).

It is the State's position that the remarks were not improper and were in answer to matters argued by defense counsel and thereby "invited." Thus we turn to a review of the jury arguments, including that of defense counsel, to determine whether, in this context, the prosecutor engaged in conduct that was grossly unfair and calculated to mislead and prejudice the jury in its deliberations.

[2] Defense counsel, in a vigorous, well-organized and polished argument, developed, as one of the themes of the defense, that the State had deliberately attempted to conceal evidence by refusing to call as witnesses Larry Smith and John Benchina.

These witnesses testified for the defense and, with respect to what the killer was wearing at the time Officer Cannon was shot, their testimony was inconsistent with the State's theory.

Defense counsel argued as follows:

> Isn't that a strange way to prosecute a case? You go out to figure out what happened on a given night, and you bring everybody in who can tell you something about it except two people who are independent, not co-defendants, not interested in anyone, not troubled, who could tell you what happened, who say the same night it happened exactly how it happened, and what do they do? They don't bring them at all. John Benchina and Larry Smith. . . . So everybody they could find who had something to say that they thought could fit their theory, they brought in and put them on the witness stand and let you hear them. Why then, why then, did they not bring in two people who had told them on the very night that it happened that they had seen it? The two men who had made a statement of what they had seen shortly after they saw it? Because they were operating on this theory that Mr. Abdullah was wearing a blue jacket and a blue hat, and if they got eyewitnesses who said, 'No, that's not what the killer had on,' they don't want you to hear that. So they leave them out altogether. Leave them out altogether. And who brought them in to tell you what they saw? We did.

In response, the State argued as follows:

> A lawyer puts a witness up and vouches for his credibility, which means if I call that witness, I have got to believe what that witness says. A lawyer may not ethically put up a witness that he believes will lie.

The witness Benchina, who was driving the truck in which Smith was a passenger, saw much of what happened through the rearview mirror of the vehicle as he sped away from the scene. The witness Smith had a history of public drunkenness, drunken driving, and drug use. He had attempted to avoid being jailed after being arrested for ticket scalping by telling a Charlotte police officer that he was a key witness to the Cannon killing. He failed to attend lineups arranged to view suspects in this case and eventually fled Mecklenburg County because of pending criminal

charges. There was reason to believe that Officer Cannon had arrested Smith in 1978 for failure to appear in court on a marijuana charge.

In light of these facts, two conclusions readily emerge. First, the State had justifiable reason for not calling these two witnesses. Second, the State was justified in explaining to the jury its failure to call these witnesses in the face of defense counsel's insinuation that the failure was a deliberate attempt to conceal evidence. Furthermore, as a general proposition of legal accuracy, the prosecutor's remark is supportable. *See* 1 Brandis on North Carolina Evidence § 40 (2d rev. ed. 1982) (the State may not, as a general rule, impeach its own witness). We therefore hold that the alleged impropriety of this remark was neither grossly unfair nor calculated to prejudice the jury.

[3] Defense counsel persuasively argued in closing that the testimony of the three co-conspirators, Owens, Randolph, and Washington, was highly suspect as each had testified "to save his life . . . [w]hatever he needs to say, he's willing to say it." They were, in fact, characterized by defense counsel as "three desperate men who are seeking to save their own lives."

In response the prosecutor first pointed out that the crime was committed not by three, but by six individuals. He then stated "[a]nd so I, as the District Attorney, who has the responsibility for administration of justice in Mecklenburg County, I made the decision that we're going to try six men and not three men, even though three men may be easily convicted." Later, in the argument, the prosecutor added, "I don't want them to plead guilty. I want them to know, 'If you don't testify truthfully, you will go on trial for your life.' Certainly." These remarks, contends the defendant, amounted to the injection of an improper expression of the prosecutor's personal opinions into the jury argument. Defendant does not clearly articulate how he was prejudiced.

The prosecutor was merely attempting to legitimize what defense counsel had suggested was somehow an unfair and nefarious practice of resorting "to the criminals themselves for testimony with which to convict their confederates in crime." He did so by pointing out that while Owens, Randolph and Washington could easily be convicted on their confessions, their testimony, in return for sentence concessions, would ensure the

conviction of the other three. The argument was not unfair. It was not misleading. It was not prejudicial.

[4] Defense counsel, having attacked the testimony of the three co-conspirators, then suggested that, because the prosecution "obviously realized that that wasn't going to do it," it came up with Martin's girlfriend, Bernise Aldridge. The prosecutor's comments concerning Ms. Aldridge's testimony at trial forms the basis for defendant's final argument under this assignment of error. The prosecutor stated:

> John Martin's girlfriend got up here. Did she do anything to free John Martin? She got up here, and as I heard her testimony, she said, 'Yes, John Martin was with them. John Martin was splitting up money. John Martin was talking about what they had done.'
>
> . . . .
>
> Bernise Aldridge put her boyfriend in this thing just as deeply as anybody else, John Martin.

In so arguing, the prosecutor misstated the evidence. Ms. Aldridge testified that Martin was not present when the proceeds of the robbery were divided. Another witness placed Martin in the house at this time. The inaccuracy, however, was, in our view, not so prejudicial as to affect the outcome of the trial. Not only did it have little bearing on defendant's guilt, but it was merely a perpetration of an inaccuracy already before the jury by way of defense counsel's argument, summarizing Ms. Aldridge's testimony as follows:

> So she comes in and says that she went home about 11:00 or 11:30 from her aunt's house on the night of the twenty-third, and that she saw Harold Gordon there, and all these others there, *she said, Martin,* Abdullah, Owens, and *said she saw all of them there,* and then she only tells you what she heard Abdullah say. Everybody can remember everything Mr. Abdullah said.

(Emphasis added.)

In light of the foregoing, we do not find these arguments so improper as to persuade us to hold that the trial judge abused his discretion in not recognizing and correcting them *ex mero motu.*

[5] By his third assignment of error, defendant raises two, but argues only one alleged error in the trial court's denial of defendant's request for an instruction to the jury relating to the recapitulation of the evidence and defendant's contentions. Defendant first requested that the trial judge state with respect to defendant's contentions concerning the testimony of the three co-conspirators who testified for the State, that they testified falsely. The trial judge declined to do so. No argument was presented on this point. We hold that the trial judge was entirely proper in this ruling. To hold otherwise would "open the door" to requiring at every phase of the instruction that a trial judge comment on the contentions of the parties concerning the veracity of witnesses testifying for the other party. We believe this practice is neither necessary nor advisable.

[6] Defendant also requested that the trial judge instruct with respect to the testimony of Wendy Jenkins, the store clerk, that "*after having stated* [to the police] *that she would know the person with the gun if she ever saw him again,*" she "appeared and viewed the lineup in which the defendant appeared, but could not identify him." The italicized portion of this instruction, although requested, was not given.

We note initially that by statute, the trial judge must, in instructing the jury, "declare and explain the law arising on the evidence. He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence. . . ." G.S. § 15A-1232. Testimony which merely tends to impeach or show bias is not substantive in nature and need not be summarized. *State v. Adcox*, 303 N.C. 133, 277 S.E. 2d 398 (1981); *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980). Defendant attempts to argue that Ms. Jenkins's inability to identify the defendant is tantamount to substantive exculpatory evidence that defendant was not the gunman. We disagree. This evidence, fully explored during the cross-examination of Ms. Jenkins, served only to impeach the credibility of Owens and Randolph, the eyewitness co-conspirators, and other witnesses who testified to defendant's own admissions that it was he who murdered Officer Cannon. The trial judge properly denied defendant's request.

Defendant next contends that the trial judge violated the language of the Fair Sentencing Act, G.S. § 15A-1340.4, when he imposed the maximum sentences upon defendant's convictions of

conspiracy to commit armed robbery and armed robbery. Defendant challenges two of the four aggravating factors upon which he relied in imposing these sentences: (1) that the offense was committed for pecuniary gain, G.S. 15A-1340.4(a)(1)(c); and (2) that the defendant was armed with or used a deadly weapon at the time of the crime, G.S. § 15A-1340.4(a)(1)(i). Defendant argues that these factors were erroneously considered because evidence necessary to prove the elements of the offense was duplicated in proving these aggravating factors. G.S. § 15A-1340.4(a)(1).

[7] We first determine whether defendant is entitled to a new sentencing hearing on the armed robbery charge. In support of his position that the trial judge improperly relied on G.S. § 15A-1340.4(a)(1)(c), that the armed robbery was committed for hire or pecuniary gain, defendant cites to numerous cases filed by the Court of Appeals which have held that reliance on this factor was error. Beginning with *State v. Morris*, 59 N.C. App. 157, 296 S.E. 2d 309 (1982), the Court of Appeals has reasoned that "if the pecuniary gain at issue in a case is *inherent in the offense*, then that 'pecuniary gain' should not be considered an aggravating factor." *Id.* at 161-62, 296 S.E. 2d at 313 (emphasis added). *See State v. Thompson*, --- N.C. App. ---, 303 S.E. 2d 85 (1983); *State v. Thompson*, --- N.C. App. ---, 302 S.E. 2d 310 (1983); *State v. Setzer*, 61 N.C. App. 500, 301 S.E. 2d 107 (1983); *but see State v. Crews*, No. 829SC520 (N.C. App. filed Dec. 21, 1982), *cert. denied*, --- N.C. ---, 301 S.E. 2d 391 (1983). In *Crews*, the Court of Appeals, relying on *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981), found no error in the submission of this factor. In a footnote in *Morris*, the Court of Appeals had, however, distinguished our holding in *Oliver* by pointing out that "our capital punishment statute does not contain a statutorily mandated proscription against the use of evidence necessary to prove an element of the offense as does our Fair Sentencing Act." 59 N.C. App. at 161, 296 S.E. 2d at 312. In *Oliver*, defendants were convicted of first degree murder perpetrated during the course of an armed robbery. We held that "[t]he circumstance that the capital felony was committed for pecuniary gain, . . . is not an essential element . . . [of the offense];" and that "it is appropriate for [pecuniary gain] to be considered on the question of [defendant's] sentence" since "[t]his circumstance examines the motive of the defendant rather than his acts." 302 N.C. at 62, 274 S.E. 2d at 204.

While it is true that our capital punishment statute, G.S. § 15A-2000, differs from the Fair Sentencing Act in that the former does not include a proscription against the use of evidence necessary to prove an element of the offense, we are also bound by the language of G.S. § 15A-1340.4(a)(1) which states, in pertinent part, that "[e]vidence *necessary to prove an element of the offense* may not be used to prove any factor in aggravation. . . ." (Emphasis added.) By this language it seems clear that it is not the use of evidence which is merely "inherent in the offense" but the use of evidence *necessary to prove an element of the offense* which is proscribed. It is also equally clear that pecuniary gain is not an essential element of the crime of armed robbery. Those elements include (1) the unlawful taking, or attempted taking of personal property from another; (2) the possession, use of threatened use of "firearms or other dangerous weapon, implement or means"; and (3) danger or threat to the life of the victim. *See State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978). Thus, if defendant's sole argument was based on the assumption that the aggravating factor, pecuniary gain, is an essential element of armed robbery and thereby precluded under G.S. § 15A-1340.4 (a)(1), his argument would fail.

However, defendant further argues that the correct interpretation of G.S. § 15A-1340.4(a)(1)(c) precludes the use of this aggravating factor in any circumstance other than when a defendant is hired or paid to commit the offense. In support of this interpretation, defendant points to 1983 Session Law, Chapter 70, which, effective 1 October 1983, would amend G.S. § 15A-1340.4 (a)(1)(c), changing the present language that "[t]he offense was committed for hire or pecuniary gain" to "[t]he defendant was hired or paid to commit the offense." Significantly, the amendment was styled "An Act to *Clarify* the Aggravating Factor Regarding Pecuniary Gain." (Emphasis added.)

Judge Becton, in *State v. Thompson*, recently discussed the effect of the amendment:

> That amendment, in our view, clearly evinces the Legislature's intent to avoid the enhancement of a defendant's sentence simply because money or other valuable items were involved in the crime charged. Bound as we are fairly to interpret legislative enactments, and charged both to divine

> and carry out the intent of the Legislature, we are compelled to hold that the trial court erred in considering pecuniary gain as a factor in aggravation of defendant's sentence.

--- N.C. App. at ---, 303 S.E. 2d at 86.

We find this reasoning sound and therefore hold that in the case sub judice, where there is no evidence that defendant was hired or paid to commit the crime, the trial court improperly relied on G.S. § 15A-1340.4(a)(1)(c) in sentencing defendant in the armed robbery.

[8] Furthermore we agree with the defendant that the trial judge improperly relied on G.S. § 15A-1340.4(a)(1)(i), *i.e.*, that the defendant was armed with or used a deadly weapon at the time of the crime, in enhancing his sentence for armed robbery. One essential element necessary to prove the offense of armed robbery is that of the possession, use or threatened use of a firearm or other dangerous weapon. Thus the use of this factor is proscribed under G.S. § 15A-1340.4(a)(1). *State v. Thompson*, --- N.C. App. ---, 302 S.E. 2d 310; *State v. Brooks*, --- N.C. App. ---, 301 S.E. 2d 421 (1983).

With respect to the use of the aggravating factor of "pecuniary gain" in sentencing on the conspiracy charge, the State notes correctly that:

> A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. The conspiracy is the crime and not its execution. No overt act is necessary to complete the crime of conspiracy. As soon as the union of the wills for the unlawful purpose is perfected, the offense of conspiracy is complete. *State v. Bindyke*, 288 N.C. 608, 220 S.E. 2d 521 (1975).

It is apparent that the elements of the crime of conspiracy to commit armed robbery do not include the commission of the crime for pecuniary gain *or* possession or use of a deadly weapon at the time of the crime. However, in light of our adoption of the interpretation given G.S. § 15A-1340.4(a)(1)(c), as amended, and because there is no evidence that defendant was hired or paid to commit

this crime, we hold that the trial court improperly relied on this factor in enhancing defendant's sentence in the conspiracy case. We find no error in the trial court's reliance on G.S. § 15A-1340.4 (a)(1)(i), that defendant was armed with a deadly weapon at the time of the crime.

Defendant's convictions for first degree murder, armed robbery and conspiracy to commit armed robbery are affirmed. The armed robbery and conspiracy cases are remanded to Superior Court, Mecklenburg County, for resentencing.

Case No. 81CRS85033, First Degree Murder—no error.

Case No. 81CRS85034, Robbery with a Firearm—remanded for resentencing.

Case No. 82CRS3027, Felonious Conspiracy to Commit Robbery with a Firearm—remanded for resentencing.

STATE OF NORTH CAROLINA v. ERNEST LEON MYERS

No. 231A82

(Filed 9 August 1983)

1. **Homicide § 18.1— premeditation and deliberation—sufficiency of evidence**

The State's evidence in a prosecution for first degree murder was sufficient to infer premeditation and deliberation where the evidence tended to show that defendant made statements to three witnesses in which he stated in substance that the victim "was supposed to get some pills for him, Preludin, and he went up and she didn't have them and she got freaked out and he beat her with a brick"; that physical evidence found at the scene tended to show that the victim was repeatedly struck about the head with a brick with such force as to break the brick into pieces; that blood consistent with the victim's blood type was splattered throughout the home; and that there was evidence tending to show that prior to the victim's death there was an attempt to smother her.

2. **Homicide § 23— instructions concerning contradictory statements—"consciousness of guilt"—erroneous**

An instruction in a prosecution for first degree murder which tended to show contradictions in defendant's statements concerning his whereabouts on the day of the murder was erroneous because it permitted the jury to roam at

will without making it clear that the falsehood did not create a presumption of guilt or that, standing alone, such evidence was not sufficient to establish guilt. Neither did the trial judge inform the jury that such evidence could not be considered as tending to show premeditation and deliberation. In that the evidence in the case was entirely circumstantial, and since the witnesses upon whom the State relied to furnish the facts from which inferences of defendant's guilt were drawn were of extremely questionable credibility, there was a reasonable possibility that a different result would have been reached had the erroneous instruction not been given.

Justice MEYER dissenting.

APPEAL by defendant from *Friday, Judge*, at the 4 February 1982 Regular Session of BUNCOMBE Superior Court.

Defendant was charged by indictment, proper in form, with the first-degree murder of Gillia Dianna Hennessee. He entered a plea of not guilty.

The State offered evidence tending to show that on 22 February 1975, the body of the victim, a former nurse at St. Joseph Hospital, was found in a rondette-type dwelling in Asheville which she had vacated on 20 February 1975. She was seen leaving her newly-occupied trailer home on 21 February 1975 by a neighbor, Mr. Morrow. She did not return that evening. On 22 February, Mr. Morrow and his wife went to her former dwelling and found Ms. Hennessee's body. The police were notified and Asheville police and a S.B.I. agent came to the scene. The officers found the victim partially nude, lying face up on the floor of the rondette. They observed blood on the floor and walls in the bedroom and kitchen and on the clothing rod of a closet. The blood was later analyzed and was found to be of the same type as the victim's blood. Two halves of a brick were lying near the body. Bloodstains and hair found on the brick were determined to be consistent with Ms. Hennessee's hair and blood type. No bloodstains were found upon a pair of pants and underpants which were discovered in the kitchen area. The officers searched for fingerprints without success.

Dr. Hudson, the Chief Medical Examiner for North Carolina, witnessed an autopsy of the body which was performed by another pathologist. He observed six lacerations of the scalp and a skull fracture beneath one of the lacerations. A brick-type material was imbedded in one of the lacerations. The autopsy also revealed a fiber in the deceased's lung. Dr. Hudson stated that in

his opinion the fiber was probably taken into the lung by a breath drawn from a cloth material held over the victim's mouth and nose area about fifteen minutes before her death. In the doctor's opinion, Ms. Hennessee died as a result of blunt trauma to the head. He further testified that either of two wounds were sufficient to have caused her death. He did not observe any evidence of a sexual assault.

Alphonso Pearcy testified that he encountered defendant at the Chabaz Restaurant in Asheville around noon on 21 February 1975. When defendant inquired as to the whereabouts of a mutual friend by the name of McQueen, Pearcy offered to direct him to McQueen's residence. Defendant drove the two of them in a gold colored Toyota to a rondette located near the rondette where Ms. Hennessee's body was found. They left upon finding no one at the McQueen residence.

Mary Ellen Toreson, who lived near the rondette formerly occupied by Ms. Hennessee, testified that on 21 February she observed a yellowish brown foreign car, similar to a Toyota or Honda, parked near the Hennessee rondette. She saw a black man of medium build and height with short hair talking to Ms. Hennessee outside the rondette at about 3:00 o'clock that day. She later heard a noise coming from the Hennessee rondette but was unable to see anything except that the drapes in one of the windows were parted.

Myra Elaine Allen testified that on 21 February 1975, at about 4:00 or 4:15 p.m. as she was going to a neighbor's house to make a telephone call, she saw defendant, who she knew as "Teabags," leaving the Hennessee rondette. She stated that in 1975 she made a statement to police officers consistent with her testimony, and that she was willing to testify in court at that time. On cross-examination she admitted that her husband had been convicted of a drug violation in 1981 and that he had asked her to testify against defendant. She denied that she agreed to testify in exchange for a sentencing concession in her husband's case, but admitted that she had used narcotics in the past.

In corroboration of the witness Allen, the State offered witnesses David Moss and Delores Poole. Moss testified that he was a neighbor of Myra Elaine Allen and that she used his telephone at about 4:30 p.m. on 21 February 1975. The witness Poole

testified that about five to seven days after Ms. Hennessee's death, Mrs. Allen told her that she had seen "Teabags" leaving the Hennessee rondette.

Fred William Lee Hensley, the Chief of Police of the Asheville Police Department, testified that in 1975 he was a lieutenant on the police force and participated in the investigation of Ms. Hennessee's murder. He stated that on 11 July 1975, Mrs. Allen gave him a written statement concerning the Hennessee murder. This statement, which he read into evidence, substantially corroborated Mrs. Allen's testimony. On cross-examination he testified that in 1975 Mrs. Allen stated that she would not testify.

Robert Smith testified that in 1975 he and defendant became friendly while they were both inmates at Craggy Prison. He said that defendant made statements about a nurse. He testified that defendant said, "that she was supposed to get some pills for him, Preludin, and he went up and she didn't have them and she got freaked out and he beat her with a brick." He further testified that defendant repeated the substance of this statement to him about six months later. On cross-examination the witness stated that Delores Poole was his sister and that the witness Allen was married to his uncle. He admitted that he had been convicted of breaking and entering and possession and sale of drugs on two occasions. He stated that he was not guilty of any of these offenses.

Mary Frances Pickens testified that in November of 1975 defendant told her that he had "killed the white woman with a brick." She stated that defendant repeated the substance of this statement to her at a later date. She further testified:

> And I asked him why did he kill her, and he said she was supposed to have brought him some drugs and he thought she had some money, but she didn't have no money. She just had a checkbook.

On cross-examination, the witness admitted that she had been convicted of larceny, assault, trespassing and possession of drugs. She further admitted that she engaged in lesbian activities.

Diane Lloyd testified that defendant told her that he had gone up on the mountain and killed a girl with a brick. She further stated:

> What he told me was that he dressed up like a woman and he said how smooth his face was. He could wear a beard or not, and his skin was very smooth if he shaved. He dressed as a woman. He went up there and the girl—I don't remember if the door was open or not, but anyway, he was outside. He said, "Bitch, you've been fuckin' with my man," and he put his knee—kicked her in the stomach with his knee and then he started beating her in the head with a brick.

On cross-examination it was established that this witness had been convicted of attempting to pass a forged prescription and passing worthless checks. She also admitted that she had used marijuana and heroin.

Ikey Lee Noah testified that while he was an inmate at Craggy Prison he overheard a conversation between defendant and an unidentified woman. We quote the pertinent part of his testimony:

> They were talking and I overheard part of the conversation. The girl looked kind of nervous and she was asking if some people might be following her. And he said, "About that nurse?" And she said, "Yeah." He said, "I don't think so. It's been about six years and as soon as my time's up, we'll leave and get out of the state. They can't prove nothing."

Billy Matthews, a special agent with the S.B.I., testified that he was assigned to investigate the murder of Ms. Hennessee and on 14 July 1975 he had a conversation with defendant. Defendant stated that the only time he had ever gone "up on the mountain" was the time he was accompanied by Alphonso Pearcy. He further told Mr. Matthews that on the morning of 21 February 1975 he had two teeth pulled and two teeth filled by Dr. Love in Black Mountain, North Carolina. At around 3:00 o'clock he picked up his wife, returned to his home and remained there for the rest of the day. In another conversation on 22 September 1981, defendant reaffirmed his statements concerning his activities on 21 February 1975.

Dr. J. H. Love testified that according to his records, he first saw defendant as a patient on 24 March 1975.

Defendant offered no evidence.

The jury returned a verdict of guilty of first-degree murder. Defendant appealed from judgment imposing a sentence of life imprisonment pursuant to G.S. 7A-27(a).[1]

Rufus L. Edmisten, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State.

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

BRANCH, Chief Justice.

[1] We first consider defendant's argument that there was insufficient evidence to show that he killed Ms. Hennessee with premeditation and deliberation.

In *State v. Corn*, 303 N.C. 293, 278 S.E. 2d 221 (1981), Justice Copeland stated the rules governing the submission of a charge of first-degree murder. We quote:

> In order for the trial court to submit a charge of first degree murder to the jury, there must have been substantial evidence presented from which a jury could determine that the defendant intentionally shot and killed the victim with malice, premeditation and deliberation. *State v. Horton*, 299 N.C. 690, 263 S.E. 2d 745 (1980); *State v. Heavener*, 298 N.C. 541, 259 S.E. 2d 227 (1979); *State v. Baggett*, 293 N.C. 307, 237 S.E. 2d 827 (1977). "Substantial evidence" is that amount of relevant evidence that a reasonable mind might accept as sufficient to support a conclusion. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). In ruling upon defendant's motion to dismiss on the grounds of insufficient evidence, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's

1. The crime for which defendant was convicted occurred on 21 February 1975. At that time the mandatory penalty for first-degree murder was death. G.S. 14-17. In *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed. 2d 944 (1976), the United States Supreme Court declared the mandatory death penalty provision in G.S. 14-17 unconstitutional. Furthermore, our present death penalty statute, G.S. 15A-2000 *et seq.*, does not apply to this case. The effective date of G.S. 15A-2000 *et seq.* was 1 June 1977. The Legislature provided that "[t]he provisions of this act shall apply to murders committed on or after the effective date of this act." 1977 N.C. Session Laws, Ch. 406, § 8.

favor. *State v. Fletcher*, 301 N.C. 709, 272 S.E. 2d 859 (1981); *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980).

Premeditation has been defined by this Court as thought beforehand for some length of time, however short. No particular length of time is required; it is sufficient if the process of premeditation occurred at any point prior to the killing. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980); *State v. Reams*, 277 N.C. 391, 178 S.E. 2d 65 (1970); *State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969). An unlawful killing is committed with deliberation if it is done in a "cool state of blood," without legal provocation and in furtherance of a "fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose." *State v. Faust*, 254 N.C. 101, 106-07, 118 S.E. 2d 769, 772 (1961). The intent to kill must arise from "a fixed determination previously formed after weighing the matter." *State v. Exum*, 138 N.C. 599, 618, 50 S.E. 283, 289 (1905). *See also State v. Baggett, supra; State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974).

Id. at 296-97, 278 S.E. 2d at 223.

Premeditation and deliberation are mental processes and ordinarily must be proved by circumstantial evidence. *State v. Corn, supra; State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982). Among the circumstances which may be considered as tending to show premeditation and deliberation are: (1) the want of provocation on the part of the victim, (2) the defendant's conduct and statements before and after the killing, (3) threats made against the victim by the defendant, (4) ill will or previous difficulty between the parties, (5) evidence that the killing was done in a brutal manner. *See State v. Calloway, supra; State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978); *State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978). The nature and number of the victim's wounds is also a circumstance from which an inference of premeditation and deliberation may be drawn, *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, --- U.S. ---, 103 S.Ct. 503, 74 L.Ed. 2d 642 (1982), as is the number of blows inflicted upon the victim. *State v. Love*, 296 N.C. 194, 250 S.E. 2d 220 (1978); *State v. Thomas, supra.*

The State's evidence tended to show that defendant made statements to three witnesses in which he stated the manner and

motive for the murder of Ms. Hennessee. He told the witness Smith that the victim "was supposed to get some pills for him, Preludin, and he went up and she didn't have them and she got freaked out and he beat her with a brick." He in substance repeated the statement to Smith some six months later. Defendant also made a statement to the witness Mary Frances Pickens that he "killed the white woman with a brick." He indicated to Ms. Pickens that he killed Ms. Hennessee because she did not give him "some drugs" and further because he thought "she had some money." Testimony of the witness Lloyd was to the effect that defendant told her he dressed up like a woman and went to the home of the victim and beat her to death with a brick.

This evidence alone was sufficient to carry the case to the jury on the question of premeditation and deliberation. It is true that the credibility of these witnesses was questionable, but the credibility of the witness is a question for the jury. *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978). Further, the State's evidence as to premeditation and deliberation was strengthened by the physical evidence found at the scene and the testimonial evidence of Dr. Hudson. This evidence tends to show that the victim was repeatedly struck about the head with a brick with such force as to break the brick into two pieces. Two of the blows were of such force that either of them could have caused death within a short time.

Blood consistent with Ms. Hennessee's blood type was splattered throughout the rondette and there was blood on the bottom of her feet. These facts support an inference that the victim attempted to flee and her assailant pursued and continued his attack. The brutality of the murder is accentuated by the fact that there was evidence tending to show that prior to the victim's death there was an attempt to smother her. Further, there was no evidence of provocation on the part of Ms. Hennessee.

This sustained and brutal attack without provocation on the part of the victim, together with the testimonial evidence, amply supported a jury finding that defendant acted in accordance with a fixed design or that he had sufficient time to weigh the consequences of his action.

We therefore hold that there was sufficient evidence to support a jury finding of premeditation and deliberation.

[2] We next turn to defendant's contention that the trial judge committed prejudicial error in his instructions to the jury. He specifically maintains that the following portion of the instructions was erroneous:

> Members of the jury, there's evidence which tends to show the Defendant stated to Mr. Matthews that on the date in question, the 21st of February, 1975, that he and Pearcy went to the rondette on Howland Road and that he kept a dental appointment with Dr. Love and that he picked up his wife at work and remained home. Now, there's been further evidence from Dr. Love which says the Defendant's first appointment with Dr. Love was on March 24, 1975. Now, members of the jury, if you find from this evidence that the Defendant was not where he professed to be on February 21, 1975 and you so find beyond reasonable doubt, and that this was done to divert suspicion from himself, then you may give such weight as you find it's reasonable to do.

This portion of the instruction was requested by the State and was given over defendant's objection.

It is established by our decisions that false, contradictory or conflicting statements made by an accused concerning the commission of a crime may be considered as a circumstance tending to reflect the mental processes of "a person possessed of a guilty conscience seeking to divert suspicion and to exculpate [himself]." *State v. Redfern*, 246 N.C. 293, 297-98, 98 S.E. 2d 322, 326 (1957). The probative force of such evidence is that it tends to show consciousness of guilt. *Id. See also State v. Yearwood*, 178 N.C. 813, 101 S.E. 513 (1919); *State v. Gillis*, 15 N.C. 606 (1834).

The State takes the position that defendant was not prejudiced by the challenged instruction since the instruction failed to tell the jury that the false statements could be considered as evidence tending to show consciousness of guilt on the part of defendant. The State maintains that the instruction was in fact favorable to defendant since the jury was instructed to give this evidence "such weight as you find it's reasonable to do." At first glance, the State's argument seems plausible and the instruction itself appears to be rather innocuous. However, upon a closer study of the rationale of the cases permitting evidence of falsehoods or contradictory statements as showing consciousness

of guilt, and an application of that law to the facts of this case, we must reject the State's argument.

In *State v. Redfern, supra*, the defendant was charged with murder. The defendant made various conflicting statements about how the deceased met his death at the scene of the crime. This Court held that "[t]hese conflicting statements voluntarily made at the scene of the homicide, tend to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate herself. This line of testimony was substantial evidence of *substantial probative force*, tending to show consciousness of guilt." 246 N.C. at 297-98, 98 S.E. 2d at 326 (emphasis added) (citations omitted).

State v. Yearwood, supra, involved an alibi. There the defendant's mother, in his presence and with his assent, stated that the defendant was in bed at the time the alleged crime was committed. There was evidence that he was seen away from home at that time. The Court held that these facts were circumstances tending to show guilt since defendant was impliedly asserting an alibi which was contradicted by other evidence.

Our research discloses that "consciousness of guilt" may be established, *inter alia*, by evidence of flight on the part of an accused.[2] We are of the opinion that the rules of law governing flight which show consciousness of guilt are equally applicable to evidence of falsehood. We therefore find it helpful to consider the evidentiary effect of flight by an accused.

In North Carolina, evidence of flight does not create a presumption of guilt but is some evidence which may be considered with other facts and circumstances in determining guilt. However, proof of flight, standing alone, is never sufficient to establish guilt. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). Further, evidence of flight *may not* be considered as tending to show premeditation or deliberation. *State v. Payne*, 213 N.C. 719, 197 S.E. 573 (1938); *State v. Marsh*, 234 N.C. 101, 66 S.E. 2d 684 (1951).

2. We are advertent to the fact that other acts of an accused such as escape, attempted suicide, and attempts to bribe may also be evidence of implied admissions or consciousness of guilt. For the sake of brevity, we discuss only evidence of flight.

In instant case, we find the challenged instruction erroneous because it permitted the jury to roam at will without making it clear that the falsehood did not create a presumption of guilt or that, standing alone, such evidence was not sufficient to establish guilt. Neither did the trial judge inform the jury that such evidence could not be considered as tending to show premeditation and deliberation.[3] Furthermore, the statements referred to in the instruction under scrutiny were completely irrelevant since the alleged falsehood referred to defendant's whereabouts during the morning hours of 21 February 1975 and all the evidence was to the effect that the crime occurred in the afternoon of that day.

Having concluded that the instruction was erroneous, we consider whether the instruction before us was of such prejudice as to require a new trial.

G.S. 15A-1443(a) states the test for prejudicial error to be whether there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." The burden of showing prejudice is upon the defendant. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980).

The evidence in the case before us was entirely circumstantial. None of the investigatory or scientific evidence tended to point to defendant as the perpetrator of the crime. Witnesses upon whom the State relied to furnish the facts from which inferences of defendant's guilt were drawn were of extremely questionable credibility. Although we are of the opinion that the evidence was sufficient to survive a motion to dismiss, all of the circumstances present a very close question as to defendant's guilt or innocence. In addition to the matters hereinabove set forth, the trial judge's emphasis upon the negative aspect of defendant's statements to the police officers may well have left the jury with the impression that he did not find defendant's statements to be credible. *See State v. Byers*, 80 N.C. 426 (1879).

For these reasons, we are of the opinion that there was a reasonable possibility that a different result would have been

3. We note that the pattern jury instruction on flight, N.C.P.I.—Crim. 104.36 (1970), contains suggested language as to consciousness of guilt which may be appropriate in charging on falsehoods seeking to divert suspicion as evidence of consciousness of guilt.

reached had the erroneous instruction not been given. We therefore hold that this erroneous instruction requires a new trial.

In the present posture of this case, we do not deem it necessary to discuss defendant's contention that the trial judge improperly expressed an opinion by calling the witness, Dr. Love, to the bench at the conclusion of his testimony and engaging in a brief conversation with the doctor. Suffice it to say that the trial judge must not by words or conduct suggest an opinion as to the weight of the evidence or as to the credibility of a witness. *State v. Belk*, 268 N.C. 320, 150 S.E. 2d 481 (1966).

For the reasons stated, there must be a

New trial.

Justice MEYER dissenting.

I respectfully dissent from the majority's conclusion that the trial court's instruction concerning the import of Dr. Love's testimony constituted prejudicial error.

The majority correctly points out that "false, contradictory or conflicting statements made by an accused concerning the commission of a crime may be considered as a circumstance tending to reflect the mental processes of 'a person possessed of a guilty conscience seeking to divert suspicion and to exculpate [himself].' *State v. Redfern*, 246 N.C. 293, 297-98, 98 S.E. 2d 322, 326 (1957)." The majority characterizes the challenged instruction "at first glance" as seemingly "innocuous," and further characterizes the State's argument that the omission of the "consciousness of guilt" language was favorable to the defendant as seemingly "plausible." With these conclusions I agree.

My reading of the majority's position is that the trial judge erred in failing to include in his instruction statements to the effect (1) that the evidence, if believed, could be considered as consciousness of guilt; (2) that the evidence did not create a presumption of guilt and was not sufficient to establish guilt; and (3) that the evidence could not be used to show premeditation and deliberation. It is the omission of the latter two statements upon which the majority apparently rests its decision.

After finding error in the omission of these statements, the majority then points out, significantly, that "the statements referred to in the instruction under scrutiny were *completely irrelevant* since the alleged falsehood referred to defendant's whereabouts during the morning hours of 21 February 1975 and all the evidence was to the effect that the crime occurred in the afternoon of that day." (Emphasis added.) Defendant's alleged falsehood did nothing to establish an alibi for his whereabouts at the time of the crime; and thus, ostensibly it may not have been intended to "divert suspicion" or "exculpate" the defendant. Under these circumstances the alleged falsehood becomes not only doubtfully relevant to the question of guilt but is also reduced to insignificance for any purpose other than its value as traditional impeachment evidence. It is entirely possible, then, that the jury never reached the question of the weight to be given this evidence, having determined that it was not the purpose of this falsehood to divert suspicion.

Even assuming the jury did reach the question of the weight to be given to what amounted to an inconsistency relating to a totally different time frame (and thus a collateral matter) of no significance to the murder itself, I cannot join with the majority in its implied assumption that the jury, "roaming at will," improperly considered this evidence as proof of defendant's guilt or to establish premeditation and deliberation.

Nor do I agree with the majority's position that "the trial judge's emphasis upon the negative aspect of defendant's statements to the police officers may well have left the jury with the impression that he did not find defendant's statements to be credible." The fact that a trial judge summarizes properly presented evidence tending to show that a defendant lied in his statement to the police does not constitute an expression of opinion. G.S. § 15A-1232.

Finally, while evidence against this defendant was, indeed, circumstantial, it overwhelmingly pointed to defendant's guilt. While it is true that the relationship of some of the witnesses makes their credibility as truthful witnesses suspect, the State presented twenty-six witnesses, nine of whom either placed defendant at the scene of the crime or identified him, through defendant's own admissions to them, as the murderer of Diane

Hennessee. The jury resolved any question as to these witnesses' credibility against the defendant at trial.

I would vote to affirm defendant's conviction.

MARIE R. LEONARD, ADMINISTRATRIX OF THE ESTATE OF SAMUEL L. LEONARD, DECEASED v. JOHNS-MANVILLE SALES CORPORATION, A DELAWARE CORPORATION; UNARCO INDUSTRIES, INC., AN ILLINOIS CORPORATION; GAF CORPORATION, A DELAWARE CORPORATION; ARMSTRONG CORK COMPANY, A PENNSYLVANIA CORPORATION; RAYBESTOS-MANHATTAN, INC., A CONNECTICUT CORPORATION; OWENS-CORNING FIBERGLASS CORPORATION, A DELAWARE CORPORATION; PITTSBURGH CORNING CORPORATION, A PENNSYLVANIA CORPORATION; THE CELOTEX CORPORATION, A DELAWARE CORPORATION; NICOLET INDUSTRIES, A PENNSYLVANIA CORPORATION; FORTY-EIGHT INSULATION, INC., AN ILLINOIS CORPORATION; EAGLE-PICHER INDUSTRIES, INC., AN OHIO CORPORATION; STANDARD ASBESTOS & INSULATION CO., A MISSOURI CORPORATION; OWENS-ILLINOIS, INC., AN OHIO CORPORATION; H. K. PORTER, A PENNSYLVANIA CORPORATION; NATIONAL GYPSUM CO., A DELAWARE CORPORATION; FIBREBOARD CORPORATION, A DELAWARE CORPORATION; GARLOCK, INC., A FOREIGN CORPORATION; KEENE CORPORATION, A NEW JERSEY CORPORATION; NORTH AMERICAN ASBESTOS CORPORATION, A FOREIGN CORPORATION; CAREY CANADIAN MINES, LTD., A FOREIGN CORPORATION; LAKE ASBESTOS OF QUEBEC, LTD., A FOREIGN CORPORATION; AMATEX CORPORATION, A PENNSYLVANIA CORPORATION; SOUTHERN ASBESTOS COMPANY

No. 697PA82

(Filed 9 August 1983)

1. Courts § 21.5— injury in another state—what law governs negligence claim

When the injury giving rise to a negligence claim occurs in another state, the law of that state ordinarily will govern resolution of the substantive issues in the controversy. However, if the foreign jurisdiction has no statutory or decisional law on the question involved, the courts of this state will not speculate what law such jurisdiction might adopt and will apply the law of North Carolina.

2. Master and Servant § 89.3— wrongful death action—concurring negligence by employer who paid workers' compensation—pro tanto defense

In a North Carolina wrongful death action against the manufacturers of asbestos which allegedly caused decedent's death by asbestosis, defendant manufacturers were entitled to allege as a pro tanto defense the concurring negligence of decedent's employer who had paid a Virginia workers' compensation claim arising from the asbestosis. Although G.S. 97-10.2 does not apply

since workers' compensation was not recovered under the North Carolina act, the policy and reasoning behind this statute apply so that defendants may allege concurring negligence as a defense for the same limited purposes and by the same procedures set forth in the statute.

ON discretionary review of the decision of the Court of Appeals, 59 N.C. App. 454, 297 S.E. 2d 147 (1982), reversing an order entered by *Godwin, J.*, at the 3 August 1981 Session of Superior Court, DURHAM County.

Samuel L. Leonard was a pipefitter and welder for a number of years, during which he was exposed to asbestos while working at several different locations. His last exposure to asbestos occurred while he was employed by Stone & Webster Engineering Corporation ("Stone & Webster") in the state of Virginia. Shortly after he was diagnosed as having asbestosis, Mr. Leonard filed a workers' compensation claim in Virginia against Stone & Webster and its compensation insurance carrier, Continental Casualty Company. After he testified before the Commission and while his claim was pending, Mr. Leonard died in Durham, North Carolina. On 28 August 1979, the Virginia Industrial Commission awarded Marie B. Leonard, Mr. Leonard's widow, workers' compensation of $175 per week for 500 weeks. The Commission also ordered Stone & Webster and Continental Casualty Company to pay all of Mr. Leonard's medical expenses resulting from his disability, as well as statutory burial expenses.

Marie B. Leonard was appointed the acting administratrix of the estate of Samuel L. Leonard and on 1 August 1979 filed an action against the defendants in the present case to recover damages for the wrongful death of her husband. Defendants are manufacturers and/or processors and retailers of asbestos products which may have caused Mr. Leonard's asbestosis and resulting death. On 2 March 1981, defendants moved to amend their answer by adding the following:

LAST DEFENSE

On information and belief it is alleged that the employer of plaintiff's intestate, to-wit, Stone & Webster Engineering Corp., at the time of his alleged exposure to asbestos was negligent in that it failed to properly and safely equip plaintiff with the necessary protection. That it provided the

orders and directions under which plaintiff worked involving any asbestos that may have been in his work area. That it allowed asbestos products to be used by plaintiff and others on its premises in a manner so as to create a condition of danger for the plaintiff. That as to any asbestos-containing products that may have been shipped, if any, by this answering defendant to the plaintiff's said employer, although the said employer knew or should have known in the exercise of ordinary care of the general warnings contained on, shipped with and generally noted by any defendant so shipping and others, it still failed to pass on these warnings to plaintiff and others. That it failed to provide suitable training and education for its employees, including the plaintiff's intestate; and also for its sub-contractors and contractors about the premises or it failed to enforce such safety training and it failed to require the plaintiff and the other employees to keep the premises clean and dust free and in normal good housekeeping and cleanliness.

That if this answering defendant was negligent in any regard, which is denied, the aforementioned negligence of Stone & Webster Engineering Corp., the employer of plaintiff's intestate, was at the least the cause of any injury done to plaintiff's intestate by asbestos and such negligence of Stone & Webster Engineering Corp. joined and concurred with any denied negligence of this defendant in producing any injuries and damages sustained by plaintiff's intestate. That under the provisions of NCGS 97-10.2(e) this defendant is entitled to have submitted to the jury an issue as to whether the negligence of the employer joined and concurred with the negligence of this defendant, if any, in producing the damages to plaintiff's intestate and if such issue should be answered in the affirmative this defendant is entitled to have the verdict reduced by the amount of any worker's compensation payments or like payments made to plaintiff's intestate or made on his behalf.

Defendants' motion was granted 13 April 1981 and their amended answer ordered served on Stone & Webster. On 26 June 1981, Stone & Webster filed a motion to strike defendants' last defense on grounds that N.C.G.S. 97-10.2 and the North Carolina

Workers' Compensation Act were inapplicable to the wrongful death action filed by Mrs. Leonard. By order filed 4 August 1981, Judge Godwin denied Stone & Webster's motion; however, the court did strike the following portion of defendants' last defense: "under the provisions of N.C.G.S. 97-10.2(e)." On 2 September 1981, Stone & Webster filed a "Response," in which it replied to defendants' Last Defense as follows:

FIRST DEFENSE

Defendants' Last Defense fails to state a claim against Stone & Webster Engineering Corporation upon which relief can be granted, and Stone & Webster moves, pursuant to NCR Civ. P 12(b)(6), that their Last Defense be dismissed.

SECOND DEFENSE

1. The allegations of the Last Defense are denied.

WHEREFORE, having responded to the defendants' Last Defense, Stone & Webster Engineering Corporation prays that it recover from the defendants the full amount of workers' compensation benefits paid to plaintiff's intestate or paid on his behalf, interest and attorneys' fees as allowed by law, and costs.

Although it has never been made a party in this case, Stone & Webster filed a petition for writ of certiorari in the Court of Appeals, arguing that Judge Godwin erred by failing to strike the whole of defendants' Last Defense. The Court of Appeals granted Stone & Webster's petition on 10 September 1981 and, in an opinion filed 16 November 1982, held that the trial court erred in denying Stone & Webster's motion to strike defendants' last defense. We granted defendants' petition for discretionary review 8 March 1983.

Smith Moore Smith Schell & Hunter, by McNeill Smith and Gerard H. Davidson, Jr.; Battle, Winslow, Scott & Wiley, P.A., by Marshall A. Gallop, Jr.; Brown and Johnson, by C. K. Brown, Jr.; Wallace Barwick & Landis, P.A., by Fitzhugh E. Wallace; Smith Anderson Blount Dorsett Mitchell & Jernigan, by James G. Billings and Thomas N. Barefoot; Bryant Drew Crill & Patterson, by Victor S. Bryant, Jr.; and Poisson Barnhill & Britt, by Donald E. Britt, Jr., for defendant appellants.

Young, Moore, Henderson & Alvis, P.A., by Edward B. Clark and B. T. Henderson II, for Stone & Webster Engineering Corporation.

Haywood, Denny & Miller, by George W. Miller, Jr. and Michael W. Patrick, for plaintiff, amicus curiae.

MARTIN, Justice.

The issue we must decide is whether in this North Carolina wrongful death action defendant manufacturers are entitled to amend their answers to allege as a pro tanto defense the concurring negligence of decedent's employer who had paid a Virginia workers' compensation claim arising from the asbestosis which ultimately caused decedent's death. For reasons stated below, we hold that defendants in this case may allege as a defense the concurring negligence of decedent's employer.

[1] Traditionally, this court has held that when the injury giving rise to a negligence claim occurs in another state, the law of that state will govern resolution of the substantive issues in the controversy. *E.g., Thames v. Teer Co.*, 267 N.C. 565, 148 S.E. 2d 527 (1966); *McCombs v. Trucking Co. and Miller v. Trucking Company*, 252 N.C. 699, 114 S.E. 2d 683 (1960); *Childress v. Motor Lines*, 235 N.C. 522, 70 S.E. 2d 558 (1952); *Charnock v. Taylor*, 223 N.C. 360, 26 S.E. 2d 911 (1943); *Chewning v. Chewning*, 20 N.C. App. 283, 201 S.E. 2d 353 (1973); *Williams v. General Motors Corp.*, 19 N.C. App. 337, 198 S.E. 2d 766, *cert. denied*, 284 N.C. 258 (1973). N.C.G.S. 8-4 authorized our courts to "take notice of such law in the same manner as if the question arose under the law of this State." *Thames v. Teer Co., supra.* The party seeking to have the law of a foreign jurisdiction apply has the burden of bringing such law to the attention of the court. If the foreign jurisdiction has no law, either statutory or decisional, on the question involved, the courts of this state will not speculate what law such jurisdiction might adopt and will apply the law of North Carolina.

In the present case, Stone & Webster argues that because the place of decedent's injury was in Virginia, the law of Virginia should apply and Virginia law would not permit it to be brought into this litigation for any purpose. Virginia does not have a statute permitting or prohibiting a third party sued in tort by an employee to allege as a pro tanto defense the negligence of an employer who has paid workers' compensation to the employee

for the injury. *Cf.* N.C. Gen. Stat. § 97-10.2(e) (1979). Like North Carolina, however, Virginia does not permit defendants in an employee's tort suit to join an employer as a party defendant based on a claim that the employer is a joint tort-feasor if the employer has paid workers' compensation for the injury sued upon. *Virginia Elec. & Power Co. v. Wilson*, 221 Va. 979, 277 S.E. 2d 149 (1981) (cited hereafter as "Vepco"). *See, e.g., Hunsucker v. Chair Co.*, 237 N.C. 559, 75 S.E. 2d 768 (1953). In *Vepco*, Virginia Electric and Power Company was sued in tort by employees of K. F. Wilson for damages for personal injuries allegedly caused by a gas main explosion. K. F. Wilson had paid workers' compensation to these employees, and the power company sought to implead Wilson in the personal injury suit for contribution or indemnity on the theory that Wilson was a joint tort-feasor. The Supreme Court of Virginia affirmed dismissal of Wilson as a third-party defendant, holding that because plaintiff had no right of action in tort against Wilson, the power company could not implead Wilson for contribution or indemnity. *See* Va. Code §§ 8.01-34, 65.1-40 (1980); *Fauver v. Bell*, 192 Va. 518, 65 S.E. 2d 575 (1951). *See also Jennings v. Franz Torwegge Machine Works*, 347 F. Supp. 1288 (W.D.Va. 1972).

However, neither our own research nor that of Stone & Webster has revealed any Virginia case either permitting or prohibiting third parties to raise the employer's negligence as a pro tanto defense in a suit such as the instant one. Stone & Webster urges this Court to read the *Vepco* decision, *supra*, as an indication that the Supreme Court of Virginia would not allow Stone & Webster to be brought into this suit for any purpose. We decline to engage in such speculation. If this case were before it, the Supreme Court of Virginia might very well allow Stone & Webster to be brought into this suit for the limited purpose argued by defendants, while refusing to allow it to be impleaded as a joint tort-feasor. *Cf. Brown v. R. R.*, 204 N.C. 668, 169 S.E. 419 (1933) ("Brown II"). In the absence of any Virginia law one way or the other on this issue, the rule of *lex loci delicti commissi* does not apply. Instead, we hold that North Carolina law applies.[1] We now explain what that law is.

1. Moreover, even if Virginia law clearly prohibited an employer's negligence to be litigated for the limited purposes allowed under North Carolina law, under

[2] If Mr. Leonard had been awarded workers' compensation under the North Carolina Workers' Compensation Act, then in this tort action defendants would have been able to bring decedent's employer into the suit for limited purposes by alleging that the employer's contributory negligence was a cause of decedent's injuries. N.C.G.S. 97-10.2 provides in pertinent part as follows:

> (a) The right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the "third party." The respective rights and interests of the employee-beneficiary under this Article, the employer, and the employer's insurance carrier, if any, in respect of the common-law cause of action against such third party and the damages recovered shall be as set forth in this section.
>
> (b) The employee, or his personal representative if he be dead, shall have the exclusive right to proceed to enforce the liability of the third party by appropriate proceedings if such proceedings are instituted not later than 12 months after the date of injury or death, whichever is later. . . .
>
> . . . .
>
> (e) The amount of compensation and other benefits paid or payable on account to [*sic*] such injury or death shall not be admissible in evidence in any proceeding against the third party. If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as

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the facts of this case, the governmental interests and public policy of our state would require us to abjure the *lex loci delicti commissi* rule.

> to this issue as fully as though he were a party although not named or joined as a party to the proceeding. Such issue shall be the last of the issues submitted to the jury. If the verdict shall be that actionable negligence of the employer did join and concur with that of the third party in producing the injury or death, then the court shall reduce the damages awarded by the jury against the third party by the amount which the employer would otherwise be entitled to receive therefrom by way of subrogation hereunder and the entire amount recovered, after such reduction, shall belong to the employee or his personal representative free of any claim by the employer and the third party shall have no further right by way of contribution or otherwise against the employer, except any right which may exist by reason of an express contract of indemnity between the employer and the third party, which was entered into prior to the injury to the employee.

N.C. Gen. Stat. § 97-10.2(a), (b), (e) (1979). However, because in this case neither decedent nor his administratrix recovered workers' compensation under the North Carolina act, N.C.G.S. 97-10.2(e) does not control. N.C. Gen. Stat. § 97-10.2(a) (1979). Nevertheless, we find that the policy and reasoning behind this statute apply equally to the facts in the present case and thus defendants may allege the contributory negligence of Stone & Webster as a defense for the same limited purposes and by the same procedure set forth in N.C.G.S. 97-10.2.

The procedure provided for in N.C.G.S. 97-10.2(e) was created judicially in *Brown II, supra*, 204 N.C. 668, 169 S.E. 419. In that case plaintiff's intestate was driving a truck in the employ of Chero-Cola Bottling Company ("Chero-Cola") when he was struck and killed by a train owned by defendant, Southern Railway Company ("Railway"). Chero-Cola paid decedent's administrator workers' compensation and this administrator then instituted a wrongful death action against Southern Railway. Under the workers' compensation statute in effect at the time, an employer who had paid workers' compensation was entitled to be subrogated pro tanto to the employee's right to recover damages from a third party whose negligence caused the employee's injury:

> The acceptance of an award under [the Workmen's Compensation Act] against an employer for compensation for the

> injury or death of an employee shall operate as an assignment to the employer of any right to recover damages which the injured employee or his personal representative or other person may have against any other party for such injury or death; and such employer shall be subrogated to any such right, and may enforce, in his own name or in the name of the injured employee or his personal representative the legal liability of such other party.

N.C. Code Ann. § 8081(r) (Supp. 1929). Thus, if Railway were determined liable for decedent's death, Chero-Cola would be paid from the damages assessed an amount equal to the workers' compensation it had paid to decedent.[2]

In the wrongful death case brought against it, however, Railway moved to join Chero-Cola as a party defendant, alleging that Chero-Cola's negligence was also a cause of decedent's death and thus Chero-Cola was liable as a joint tort-feasor. The trial court allowed Railway's motion, but on appeal this Court reversed, explaining that once an employer has paid workers' compensation he cannot be held liable with a third party as a joint tort-feasor.

> In *Conrad v. Foundry Co.*, 198 N.C. 723, 153 S.E. 256 [266], it is said that the General Assembly of this State by its enactment of chapter 120, Public Laws 1929, known as the Workmen's Compensation Act, discarded the theory of fault as the basis of liability of an employer to his employee, when both have become in accordance with its provisions, subject to said act, and conferred an absolute right of compensation on every employee who is injured by an accident arising out of and in the course of the employment. In consideration of the enlarged liability of the employer to an injured employee, the employee is deprived by the act of certain rights and remedies which he had prior to its enactment, both at common law and under statutes of this State. Section 11 of said act (N. C. Code, 1931, sec. 8081(r)[]), expressly provides that "the rights and remedies herein granted to an employee,

2. If the damage award exceeded the amount of workers' compensation the employer had paid, the remainder, less costs and attorney's fees, would be given to the employee or his personal representative. N.C. Code Ann. § 8081(r) (Supp. 1929).

> when he and his employer have accepted the provisions of this chapter, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representatives, parents, dependents or next of kin, as against his employer, at common law or otherwise, on account of such injury, loss of service or death."
>
> By virtue of the foregoing provision of the statute, the Chero-Cola Bottling Company, on the facts appearing in the record, and admitted for the purposes of plaintiff's appeal, is not liable to plaintiff as a joint *tort-feasor.* The said company has been expressly relieved of such liability by the provisions of the statute.

Brown v. R. R., 202 N.C. 256, 263-64, 162 S.E. 613, 617-18 (1932) ("Brown I"). Therefore, Chero-Cola could not be made a party defendant in the action. *See generally* Larson, *Third-Party Action Over Against Workers' Compensation Employer*, 1982 Duke L.J. 483 (1982).

However, Railway then went on to amend its answer to allege that because Chero-Cola's negligence was a cause of decedent's death, Chero-Cola and its insurer should be barred from any recovery insofar as they would become beneficiaries of any damages that might be awarded by virtue of N.C. Code Ann. § 8081(r). Upon plaintiff's motion, the trial court struck Railway's amended answer as "immaterial and irrelevant." Railway appealed to this Court, which explained the theory behind Railway's amendment as follows:

> The defendant by leave of court filed an amended answer as set out above and said to the employer in substance: "If it be conceded that I was negligent, you were also guilty of negligence. If I killed the deceased you participated actively in the killing, and sound public policy, sanctioned and adopted by decisions of the Supreme Court, forbids you to profit by your own wrong or to pluck good fruit from the evil tree of your own planting." The pertinent idea was declared in *Davis v. R. R.*, 136 N.C. 115, 48 S.E. 591, as follows: "The underlying principle in our view is that no one shall profit by his own wrong, and if the father's negligence, and not that of the railroad company, was the proximate cause of the death

> (under the doctrine of the 'last clear chance'), it would be obviously wrong to permit him to put money into his pocket for damages proximately caused by his own negligence, because sued for through an administrator (whether himself or another), yet for his benefit." [136 N.C. at 87, 48 S.E. at 592.] The same thought was expressed in *Goldsmith v. Samet*, 201 N.C. 574 [160 S.E. 835] in these words: "In the instant case, therefore, if recovery were allowed, the amount would be divided between the two wrongdoers. This is also contrary to the policy of the law." [201 N.C. at 575, 160 S.E. at 835.]

Brown II, supra, 204 N.C. at 670, 169 S.E. at 420.

The Court then held that Railway could amend its answer to raise as a defense that the employer's negligence caused the employee's death. As the Court explained:

> [W]hen the employee or his estate has been satisfied, and the employer seeks to recover the amount paid by him, from such third party, his hands ought not to have the blood of the dead or injured workman upon them, when he thus invokes the impartial powers and processes of the law.
>
> . . . [I]f such defense [contributory negligence of the employer] be not recognized, an employer could by his own negligence participate in the killing or injuring of the workman, pay for it, and then wash his hands of his own wrong merely because he brought a suit against the third party, who also contributed to the injury or death.

Id. at 671, 169 S.E. at 420. Thus, although Chero-Cola could not be made a party defendant, if the defendants proved that Chero-Cola's negligence contributed to decedent's death, Chero-Cola could not recover its subrogated interest, and the damages awarded plaintiff employee would be reduced by the amount of the employer's subrogated interest. It was this holding that was codified in 1959 as N.C.G.S. 97-10.2(e).

We find that the reasoning of *Brown II, supra*, applies equally to the instant case. If Stone & Webster, decedent's employer, negligently contributed to decedent's death, it would be grossly inequitable not to permit defendants to prove this in a wrongful death action. Further, Stone & Webster might then attempt to

recover from the plaintiff an amount equal to the workers' compensation it had paid. *Cf.* N.C. Gen. Stat. § 97-10.2(f) (1979); Va. Code § 65.1-41 (1980). The mere fact that Stone & Webster paid decedent's workers' compensation claim under Virginia's workmen's compensation act will not be allowed to undermine the policies of fairness and the long-standing principle that no one should benefit from his own wrong. *Davis v. R. R.*, 136 N.C. 115, 48 S.E. 591 (1904).

In summary, we hold that defendants may raise Stone & Webster's negligence as a pro tanto defense. Stone & Webster shall not be made a party defendant, although it shall be afforded the opportunity to defend against the allegation of negligence in the manner provided in N.C.G.S. 97-10.2(e). The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. ERIC JEROME MOORE

No. 65A83

(Filed 9 August 1983)

1. **Criminal Law § 34 — evidence of another crime committed by defendant inadmissible — prejudicial error**

In a prosecution for a first degree sexual offense, attempted first degree rape and robbery with a dangerous weapon, the trial court committed prejudicial error by allowing into evidence the testimony of a rape victim who testified that defendant had raped her approximately two months after the attempted rape for which he was being tried. The differences in the two attacks were significant in that one attack occurred during the day at a business while the other victim was attacked at night in her apartment; one victim had been repeatedly threatened while the other attack did not involve any threats; one victim was continuously brutally slapped and her assailant attempted to stab her while the other victim was never struck; one victim was verbally abused while the other victim was not; and one attack involved repeated rapes, acts of oral sex and attempted anal sex while the other attack consisted of one act of oral sex and an attempted rape.

2. **Criminal Law § 50.2 — shorthand statement of fact — properly admitted**

The trial court properly allowed a prosecuting witness in a prosecution for a first degree sexual offense and armed robbery to testify, over objection, that no one was in the building other than she and the defendant. The prosecuting

witness's answer could be referred to as a shorthand statement of fact instead of an impermissible opinion.

Justice MEYER dissenting.

Chief Justice BRANCH and Justice COPELAND join in this dissent.

BEFORE *Washington, Judge,* at the 13 September 1982 Criminal Session of Superior Court, GUILFORD County, the defendant was convicted of three separate counts. He received a life sentence for first degree sexual offense, six years for attempted first degree rape and fourteen years for robbery with a dangerous weapon.

The defendant appealed his life sentence directly to the Supreme Court as a matter of right. His motion to bypass the Court of Appeals on the other sentences was allowed by the Supreme Court on 9 March 1983.

Rufus L. Edmisten, Attorney General, by Richard L. Kucharski, Assistant Attorney General, and David E. Broome, Jr., Associate Attorney, for the State.

Pinkney J. Moses, for defendant appellant.

MITCHELL, Justice.

[1] The principal question presented by the defendant's appeal is whether the trial court committed prejudicial error by allowing the State to introduce evidence that the defendant committed a sexual crime against another individual subsequent to the crime for which he was being tried. We hold that the evidence was erroneously admitted and that its admission prejudiced the defendant and requires a new trial.

The State introduced evidence which tended to show that Lisa Burton was assaulted on 19 February 1982. Burton testified that she was working at the Old Arlington Dry Goods Store in Greensboro on that date. At approximately 1:00 p.m. she was alone in the store with the front and back doors locked. At that time she unlocked the back door and went outside to walk her dog. While outside she was approached by a man she later identified as the defendant. He asked her about the store and she tried to get him to leave and come back when the store was open. He then showed her a magazine page which contained a picture of

a naked woman. Burton tried to get back into the store and lock the door, but the defendant forced his way in before she could close the door. She tried to get him to leave, but he told her that "he was going to do it and that [she] wanted it." He grabbed her and, as she tried to push him away, he produced a long kitchen knife with a wooden handle. The defendant then forced Burton into the bathroom, pulled her pants down around her ankles and ordered her to lie on the floor. He then told her not to move and left the bathroom, closing the door and "clicking" the doorknob from the outside. Burton was not sure whether the door could be locked from the outside.

After a brief time, the defendant returned to the bathroom with the knife still in his hand. The defendant lowered his pants and then performed cunnilingus on Burton against her will. He then rubbed his genitals against her genitals until he ejaculated. He did not penetrate Burton. He then wiped Burton and the floor with a hand towel. He ordered her to get dressed and, according to Burton, said "I didn't hurt you, I was gentle with you." He then left the bathroom, closing the door behind him. Burton heard him moving about in the store and waited fifteen to twenty minutes before she left the bathroom and ran to a nearby office and called the police. She left the bathroom at approximately 1:30 p.m.

Burton testified that prior to the attack her handbag with her wallet was on a stool behind the cashier's counter at the front of the store. She returned to the store with the police about seventy minutes after the attack. She found her purse but her wallet which contained thirty dollars and some credit cards was missing.

Burton identified the defendant in court. Previously she had picked a photograph of the defendant out of approximately fifty photographs that she was shown. She also had identified the defendant from among thirty to forty men seated in the Guilford County Courthouse on 24 May 1982.

Howard Stone, a witness for the State, testified that he worked doing odd jobs for the owner of the Old Arlington Dry Goods Store. On 19 February 1982, he was putting the garbage cans out behind the store when he saw the defendant coming out of the store. He had seen the defendant three or four times before near the store and had previously spoken to him. The

defendant saw Stone and left quickly without speaking to him. Stone identified the defendant in court and from a photographic lineup.

Janette Faye Davenport also testified for the State. She testified that she was living alone in an apartment in Greensboro on 16 April 1982. At approximately 1:00 a.m. on that morning, Davenport was awakened by someone in her bedroom. It was dark but she could see a figure standing over her and the man told her to take off her clothes. She later identified this man as the defendant. After she removed her night clothes the man forced her to perform fellatio. He then tried to have intercourse with her but was unable to penetrate her. He forced her to perform fellatio again after which he succeeded in having intercourse with Davenport. He then unsuccessfully attempted anal intercourse. At one point the assailant grabbed Davenport and something on his knuckle cut her neck. The attacker raped her again and forced her to perform fellatio a third time until he ejaculated.

During the entire attack the man brutally slapped Davenport and used obscenities to verbally abuse her. He repeatedly told her that he was going to kill her before he left, although she had not yet seen a weapon. He also asked her for money and she told him that she had seven or eight dollars, but he apparently did not take any money.

After the attack Davenport tried to run out of the apartment. The attacker caught her in the kitchen and the two fought. The attacker shoved her back onto the dining room table. Davenport managed to kick the front door open and began screaming, but he pulled her back into the apartment. He again said that he was going to kill her and, for the first time, she saw that he had a knife. He made a motion with the knife which, according to Davenport, would have stabbed her had she not moved. She stopped struggling and he again said he would kill her before he left. Somehow she was able to get free. She ran out the front door and banged on a neighbor's window yelling for someone to help her. As a neighbor turned on her light, the attacker walked out of Davenport's apartment and said something to the effect of "I'll damn well help you."

The testimony of the defendant and his witnesses tended to show that he was not in Greensboro on 19 February 1982 and that

he did not attack Burton. The defendant stated that he was living in Winston-Salem and that he had never seen Howard Stone before the trial.

The testimony of Davenport was offered by the State for the sole purpose of identifying the defendant as the man who attacked Burton. The evidence was introduced over the defendant's objection and after arguments by both the defendant and the State. The defendant contends that the admission of Davenport's testimony into evidence was prejudicial error. We agree.

The general rule is that the State may not present evidence that the defendant committed other crimes distinct, independent, or separate from the offense for which he is being tried. *State v. Freeman*, 303 N.C. 299, 278 S.E. 2d 207 (1981); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). "This is true even though the other offense is of the same nature as the crime charged." *State v. McClain*, 240 N.C. at 173, 81 S.E. 2d at 365.

In *McClain*, this Court, through Justice Ervin, enumerated several exceptions to this general rule. The fourth exception, apparently relied upon by the State to support the admissibility of Davenport's testimony, is as follows:

> Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged.

State v. McClain, 240 N.C. at 175, 81 S.E. 2d at 367.

Assuming, *arguendo*, that the defendant was not definitely identified as the perpetrator of the crime charged, the circumstances of the two crimes must still be such as to "tend to show that the crime charged and another offense were committed by the same person" before the evidence will be admissible. *Id.* Therefore, before this exception can be applied, there must be shown some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both crimes. *See e.g., State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982); *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976); *State v. McClain*, 282 N.C. 357, 193 S.E. 2d 108 (1972). To

allow the admission of evidence of other crimes without such a showing of similarities would defeat the purpose of the general rule of exclusion. *See State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

In the present case, while there were some similarities between the two crimes, the differences were more numerous and of greater significance. The two attacks were similar in that both were sexual assaults on women who were approximately the same age, twenty-seven years old and thirty-one years old. The age of the victims in this case is not as significant as it could be if the victims were particularly young or old. *See State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982). Both crimes involved oral sex, although one was fellatio and the other was cunnilingus. In each attack the assailant displayed a knife. While both attacks occurred in Greensboro within a two-month period, time and place are more relevant if the crimes occur within a short period of each other and a closer proximity than simply the same city. *See State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976); *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974).

While there are some similarities as outlined above, the differences in the two attacks are more significant. One attack occurred during the day at a business while the other victim was attacked at night in her apartment. The Davenport attacker repeatedly threatened to kill the victim before he left while the attack on Burton did not involve any threats. Davenport was continually brutally slapped and her assailant attempted to stab her. Burton was never struck by her attacker and, although he held a knife, he did not use the weapon in any manner other than to display it to her. In the attack on Davenport, the assailant continually used profanity and verbally abused the victim. In the attack for which the defendant was being tried, the assailant used no such language or verbal abuse. The attack on Davenport involved repeated rapes, acts of oral sex and attempted anal sex. The attack on Burton consisted of one act of oral sex and an attempted rape. The attack on Davenport culminated in a fight during which her assailant tried to stab her and concluded when she broke free and ran naked from her house. Burton's attack culminated with the assailant calmly telling her that he had not hurt her, asking her not to tell the police and leaving her in the unlocked bathroom.

While this Court has been "very liberal in admitting evidence of similar sex crimes," *State v. Greene*, 294 N.C. 418, 423, 241 S.E. 2d 662, 665 (1978), the evidence cannot be admitted unless it falls within an exception to the general rule of exclusion. "Since evidence of other crimes is likely to have a prejudicial effect on the fundamental right of the accused to a fair trial, the general rule of exclusion should be strictly enforced in all cases where it is applicable." *State v. McClain*, 240 N.C. at 176, 81 S.E. 2d at 368. In light of the limited similarities between the two crimes, we hold that the evidence of the attack on Davenport should have been excluded.

Having determined that the evidence was improperly admitted, we must now examine whether the error in admitting the evidence was prejudicial to the defendant. G.S. 15A-1443(a), which is controlling on this issue, provides:

> A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

The two crimes in the case *sub judice* did not present such distinctly similar facts or actions by the assailants as to provide a reasonable inference that the same person committed both offenses. Given the graphic description by Davenport of an attack far more brutal than the crime for which the defendant was being tried, it would appear that the testimony tended "to inflame the minds of the jurors against [the defendant] and to preclude that calm and impartial consideration of [his] case to which [he] was entitled." *State v. McClain*, 240 N.C. at 177, 81 S.E. 2d at 368. We hold, therefore, as we did in *McClain*, that because of the prejudicial effect of the error the defendant is entitled to a new trial. *See also State v. Austin*, 285 N.C. 364, 204 S.E. 2d 675 (1974); *State v. Whitney*, 26 N.C. App. 460, 216 S.E. 2d 439 (1975).

[2] One final issue raised by the defendant on appeal needs to be addressed. The defendant assigns as error the ruling by the trial

court that allowed Burton to testify, over objection, that no one was in the building other than she and the defendant. We hold that this assignment is without merit.

In regard to the missing wallet and the charge of robbery with a dangerous weapon, Burton was asked, "Was there anyone else in there besides you and the defendant?" Over the defendant's objection, she answered that there was not. The defendant contends that this question was improper because it required the witness to give an impermissible opinion. As we stated in *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E. 2d 178, 187 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3210 (1976):

> This Court has long held that a witness may state the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." Such statements are usually referred to as shorthand statement of facts.

(Quoting *State v. Skeen*, 182 N.C. 844, 845-46, 109 S.E. 71, 72 (1921)). *See also State v. Jones*, 291 N.C. 681, 231 S.E. 2d 252 (1977); *State v. Nichols*, 268 N.C. 152, 150 S.E. 2d 21 (1966). The trial court did not err by allowing Burton's testimony.

Based on the court's prejudicial error in allowing the State to present evidence that the defendant committed a subsequent unrelated crime, we order that the defendant be given a new trial.

New trial.

Justice MEYER dissenting.

I respectfully dissent from the majority's conclusion that defendant is entitled to a new trial for error in allowing Ms. Davenport to testify that defendant committed a similar sexual attack upon her.

The majority's analysis on this issue acknowledges that "this Court has been 'very liberal in admitting evidence of similar sex crimes,' *State v. Greene*, 294 N.C. 418, 423, 241 S.E. 2d 662, 665 (1978)." Having thus so stated, and having, of necessity, admitted

to numerous striking *similarities* between the two crimes, the majority chooses in unprecedented fashion to gloss over these similarities and to concentrate rather on the *differences* in the two attacks, which differences it characterizes as "significant." Our case law does not support this method of analysis.

Admittedly, an analysis to determine similarities necessarily entails a consideration of differences. Under our settled case law the focus is on the *similarity* of circumstances of the two crimes which *tends* to identify the defendant as the perpetrator of the crime for which he is being tried. If the evidence of the circumstances of the other crime or act reveals both striking similarities and "significant differences," is it admissible? The answer is "yes," *if*, on balance, the similarities tend to identify the defendant as the perpetrator of the crime which is the subject of the trial.

In *Greene*, defendant picked up the prosecuting witness, Ms. Rutherford, on the street, took her to a wooded area and raped her. Earlier that same day defendant, posing as a painter, gained entrance to the apartment of Ms. Elerick, forced her at knifepoint to remove her clothes, and attempted sexual intercourse with her. This Court held that:

> Since both victims described defendant's physical appearance and the clothing that he wore on the afternoon of 3 May 1976, evidence of the offenses committed against Ms. Rutherford would have been admissible in the case charging assault with intent to commit rape upon Mrs. Elerick for the purpose of establishing defendant's identity as her assailant.

Id. at 423, 241 S.E. 2d at 665.

In *State v. Freeman*, 303 N.C. 299, 278 S.E. 2d 207 (1981), the prosecuting witness, Ms. Whitman, discovered the defendant standing nude in her bathroom. He committed several acts of oral sex upon her, raped her, and masturbated in front of her. Defendant challenged the admissibility of testimony by another witness, Ms. Walters, that defendant had been seen standing naked behind her house on more than forty occasions and that he would sometimes "abuse himself" in her presence. Justice Exum, writing for the majority, held that this evidence was admissible:

> We think the testimony of Ms. Walters was probative of this question. It did tend to identify defendant as the perpetrator of the crimes against Ms. Whitman. This is so because the circumstances of the crimes charged and those of the offenses observed by Ms. Walters tend to show that both were committed by the same person. The victim, Ms. Whitman, testified that when she first observed her assailant he was standing naked in her bathroom. After he raped her he masturbated in her presence. Ms. Walters testified that she had on numerous occasions observed defendant on her premises in her presence standing naked and that on some of these occasions defendant would masturbate.

Id. at 302, 278 S.E. 2d at 209.

Had the Court in *Freeman* adopted today's majority's new test of "significant differences" a different result would have been compelled. However, the *Freeman* Court properly emphasized the similarities between the two crimes, *i.e.*, that defendant on both occasions appeared naked and masturbated.

In *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982), defendant came out of a parking deck, accosted the eighteen year old prosecuting witness, Ms. Martin, on the street. Threatening her with a knife, he dragged Ms. Martin into an alley. He demanded that she "give [him] what [he] want[ed]," and that she have oral sex with him. Defendant lay on top of Ms. Martin, tried unsuccessfully to insert his penis into her vagina, and finally reached a climax while lying on top of her. A month after this incident, defendant came out from a parking lot and accosted fifteen year old Porshe Mosely on a street, dragged her behind some apartments and, holding a knife to her throat, exposed his penis, demanding that "if [she] didn't give him some he was going to kill [her]." Defendant then began dragging Ms. Mosely to a nearby church field at which point she called to a friend for help and escaped. This Court, in an opinion authored by Justice Mitchell, held that Ms. Mosely's testimony was admissible for purposes of identifying the defendant as the perpetrator of the attack against Ms. Martin, noting the following similarities: (1) In each case the perpetrator came from a parking area in the vicinity of a church and grabbed a teenage woman on the public streets; (2) in each case the perpetrator held a knife on the victim and proceeded to

drag her to a secluded area from which he had more than one route of escape; and (3) the manner in which the perpetrator in each situation exposed himself to the young woman while holding a knife on her as well as the manner of his demands that they commit sexual acts with him were substantially the same. *Id.* at 224, 287 S.E. 2d at 839.[1] The Court did not note differences, significant or otherwise, between the two attacks.

In the case *sub judice,* not only are the similarities between the two crimes more numerous than in *Greene, Freeman,* or *Leggett,* but they point unerringly to the fact that both crimes were committed by the same person. It is to these similarities, both in number and significance, to which this Court should more properly refer in determining whether Ms. Davenport's testimony was properly admissible:

(1) The victims in both attacks were approximately the same age—i.e., Lisa Burton was 27 years old at the time of trial, and Ms. Davenport was 31 years old at the time of trial.

(2) The sexual attacks on both women occurred inside buildings which were under the control of the victims, in which the victims were alone at the time of the attacks, and in which the attacker entered without invitation.

(3) In both attacks, the attacker wanted or needed and, therefore, forced the victim to engage in oral sex prior to intercourse or attempted intercourse.

(4) In both attacks, the attacker used a knife as a weapon to gain control of the victims after the victims pushed him away.

(5) In both attacks, the attacker instilled the fear of death in his victims.

(6) In both attacks, the attacker sought the victims' money.

(7) Both attacks occurred in Greensboro within less than a two month period.

1. While the defendant in *Leggett* later admitted from the stand that he was then serving a sentence for the other crime, that circumstance was not considered in determining the admissibility of Ms. Mosely's testimony.

I would vote to affirm defendant's conviction.

Chief Justice BRANCH and Justice COPELAND join in this dissent.

RONDA JOY WILLIAMS KING v. SANDRA HUDSON ALLRED, LLOYD G. HARZE AND NU-CAR CARRIERS, INC.

No. 93A83

(Filed 9 August 1983)

Automobiles and Other Vehicles § 87.8— truck improperly parked on highway—automobile driver intoxicated—no insulating negligence

In an action to recover for injuries to a passenger in an automobile which struck a truck parked on the highway at night, the negligence of the truck driver in parking on the traveled portion of the highway and in failing to mark the parked truck with lights or flares was not insulated as a matter of law by the negligence of the driver of the automobile in driving while intoxicated. G.S. 20-134; G.S. 20-16(a).

Justice MARTIN dissenting.

APPEAL by plaintiff, pursuant to G.S. 7A-30(2) of the decision of the Court of Appeals (*Judge Hill*, with *Judge Johnson* concurring, and *Judge Arnold* dissenting) reported at 60 N.C. App. 380, 299 S.E. 2d 248 (1983). The Court of Appeals affirmed the order of *Kivett, J.*, granting summary judgment for defendant Harze and his employer Nu-Car Carriers, Inc., and dismissed with prejudice the plaintiff's action against these two defendants.

A motion for summary judgment is decided by the trial court upon a review of the pleadings, depositions, answers to interrogatories, admissions and affidavits presented in the case. Rule 56 of the Rules of Civil Procedure; *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). In this case the evidence reveals that the plaintiff, Ronda Joy Williams King and one of the defendants, Sandra Hudson Allred, left Ms. Allred's home in Trinity, North Carolina and drove to a bar in Greensboro. While the two women were at the bar they drank some beer. Sometime around 2:00 a.m. they left the bar intending to return to Ms. Allred's home in Trinity. According to defendant Allred both women were intoxicated when they left the bar in Greensboro.

While en route from Greensboro to Trinity the defendant Allred drove her 1974 Pontiac automobile in a southerly direction along rural paved road 1419, which is a service road leading to Interstate 85. Ms. Allred stated that the road was 36 feet wide and straight except for one curve approximately 500 feet prior to the point of impact and that she was driving 45 M.P.H. at all times. Ms. Allred also stated that as she drove down rural road 1419 she saw an approaching vehicle with bright lights; that the night was dark and there were no other lights on the road. Ms. Allred stated that she saw the defendant's truck parked in her lane of travel only "a second or two" before the collision. There were no lights on the truck, no flares on the roadside, and no other lights which might have indicated to an approaching motorist that a vehicle was stopped in the road. The time of the accident was estimated to be 2:30 a.m.

In an affidavit made several months after the accident Ms. Allred stated that the plaintiff, Ms. King, freely entered her car for the purpose of receiving a ride to her automobile. In addition Ms. Allred stated "at the time of the accident, I was under the influence of intoxicants and I did not see the truck in time to avoid colliding with it" and "that she was unable to operate an automobile in a careful and prudent manner. . ." The investigating officer stated that although he detected the odor of alcohol on Ms. Allred's breath he did not believe she was under the influence of alcohol at the time of the accident.

All defendants entered motions for summary judgment. The trial court granted the motions made by defendant Harze and defendant Nu-Car Carriers, Inc. but denied a similar motion made by defendant Allred. The reasoning of the trial court was that the negligence of Ms. Allred intervened and insulated the negligence of defendants Harze and Nu-Car Carriers, Inc. In short the trial court held, and the Court of Appeals agreed, that the negligence of Ms. Allred was the sole proximate cause of plaintiff's injury. Plaintiff appealed from the decision of the Court of Appeals as a matter of right in light of the dissenting opinion.

Raymond A. Bretzmann of Bretzmann, Brinson and Bruner for the plaintiff-appellant.

G. Marlin Evans of Nichols, Caffrey, Hill, Evans and Murrelle for the defendants Harze and Nu-Car Carriers, Inc.

COPELAND, Justice.

The sole issue before us is whether the trial court properly granted summary judgment for defendants Harze and Nu-Car Carriers, Inc., which dismissed with prejudice the plaintiff's claims against these defendants. We hold that the trial court erred in granting these defendants' motions for summary judgment.

Generally, issues arising in a negligence case are not susceptible to summary adjudication. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). "It is only in exceptional negligence cases that summary judgment is appropriate. (Citations omitted.) This is so because the rule of a prudent man (or other applicable standard of care) must be applied, and ordinarily the jury should apply it under appropriate instructions from the Court." *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E. 2d 189, 194 (1972). In this case, as in all summary adjudications, the moving party may prevail upon his motion only if he establishes that there is no triable issue of fact. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). In addition, factual inferences arising from the evidence must be drawn against the moving party. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). In the case *sub judice* there is a triable issue of fact as to the proximate cause of the collision and the resulting injury to the plaintiff.

The facts of this case reveal the presence of two negligent groups, (1) defendant Harze and his employer, defendant Nu-Car Carriers, Inc. and (2) defendant Allred. When the defendant Harze parked the truck owned by Nu-Car Carriers, Inc., on the portion of the highway used for travel without displaying any lights or flares whatsoever he violated G.S. 20-134 which is negligence *per se. Barrier v. Thomas and Howard Co.*, 205 N.C. 425, 171 S.E. 626 (1933). In addition it is a violation of G.S. 20-161(a), to leave a vehicle on the main traveled portion of the highway beyond municipal corporate limits unless it is impossible to move the vehicle due to a breakdown. Defendant Harze also violated G.S. 20-161(a) and such violation is negligence *per se. Hughes v. Vestal*, 264 N.C. 500, 142 S.E. 2d 361 (1965). The negligence of defendant Harze is imputed to defendant Nu-Car Carriers, Inc., since agency is admitted in the pleadings. *Jackson v. Mauney*, 260 N.C. 388, 132 S.E. 2d 899 (1963); *Dowdy v. R.R.*, 237 N.C. 519, 75 S.E. 2d 639 (1953). The

second negligent party in this case is defendant Allred who admits to driving her vehicle while under the influence of intoxicants which prevented her from operating the automobile in a careful and prudent manner. This act is negligence *per se*. *Watters v. Parrish*, 252 N.C. 787, 115 S.E. 2d 1 (1960).

Conceding that both sets of defendants were negligent *per se* in their actions, the Court of Appeals held, as did the trial court, that the negligence of defendant Allred was the sole proximate cause of the collision and thereby insulated from liability the negligence of defendants Harze and Nu-Car Carriers, Inc. In short, the Court of Appeals held that no collision would have occurred but for the negligence of defendant Allred. The doctrine of insulating negligence and the criteria for determining its application apparently is composed of two tests. In the first test the court views the collision from the position of the original negligent actor. Chief Justice Stacy noted in *Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808 (1940) that, "[t]he test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury." 217 at 89, 6 S.E. 2d at 812. In the second test the Court views the collision from the position of the second or intervening negligent party. In *Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88 (1938) Chief Justice Stacy said, in citing *Kline v. Moyer*, 325 Pa. 357, 191 A. 43 (1937), as setting out a practical statement of the rule of insulating negligence that, " 'where a second actor has become aware of the existence of a potential danger created by the negligence of an original tortfeasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability because the condition created by him was merely a circumstance of the accident and not its proximate cause.' " 213 N.C. at 44, 195 S.E. at 90.

Although this Court has applied two distinct tests for determining whether the negligence of one party should be excused because of the intervening negligence of another, there is a common thread which weaves its way through both of Chief Justice Stacy's comments on the doctrine of insulating negligence. The question is not when should the second actor carry the entire burden but when should the first actor be totally relieved of all

liability. The common thread in these two tests is foreseeability. Under the first test as set out in *Butner v. Spease, supra*, the first actor is relieved of all liability because he could not be expected to foresee the subsequent intervening negligent act and resulting injury. Under the second test set out in *Powers v. Sternberg, supra*, the first actor is free of liability because he could not be expected to foresee that the second actor would ignore the dangerous conditions created by the first actor.

In the case *sub judice* the original negligent party, Harze, personally could have foreseen the negligence of the defendant Allred and the resultant collision. Likewise, there is nothing in the record which suggests that the defendant Allred became aware of the dangerous conditions created by the negligence of defendant Harze in time to avoid the accident. In *Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88 (1938) Chief Justice Stacy, in citing *Kline v. Moyer, supra*, stated, " 'where, however, the second actor does not become apprised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tortfeasors are contributing causes. . . .' " 213 N.C. at 44, 195 S.E. at 90. The evidence presented before the trial court in this case does not resolve a crucial question of fact, to-wit, whether a reasonable and prudent person traveling south along rural road 1419 at 2:30 a.m., who encountered an approaching vehicle with bright lights, would have observed the unlighted truck in time to avoid colliding with it. The question of what was the proximate cause of the collision can be decided in one of three ways under the facts in this case: (1) that the negligence of defendant Allred was the sole proximate cause, (2) that the negligence of defendant Harze was the sole proximate cause and (3) that the negligence of all the defendants combined and were contributing proximate causes of the collision.

It is not enough to establish liability if all that can be shown is that an actor was negligent. There must be a showing or determination of proximate cause. Justice, later Chief Justice, Sharp wrote in *Atkins v. Moye*, 277 N.C. 179, 176 S.E. 2d 789 (1970) that, "unquestionably a motorist is guilty of negligence if he operates a motor vehicle on the highway while under the influence of intoxicating liquor. Such conduct, however, will not constitute either actionable negligence or contributory negligence unless—like any

other negligence—it is causally related to the accident. Mere proof that a motorist involved in a collision was under the influence of an intoxicant at the time does not establish a causal relation between his condition and the collision." (Citations omitted.) 277 N.C. at 186, 176 S.E. 2d at 794. Even though a motorist must exercise ordinary care when driving at night, the doctrine of insulating negligence was "not designed to require infallibility of the nocturnal motorist, or to preclude him from recovery of compensation for an injury occasioned by collision with an unlighted obstruction whose presence on the highway is not disclosed by his own headlights or by other available lights." Speaking through Justice Ervin in *Thomas v. Motor Lines*, 230 N.C. 122, 132, 52 S.E. 2d 377, 383-384 (1949).

Under the facts of this case we cannot say as a matter of law that the negligence of the defendant Allred was the sole proximate cause of the collision which resulted in injury to the plaintiff. The statements made by defendant Allred clearly establishes that she was negligent in operating her automobile. Ms. Allred's affidavit states in part:

> (A)t the time of the accident, I was under the influence of intoxicants and I did not see the truck in time to avoid colliding with it; . . . Just before the accident, this affiant was intoxicated to the extent that she was unable to operate an automobile in a careful and prudent manner or keep it under proper control.

Although this statement settles the issue of her negligence it does not determine as a matter of law the causal relationship between her negligence and the accident. The facts simply do not preclude a finding by the jury that the defendants', Harze and Nu-Car Carriers, Inc., negligence was *a* proximate cause or *the* sole proximate cause of the collision. For these reasons summary judgment was not proper in this case.

We, therefore, reverse the ruling of the Court of Appeals and remand this case to that court for remand to Superior Court, Guilford County for trial.

Reversed and remanded.

Justice MARTIN dissenting.

I dissent. The trial judge granted summary judgment in favor of defendants Harze and Nu-Car Carriers, Inc. Defendant Allred's motion for summary judgment was denied; however, that ruling was not before the Court of Appeals and has not been presented to this Court. The Court of Appeals affirmed the dismissal of plaintiff's action against Harze and Nu-Car Carriers, Inc.

The result reached by the Court of Appeals was correct, and I vote to affirm. The Court of Appeals held that the trial court ruled "that the negligence of Allred insulated the negligence of Harze and Nu-Car Carriers, Inc."

In this case all of the defendants were negligent as a matter of law. Allred was negligent in operating her car while intoxicated. Harze and Nu-Car Carriers, Inc. were negligent in parking the truck in violation of N.C.G.S. 20-134. The question of whether Allred's negligence insulated the negligence of Harze and Nu-Car Carriers, Inc. was proper for disposition in the summary judgment hearing. There was no genuine issue as to any material fact before the trial court. *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972).

All the evidence shows that both plaintiff and her host driver, Allred, were intoxicated at the time of the collision. The majority, with understandable but undue restraint, states that the two women "drank some beer." In my view of the record, a more accurate statement is that they were completely soused. The record shows:

> State whether you [Allred] or Ronda Joy Williams King had consumed any alcoholic beverages or taken any druges [*sic*] or medication within eight (8) hours prior to said occurrence, the place where the same were obtained, and the nature and the amount thereof, and the time last quantity was ingested.
>
> ANSWER: Yes, at Lounge; beer; we were both intoxicated. We had been together all evening.
>
> * * * *
>
> Q. Mrs. King, are you aware of the fact that Sandra Allred has filed in this case a statement under oath that both

you and she were intoxicated at the time this accident occurred?

A. Do I know that she has said that?

Q. Yes.

A. Yes, sir.

Q. Do you agree that that's true?

A. That we were both drinking?

Q. That you were both intoxicated?

A. Yes, sir.

* * * *

SANDRA HUDSON ALLRED, being first duly sworn, deposes and says:

. . . [T]his affiant and Ronda Williams (now Ronda Williams King) drank beer at the lounge and both of them had consumed beer together before they ever went to the lounge; that when they decided to leave the lounge to go back to their homes in High Point, they were both very intoxicated; that Ronda Williams could have spent the rest of the night at the lounge or arranged for other transportation to her home, but she walked to this affiant's automobile and got into the passenger's seat of the automobile on her own free will; that after she got in the automobile, she leaned back and closed her eyes, as if she were dozing or asleep; that from the time she got into the automobile until the time of the accident, she made no statement to me about the manner in which I was driving the automobile; at the time of the accident, I was under the influence of intoxicants and I did not see the truck in time to avoid colliding with it; on the other occasions Ronda and this affiant had left their homes in High Point and gone to Greensboro for the evening, where they consumed beer and got intoxicated, and this affiant drove the automobile back to their homes in High Point, and on those occasions, the plaintiff voluntarily got into the automobile and rode back to High Point with this affiant and on those occasions they did not have an accident. Just before

> the accident, this affiant was intoxicated to the extent that she was unable to operate an automobile in a careful and prudent manner or keep it under proper control.

All the evidence shows that not only was defendant Allred intoxicated while she was driving the car, she was intoxicated to such an extent that she could not operate the car in a careful and prudent manner. Allred was negligent as a matter of law. *Watters v. Parrish*, 252 N.C. 787, 115 S.E. 2d 1 (1960).

I find this case to be controlled by *Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88 (1938). In *Powers*, plaintiff's decedent was riding as a passenger in a car operated by one Bedenbaugh. The car collided with a truck negligently parked on the highway. There was ice on the highway and Bedenbaugh knew the road was slick. Bedenbaugh had consumed some alcoholic liquor. He struck the parked truck with such force that it was knocked several feet, his car was demolished and plaintiff's decedent instantly killed. This Court, through Chief Justice Stacy, held that the negligence of defendants in parking the truck on the highway was insulated by the active negligence of Bedenbaugh.

> There are a few physical facts which speak louder than some of the witnesses. The force with which the Bedenbaugh car ran into the truck, with its attendant destruction and death, establishes the negligence of the driver of the car as the proximate cause of the injury. . . .
>
> . . . .
>
> The parking of the truck, if a remote cause, was not the proximate cause of the injury. . . . The conduct of Wallis would have produced no damage but for the active intervening negligence of Bedenbaugh. This exculpates the defendants.

Id. at 43-44, 195 S.E. at 89 (citations omitted). *See McNair v. Boyette, supra; Rowe v. Murphy*, 250 N.C. 627, 109 S.E. 2d 474 (1959); *Basnight v. Wilson*, 245 N.C. 548, 96 S.E. 2d 699 (1957); *Skinner v. Evans*, 243 N.C. 760, 92 S.E. 2d 209 (1956); *Loving v. Whitton*, 241 N.C. 273, 84 S.E. 2d 919 (1954).

So here, as in *Powers v. Sternberg*, the physical facts establish the negligence of Allred as the sole proximate cause of

plaintiff's injuries. Allred admitted that she "was under the influence of intoxicants and I did not see the truck in time to avoid colliding with it" and that "[j]ust before the accident, this affiant was intoxicated to the extent that she was unable to operate an automobile in a careful and prudent manner or keep it under proper control."

The majority states that Harze "personally could have foreseen the negligence of the defendant Allred." A person using the highway is not bound to anticipate that another will be negligent. He may assume until the last moment that others will obey the rules of the road and drive in a reasonably prudent manner. *Loving v. Whitton, supra.*

Although I do not embrace all the language of the Court of Appeals opinion, particularly its reference to what Allred could have seen if she had not been intoxicated, the correct result was reached. The negligence of Allred insulated the negligence of Harze and Nu-Car Carriers in leaving the truck parked on the highway. *Powers v. Sternberg, supra.* I vote to affirm the Court of Appeals.

STATE OF NORTH CAROLINA v. PAUL WILSON BARE

No. 533A82

(Filed 9 August 1983)

1. **Criminal Law § 117.3— State's witness—failure to give special instruction regarding witness's testimony proper**

In a prosecution for murder, the trial court did not err in refusing defendant's request for a special instruction that the testimony of a State's witness should be carefully scrutinized if the jury found that the witness was testifying in return for special consideration from the police and prosecution since (1) there was no formal grant of immunity within the purview of G.S. 15A-1052(c), (2) the uncontroverted evidence at trial was that there was no "understanding or agreement" not to try the witness for murder or to reduce any charges or to recommend any sentence concessions as provided by G.S. 15A-1054(a), and (3) the instructions actually given revealed that the jury was made well aware that the witness's testimony was to be scrutinized closely.

2. **Criminal Law § 33— testimony of State's witness—not prejudicial**

The trial court did not commit prejudicial error by allowing the State's witness to testify that he began doing undercover work after seeing the ef-

fects of drugs on two people. The testimony did not relate either to the crime or to the defendant or the victim, and the witness was available and was subjected to protracted cross-examination so that the jury could evaluate his sincerity and demeanor and "weigh" his testimony.

APPEAL by defendant from a judgment of the Superior Court entered following his convictions of murder and kidnapping.

Defendant's trial began during the 1 June 1982 Session of Superior Court, ASHE County, before *Judge Donald Smith.* A jury found defendant guilty of first-degree murder and first-degree kidnapping. The jury recommended a life sentence for the first-degree murder conviction and defendant was sentenced to a concurrent term of 40 years for the kidnapping conviction. Under N.C.G.S. § 7A-27(a) (1981) defendant appeals his murder conviction to this Court as a matter of right; on 16 February 1983 this Court allowed defendant's motion to bypass review by the Court of Appeals of his kidnapping charge so that the convictions could be consolidated for review.

Rufus L. Edmisten, Attorney General, by George W. Boylan, Assistant Attorney General, for the State.

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

FRYE, Justice.

Defendant presents on appeal three issues to this Court. First, he contends that the trial court committed reversible error in refusing to instruct the jury to carefully scrutinize the testimony of a particular witness if it found that the witness was testifying in return for special consideration from the police and prosecution. Second, defendant contends that the trial court erred by allowing a State's witness to testify that he began doing undercover work after personally seeing the effect of drugs on two people, testimony defendant claims is not only irrelevant but also prejudicial. Finally, defendant argues that the trial court erred in denying his motion to prohibit death qualification of the jury, permitting the State to ask prospective jurors death qualification questions, and striking for cause those jurors opposed to the death penalty. We have carefully reviewed each of these issues and hold that no prejudicial error was committed. Defendant, therefore, is not entitled to a new trial.

I.

The State's chief witness and an eyewitness to the murder and kidnapping of the victim in this case, Lonnie Gamboa, was Joseph Eugene Vines. Before testifying to the events surrounding these crimes, Vines testified extensively about his background. He stated, in essence, that he makes his living traveling from city to city working as an undercover agent for various state and federal law enforcement agencies. It was this undercover work which Vines indicated brought him into contact on 20 December 1981 with two men, Gary Miller and "Red" Hattaway. After being introduced to Miller and Hattaway, Vines was told that he was "going to be doing some work with them so I could become part of their family."

The next day, Vines met Gamboa while he was sitting with Hattaway at a table in a Pizza Hut. At that time Hattaway told Gamboa that he owed him $120,000; Gamboa said he only owed Hattaway about $30,000. In addition, Hattaway asked Gamboa to tell him what happened to $380,000 worth of drugs that had come into town and for which he had not received any money. Hattaway also asked Gamboa if he had any property which he could sign over in order to help pay back the money he owed. Gamboa said he had two acres of land, a van and a trailer, the titles to which he would sign over to Hattaway.

On the morning of 23 December 1981, Hattaway called Vines and gave him the name which Gamboa was to use in transferring the titles to the various properties. In addition, he told Vines to tell Gamboa to bring the transcript of the trial in which Gamboa and Miller testified. Hattaway told Vines he wanted to read the transcript to determine which of the two men had lied at trial.

Later that day Vines picked up Gamboa at his home and drove to a bar. Hattaway later arrived and the three men then left the bar, got into Hattaway's car and drove to the parking lot of another bar where they picked up Miller. At that point, Miller asked Gamboa "why he was telling lies" on him. Gamboa's hands were then taped together and Gamboa was put into the trunk of the car and told he was being taken to Virginia "to talk to the big man." The four men then drove to the Blue Ridge Parkway in two cars, turning off onto an old paved rural road. After driving a short distance they arrived at defendant's house and parked in

front of an old blue trailer nearby. Gamboa was let out of the trunk and handcuffed to a tree. Miller and Vines then went to a garage located behind the blue trailer and Hattaway introduced Vines to defendant, Paul Wilson Bare, for the first time.

Later that evening, Vines and Miller went to the tree to which Gamboa was handcuffed, uncuffed him, and the three went to the garage near Bare's home. Still later that evening, after conferring with Miller and Hattaway, Bare told Gamboa that he would have to go to the "big man's house." Bare then left the garage, returning a few minutes later with a white rag or towel. At that point, Bare told Gamboa that he was going to have to blindfold him because he did not want him to know where he lived "even though we are going through the back way, through the fence" presumably to get to the big man's house. Bare put the blindfold on Gamboa. Bare, Gamboa, Miller and Vines then got into a truck which Bare drove.

After driving 10 or 15 minutes, Bare stopped the truck. Vines helped Gamboa out of the truck; Bare then led the group up a little hill of small pines and seedlings. Bare headed for a fence; the group followed. Bare then took Gamboa by the arm and led him through a hole in the fence. Bare motioned to Vines with his shotgun for Vines to follow Gamboa. Just inside the fence Vines stated he saw a huge hole, a mine shaft. Miller motioned to Vines to push Gamboa into the hole. Vines did so but Gamboa did not fall all the way. Bare told Vines to help Gamboa out of the hole, giving him a six-foot long limb to do so. After Vines helped Gamboa out of the hole, Bare then motioned with his shotgun to Vines for him to shove Gamboa into the hole again. Vines did so. This time Gamboa apparently fell all the way down the hole. Bare then threw the six-foot tree limb into the hole. At that point, Vines testified that the following conversation took place:

A. Then Mr. Bare told us to pick up some rocks, couple of rocks apiece and throw them down the hole to make sure Mr. Gamboa wasn't hung up anywhere in the hole, which Mr. Miller and I did, we each threw two stones about this size.

Q. Is that about eight inches across?

A. Like river rocks, kind of oblong and round.

Q. What happened next?

A. As they went down it sounded like they hit a couple of times and sounded like they hit something that was tin and at that time Mr. Miller turned to Mr.—and said, 'That makes 22.' and Mr. Bare said, 'No, that's 23.'

Bare was found guilty of first-degree kidnapping and first-degree murder on the basis of premeditation and deliberation. During the sentencing phase of the trial, the jury found three aggravating circumstances: (1) that defendant had previously been convicted of a felony involving the use of violence to the person; (2) that the capital felony was committed while defendant was engaged in the commission of a kidnapping; and (3) that the murder was especially heinous, atrocious or cruel. The jury, however, recommended a life sentence after determining that they could not unanimously find beyond a reasonable doubt that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. Defendant was sentenced to life in prison for the murder conviction and a concurrent term of forty years for the kidnapping conviction.

A.

[1] We first consider defendant's contention that the trial court committed reversible error in refusing defendant's request for a special instruction to the jury that the testimony of Vines should be examined with great care if the jury found that Vines was testifying in return for special consideration from the police and prosecution. With respect to defendant's request for special instructions, the trial court noted:

> Mr. Siskind [defendant's attorney] asked that I instruct the jury as to the effect of witnesses having immunity or quasi-immunity and the court has refused because there is no evidence any witness has immunity from the State of North Carolina; the fact Mr. Vines testified he did not have immunity and could be indicted any time.

Defendant concedes that "[c]learly, the trial court was correct when it said that there had been no evidence of a formal grant of immunity." Accordingly, N.C.G.S. § 15A-1052(c) (1978), which requires the trial court to inform the jury of a grant of immunity and to "instruct the jury as in the case of interested witnesses,"

is not applicable.[1] However, defendant contends that because Vines had not been arrested or indicted in connection with the incident even though his own testimony indicated that he was guilty of murder, it is "crystal clear that the prosecutor had exercised his discretion under N.C.G.S. § 15A-1054 not to prosecute Vines at least in part upon the *understanding* that Vines would testify against Bare and others."[2]

It is only those special instructions which are supported by the evidence that must be given to the jury. *State v. Bock*, 288 N.C. 145, 158-59, 217 S.E. 2d 513, 522 (1975). The uncontroverted evidence at trial was that there was no "understanding or agreement" not to try Vines for murder or to reduce any charges or to recommend any sentence concessions as provided by N.C.G.S. § 15A-1054(a). Indeed, Vines testified as follows:

Q. Have you ever been promised anything else other than the Witness Protection Program for testimony you are giving here and participation in this case?

A. No sir I have not even been promised to put on Witness Protection; the case is still in Washington and still deciding if they are going to put me under witness protection. Not been promised anything by Mr. Chapman, Ashburn or anything else.

Q. So far as you know if they wanted to charge you today they could?

A. Yes sir.

Q. But they never said they wouldn't charge you, is that correct?

A. No sir, they didn't tell me they would not.

1. Specifically, N.C.G.S. § 15A-1052(c) provides as follows: "In a jury trial the judge must inform the jury of the grant of immunity and the order to testify prior to the testimony of the witness under the grant of immunity. During the charge to the jury, the judge must instruct the jury as in the case of interested witnesses. (1973, c. 1286, s. 1; 1975, c. 166, s. 27.)"

2. N.C.G.S. § 15A-1054(a) authorizes the prosecutor "when the interest of justice requires, . . . [to] exercise his discretion not to try any suspect for offenses believed to have been committed within the judicial district . . . upon the understanding or agreement that the suspect will provide truthful testimony in one or more criminal proceedings."

In addition, as the State points out, Thomas L. Chapman, a federal agent, testified with regard to the possible "indictment" of Vines as follows:

> Q. Well sir, isn't it true in order to get into the program, if Mr. Ashburn is the man who did it, whoever is in charge, have to first tell the government they will not be indicted for the crime which he was involved?
>
> A. No sir, that is incorrect, he could be put in the program if in fact at a later time he was going to be indicted.
>
> . . . .
>
> Q. Is it your testimony that no promise of immunity of any type have been given to Mr. Vines?
>
> A. That's correct.
>
> Q. And you discussed that with Mr. Ashburn and Mr. Waddell?
>
> A. That's correct.
>
> Q. And if any of the parties wanted to, who had the power and authority they could indict Mr. Vines at this time?
>
> A. It's my understanding he could be indicted.

We conclude, therefore, that the trial court did not err in refusing defendant's request for special instructions because the evidence did not support the giving of such an instruction. Nevertheless, the trial court gave the jury an extensive instruction on evaluating the credibility of interested witnesses and in so doing referred to Vines specifically:

> Now it may be that you will find that one or more of the witnesses who testified is what we call or refer to as an interested witness. Very simple, an interested witness is a witness who in some way is interested in the outcome of this case. In deciding whether or not to believe any witness who testifies you may take into account any interest that you find the witness has in the outcome of the case. If after doing that though you were to believe that witness either in whole or part you would treat then what you believe the same as you would treat any other evidence you might believe. Now as I

remember, but ladies and gentleman, you are required in your deliberations to take your recollection of the evidence, and not that of the court or the attorneys or any or all of us for that matter, but as I remember there was some evidence which tended to show the witness Vines, Joseph Vines, as I remember was an accomplice in the commission of the crimes charged in this case. There was also some evidence which tended to show that he was an informer or undercover agent for law enforcement purposes. But an accomplice is a person who joins with another in the commission of a crime. He may actually take part in the acts necessary to accomplish the crime or he may knowingly help or encourage another in the crime either before or during its commission. But ladies and gentleman, both informers or undercover agents and accomplices are considered by law to have an interest in the outcome of the case. Therefore you should examine every part of the testimony of Mr. Vines with the greatest care and caution. If after doing that though you were to believe his testimony either in whole or in part then you would treat what you believe the same as you would any other evidence that you might believe.

A comparison of the special instructions requested and the instructions actually given regarding Vines' testimony reveals that the jury was made well aware that Vines' testimony was to be scrutinized closely because, in one way or another, he was considered to have an interest in the outcome of this case. In sum, therefore, we find no error in the failure of the trial court to give the special instruction defendant requested.

B.

[2] Defendant also contends that the trial court committed prejudicial error by allowing Vines to testify that he began doing undercover work after seeing the effects of drugs on two people. On direct examination, Vines testified about his "undercover-type investigative work" as follows:

Q. What caused you to decide to go into this type of work?

MR. MARGER: Objection.

THE COURT: Overruled.

A. Before that I had been in Atlanta, Georgia, and I watched a small boy 12 years old throw his guts up from an overdose of junk—

MR. MARGER: Objection, motion to strike.

THE COURT: Motion to strike is denied.

Q. Anything else?

A. Yes sir, I had a good friend of mine, a guy gave her what she thought was mescaline—

MR. MARGER: Objection.

THE COURT: Sustained as to what someone else thought.

A. But he gave her STP.

MR. MARGER: Objection.

THE COURT: Sustained.

Q. Just describe what you yourself saw Mr. Vines.

A. She had left and went out to see somebody and we didn't see her again for two weeks, and when we found her she was walking around the streets in a sack and she's still in a mental institution today far as I know.

MR. MARGER: Objection.

THE COURT: Sustained as to what he does or doesn't know.

The defendant contends that the admitted testimony is irrelevant in that it does not tend to establish the probability or improbability of any fact in issue, *Rush v. Beckwith*, 293 N.C. 224, 231, 238 S.E. 2d 130, 135 (1977), and that its only effect was to "unfairly capture the sympathy of the jury while prejudicing the jury against the defendant, with a completely collateral matter." The defendant seeks a new trial, relying upon *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967); and *State v. Rinaldi*, 264 N.C. 701, 142 S.E. 2d 604 (1965).

The defendant's reliance upon *Johnson* and *Rinaldi* is misplaced. In *Johnson*, the admission of irrelevant testimony that

the victim was a disabled veteran combined with the trial court's failure to permit testimony of prior specific acts of violence by the deceased victim prevented the defendant from adequately presenting his defense of self-defense to a murder charge. In *Rinaldi* this Court granted a new trial to the defendant in a murder case because the court erroneously permitted testimony indicating that the defendant had attempted a homosexual act with the witness. The testimony was prejudicial under the well-established rule that evidence of a separate, independent crime by a defendant cannot be used to prove the crime for which he is currently being tried.

In *Johnson*, the challenged testimony related to the character of the victim of the crime; in *Rinaldi* the character of the defendant. Here the challenged testimony related neither to the victim of the crime nor defendant but instead to the witness—his reason or motive for entering a particular kind of work. In both *Johnson* and *Rinaldi* the challenged testimony was used by the prosecutor as evidence to prove the State's case—in *Johnson* to disprove defendant's defense of self-defense and in *Rinaldi* to show that the defendant was the type of person who would commit murder.

In contrast, the prosecutor in this case could not and did not use the challenged testimony to prove or disprove any element of the murder or kidnapping since the testimony did not relate to either crime or to the defendant or the victim. Assuming *arguendo*, however, that the testimony was irrelevant, it was not prejudicial. Vines was available and was subjected to protracted cross-examination so that the jury could evaluate his sincerity and demeanor and "weigh" his testimony. Under these circumstances, there is no "reasonable possibility" that the jury would have reached a different result if it had not heard this testimony. N.C.G.S. § 15A-1443(a) (1978).

C.

Finally, defendant contends that the trial court erred in denying his motion to prohibit death qualification of the jury, in permitting the State to ask prospective jurors death qualification questions, and in striking for cause those jurors opposed to the death penalty. In essence, defendant contends that although he received a life sentence, "the death qualifying" of the jury prior to the guilt phase resulted in a guilt prone jury thereby depriving

him of the right "to a fair trial, fair sentencing hearing, a jury chosen from a cross-section of the community, equal protection of the law and due process of law." Although defendant recognizes that this Court has decided this same issue against him in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980), he nevertheless urges us to re-examine our position. We decline to do so at this time. *See also State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243 (1982); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981).

In sum, therefore, we hold that defendant received a trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. SHEREE VONELLE SUDDRETH BYRD AND JOSEPH ALLEN BYRD

No. 159A83

(Filed 9 August 1983)

Homicide § 21.9; Parent and Child § 2.2— violation of child abuse statute—involuntary manslaughter—insufficient evidence

The State's evidence was insufficient for the jury to find that the death of defendant's 25-day-old child was proximately caused by defendants' violation of the child abuse statute, G.S. 14-318.2, and that defendants were thus guilty of involuntary manslaughter of the child, where the evidence showed only that the child died as a result of blunt trauma to the head and that the child could not yet sit up and therefore could not have caused the injuries to himself, but there was no evidence that the child was an example of the "battered child syndrome" so as to give the State the benefit of the inference that the injuries were intentionally inflicted by the child's caretakers; evidence that defendants' other child had suffered from the "battered child syndrome" could not furnish the basis for an inference that the injuries to the child in question were non-accidentally inflicted, and the evidence was insufficient to show that the child's injuries were inflicted "other than by accidental means"; the evidence raised only a suspicion or conjecture that defendants were responsible for the child's injuries since there were other adults living in the household who had the opportunity to inflict the injuries either accidentally or intentionally; and the evidence was insufficient to show that defendants "created or allowed to be created a substantial risk of physical injury" to the child.

APPEAL by defendants pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals, opinion by *Webb, Judge*, with

Hedrick, Judge, concurring and *Becton, Judge,* dissenting, 60 N.C. App. 624, 300 S.E. 2d 49 (1983), finding no error in the judgment entered by *Snepp, Judge,* at the 18 January 1982 Session of CALDWELL Superior Court.

Defendants Sheree Vonelle Suddreth Byrd and Joseph Allen Byrd were charged by indictments, proper in form, with the second-degree murder of their infant son, Jo Van Byrd. Each defendant entered a plea of not guilty and the cases were consolidated for trial. At the conclusion of the evidence the trial judge submitted the possible verdicts of guilty of involuntary manslaughter or not guilty.

At trial, the State offered evidence tending to show that on 25 January 1981, at about 7:40 a.m., Mr. and Mrs. Byrd and an unidentified male came to the Caldwell Memorial Hospital Emergency Room. Mrs. Byrd was carrying the body of her 25-day-old infant son, Jo Van Byrd. The child was dead and rigor mortis had set in. Both parents were very upset. The child was taken to the cardiac room where resuscitation efforts were made without success. It was the opinion of Dr. Abernathy, who was in charge at that time, that the baby had been dead for over an hour. Dr. Abernathy and the attending nurse did not observe any signs of trauma upon the child's body. Dr. Abernathy talked to Mrs. Byrd very briefly about the circumstances of the death. She told him that she had wakened at about 6:00 a.m. to feed the baby and noticed that he didn't breathe correctly. She thought at that time that milk might have been coming out of his nose. She also told the doctor that the baby was sleeping in a bed with her and her husband.

Mrs. Verna DeVane, a schoolteacher in Caldwell County, testified that she visited in the Byrd home on three occasions beginning around 2 January 1981. Although the house was cold, "the baby seemed to be fine, everything calm and peaceful." She stated that she had known Mrs. Byrd since she was a small girl and that Mrs. Byrd had a very good reputation in the community. She had only known Mr. Byrd for a few years and as far as she knew, his reputation was good.

Dr. John Bauer, qualified as an expert in pathology, testified that he performed an autopsy on the body of Jo Van Byrd on 26 January 1981. He observed no external trauma, but discovered a

hemorrhage under the scalp in the back of the head and a film of blood around the cover of the brain. He also noted a spinal cord deformity and concluded that the child died from a spontaneous rupture of the blood vessels beneath the arachnoid membrane.

Mr. H. H. Groome, Jr. testified that he was an attorney and represented the Caldwell County Department of Social Services. He stated that the Department had custody of another of defendants' children, YaVonka Byrd, and that the Department had denied return of custody or overnight visitation to the parents because of certain questions concerning Jo Van's death. Mr. Groome testified that he talked with defendants on 19 June 1981 concerning custody of YaVonka. Mrs. Byrd told him that defendants and Jo Van Byrd had been residing in the home of Mrs. Byrd's mother. Mrs. Byrd's brother and uncle also resided there. All of these persons were present in the home the night before the child's death. Mr. Groome further stated that Mrs. Byrd had told him that she and her husband went to bed at about 11:30 p.m. on the night before the child's death and that the baby slept in the bed with them. The baby was alive at 3:00 a.m. but at 6:30, Mrs. Byrd discovered that the child was not breathing and took him to the hospital. Prior to going to the hospital, her husband attempted mouth-to-mouth resuscitation on the baby without success.

Pursuant to a court order, the body of Jo Van Byrd was exhumed on 4 September 1981 and removed to Chapel Hill for further examination by Dr. John Butts of the Medical Examiner's Office.

Dr. Butts, a medical examiner and Senior Assistant Chief Medical Examiner for the State of North Carolina, was qualified as a medical expert in pathology. Dr. Butts testified that he noted a series of breaks in the first through the sixth ribs on the child's right side, which in his opinion had been broken approximately one to two weeks prior to the child's death. He also stated that in his opinion Jo Van Byrd's death could not have been caused by a vascular malformation. Dr. Butts found three areas of discoloration on the child's scalp. He testified that in his opinion the more severe bruise at the back of the head caused damage to the brain. He further testified that in his opinion the bruise was the result of "blunt trauma—force applied to the child's head or child's head

applied to some blunt object with force." In his opinion, Jo Van Byrd died as a result of "blunt trauma to the head."

Dr. Sarah Sinal testified that on 6 December 1978 she examined YaVonka Byrd, who was then one month old. She found a bruise over the child's right eye, bleeding in back of both eyes, and small healing lacerations on the lower right leg. There were also linear shaped scratches on the child's back and a bruise on her breastbone. There was bulging of the interior frontal area and a needle aspiration produced blood from the space between the skull and brain. There were no visible exterior bruises on the child's head.

On 10 May 1979, she talked to defendants concerning another examination of YaVonka. She advised them that her examination of the child disclosed bleeding on the brain as well as several fractured ribs. In her opinion, the brain injury was caused by trauma. Defendants stated to her that they were not aware of the injuries and that the child had only been in their custody for "a couple of weeks." The child was six months old at that time.

On 28 June 1979, the child was again examined by Dr. Sinal and this examination disclosed a deep bruise to the left side of the child's forehead. There were lesion blister-type injuries on the child's back from her shoulders to her buttocks. There were also scratches on the back and a deep bruising-type injury to the buttocks. The doctor further testified that in her opinion, YaVonka Byrd represented "an example of a Battered Child Syndrome."

At the conclusion of the State's evidence, each defendant moved for a dismissal and the trial judge denied the motions. Defendants offered no evidence.

Both defendants were convicted of involuntary manslaughter and appealed from judgments imposing upon each of them a prison sentence for a maximum term of ten years and a minimum term of eight years.

The Court of Appeals found no error, rejecting defendants' contention that there was insufficient evidence from which the jury could find that each of them intentionally violated G.S. 14-318.2(a) and that the violation was the proximate cause of Jo Van Byrd's death. Judge Becton agreed with the majority that defendants' motions to dismiss were properly denied, but found

prejudicial error in the district attorney's closing argument and in the admission of evidence tending to show that defendants' other child suffered from the "battered child syndrome."

Rufus L. Edmisten, Attorney General, by Nonnie F. Midgette, Assistant Attorney General, for the State.

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

W. C. Palmer for defendant-appellant Joseph Allen Byrd.

BRANCH, Chief Justice.

Each defendant assigns as error the trial judge's denial of their respective motions to dismiss at the close of the State's evidence.

G.S. 14-318.2 provides:

> (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the misdemeanor of child abuse.
>
> (b) The misdemeanor of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies, and is punishable as provided in G.S. 14-3(a).

This Court considered the above-quoted statute in *State v. Fredell*, 283 N.C. 242, 195 S.E. 2d 300 (1973). We there stated:

> This statute [14-318.2] provides for three separate offenses: If the parent by other than accidental means (1) inflicts physical injury upon the child, (2) allows physical injury to be inflicted upon the child, or (3) creates or allows to be created a substantial risk of physical injury.

Id. at 244, 195 S.E. 2d at 302.

Involuntary manslaughter is "the unlawful and unintentional killing of another human being without malice . . . which prox-

imately results from the commission of an unlawful act not amounting to a felony or not naturally dangerous to human life, or from the commission of some act done in an unlawful or culpably negligent manner, or from the culpable omission to perform some legal duty." *State v. Everhart*, 291 N.C. 700, 702, 231 S.E. 2d 604, 606 (1977). Thus, a violation of G.S. 14-318.2 proximately resulting in death would support a conviction of involuntary manslaughter.

Decision of the question presented by this assignment of error requires restatement of the often stated rule as to how evidence must be considered by a trial judge upon a motion to dismiss.

The trial judge must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. Exculpatory statements offered by the State are also properly considered by the court. 4 Strong's N.C. Index 3d, Criminal Law § 104. The question for the court is whether there is substantial evidence to support a jury finding that the offense charged in the bill of indictment was committed, and that the defendant was the perpetrator or one of the perpetrators of that offense. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971); *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). On the other hand, if the evidence so considered raises no more than a suspicion or a conjecture that the offense charged in the indictment has been committed or that the defendant committed it, then the evidence is not sufficient to carry the case to the jury. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971).

We note that in this prosecution the State apparently relied heavily upon the theory of the "battered child syndrome."

The landmark case in North Carolina on the "battered child syndrome" is *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). In *Wilkerson*, Justice Exum quoted with approval the following passage from *People v. Jackson*, 18 Cal. App. 3d 504, 507, 95 Cal. Rptr. 919, 921 (1971):

> A finding, as in this case, of the "battered child syndrome" is not an opinion by the doctor as to whether any particular person has done anything, but, as this doctor in-

> dicated, "it would take thousands of children to have the severity and number and degree of injuries that this child had over the span of time that we had" by accidental means. In other words, the "battered child syndrome" simply indicates that a child found with the type of injuries outlined above has not suffered those injuries by accidental means. This conclusion is based upon an extensive study of the subject by medical science. The additional finding that the injuries were probably occasioned by someone who is ostensibly caring for the child is simply a conclusion based upon logic and reason. Only someone regularly "caring" for the child has the continuing opportunity to inflict these types of injuries; an isolated contact with a vicious stranger would not result in this pattern of successive injuries stretching through several months.

295 N.C. at 570, 247 S.E. 2d at 911-12.

The "battered child syndrome" is simply a medicolegal term which describes the diagnosis of a medical expert based on scientific studies that when a child suffers certain types of continuing injuries that the injuries were not caused by accidental means. Upon such a finding, it is logical to presume that someone "caring" for the child was responsible for the injuries.

We have carefully examined the entire transcript of this case and find no medical testimony indicating that Jo Van Byrd was an example of the "battered child syndrome." Therefore, the State does not have the benefit of the permissible inferences arising from testimony that a child is an example of the "battered child syndrome," that is, that the injuries suffered were intentionally inflicted by the caretakers of the child. Thus, the prosecution must rely upon other evidence to prove a violation of G.S. 14-318.2 and to support a conviction of involuntary manslaughter.

An essential element of proof under the statute is a showing that the injuries suffered by the child were inflicted "by other than accidental means." Here, the only testimonial evidence concerning accidental injury came from Dr. Butts, who stated that in his opinion a 25-day-old child could not sit up, crawl or turn over. This evidence supports an inference that the child could not have accidentally caused the injuries to *himself.* This is not, however, tantamount to a statement that *another* person could not have, or

was unlikely to have, accidentally inflicted the injuries. There simply is no direct and clear evidence that Jo Van's injuries were inflicted "other than by accidental means."

It is true that the trial judge had before him evidence that another child of defendants, YaVonka Byrd, was hospitalized on 6 December 1978 at the age of one month for injuries remarkably similar to those suffered by Jo Van. Further, there was medical testimony that YaVonka was an example of the "battered child syndrome." This evidence, then, supports an inference that *YaVonka's* injuries were inflicted by other than accidental means.

This inference cannot, however, furnish the basis for an inference that *Jo Van's* injuries were nonaccidentally inflicted. Our rule is clear that:

> A basic requirement of circumstantial evidence is reasonable inference from established facts. Inference may not be based on inference. Every inference must stand upon some clear and direct evidence, and not upon some other inference or presumption. [Citations omitted.]

State v. Parker, 268 N.C. 258, 262, 150 S.E. 2d 428, 431 (1966), *quoting, Lane v. Bryan*, 246 N.C. 108, 112, 97 S.E. 2d 411, 413. *See also, State v. LeDuc*, 306 N.C. 62, 78, 291 S.E. 2d 607, 617 (1982).

Applying these legal principles to the facts here presented, it is clear that the jury may not infer that Jo Van's injuries were intentionally inflicted because there was evidence to support an inference that another child had been intentionally abused. Since we cannot build an inference upon an inference in order to establish an ultimate fact upon which guilt is premised, and since there is no direct evidence that the injuries were other than accidental, the State has failed to prove the crucial element of G.S. 14-318.2 that the injuries were inflicted "by other than accidental means."

Further, the evidence in this case raises only a suspicion or conjecture that defendants were those responsible for Jo Van's injuries. There were three other adults living in the Byrd household who had the opportunity to inflict the injuries, either accidentally or intentionally. Even though YaVonka was diagnosed as suffering from the "battered child syndrome," the circumstances surrounding her injuries do not, in our opinion,

support an inference that defendants were responsible for her injuries. This is so because the record is very cloudy as to who was "caring" for YaVonka at the time her injuries occurred. We also note that even if this evidence did raise an inference that defendants intentionally harmed YaVonka, for the reasons earlier stated, the jury could not from that inference further infer that defendants inflicted injuries upon Jo Van.

Finally, the evidence presented by the prosecution is insufficient to support a conviction under G.S. 14-318.2 on the basis that defendants "created or allowed to be created a substantial risk of physical injury." The facts relating to Jo Van reveal a single incident in which the parents brought the deceased child to the hospital without visible injuries to the body. The pathologist who performed the initial autopsy found nothing indicating the injuries had been inflicted upon the child. He concluded that Jo Van died from natural causes. It is therefore entirely possible that either parent could have accidentally or intentionally inflicted the injuries without the other knowing about the incident. It is equally possible that one of the other adult occupants of the household might have inflicted the injuries, accidentally or intentionally, without either parent's knowledge.

We are forced to conclude that the evidence implicating defendants as those responsible for Jo Van's injuries, and the evidence as to whether the injuries were accidentally or intentionally inflicted, is so speculative and conjectural that defendants' motions for dismissal should have been granted.

Although not pertinent to decision in this case, we deem it appropriate to correct what we perceive to be an erroneous statement of the law in the Court of Appeals opinion.

In discussing the admissibility of evidence tending to show that defendants' other child suffered from the "battered child syndrome," a majority of the panel of the Court of Appeals articulated the following rule of law:

> [E]vidence of a separate crime is admissible to prove the crime for which a defendant is being tried if the separate crime is similar to the one for which the defendant is being tried, and was committed within a time not too far removed from the crime with which the defendant was charged.

60 N.C. App. at 629, 300 S.E. 2d at 52. We find this to be an incorrect statement of the law.

In *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), this Court enunciated the rule that evidence of other crimes, offenses or circumstances is inadmissible if its only relevance is to show the character of the defendant or his disposition to commit an offense of the nature of the one charged. There are exceptions to this rule which allow admission of such evidence if it tends to prove knowledge, motive, plan or design, identity, connected crimes or sex offenses. *See* 1 Brandis on North Carolina Evidence, § 92 (2d ed. 1982) and cases cited therein. We find nothing in any of our cases, however, which would authorize the admission of prior crimes purely because they are "similar" and "within a time not too far removed from the crime with which the defendant [is] charged." This broad rule articulated by the Court of Appeals amounts to a total emasculation of the *McClain* rule and is expressly disavowed.

The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. LEROY WALLACE

No. 90A83

(Filed 9 August 1983)

1. **Criminal Law § 50.2— failure to strike testimony referring to "bloodstains"— no error**

Since the trial judge in a prosecution for second degree murder could have properly allowed the witness to testify that he observed bloodstains, the court did not commit prejudicial error when it failed to instruct the jury to disregard the witness's statements identifying red stains as "bloodstains."

2. **Homicide § 30.3— failure to submit involuntary manslaughter as possible verdict— prejudicial error**

Where defendant's evidence tended to show that he shot the victim when the defendant grabbed the gun and attempted to throw it across the room, the evidence was sufficient to merit an instruction of involuntary manslaughter. The fact that the evidence also merited an instruction of accidental killing which was given, did not alleviate the need for an instruction on involuntary

manslaughter since it also was properly presented by the evidence. Nor was the error cured when the jury returned a verdict of murder in the second degree.

3. **Homicide §§ 27.1, 28— instructions on voluntary manslaughter and self-defense not supported by evidence**

In a prosecution for second degree murder, the evidence did not support instructions on self-defense or voluntary manslaughter.

BEFORE *Davis, Judge*, at the 23 October 1982 Criminal Session of Superior Court, RICHMOND County, the defendant was convicted of murder in the second degree and sentenced to life imprisonment. The defendant appealed to the Supreme Court.

Rufus L. Edmisten, Attorney General, by Harry H. Harkins, Jr., Assistant Attorney General, for the State.

Benny S. Sharpe, for defendant appellant.

MITCHELL, Justice.

The defendant contends that the trial court erred in not striking testimony that referred to "bloodstains." We hold that such a characterization was admissible. The defendant also assigns as error the failure of the trial court to instruct the jury as to the possible verdict of guilty of involuntary manslaughter. We agree that the charge should have been given and order a new trial.

The evidence for the State tended to show that the defendant lived in South Carolina. On the afternoon of 24 April 1982, he rode with four other people to Hamlet, North Carolina to visit his girlfriend, Alberta Bethea, the deceased. A witness for the State testified that he saw Bethea sell marijuana to two people just prior to the defendant's arrival and that she had a large amount of money in her possession. The defendant appeared intoxicated when he arrived at Bethea's house and she indicated that she did not want him to stay if he was in that condition. The defendant and the deceased did not argue, but after a few minutes the defendant repeatedly asked the deceased if she wanted him to stay until she finally told him that she did not. At that point the defendant, who had his back toward the deceased, stood up, turned around and shot the deceased. All of these events took place in Bethea's den which was located in the lower level of the house.

After he shot Bethea the defendant carried her out of the house and put her into her car. While he was in front of the car, Anna Kara Bethea, the deceased's sixteen year old daughter, arrived home. The defendant told the girl, "I just killed your mother, I hated to do it." He then drove Bethea to the hospital, where he was arrested.

The defendant testified that he had been a frequent visitor at the Bethea house and went there on 24 April 1982 to spend the weekend. When he arrived at Bethea's house, he had had only one beer. He and Bethea went to the bedroom in the upper level of the house where the defendant asked her for $330.00 to pay a fine in South Carolina. Bethea agreed to give him the money, but when he asked for an additional $20.00 to pay for his ride to Hamlet, she got mad. She threw the money down and said that she would kill him before letting him leave with the money. Bethea started toward her gun which was on top of the dresser, but the defendant grabbed it out from under her hand. The defendant was attempting to throw the gun across the room when it fired and the bullet struck the deceased. He then put the gun in his pocket and picked Bethea up and carried her downstairs, through the den, put her in the car and drove her to the hospital. The defendant testified that Bethea was shot accidentally and that he did not mean to kill her because he loved her.

Two prior statements made by the defendant were also admitted into evidence. On 25 April 1982, the defendant told the police officers that Bethea had asked him to try to fix her gun. While he was attempting to uncock the gun, it fired and Bethea was killed. On 28 April 1982, the defendant admitted that he had lied in the 25 April statement. His second statement was substantially the same as his trial testimony, except as to the account of the actual shooting. The defendant stated, "Alberta Bethea said I will kill you before you get out of this house. Alberta Bethea started toward the dresser. I could see a gun laying on it. I got to the gun and grabbed it. Alberta Bethea came towards me. I shot Alberta Bethea." At trial the defendant explained that this statement was not incorrect, just incomplete. He stated that it was possible that he and the officer misunderstood each other when he made that statement.

[1] The defendant first assigns as error the failure of the trial court to instruct the jury to disregard a portion of a State's

witness's testimony to which the court had sustained the defendant's objection. We hold that it would not have been error for the court to have overruled the defendant's objection to the testimony and, therefore, the court's failure to instruct the jury to disregard the testimony was not prejudicial error.

The main investigating officer, Lieutenant Terry Moore, testified that when he was examining a chair in the den of Bethea's house, he observed "bloodstains." The defendant stated to the court, "I object to him calling them bloodstains, your Honor. Move to strike it." The court sustained the objection but did not act on the motion to strike. The witness proceeded to identify the discoloration as a "red stain." During a later portion of his testimony, Lieutenant Moore again referred to "the chair that was bloodstained," which precipitated the following exchange:

> MR. SHARPE: Object to that, if your Honor, please. Strike that.
>
> A. I'm sorry, red stained.
>
> THE COURT: Just a moment. Do you want to say more?
>
> MR. SHARPE: Your Honor, the officer was indicating that the—in his testimony that the stains on the chair were bloodstains.
>
> THE COURT: As to what the stains were, SUSTAINED.

While our rules of evidence generally purport to prohibit the stating of opinions by nonexperts, the decided cases present a plethora of exceptions which have nearly consumed the rule. *State v. Huggins*, 35 N.C. App. 597, 242 S.E. 2d 187, *disc. rev. denied*, 295 N.C. 262, 245 S.E. 2d 779 (1978). Numerous cases have held that a witness may testify that he or she saw "blood" or "bloodstains." *State v. Mason*, 295 N.C. 584, 248 S.E. 2d 241 (1978), *cert. denied*, 440 U.S. 984, 60 L.Ed. 2d 246, 99 S.Ct. 1797 (1979); *State v. Jones*, 291 N.C. 681, 231 S.E. 2d 252 (1977); *State v. Gurley*, 283 N.C. 541, 196 S.E. 2d 725 (1973); *State v. Locklear*, 41 N.C. App. 292, 254 S.E. 2d 653, *rev. denied*, 298 N.C. 571, 261 S.E. 2d 129 (1979); *State v. Ledford*, 41 N.C. App. 213, 254 S.E. 2d 780 (1979); *State v. Huggins*, 35 N.C. App. 597, 242 S.E. 2d 187, *disc. rev. denied*, 295 N.C. 262, 245 S.E. 2d 779 (1978). Since the trial

court could have properly allowed the witness to testify that he observed bloodstains, the court did not commit prejudicial error when it failed to instruct the jury to disregard the witness's statements.

[2] The defendant also contends that the court erred by not submitting the possible verdict of guilty of involuntary manslaughter to the jury. Having reviewed the evidence in this case, we hold that it was prejudicial error to refuse the defendant's requested charge on involuntary manslaughter.

The court submitted three possible verdicts to the jury, "1. Guilty of second degree murder; or 2. Guilty of voluntary manslaughter; or 3. Not guilty." In addition, the court instructed on self-defense and accidental killing, as the defendant had requested. The defendant's request for an instruction on involuntary manslaughter was, however, denied. The jury returned a verdict of guilty of murder in the second degree.

When there is evidence from which the jury could find the defendant guilty of a lesser included offense, the defendant is entitled to proper instructions on that lesser offense. *State v. Cates*, 293 N.C. 462, 238 S.E. 2d 465 (1977); *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976); *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971). In the present case, the defendant's evidence, if believed, could support a verdict of involuntary manslaughter. Involuntary manslaughter has been defined as the unlawful and unintentional killing of another human being, without malice, which proximately results from an unlawful act not amounting to a felony and not naturally dangerous to human life, or from an act or omission constituting culpable negligence. *State v. Norris*, 303 N.C. 526, 279 S.E. 2d 570 (1981); *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978); *State v. Everhart*, 291 N.C. 700, 231 S.E. 2d 604 (1977).

Clearly there was sufficient evidence of involuntary manslaughter in the case *sub judice* to merit an instruction regarding that possible verdict. The defendant testified that Bethea was shot when the defendant grabbed the gun and attempted to throw it across the room. The jury could have found that the defendant's action in handling a gun in this way when he believed it to be loaded and cocked constituted culpable negligence, even

under the circumstances as he described them. As we stated in *State v. Foust*, 258 N.C. 453, 459, 128 S.E. 2d 889, 893 (1963):

> It seems that, with few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter.

Accord, State v. Moore, 275 N.C. 198, 166 S.E. 2d 652 (1969).

The State in its brief concedes that the defendant was entitled to an instruction on the lesser included charge of involuntary manslaughter. The State argues, however, that because the court charged on accidental killing, the defendant received a more favorable charge and therefore was not prejudiced by the failure of the court to submit the issue of involuntary manslaughter. This argument is without merit.

The defendant's evidence supported an instruction on accidental killing. *See State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979). Such an instruction does not alleviate the need for an instruction on involuntary manslaughter when properly presented by the evidence. Even though the concept of culpable negligence was not defined to the jury, they nevertheless could believe the defendant's evidence and yet find that his handling of the gun constituted what would amount to culpable negligence. Under the instructions as given, the jury would be in a quandary as to which verdict to return. A culpably negligent act would not fit the definition of accident, self-defense, voluntary manslaughter or murder in the second degree.

The error in failing to instruct on involuntary manslaughter in this case was not cured by the verdict of murder in the second degree. As we stated in *State v. Wrenn*, 279 N.C. 676, 681, 185 S.E. 2d 129, 132 (1971), when there is evidence of guilt of the lesser charge,

> [e]rroneous failure to submit the question of defendant's guilt of lesser degrees of the same crime is not cured by a verdict of guilty of the offense charged because, in such case, it cannot be known whether the jury would have convicted of a

lesser degree if the different permissible degrees arising on the evidence had been correctly presented in the court's charge.

This is also true when the jury returns a verdict convicting the defendant of the highest offense charged, even though the conviction could have been of an intermediate offense. *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969). We note, however, that an error in an instruction on manslaughter may be cured by a verdict of murder in the first degree when there was a proper instruction as to murder in the first degree and murder in the second degree. *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982); *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (1969).

The principle that the error is not cured by the verdict of guilty of murder in the second degree is particularly applicable in the present case. If the jury did not believe that the shooting was a nonnegligent accident, then under the evidence and instructions it was left with no alternative other than a verdict of murder in the second degree. Although the instructions were given, the evidence in the case would not support a verdict of not guilty by reason of self-defense or a verdict of guilty of voluntary manslaughter.

[3] A defendant is entitled to an instruction on perfect self-defense as an excuse for a killing when it is shown that, at the time of the killing, the following four elements existed:

(1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Bush, 307 N.C. 152, 158, 297 S.E. 2d 563, 568 (1982) (quoting *State v. Norris*, 303 N.C. 526, 530, 279 S.E. 2d 570, 572-73 (1981)).

In the present case the State's evidence, if believed, clearly supports nothing less than a verdict of murder in the second degree. The defendant's evidence, however, indicates that he did not shoot the deceased intentionally. Although she had threatened to kill him and he believed she was about to grab the gun, his only intent was to throw the gun across the room and the gun fired accidentally. This testimony clearly establishes that the first element of self-defense was not present: the defendant did not believe it to be necessary to kill the deceased. *State v. Rawley*, 237 N.C. 233, 74 S.E. 2d 620 (1953).

Other than the State's evidence, the only evidence that the defendant might have shot the deceased intentionally is his second statement. At trial he testified that the statement was not complete and accurate insofar as it gave the impression that he intentionally shot Bethea as she was moving toward him. Assuming, *arguendo*, that the statement does indicate that he intentionally shot the deceased, it is nevertheless insufficient to invoke the doctrine of self-defense. The record is completely devoid of any evidence tending to prove the second element of self-defense, that the defendant's belief was reasonable. The deceased was unarmed and the defendant had a gun. There was no evidence introduced to show that the defendant was afraid of the deceased or that she could have overpowered the defendant or prevented him from leaving.

> In other words, before the defendant is entitled to an instruction on self-defense, two questions must be answered in the affirmative: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable? If both queries are answered in the affirmative, then an instruction on self-defense must be given. If, however, the evidence requires a negative response to either question, a self-defense instruction should not be given.

State v. Bush, 307 N.C. 152, 160-61, 297 S.E. 2d 563, 569 (1982). Therefore, there was no evidence on which the jury could have found the defendant not guilty by reason of perfect self-defense.

Similarly, there was no evidence to support a verdict of voluntary manslaughter. In general, voluntary manslaughter is an intentional killing without premeditation, deliberation or malice but done in the heat of passion suddenly aroused by adequate provocation or in the exercise of imperfect self-defense where excessive force under the circumstances was used or where the defendant is the aggressor. *State v. Norris*, 303 N.C. 526, 279 S.E. 2d 570 (1981); *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). Clearly, in the present case there was no evidence tending to indicate that the defendant killed the deceased in the heat of passion suddenly aroused by adequate provocation.

In order for an instruction on imperfect self-defense to be required, the first two elements of perfect self-defense must be shown to exist. *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982). As pointed out above, the evidence indicated that the defendant did not in fact form a belief that it was necessary to kill the deceased and, if he did form such a belief, there is no evidence tending to show that such a belief was reasonable under the circumstances. Therefore, there was no basis on which the jury could have found the defendant guilty of voluntary manslaughter.

As previously stated, the State's evidence in the present case, if believed, would only support a verdict of guilty of murder in the second degree. The defendant's evidence, if believed, would support verdicts of guilty of involuntary manslaughter or not guilty by reason of accidental killing. The failure of the trial court to submit the issue of involuntary manslaughter was prejudicial to the defendant and mandates a new trial. Additionally, if the same evidence is presented at retrial, the court should not instruct on self-defense or voluntary manslaughter. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979); *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978); *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969).

Finally, the defendant assigns as error the failure of the State to provide a complete transcript as required under G.S. 15A-1241. Apparently, the court reporter omitted portions of the transcript which included the defendant's cross examination of

Lieutenant Moore. Since our holding in this case requires a new trial, the defendant was not prejudiced by any possible omissions in the transcript.

New trial.

RICKEY LILES, EMPLOYEE-PLAINTIFF v. CHARLES LEE BYRD LOGGING COMPANY, EMPLOYER, SELF-INSURER (HEWITT, COLEMAN & ASSOCIATES, SERVICING AGENT), DEFENDANTS

No. 673PA82

(Filed 9 August 1983)

1. **Master and Servant § 74— scars on knee—no serious bodily disfigurement**

Findings by the Industrial Commission did not support its conclusion that two scars around plaintiff's knee constituted "serious bodily disfigurement" compensable under G.S. 97-31(22) where the description of the scars contained in the findings was not such that, standing alone, it would appear that plaintiff has been rendered "repulsive to other people" so as to give rise to the presumption that he has suffered a diminution of his future earning power because of the scars, and the Commission's findings that plaintiff was 25 years old, had an eleventh grade education, and had worked as a farmer, painter, electrician, assembly line worker and logger would not support a presumption that plaintiff suffered a diminution of his future earning power because of the scars.

2. **Master and Servant § 74— serious bodily disfigurement—return to same job**

The fact that plaintiff returned to the same job at the same wages after an accident was not dispositive of the issue as to whether plaintiff suffered a diminution of his future earning power from scars received in the accident but was only one of many factors to be considered on that issue.

3. **Master and Servant § 74— serious bodily disfigurement—absence of accompanying disability—irrelevancy**

Since G.S. 97-31(22) by its terms applies only to "serious bodily disfigurements" which are not accompanied by any other disability which would already have been compensated for under another provision of the Workers' Compensation Act, the Court of Appeals erred in relying on the fact that plaintiff's scars were not accompanied by any other disability to work in determining that they did not constitute serious bodily disfigurement entitling plaintiff to compensation.

ON discretionary review, pursuant to G.S. § 7A-31, of a decision of the Court of Appeals, 59 N.C. App. 330, 296 S.E. 2d 485

(1982), reversing an award of compensation by the North Carolina Industrial Commission.

A Deputy Commissioner of the North Carolina Industrial Commission awarded $575 in compensation to plaintiff for scars around plaintiff's knee. The Full Commission affirmed this award. In an opinion by *Judge Hill* with *Judges Arnold* and *Wells* concurring, the Court of Appeals reversed the decision of the Industrial Commission and determined that plaintiff was not entitled to relief. On 28 January 1983 this Court granted plaintiff's petition for discretionary review to review the Court of Appeals' decision.

Hassell, Hudson & Lore, by R. James Lore; and Robert L. Anderson, Attorneys for plaintiff-appellant.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Scott M. Stevenson, Attorney for defendant-appellees.

FRYE, Justice.

The question for decision is whether two scars around plaintiff's knee constitute "serious bodily disfigurement" and thus are compensable disfigurements under N.C.G.S. § 97-31(22) (1979). We hold that, under the facts of this case, these scars are not compensable disfigurements.

I.

During the hearing conducted to determine if his scars were compensable disfigurements, plaintiff, Rickey Liles, testified as follows:

He was working for the Charles Lee Byrd Logging Co. when, in the course of cutting down a tree with a chain saw, he cut himself. This injury required stitches, and, as a result, Liles was left with "a scar or blemish" on his leg. After recovering for about two weeks, Liles testified that he "returned to work doing basically the same thing that I was doing before the injury. My job was to cut down trees with a chain saw and I returned to the same job after the accident as before the accident. I made the same wages after the accident as I made before the accident."

Liles also testified that he is 25 years old. He quit school after the 11th grade. He has worked on an assembly line, painted, logged for five years, farmed with his father, and done some elec-

trical work. He has no special training for any type of employment. Currently, he is unemployed.

Based upon this evidence, Morgan R. Scott, a Deputy Commissioner at the North Carolina Industrial Commission, made the following findings of fact:

> 1. Plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer when a chain saw cut into his right leg while he was cutting down trees.
>
> 2. As a result of the aforesaid injury, plaintiff sustained serious and permanent bodily disfigurement described as follows:
>
> > On Plaintiff's left [sic] leg just above the kneecap is a scar that is approximately 3 inches long, and slightly over ¼ inch wide. It is redder than the surrounding skin but does not appear to be raised. It is noticeable from a distance of 6 feet.
> >
> > Immediately below that scar is a shorter scar that is approximately 1½ inch in length. It varies up to ¼ inch in width. It, too, is redder than the surrounding skin. It is noticeable from a distance of 6 feet but does not appear to be raised.
>
> 3. Plaintiff is 25 years old and completed the 11th grade. He has had no special job training. He has worked on the assembly plant for Sylvania, has painted, has farmed, and has worked in logging for 5 years. He is presently unemployed.
>
> 4. The scar does not cause discomfort except for occasional itching. However, plaintiff is somewhat self-conscious whenever the scar is visible.
>
> 5. As a result of the aforesaid injury, plaintiff has suffered serious and permanent bodily disfigurement which mars his appearance to such an extent that it may reasonably be presumed to lessen his future opportunities for remunerative employment and so reduce his future earning capacity. The fair and equitable amount of compensation for said disfigurement under the Workers' Compensation Act is $575.00.

Based upon these findings of fact, the Commissioner then made the following conclusion of law:

> As a result of injury by accident giving rise hereto, plaintiff has sustained serious and permanent bodily disfigurement for which he is entitled to compensation in the amount of $575.00. G.S. 97-31(22); *Cates v. Hunt Construction Co., Inc.*, 267 N.C. 560 (1966).

The Full Commission affirmed the Deputy Commissioner's award to Liles. The Court of Appeals, however, reversed the Commission's determination and held that Liles is not entitled to compensation because the evidence does not support a finding that the scars around Liles' knee were a "serious bodily disfigurement" within the meaning of N.C.G.S. § 97-31(22).

The question in this case is whether the Commission's findings of fact support the conclusion of law made that Liles has sustained "serious and permanent bodily disfigurement" for which he is entitled to compensation. For the reasons discussed below, we hold that these findings do not support such a conclusion.

II.

The applicable provision of the Workers' Compensation Act governing "serious bodily disfigurement," N.C.G.S. § 97-31(22), provides as follows:

> (22) In case of serious bodily disfigurement for which no compensation is payable under any other subdivision of this section, but excluding the disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the schedule contained in this section, the Industrial Commission may award proper and equitable compensation not to exceed ten thousand dollars ($10,000).

In articulating the standard under which a "disfigurement" is to be considered "serious," and thus compensable under N.C.G.S. § 97-31(22), this Court held in *Davis v. Sanford Constr. Co.*, 247 N.C. 332, 101 S.E. 2d 40 (1957), as follows:

> Under our decisions, there is a serious disfigurement in law only when there is a serious disfigurement in fact. A serious disfigurement in fact is a disfigurement that mars

> and hence adversely affects the appearance of the injured employee to such extent that it may be reasonably presumed to lessen his opportunities for remunerative employment and so reduce his future earning power. True, *no present loss of wages* need be established; but to be *serious*, the disfigurement must be of such nature that it may be fairly presumed that the injured employee has suffered a diminution of his future earning power. *Stanley v. Hyman-Michaels Co., supra; Branham v. Panel Co., supra;* Larson, Workmen's Compensation Law, Vol. 2, Sec. 58.32; also see (dictum) *Marshburn v. Patterson*, 241 N.C. 441, 448, 85 S.E. 2d 683.

Id. at 336, 101 S.E. 2d at 43 (emphases original).

Indeed, fourteen years before the *Davis* decision, this Court quoted an analogous definition of "serious" disfigurement, a definition which had been stated in more elemental terms: "To warrant compensation for disfigurement it must be so permanent and serious that it, in some manner, hampers or handicaps the person in his earning or in securing employment, or it must be such as to make the person repulsive to other people." *Branham v. Denny Roll and Panel Co.*, 223 N.C. 233, 239, 25 S.E. 2d 865, 869 (1943), *quoting Poston v. Amer. Enka Corp.*, 1 I.C. 53. In stating that the disfigurement must be such "as to make the person repulsive to other people," the Court was impliedly noting that one who is so disfigured as to be considered "repulsive" to others is less likely to be hired and thus is hampered or handicapped in his earning or securing employment.

In short, then, to be *serious*, a bodily disfigurement "must be of such nature that it may be fairly presumed that the injured employee has suffered a diminution of his future earning power." *Davis v. Sanford Constr. Co., supra*, 247 N.C. at 336, 101 S.E. 2d at 43.

In determining if a particular disfigurement is of such a nature that it may be fairly presumed that the injured employee has suffered a diminution of his future earning power, this Court has articulated several factors to be examined. In *Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 22 S.E. 2d 570 (1942), this Court held:

> In awarding compensation for serious disfigurement, we think the Commission, in arriving at the diminution of earn-

> ing power for disfigurement and making its award, should take into consideration the natural physical handicap resulting from the disfigurement, the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment.

Id. at 266, 22 S.E. 2d at 576.

This Court indicated in *Stanley* that these factors—"natural physical handicap resulting from the disfigurement, the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment"—were factors to be used "in arriving at the diminution of earning power"—the *amount* of an award. It follows, however, that these same factors are to be used as well to determine *if any* award is to be made, that is, whether the disfigurement is in fact "serious" and thus compensable under N.C.G.S. § 97-31(22) because it is such as to give rise to the presumption that the worker has suffered a diminution of his future earning power. Indeed, this Court held in *Davis*, after quoting the factors articulated in *Stanley*, that "*whether* an injured employee has suffered a 'serious facial or head disfigurement' is a question of fact to be determined by the Commission, *after taking into consideration the factors indicated above* . . . ." 247 N.C. at 337, 101 S.E. 2d at 44 (emphases added).[1]

[1] In this case, the Commission, through its Deputy Commissioner, examined all of the necessary factors and included them in its findings of fact. That is, the Commission noted the "natural physical handicap resulting from the disfigurement" by including in its findings a description of the scars: one scar being about three inches long and about one-quarter inch wide, the other being about one and one-half inches long and up to one-quarter inch

1. The difference between N.C.G.S. § 97-31(21), the statute providing compensation for "serious facial or head disfigurement" and N.C.G.S. § 97-31(22), the statute providing compensation for "serious bodily disfigurement" is that once it is found as a fact that an injured employee has suffered "serious facial or head disfigurement" an award of compensation is mandatory. Under N.C.G.S. § 97-31(22), however, the decision whether to award compensation for "serious bodily disfigurement" lies within the Commission's discretion. *Davis v. Sanford Constr. Co.*, *supra*, 247 N.C. at 335, 101 S.E. 2d at 42. At any rate, under both statutes the determination of whether an injured employee has suffered a "serious" disfigurement is a question of fact which must be determined by the Commission after taking into consideration the factors articulated above. *See Id.* at 336, 101 S.E. 2d at 43; *Stanley v. Hyman-Michaels Co.*, *supra*, 222 N.C. at 257, 22 S.E. 2d at 570.

wide, both appearing redder than the surrounding skin and noticeable at a distance of six feet. The Commission also properly noted plaintiff's age of 25, the fact that he has no special job training, his experience on the assembly line for Sylvania, and his experiences painting, farming and logging. The Commission also noted Liles' education level—that he had completed the 11th grade. The Commission further recognized the "adaptability of the employee to obtain and retain employment" in setting out not only the factors above, but also in stating that Liles was unemployed at the time of the hearing. Thus, it appears that the Commission's findings of fact included all of the necessary factors that it was to consider in reaching a conclusion as to whether Liles' scar qualified as a "serious bodily disfigurement" and thus was compensable under N.C.G.S. § 97-31(22). Nevertheless, these findings of fact do not support the Commission's conclusion of law that Liles is entitled to compensation. This is so because there is no rational connection, no nexus, no relation between these factors and the scars themselves which would give rise to the presumption that Liles has suffered a diminution of his future earning power. In *Davis* this Court held that "whether an injured employee has suffered a 'serious facial or head disfigurement' is a question of fact to be determined by the Commission, after taking into consideration the factors indicated above, *in relation to* whether it may be fairly presumed to cause a diminution of his future earning power." *Davis v. Sanford Constr. Co., supra*, 247 N.C. at 337, 101 S.E. 2d at 44 (emphasis added).

The description of Liles' scars contained in the Commission's findings of fact is not such that, standing alone, it would appear that Liles has been rendered "repulsive to other people" because of the scars. The description of Liles' scars thus fails to give rise to the presumption that he has suffered a diminution of his future earning power because of these scars. Likewise, the particularities of the other factors the Commission examined, Liles' own age, training, experience, education, occupation and adaptability to obtain and retain employment, are not of the type which would give rise to the presumption that Liles has suffered a diminution of his future earning power *because* of the scars around his knee. In short, then, we hold that, based on these findings of fact, it cannot be reasonably presumed that a man 25 years of age with an 11th grade education who has worked as a

farmer, painter, electrician, assembly line worker and logger, would have suffered a diminution of his future earning power *because* of these two scars around his knee. Therefore, we hold that Liles is not entitled to compensation under N.C.G.S. § 97-31 (22).[2]

[2] In reviewing the opinion of the Court of Appeals, we note two points which need to be clarified in this area of the law. In holding that it did "not believe there has been any showing that the scars would handicap the plaintiff in obtaining or performing any job for which he is otherwise qualified," the Court of Appeals appears to have placed undue emphasis on the fact that Liles "returned to the same job he had before the accident at the same wages." *Liles v. Charles Lee Byrd Logging Co., supra*, 59 N.C. App. at 331-32, 296 S.E. 2d at 486. Although this fact is *some* evidence which would tend to negate the presumption that Liles had suffered a diminution of his future earning power, it is not dispositive of the issue. As articulated above, there are a multitude of factors that must be considered. In its opinion, however, the Court of Appeals appears to have rested its determination solely on the fact that Liles had "returned to the same job he had before the accident at the same wages."

[3] In addition, the Court of Appeals also wrote that "the scars around the plaintiff's knee are not accompanied by any other disability to work," in distinguishing the case at bar from the decision in *Cates v. Hunt Constr. Co.*, 267 N.C. 560, 148 S.E. 2d 604 (1966). *Liles v. Charles Lee Byrd Logging Co., supra*, 59 N.C. App. at 332, 296 S.E. 2d at 486. When *Cates* was decided, however, the statute governing compensation for serious bodily disfigurement provided that the Commission may award compensation in cases of serious bodily disfigurement, "including the loss of, or permanent injury to, any important external or internal organ or part of the body . . . ." In *Cates*, plaintiff was compen-

2. The result in this case might have been different had Liles been a fashion model, a factor which would give rise to the presumption that he had suffered a diminution of his future earning power—employers might be reluctant to hire models with scars around their knees. Also, the result in this case might have been different if the scars were such as to render Liles "repulsive" to others, a factor which would also give rise to the presumption that Liles has suffered a diminution of his future earning power—employers might be less likely to hire "repulsive" people.

sated for the loss of his kidney and the accompanying scar. Currently, however, N.C.G.S. § 97-31(22), provides explicitly that its terms apply only to those cases of "serious bodily disfigurement *for which no compensation is payable under any other subdivision of this section,* but *excluding the disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the schedule contained in this section . . . .*" (emphases added). Thus, by its terms, N.C.G.S. § 97-31(22) applies only to "serious bodily disfigurements" which are not accompanied by any other disability which would already have been compensated for under another provision of the Workers' Compensation Act. In recognizing this distinction, we hold that the Court of Appeals' reliance on the fact that plaintiff's scars are not accompanied by any other disability to work was misplaced.

In sum, therefore, we affirm the Court of Appeals' determination that the scars around Liles' knee are not a "serious bodily disfigurement" within the meaning of N.C.G.S. § 97-31(22), and in so doing, modify the Court of Appeals' decision to the extent that its reasoning is inconsistent with the analysis set out above.

Modified and affirmed.

STATE OF NORTH CAROLINA v. JOSEPH DANIEL KEEN, JR.

No. 59A83

(Filed 9 August 1983)

Criminal Law § 50.1— expert testimony—unresponsive answer—failure to strike prejudicial error

The trial court committed prejudicial error in failing to strike the answer of a psychiatrist in which the psychiatrist stated his opinion but failed to state his opinion in could or might terms. The psychiatrist was asked for his opinion of whether the victim "was fantasizing in any manner in his account of" how the first-degree sexual offense for which defendant was being tried occurred. Instead of answering the question, the witness stated his opinion "that an attack occurred on [the victim]; that this was a reality." G.S. 8-58.13.

APPEAL by defendant from *Small, Judge,* at the 30 August 1982 Criminal Session of Lenoir County Superior Court.

Upon a plea of not guilty defendant was tried on a bill of indictment charging him with a first-degree sexual offense on James B. Langley, Jr. Evidence presented by the State is summarized, in pertinent part, as follows:

On 29 April 1982 James B. Langley, Jr. (Langley) was 14 years old. He resided on Mewborn Avenue in Kinston with his mother, his father and his 17-year-old sister. The family had resided at this address for four years. Langley was approximately six feet tall, weighed about 200 pounds, and was in the ninth grade in school where he played trumpet in the school band and wrestled in the heavyweight division on the school wrestling team.

During the four years the Langleys resided on Mewborn Avenue, defendant and his wife lived next door. The two families became good friends and a close friendship developed between Langley and defendant. Langley and defendant joked and played pool and cribbage together. Defendant owned and played an organ and he and Langley would often get together with defendant playing his organ and Langley playing his trumpet.

On Thursday, 29 April 1982, defendant's wife was in Charlotte visiting their son. Around 9:00 p.m. defendant called Langley on the telephone and invited Langley "to come over and play some cribbage." Langley agreed to do so and at about 9:30 went to defendant's home, sat down on a sofa and started setting up the cribbage board and cards. Defendant brought Langley a soft drink and himself a beer. During the next 35 minutes the two of them played four or five games of cribbage and defendant consumed six or seven beers. Thereafter they went to the den to watch television.

After entering the den they sat at opposite ends of a couch. A short while later defendant removed a stick from under the couch. He then moved closer to Langley, holding the stick in his hand. Thereafter, defendant took Langley's hand and put it between defendant's legs. When Langley jumped up and protested, defendant stood up, pushed Langley down and struck the couch with the stick. Defendant told Langley that if he did not do what he told him to, he would kill Langley and his family. He also related certain other terrible things that he would do to Langley's sister and mother. When Langley protested and

threatened to leave, defendant shook the stick at him and eventually with the stick pressed against Langley's back, marched him to a bedroom. In the bedroom, defendant forced Langley to commit fellatio on him.

Thereafter, Langley returned to his home and later that night told his parents what had happened. He went to school the next day but became upset and was crying. After telling a teacher that he had been raped, she took him to the county mental health center. Later he was taken by his parents to Pitt Memorial Hospital where he remained eight days under the observation and treatment of Dr. J. D. Danoff.

Evidence presented by defendant is summarized, in pertinent part, as follows:

At the time in question, defendant was 58 years old, was five feet ten inches tall and weighed about 160 pounds. He had lived at the Mewborn Avenue address for 20 years with his wife to whom he had been married for 37 years. They had two sons, ages 25 and 35. The older son, Jerry, lived in Charlotte with his wife and two children. The younger son lived in New York. Defendant was employed at a local automobile dealership as a parts manager.

On the day in question defendant worked as usual. At around 9:00 o'clock that evening, as he was at home watching television and reading a newspaper, Langley called and expressed his desire to play cribbage. Defendant agreed to play and Langley entered the house at about 9:15. After Langley arrived, defendant got a club soda for Langley and a beer for himself. They proceeded to play cribbage for some period of time and then went into the den to watch television.

As they sat on a couch, Langley put his hand on defendant's leg and asked defendant if he wanted him (Langley) to "play with it." Defendant removed Langley's hand and said "of course not." Thereafter, defendant said that he was going to bed and told Langley to turn out the lights when he left. Defendant then went to his bedroom, removed his jeans and got into bed. Immediately, Langley entered the room and asked defendant if he was playing with himself. Defendant told him that he was not. Langley then sat down on the edge of the bed, put his hand in defendant's

underwear and grabbed defendant's penis. Shocked at Langley's conduct, defendant said, "James, I can't do that." Langley then said that he was in trouble and that defendant would tell his parents. Defendant suggested that Langley should go home, after which Langley hurriedly left the house.

Defendant presented numerous character witnesses. Other testimony pertinent to the question raised on appeal will be reviewed in the opinion.

The jury returned a verdict finding defendant guilty of first-degree sexual offense. From a judgment ordering that defendant be imprisoned for "the remainder of his natural life," defendant appealed to this Court pursuant to G.S. 7A-27(a).

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

Tharrington, Smith & Hargrove, by Roger W. Smith and Mark J. Prak, for defendant-appellant.

BRANCH, Chief Justice.

By his sole assignment of error defendant contends the trial court committed prejudicial error in failing to strike certain testimony of Dr. J. D. Danoff. We find merit in this assignment and hold that defendant is entitled to a new trial.

Dr. Danoff, a professor in the Department of Psychiatry at East Carolina University School of Medicine, who observed and treated Langley in the Pitt Memorial Hospital for approximately eight days, testified as a witness for the State. It was stipulated that Dr. Danoff was an expert "in the general field of psychiatry with a specialty in the area of adolescent psychiatry." Among other things, Danoff testified that while Langley was in the hospital, he was in an acute anxiety state, was suicidal, angry and hostile. Danoff further testified that emotions commonly associated with the type of incident described by Langley included anxiety, anger, shame, guilt and feelings of worthlessness.

Defendant's assignment of error relates to the following questions, answers and rulings of the trial court:

> Q. Doctor Danoff, do you have an opinion based upon your medical training and experience as to whether or not James

was fantasizing in any manner in his account of this situation?

Objection.

Court: Overruled; you may answer.

A. Yes, I do.

Court: The answer to that question is yes or no; do you have an opinion.

A. Yes, I do.

Q. What is that opinion?

A. That an attack occurred on him; that this was reality.

Motion to strike.

Court: Motion denied.

Dr. Danoff's answer was not responsive to the question asked by the prosecutor. If an unresponsive answer produces irrelevant or incompetent evidence, the evidence should be stricken and withdrawn from the jury. *See State v. Ferguson*, 280 N.C. 95, 185 S.E. 2d 119 (1971). Dr. Danoff was asked for his opinion whether Langley "was fantasizing in any manner in his account of this situation." Instead of answering the question, the witness stated his opinion "that an attack occurred on [Langley]; that this was a reality."

The evidence provided in the answer was incompetent. G.S. 8-58.13 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

We think the most reasonable interpretation of the answer given by Dr. Danoff is that, in his opinion, Langley had been "attacked" and that this was a "reality." In so answering, the witness went beyond the point of *assisting* the jury in determining a fact in issue. He, in effect, expressed an opinion as to the guilt of defendant.

In *State v. Brown*, 300 N.C. 731, 733, 268 S.E. 2d 201, 203 (1980), Justice Carlton, speaking for this Court and relying on *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978), an opinion by Justice Exum, said:

> [Expert] testimony is properly admitted if
>
> (1) the witness because of his expertise is in a better position to have an opinion on the subject than the trier of fact,
>
> (2) the witness testifies only that an event *could* or *might* have caused an injury but does not testify to the conclusion that the event did in fact cause the injury, unless his expertise leads him to an unmistakable conclusion and
>
> (3) the witness does not express an opinion as to the defendant's guilt or innocence. [Footnote omitted.]

In applying the criteria set forth in *Brown* and quoted above, criteria (1) was unquestionably met since the parties stipulated as to Dr. Danoff's expertise.

It is clear that the witness exceeded criteria (2). He did not testify that Langley's mental state was consistent with that of one who had been sexually attacked, or that an attack as described by Langley *could* or *might* have caused his mental state. On the contrary, the witness stated that in his opinion such an attack had been committed on Langley and that "this was reality."

Our conclusion that the witness exceeded criteria (2) in instant case is further supported by *Patrick v. Treadwell*, 222 N.C. 1, 21 S.E. 2d 818 (1942). While *Patrick* was a civil case involving a physical injury, we think the situation there presented is analogous to the case at bar. In *Patrick*, the plaintiff, a child, sought to recover damages for alleged injuries resulting from a collision of two automobiles. A short time prior to the collision the child's arm had been broken and set in a cast. It was alleged that in the collision the child was thrown from the seat, her cast was broken, and that fragments of bone were knocked out of place, resulting in permanent injury. This Court held that it was error to permit a doctor to state his opinion that the collision in question caused the fragment of bone to be knocked out of place, or to testify, "I know the accident did it."

We also think that under the evidence in this case, criteria (3) was violated. To find defendant guilty, it was incumbent on the State to prove, and the jury to find, that a sexual offense was committed on Langley and that defendant committed the offense. *See State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960). Since defendant admitted that he was with Langley at the time in question, and that no one else was present, the only real question for the jury was whether the sexual offense was committed on Langley. Therefore, when Dr. Danoff testified that in his opinion "an attack occurred on him" and "that this was reality," he clearly expressed an opinion as to defendant's guilt.

The remaining question for our consideration is whether the trial court's error in not striking the testimony complained of was prejudicial to defendant. We hold that it was prejudicial.

The test of harmless error "is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." G.S. 15A-1443; *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed. 2d 171, 173 (1963). *Accord, State v. Thacker*, 281 N.C. 447, 455, 189 S.E. 2d 145, 150 (1972).

In the case at hand, a decision depended primarily on whether the jury believed Langley or defendant. Both proved good reputations and both introduced evidence as to statements they made following the evening in question. That being true, the testimony of Dr. Danoff was crucial and it is probable that the jury gave considerable weight to every part of his testimony. Consequently, we must conclude that there is a reasonable possibility that the challenged testimony might have contributed to defendant's conviction.

New trial.

H. LEE WATERS, ALBERT LEE HUFF AND CLIFTON FREEDLE v. JOE E. BIESECKER, CHAIRMAN, AND PURCELL YARBROUGH AND EDWARD FOWLER, ALL MEMBERS OF THE CITY OF LEXINGTON ALCOHOLIC BEVERAGE CONTROL BOARD, AND THE CITY OF LEXINGTON ALCOHOLIC BEVERAGE CONTROL BOARD

No. 63PA83

(Filed 9 August 1983)

Municipal Corporations § 12; Negligence § 50— failure to give notice of excavation—liability of city ABC Board

A city ABC board did not have governmental immunity from liability in a suit for damages allegedly caused by its negligent failure to warn plaintiff of the excavation undertaken in the construction of an ABC store which removed lateral support from plaintiff's building on adjoining property, even though the excavation work was carried out through an independent contractor.

ON discretionary review of the decision of the Court of Appeals, 60 N.C. App. 253, 298 S.E. 2d 746 (1983), finding no error in the judgment entered by *Mills, J.*, at the 8 September 1981 Civil Session of Superior Court, DAVIDSON County. Heard in the Supreme Court 6 June 1983.

Barnes, Grimes & Bunce, by Jerry B. Grimes, for Albert Lee Huff, plaintiff appellee.

DeLapp, Hedrick and Harp, by Robert C. Hedrick, for City of Lexington Alcoholic Beverage Control Board, defendant appellant.

MARTIN, Justice.

Plaintiff brought this action for damages to their property allegedly resulting from the negligent excavation of defendant's adjoining property for the construction of an Alcoholic Beverage Control store. The claims of plaintiffs Waters, the landowner, and Freedle, a lessee, were dismissed at the close of all the evidence. Waters and Freedle did not appeal. A jury verdict was returned in favor of plaintiff Huff, who owned a building located on Waters's property. From the judgment on this verdict, defendant ABC board appealed. Claims against the individual defendants were dismissed.

Defendant ABC board proposed to build a store for the sale of alcoholic beverages upon property it owned adjoining the land

upon which Huff's building was located. A notice was posted by defendant of its proposal to construct the building. This was a general notice of the proposal and of a public meeting that would be held but did not give any details as to the method of construction or excavation required. The defendant contracted with an architect and an independent contractor to construct the building. In the construction, it was necessary to excavate the defendant's property.

During the construction, neither defendant nor its contractors notified or advised Huff about the excavation in any way. After excavation began, a crack in a plate glass window in Huff's building appeared, a crack in the masonry wall widened, waterlines under the building separated, and the pillars supporting a back corner of the building shifted or moved.

Defendant argues that the Court of Appeals erred in affirming the trial court's denial of its motion for a directed verdict. We find no error in the trial court's ruling and affirm the result reached by the Court of Appeals.

Defendant's principal contention is that it is protected from liability because of governmental immunity. In deciding this appeal, the Court of Appeals addressed the wrong legal issue. The Court of Appeals held "that the operation of an ABC store by the Board is a proprietary function and that the trial court, therefore, correctly refused to dismiss the case on the ground of governmental immunity." This was not the issue before the Court of Appeals. Plaintiff's alleged damages did not result from the *operation* of an ABC store, but from the failure to give notice of an excavation made in the *construction of a building* to be used as an ABC store. The distinction is substantive. The holding by the Court of Appeals that the operation of an ABC store is a proprietary function was not necessary for the resolution of the appeal; it is entirely obiter dictum and not approved by this Court. We expressly refrain from ruling upon this interesting issue. *Cf. Gardner v. Reidsville*, 269 N.C. 581, 153 S.E. 2d 139 (1967); *Hahn v. City of Ortonville*, 238 Minn. 428, 57 N.W. 2d 254 (1973); *Niles v. Healy*, 115 N.H. 370, 343 A. 2d 226 (1975); *Krzysztalowski v. Fortin*, 108 N.H. 187, 230 A. 2d 750 (1967).

The crucial question is whether the defendant ABC board is immune from suit for damages allegedly caused by its negligent

failure to warn the plaintiff of the excavation undertaken in the construction of the ABC store building. Our research discloses that this precise question has not been previously decided by this Court.

Although the legislature did not expressly grant authority to local ABC boards to construct buildings, such authority is impliedly granted them by N.C.G.S. 18B-701(13), which provides that a local board is authorized to "[p]erform any other activity authorized or required by the ABC law." Under the duty and power to sell alcoholic beverages, it may be reasonably implied that the boards have authority to construct buildings in which to carry out these duties. 56 Am. Jur. *Municipal Corporations, Etc.* § 541 (1971). We note that the board is not required to construct buildings; it has authority to purchase or lease buildings for use as ABC stores. N.C. Gen. Stat. § 18B-701(10) (Cum. Supp. 1981).

Davis v. Summerfield, 131 N.C. 352, 42 S.E. 818 (1902), involved an action for damages caused by depriving the soil under plaintiff's wall of its lateral support, by negligence of the defendant while excavating for a new building on the adjoining lot. This Court approved the following instruction to the jury:

> "While there is evidence that the plaintiff knew that the defendant was going to excavate and build, for she testified to that herself, still the defendant owed to her the duty, which is not an unreasonable one, to tell her of the extent of his proposed plan so she might adopt measures for self-protection, if she chose to do so, and the court charges you there is no evidence that he gave proper notice to the plaintiff on the line above indicated. To give this notice involves no expense to the proprietor and affords opportunity to the adjoining owner to protect his rights, for improvements made by one proprietor may be attended with disastrous results, even when prosecuted by competent workmen."

Id. at 353, 42 S.E. at 818. This Court then summarized the rules regarding lateral support as follows:

> The true rule deducible from the authorities seems to be that while the adjacent proprietor cannot impair the lateral support of the soil in its natural condition, but is not required to give support to the artificial burden of a wall or building

> superimposed upon the soil, yet he must not dig in a negligent manner to the injury of that wall or building, and it is negligence to excavate by the side of the neighbor's wall, and especially to excavate deeper than the foundation of that wall, without giving the owner of the wall notice of that intention that he may underpin or shore up his wall, or relieve it of any extra weight on the floors, and the excavating party should dig out the soil in sections at a time so as to give the owner of the building opportunity to protect it and not expose the whole wall to pressure at once. The defendants did not give any notice of the nature of their proposed excavation, and the evidence justified the jury in finding them guilty of negligence.

Id. at 354-55, 42 S.E. at 818.

On rehearing the case, *Davis v. Summerfield*, 133 N.C. 325, 45 S.E. 654 (1903), this Court approved its earlier holding with regard to the requirement of notice and addressed the question of whether the owner of a lot is liable for an injury done to an adjoining brick wall, through the negligence of an independent contractor in excavating adjacent to the wall. After stating the general rule of non-liability for acts of an independent contractor, the Court held:

> And there is still another class of cases to be excepted from the exemption, and that is where the contract requires an act to be performed on the premises which will probably be injurious to third persons if reasonable care is omitted in the course of its performance. The liability of the employer in such a case rests upon the view that he cannot be the author of plans and actions dangerous to the property of others without exercising due care to anticipate and prevent injurious consequences. The case before us, it seems to us, falls under this exception to the general rule.
>
> This last class of cases probably ought to be regarded as rather an extension of the one where the act to be done is "intrinsically dangerous," than a separate class.

Id. at 328, 45 S.E. at 655. In such case, the owner is responsible even though the injurious consequences flowed from the work of an independent contractor.

> Work inherently or intrinsically dangerous and which will necessarily or probably result in injury to third persons unless methods are adopted by which such consequences may be prevented, cannot be delegated to others by municipality in such manner as to exempt the municipality from liability for private injuries resulting from the negligent performance of such work. Accordingly, the city cannot evade the consequences of its failure to take proper precautions if the work to be done is inherently or intrinsically dangerous. In other words, the municipality is liable where the act which causes the injury is one which the contractor is employed to perform, and the injury results from the act of performance and not from the manner of performance.

18 McQuillin, Municipal Corporations, *Municipal Liability for Torts* § 53.76c (3d ed., 1977 revised vol.) (footnotes omitted). *See also Meares v. Wilmington*, 31 N.C. 73 (1848); *Horne v. City of Charlotte*, 41 N.C. App. 491, 255 S.E. 2d 290 (1979).

In *Meares*, the city of Wilmington lowered the grade of a street three or four feet adjoining the property of plaintiff, causing the wall of plaintiff's building to collapse. The Court, in a scholarly opinion by Justice (later Chief Justice) Pearson, held that plaintiff had a cause of action for damages. The Court expressly rejected defendant's claim of governmental immunity, holding that defendant was not liable for doing work which the law authorized it to perform, *provided* the work was done in a skillful and proper manner. Because the work was performed negligently, the city was not permitted to escape liability. *See Smith v. State*, 289 N.C. 303, 222 S.E. 2d 412 (1976); *Sides v. Hospital*, 287 N.C. 14, 213 S.E. 2d 297 (1975); *Smith v. Highway Commission*, 257 N.C. 410, 126 S.E. 2d 87 (1962); *Thompson v. R.R.*, 248 N.C. 577, 104 S.E. 2d 181 (1958); *Yowmans v. Hendersonville*, 175 N.C. 574, 96 S.E. 45 (1918); *Kaplan v. City of Winston-Salem*, 21 N.C. App. 168, 203 S.E. 2d 653, *rev'd on other grounds*, 286 N.C. 80, 209 S.E. 2d 743 (1974).

We hold that the defendant is liable for the damages resulting from the removal of lateral support from adjoining property while excavating for the construction of an ABC store because of its negligent failure to warn plaintiff of such excavation. This is true even though defendant was acting through an in-

dependent contractor. *Davis v. Summerfield, supra,* 133 N.C. 325, 45 S.E. 654. *See generally* 33 A.L.R. 2d 111 (1954). It must exercise due care to anticipate and prevent injurious consequences. This involves giving reasonable notice to an adjoining landowner of the intention to excavate, including sufficient information to enable the adjoining landowner to take necessary measures to protect his property. In this case there is no evidence that plaintiff was notified that defendant would excavate below the level of the foundation of plaintiff's wall. *Accord, Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972); *Hendricks v. Fay, Inc.,* 273 N.C. 59, 159 S.E. 2d 362 (1968); *Highway Comm. v. Transportation Corp.,* 226 N.C. 371, 38 S.E. 2d 214 (1946).

For these reasons, we affirm the result reached by the Court of Appeals.

Affirmed.

STATE OF NORTH CAROLINA v. DANNY FRANKLIN WILLIAMS

No. 602A82

(Filed 9 August 1983)

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

Although a witness's answer was not responsive to the question posed by the prosecutor, the answer that defendant "was nervous" was competent evidence and need not have been stricken.

2. **Criminal Law § 42.5— exhibits properly identified and admitted**

The trial court properly allowed into evidence two heaters which allegedly were taken from the crime scene in that they were properly identified and constituted relevant evidence tending to tie defendant to the crimes charged.

3. **Criminal Law § 77.1— letters constituting admissions of defendant—properly admitted into evidence**

Two letters which were either authenticated by the defendant or his brother were properly admitted into evidence as admissions where the subject of both letters was the events which occurred on the night in question and defendant's predicament resulting from them.

4. **Criminal Law § 162.2— late objection—no prejudicial error**

Defendant's objection to a line of questioning in which he was asked about his living arrangements with his fiancee prior to marriage came too late for

him to complain of it on appeal; however, the testimony had no bearing on the outcome of the trial. App. Rule 10(b)(1).

BEFORE *Judge D. Llewellyn* presiding at the 21 June 1982 Criminal Session of LENOIR Superior Court, and a jury, defendant was found guilty of first degree rape and first degree burglary. He received a sentence of life imprisonment on the first degree rape conviction and forty years' imprisonment on the first degree burglary conviction, the sentences to run consecutively. Defendant appealed the rape conviction as a matter of right pursuant to G.S. 7A-27(a). We allowed defendant's motion to bypass the Court of Appeals on the first degree burglary conviction.

Rufus L. Edmisten, Attorney General, by G. Criston Windham, Associate Attorney, for the state.

Fred W. Harrison for defendant appellant.

EXUM, Justice.

In this appeal defendant's assignments of error pertain primarily to rulings by the trial court on various evidentiary matters and the trial court's failure to instruct the jury on lesser-included offenses of the crimes charged. We find no substantial merit in defendant's assignments of error and no reversible error in the trial.

Evidence presented by the state tends to show that on 4 January 1982 defendant; his brother, Victor Williams; and Donald Merritt drove to Kinston from New Bern in the early morning hours. After spending several hours in Kinston the three men drove to Highway 258 where the car in which they were riding became stuck in a ditch. After several unsuccessful attempts to free the automobile, defendant left his brother and Merritt with the automobile and went in search of help. Merritt testified that he saw defendant knock on the door of the victim's house and the porch light come on. Merritt said defendant returned to the car about forty-five minutes later.

The victim, Tiffany Waller, an 81-year-old woman, testified that she answered a loud knock at her door during the early morning hours of 4 January 1982. She turned on her porch light and saw a male, whom she described as looking like defendant, outside her home. When the man asked permission to use the

phone, she told him she would make the call for him. While Waller attempted to place the requested call the man snatched open the storm door and entered without permission. The man attempted to make a phone call while asking Waller various questions about her living arrangements. The intruder then asked Waller for a drink of water. At that point the intruder grabbed Waller, threw her to the floor and, keeping his hand on her throat, forced her to engage in sexual intercourse. Waller attempted to resist but the man became angry and choked her until she became unconscious. She awoke with a severe cut to her upper lip and her hair soaked with blood. She contacted her son-in-law who took her to the hospital, where she remained for four days.

Merritt testified that when defendant returned to the automobile he stated, "I just beat and raped an old lady across the road." Defendant also suggested that Merritt return to the house with him in order to finish the job. Defendant brought with him two objects, which Merritt testified resembled state's exhibits one and two. Merritt saw defendant remove them from the trunk of the car the following day and place them under his trailer. State's exhibits one and two were heaters. Waller's son-in-law identified state's exhibit two as a heater he had observed in her home. Waller identified state's exhibit one as being similar in appearance to another heater she had in her home.

A physician examined Waller shortly after the attack and found several scratches around her vagina, severe bruising of her face and neck, bruises on her leg and a cut on her lip. Vaginal swabs were obtained and forwarded to the State Bureau of Investigation, along with Waller's clothing. William Weis, an expert forensic serologist, testified that semen was present on the vaginal swabs and the person who deposited the semen belongs to blood group A and was a secretor. Weis testified that Waller was a non-secretor but defendant had blood group A and was a secretor.

Defendant presented evidence tending to show that after the car became stuck in the ditch he and his brother Victor left in search of help. Defendant said he approached one house; when no one answered his knock, he went to the backyard where Victor was trying to start a pickup truck. After failing to obtain help he and his brother returned to the disabled vehicle. Defendant de-

cided to walk to New Bern and left the scene. Defendant later changed his mind and returned to the car about an hour later. Eventually the men freed the automobile and drove to Victor Williams' house. From there, defendant was taken to his home in New Bern where Merritt gave him the car keys and told him the heaters Victor Williams had promised to get him were in the trunk. Defendant stated that was the first time he had seen the heaters and he put them next to his house. Defendant denied breaking into Waller's house and raping her.

Defendant also presented the testimony of Troy Hamlin, a forensic chemist with the North Carolina State Bureau of Investigation who specializes in hair analysis. Hamlin testified that a hair fragment obtained during an examination of Waller was not microscopically consistent with the hair of either Waller or defendant.

[1] Under his first assignment of error defendant contends the trial court erred by allowing Victor Williams, a witness for the state, to give an opinion about the mental state of defendant on the night in question. The basis of this contention is that the testimony was not responsive to questions asking what defendant had said. This colloquy occurred:

> Q. Then what happened after Danny got back?
>
> A. Me and Danny walked down the road to find somebody that had a truck to pull us out and we got down the road and were gone about ten or fifteen minutes and turned around and looked and there was something with headlights back at the car and we thought maybe it was the law.
>
> Q. What did Danny say when you thought it was the law?
>
> A. At that time he was nervous.
>
> OBJECTION.
>
> COURT: OVERRULED.
>
> DEFENDANT'S EXCEPTION #1.
>
> A. He acted nervous but he walked back with me to the car.

Q. What did you say to Danny about the law being there?

A. I don't remember. I said maybe the law would help to pull us out.

Although the answer was not responsive to the question posed by the prosecutor, "responsiveness is not the ultimate test of admissibility." *State v. Batts*, 303 N.C. 155, 159, 277 S.E. 2d 385, 388 (1981). If an unresponsive answer is otherwise competent as evidence, it need not be stricken. *Id.; State v. Peele*, 281 N.C. 253, 188 S.E. 2d 326 (1972); *State v. Ferguson*, 280 N.C. 95, 185 S.E. 2d 119 (1971). That defendant "was nervous" is competent evidence. *State v. Moore*, 276 N.C. 142, 145-46, 171 S.E. 2d 453, 455-56 (1970).

[2] Defendant next maintains the trial court erred when it allowed state's exhibits one and two into evidence. He argues the exhibits were never properly identified. State's exhibit two, an old heater, was identified as one of two heaters that had been in the victim's home. The victim's son-in-law identified this older heater by inspecting the heater's plug which he had at some prior time attempted to repair. State's exhibit number one, a relatively new heater, was never positively identified, although the victim stated that it was similar to one she had in her home before the night of the burglary. Other witnesses positively identified both exhibits as items defendant removed from the trunk of the car in which he had been riding on this same night. We conclude the heaters were properly identified and constituted relevant evidence tending to tie defendant to the crimes charged. *See State v. Newman*, 308 N.C. 231, 302 S.E. 2d 174 (1983). Any equivocation relates to the weight of the testimony and not its admissibility. *Id.* at 242, 302 S.E. 2d at 182.

[3] Next, defendant argues the trial court should not have allowed into evidence two letters allegedly written by him to his brother Victor. One of the letters was authenticated by Victor when he testified that he knew defendant's handwriting and that the letter had been written by defendant. Defendant acknowledged, on direct examination, that he had written the letter. The second letter, state's exhibit number 23, was authenticated by defendant himself during cross-examination. "Anything that a party to the action has done, said or *written*, if relevant to the issues and not subject to some specific exclusionary statute or rule, is

admissible against him as an admission." 2 Brandis, *North Carolina Evidence* § 167 (2d rev. ed. of Stansbury's N. C. Evidence, 1982) (emphasis added) (footnotes omitted). *See also State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969). The subject of both letters is the events which occurred on the night in question and defendant's predicament resulting from them. Both letters are relevant. They were properly admitted.

[4] Defendant asserts the trial court erred by permitting the following questions and answers when defendant was cross-examined:

Q. Well, how long had you and your fiancee been living together before the Fourth day of January?

A. Ever since the end of 1979.

Q. Did you meet her when you were in New York on your escape?

A. No, sir, I didn't.

Q. So you've been living together since the end of 79, is that right?

A. Yes, sir.

Q. And on the Fourth day of January, 1982, you and her were living together just as husband and wife would live together, won't you?

A. Yes, sir, I was.

Q. Ya'll were sleeping in the same bed?

A. Yes, sir.

OBJECTION.

COURT: OVERRULED.

The evidence also showed that defendant and his fiancee married before the trial. Suffice it to say that defendant's objection to this line of inquiry came too late for him to complain of it on appeal. *State v. Jones*, 287 N.C. 84, 99, 214 S.E. 2d 24, 35 (1975); N.C. Rule App. P. 10(b)(1). Furthermore, we are satisfied this testimony had no bearing on the outcome of the trial, even assuming it was improper to admit and an objection had been timely made.

In his final assignment of error, defendant maintains the trial court should have instructed the jury on lesser-included offenses. Specifically, defendant requested the trial judge to instruct the jury on (1) second degree burglary, (2) felonious breaking and entering, (3) non-felonious breaking and entering, (4) attempted first degree rape, (5) attempted second degree rape and (6) assault on a female. This assignment is without merit. The trial judge must instruct on lesser-included offenses only if there is evidence to support their existence. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). All the state's evidence tended to show the crimes committed were first degree burglary and either first or second degree rape. Defendant's evidence tended to show he did not commit any crime on the night of these incidents. There is no evidence to support instruction on any of the requested lesser-included offenses. The trial judge properly refused to instruct on the lesser-included offenses. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972).

In defendant's trial, we find

No error.

STATE OF NORTH CAROLINA v. WILLIAM EDWARD MALLOY

No. 12A83

(Filed 9 August 1983)

Receiving Stolen Goods § 5.2— possession of stolen guns—insufficient evidence

The State's evidence was insufficient to show actual or constructive possession of stolen guns by defendant so as to support his conviction of possession of stolen property under G.S. 14-71.1 where it tended to show that defendant was working under the open hood of an automobile in a parking lot while another individual and a federal undercover agent took the stolen guns from the trunk of an automobile parked behind the automobile on which defendant was working; after putting the guns in his automobile, the agent went to the place where defendant was working and asked defendant whether $125.00 was right, and defendant answered "yeah"; and the agent then gave $125.00 to the defendant.

Justice MARTIN dissenting.

ON appeal of right by the defendant from the decision of a divided panel of the Court of Appeals reported at 60 N.C. App. 218, 298 S.E. 2d 735 (1983).

The defendant was charged in a proper bill of indictment with felonious possession of stolen property having a value of $600.00 in violation of G.S. 14-71.1. He was found guilty as charged and sentenced to a term of imprisonment of not less than three nor more than five years. The defendant appealed to the Court of Appeals which found no error, with one judge dissenting. The defendant appealed to the Supreme Court as a matter of right under G.S. 7A-30(2).

Rufus L. Edmisten, Attorney General, by Reginald L. Watkins, Assistant Attorney General, for the State.

Ernest B. Fullwood, for defendant appellant.

MITCHELL, Justice.

The determinative question presented is whether there was sufficient evidence introduced at trial to withstand the defendant's motion to dismiss. We hold that there was not.

The State introduced evidence tending to show *inter alia* that Todd's Gun Shop was broken into during September of 1980. All of the guns in the shop were stolen at that time. A day or two after the guns were stolen, undercover federal law enforcement agents went to a parking lot in Wilmington looking for the defendant. They eventually found the defendant there working on an automobile. They called him and he came from under the automobile. The defendant told the officers that "he didn't have the keys to the car. He told us to ride across into the project and see if we could locate an individual who supposedly had the keys to the car. I don't know what car he was talking about." The officers then rode around the area but could not find the individual they sought.

The following day the officers returned to the lot and found the defendant there. Agent Clayton Jonathan Jones of the United States Treasury Department, Bureau of Alcohol, Tobacco and Firearms, testified that the following then transpired:

> There were two other individuals in the parking lot. As we drove into the parking lot, an individual came to the rear of a

red bottom, black top Mercury and opened the trunk. I got out of the vehicle, went to the trunk and asked the individual if the weapons worked. He said, "yeah." I checked the firearms to make sure they were operable and then placed the firearms in the trunk of my vehicle. There were two firearms.

After I placed them in the trunk, I went to another vehicle parked in front of the Mercury. [The defendant] was under the hood of that vehicle talking with Earl Gray. I went up to [the defendant] and said "A hundred and twenty-five dollars right?" and he said, "yeah." I took the hundred and twenty-five dollars out of my pocket and gave it to him.

The two guns received by Agent Jones were introduced into evidence and identified as two of the guns stolen earlier from Todd's Gun Shop.

At the close of the State's evidence, the defendant moved to dismiss for insufficiency of the evidence. This motion was denied. The defendant offered no evidence.

The defendant assigns as error the trial court's denial of his motion to dismiss. He contends that the State's evidence was insufficient to warrant submission of the charge against him to the jury and to support a verdict of guilty of the crime charged.

The rules for testing the sufficiency of the evidence to withstand a defendant's motion to dismiss pursuant to G.S. 15A-1227 are well established. Upon a defendant's motion to dismiss, the question for the trial court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense, and of the defendant's being the perpetrator of such offense. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). If so, the motion is properly denied.

In considering such motions, the trial court is concerned only with the sufficiency of the evidence to take the case to the jury and not with its weight. The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying the defendant's motion to dismiss. *Id.* The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or

both. That test is whether a reasonable inference of the defendant's guilt may be drawn from the evidence. *Id.* If so the evidence is substantial and the defendant's motion to dismiss must be denied.

In making its determination on the sufficiency of the evidence, the trial court must consider the evidence in the light most favorable to the State. The State is entitled to every reasonable intendment and inference to be drawn from the evidence, and any contradictions and discrepancies are to be resolved in favor of the State. All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State must be considered by the trial court in ruling on the motion. *Id.*

If, however, when the evidence is so considered it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed. *State v. Poole*, 285 N.C. 108, 203 S.E. 2d 786 (1974). This is true even though the suspicion aroused by the evidence is strong. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

Applying these governing principles to the present case, we hold that the evidence introduced was sufficient to raise a strong suspicion of the defendant's guilt but not sufficient to remove that issue from the realm of suspicion and conjecture. The evidence introduced did not tend to show that the defendant owned or controlled the automobile from which the stolen firearms were taken or the lot in which the automobile was parked. The evidence did not tend to show that the defendant ever mentioned the firearms, saw them or knew of their presence.

The evidence tended to show that the defendant was working under the hood of an automobile parked in front of the automobile in which the stolen guns were located when the guns were taken from the trunk. This evidence by the agent placed the defendant "two car lengths and a little space" from the open trunk of the automobile from which the guns were taken. The defendant was working under the open hood of the front automobile while the other individual and the law enforcement agent were taking the stolen guns from the open trunk of the rear automobile. This evidence did not tend to show that the defendant saw the transac-

tion occurring between the other individual and the law enforcement agent or that he could have seen any such transaction from his position under the hood of the front automobile.

Perhaps the strongest evidence introduced against the defendant was evidence tending to show that Agent Jones, after putting the stolen guns in his automobile, went to the place where the defendant was working and said to the defendant: "A hundred and twenty-five dollars right?" The defendant responded, "yeah." Agent Jones then took out one hundred and twenty-five dollars and gave it to the defendant. Although this evidence raises a strong suspicion as to the defendant's guilt, we do not believe that, in the context of the present case, it was substantial evidence that the defendant was in possession, constructive or otherwise, of the stolen guns. *See e.g. State v. Chavis*, 270 N.C. 306, 154 S.E. 2d 340 (1967). Accordingly, the decision of the Court of Appeals must be and is

Reversed.

Justice MARTIN dissenting.

I respectfully dissent. The majority opinion fairly states the facts and contains an accurate summation of the applicable law. To me, there is sufficient evidence, direct and circumstantial, to carry the case to the jury.

There is substantial evidence that the guns bought by the officers were stolen from the gun shop. The value of the guns is not in question. The only elements not conclusively proven are whether defendant had possession of the guns and whether he knew or had reasonable grounds to know that they were stolen. It can be safely stated that if defendant possessed the guns, he knew or had reasonable grounds to believe that they were stolen. The majority contends the evidence is insufficient to show possession of the guns by defendant.

This transaction occurs in a parking lot, not a garage. Yet, both times in question the defendant is there "working" on a car. There is some conversation about the keys to a car. On the second visit, the trunk to a car is opened and the stolen guns displayed. Defendant is about two car lengths away, probably no

more than thirty-five feet. After the officer puts the guns into his car, the defendant agrees with him as to the price of $125 and the officer pays defendant $125 for the guns.

It is not necessary to put the guns into the hands of defendant to prove possession. Defendant did not have to see the removal of the guns to prove possession. Possession can be either actual or constructive. *State v. Meyers*, 190 N.C. 239, 129 S.E. 600 (1925). One has possession of stolen property within the meaning of the law when he has both the power and intent to control its disposition or use. The state may defeat a motion for nonsuit by presenting evidence which places the accused within such close juxtaposition to the stolen property as to justify the jury in concluding that the same was in his possession. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). More than one person can have possession of the same stolen property at the same time. The state is not required to prove that defendant had the exclusive possession of the stolen guns. Proof of joint possession is sufficient. *State v. Allen*, 279 N.C. 406, 183 S.E. 2d 680 (1971).

Here we have evidence placing the defendant within a few feet of the stolen guns *and* showing that defendant confirmed and received the sale price for the guns. The confirmation and receiving of the sale price for the stolen guns, after they were placed in the officer's car within some thirty-five feet of defendant, is sufficient substantial evidence to prove not only that defendant intended to control the disposition of the guns but that he actually did so. Why would payment have been made to and accepted by defendant unless he had at least joint possession of the stolen guns?

The evidence depicts a striking example of defendant and one or more other persons operating a business of selling stolen property. The others exhibited the property to the prospective buyer, and defendant took the purchase price. Criminals do not operate the same way as legitimate business people. The jury had no difficulty in applying the legal concepts of possession to the actions of the defendant. Common sense and reason, as well as the law, compel a jury resolution of the issue. The decision of the Court of Appeals should be affirmed.

RDC, INC., A DELAWARE CORPORATION DOING BUSINESS IN NORTH CAROLINA v. BROOKLEIGH BUILDERS,INC., BY W. JOSEPH BURNS, TRUSTEE IN BANKRUPTCY, STAFFORD R. PEEBLES, JR., TRUSTEE FOR CARLISLE B. MCKENZIE AND WIFE, LOUISE J. MCKENZIE; CARLISLE B. MCKENZIE AND WIFE, LOUISE J. MCKENZIE; STAFFORD R. PEEBLES, JR., TRUSTEE FOR MARTIN SEPTIC TANK SERVICE; MARTIN SEPTIC TANK SERVICE; WAYNE C. SHUGART, TRUSTEE FOR SMITH-PHILLIPS LUMBER COMPANY; SMITH-PHILLIPS LUMBER COMPANY; FOSTER & HAILEY, INC.; PFAFF'S, INC.; NEW WORLD, INC.; AND OLDTOWN CARPET CENTER

No. 64PA83

(Filed 9 August 1983)

Laborers' and Materialmen's Liens § 8— enforcement of lien—filing in bankruptcy court sufficient

By filing its claim of lien in the bankruptcy proceeding within 180 days after last providing labor or materials on the property, a company satisfied the requirement of G.S. 44A-13(a) that the action for enforcement of a lien be commenced within the 180-day period.

ON discretionary review of the decision of the Court of Appeals, 60 N.C. App. 375, 299 S.E. 2d 448 (1983), reversing judgment entered by *Freeman, J.*, at the 30 November 1981 Special Session of Superior Court, FORSYTH County. Heard in the Supreme Court 11 May 1983.

House, Blanco & Osborn, P.A., by Reginald F. Combs, for respondent appellant.

Peebles, Hedgpeth, Schramm & Crumpler, by Joseph C. Hedgpeth and John J. Schramm, Jr., for respondent appellees.

MARTIN, Justice.

RDC, Inc. commenced this special proceeding pursuant to N.C.G.S. 45-21.32 to determine the ownership of surplus funds from a foreclosure sale. All parties agreed that RDC, Inc. was entitled to priority of its claim, but a dispute between Foster & Hailey, Inc. ("F&H") and appellees Stafford Peebles, Jr., Trustee, and Mr. and Mrs. Carlisle B. McKenzie arose over the remainder of the funds. F&H claimed under a mechanics' lien and appellees under a deed of trust. Upon the issue raised, the proceeding was transferred to the civil issue docket of superior court, and after a hearing that court held that the lien of F&H had priority over ap-

pellees' deed of trust. The Court of Appeals reversed this ruling, and this Court granted discretionary review.

The basic facts are not contested. Brookleigh Builders, Inc. bought an unimproved parcel of land from RDC, Inc., and gave RDC a purchase money note and deed of trust securing the purchase price. Brookleigh gave another deed of trust to United Savings and Loan Association, and RDC's deed of trust was subordinated to it.

Beginning 6 November 1979, F&H provided labor and materials for construction on the property. Brookleigh gave a third deed of trust for additional funds to appellees. This occurred after F&H began providing labor and materials for the construction. On 22 September 1980, F&H filed its claim of lien as provided by N.C.G.S. 44A-12(b). F&H last provided labor and materials for the construction on 15 July 1980.

On 27 October 1980, Brookleigh filed a voluntary petition in bankruptcy. F&H duly filed a secured proof of claim based upon its lien for $6,217.65 with the bankruptcy court. On 18 February 1981, pursuant to authority of the bankruptcy court, the trustee abandoned the property in controversy. United Savings then foreclosed its deed of trust and deposited the surplus of $16,749.52 with the clerk of superior court. Upon stipulation of all parties, RDC, Inc. has been paid its claim, leaving $6,942.18 with the clerk.

The issue for our determination is whether the filing by F&H of a proof of claim in the bankruptcy proceedings of the owner of the real property constitutes the commencement of an action for the enforcement of its lien within the meaning of N.C.G.S. 44A-13(a). We hold that it does and accordingly reverse the decision of the Court of Appeals.

F&H filed its claim of lien on 22 September 1980, within 120 days after 15 July 1980, the date of the last furnishing of labor or materials. N.C. Gen. Stat. § 44A-12(b) (1976). It filed its proof of claim in the bankruptcy proceedings within 180 days after the last furnishing of labor or materials. N.C. Gen. Stat. § 44A-13(a) (1976). The property owner, Brookleigh, went into bankruptcy 27 October 1980 and the subject property remained vested in the trustee in bankruptcy until 18 February 1981, thirty-seven days

after the expiration of the 180-day period on 12 January 1981 (11 January 1981 being on Sunday).

Where real property against which the lien is asserted is vested by law in a trustee in bankruptcy, the lien shall be enforced in accordance with the orders of the bankruptcy court. N.C. Gen. Stat. § 44A-13(a) (1976). Such is the case here. F&H complied with the orders of the bankruptcy court and filed its proof of claim with that court. 11 U.S.C. § 546(b) (1979). *See generally* 4 *Collier on Bankruptcy* ¶ 67.26 (14th ed. 1978).

Counsel state, and we find no authority to the contrary, that the issue at bar is of first impression in North Carolina. We find the reasoning of the Supreme Court of Georgia on the question to be persuasive. In *Melton v. Pacific Southern Mtg. Trust*, 241 Ga. 589, 247 S.E. 2d 76 (1978), plaintiff furnished labor and materials to National Community Builders, Inc. ("NCB") to improve certain property in Fulton County, Georgia. Melton placed a lien against the property in February 1974. In March of 1974, NCB transferred the property to U.S. Guaranty Corporation. Both NCB and U.S. Guaranty filed bankruptcy proceedings in California. Melton filed a claim in the NCB bankruptcy in January 1975. The bankruptcy court authorized the transfer of the property to defendant Pacific Southern. On 22 June 1976, Melton filed an action to foreclose the lien against the property. The trial court dismissed the action as not being timely filed. The Georgia Supreme Court reversed, holding that Melton had "commenced an action" within the meaning of the Georgia statute when he filed his claim in the bankruptcy proceeding. The holding avoids "the harsh result of a materialman being deprived of his lien through no fault of his own by virtue of the bankruptcy of the contractor." *Id.* at 591, 247 S.E. 2d at 78. *See* E. Urban and J. Miles, Jr., *Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement, and Priority*, 12 Wake Forest L. Rev. 283 (1976). Federal cases in accord with *Melton* are *Phillips Const. Co., Inc. v. Limperis*, 579 F. 2d 431 (7th Cir. 1978); *American Coal Burner Co. v. Merritt*, 129 F. 2d 314 (6th Cir. 1942); *Lockhart v. Garden City Bank & Trust Co.*, 116 F. 2d 658 (2d Cir. 1940).

Appellees argue that we should not follow *Melton* and the federal cases, because in the case before us the property was abandoned by the trustee in bankruptcy. As noted above, this occurred *after* the expiration of the 180-day period. F&H could not

thereafter pursue its lien. The 180-day period is not a statute of limitations but an element of the cause of action. It is not tolled by the bankruptcy proceeding. *Assurance Society v. Basnight*, 234 N.C. 347, 67 S.E. 2d 390 (1951); 53 Am. Jur. 2d *Mechanics' Liens* § 357 (1970); Urban and Miles, *supra*. Again, the abandonment of the property by the bankruptcy court was beyond the control of F&H. Common sense and equity will not allow F&H to be deprived of its lien for reasons beyond its control. *Melton, supra*.

Appellees also contend that the general rule establishing one form of action requires that a lien be enforced by commencing an action under N.C.G.S. 1A-1, Rule 2. This argument overlooks the familiar rule of construction that a particular statute controls a general one with reference to the same subject matter. *E.g., Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E. 2d 582 (1966). N.C.G.S. 44A-13(a) specifically directs that a lien against property vested in a trustee in bankruptcy "shall be enforced" in accordance with the orders of the bankruptcy court. This provision controls over Rule 2 of the North Carolina Rules of Civil Procedure. Another example familiar to the bar where a specific directive for commencing an action prevails over Rule 2 is the filing of a claim under the Workers' Compensation Act.

We therefore hold that by filing its claim of lien in the bankruptcy proceeding within 180 days after last providing labor or materials on the property, F&H satisfied the requirement of N.C.G.S. 44A-13(a) that the action for enforcement of the lien be commenced within the 180-day period.

The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. DANNY LEE ATKINSON

No. 506PA82

(Filed 9 August 1983)

Criminal Law § 86.5— impeachment of defendant—avoiding criminal charge in another state

The district attorney could properly ask defendant whether he was "avoiding matters" in New Jersey when he left that state where the district attorney had a good faith belief that defendant was avoiding a criminal prosecution, which constituted a specific act of misconduct. Furthermore, defendant waived objection to his response showing that he had been arrested in New Jersey on a narcotics charge by failing to move to strike such testimony.

BEFORE *Judge John Jolly, Jr.*, and a jury at the 6 October 1980 Criminal Session of ROBESON Superior Court defendant was found guilty of second degree murder. He received a sentence of imprisonment for a minimum of fifteen years and a maximum of life. Defendant failed to perfect his appeal on time and petitioned this Court for a writ of certiorari. The writ was allowed on 21 September 1982.

Rufus L. Edmisten, Attorney General, and David E. Broome, Jr., Associate Attorney, for the state.

Bruce W. Huggins for defendant appellant.

EXUM, Justice.

Defendant's sole assignment of error raises the question whether the trial court erred in overruling defendant's objection to a question asked him by the prosecutor on cross-examination. For the reasons set forth below, we conclude the trial court's ruling was proper.

The state's evidence at trial tended to show defendant and his brother, Billy Ray Atkinson, began arguing as they were driving home with their father from the Stateline Grill near the North Carolina-South Carolina border. Defendant was driving the car about midnight on 2 July 1980. He pulled the car off the road as the argument with his brother grew more heated. Their father's efforts to stop the argument were not successful and defendant shot his brother in the side of the head with a .22 caliber pistol. Billy Atkinson died shortly thereafter as a result of the wound.

Defendant testified in his own defense and his testimony tended to show he shot at his brother because his brother was threatening him and he was scared. Defendant said he intended only to frighten his brother.

The jury was instructed on second degree murder, and the lesser-included offenses of voluntary manslaughter, involuntary manslaughter and not guilty. Defendant was found guilty of second degree murder.

Defendant testified on direct examination that he grew up in North Carolina but had spent ten years in Pennsylvania, New Jersey and New York before returning to North Carolina. On cross-examination the following exchanges took place:

Q. How long have you been away from New Jersey?

A. About four years.

Q. You left in March of 1976, didn't you?

A. No, I left about September of 1976.

Q. And you were avoiding—

MR. HUGGINS: Objection.

MR. WEBSTER: —matters in New Jersey at the time you left.

MR. HUGGINS: Objection.

COURT: Overruled.

THE WITNESS: Well, can I explain that?

MR. WEBSTER: Yes, sir.

A. The only matter that I was avoiding—while I lived in New Jersey, the place I lived was a real bad place called the ghettos. And I lived there practically the whole time and we have all kinds of people there. The matter I was avoiding was a drug matter. You have all kinds of people that hang there and, see, I was standing in front of a hotel where I lived and four or five guys were standing in front of the hotel. People were selling dope and stuff. The police pulled up and a fellow drops a bag of dope beside my seat and he takes the both of

> us to jail and charges us both because the man wouldn't tell that it was his, and that is the only thing I was avoiding.

Defendant argues the district attorney knew he could not ask defendant if he had been arrested for possession of drugs so he indirectly solicited testimony about defendant's drug arrest from defendant. Defendant further argues the district attorney was acting in bad faith when he asked the question. The state responds that the question asked was entirely proper, and defendant volunteered the details of the particular criminal charge against him. The state also argues that questions of the prosecutor will be presumed to be proper unless the record demonstrates otherwise; here, the record fails to show bad faith on the part of the prosecutor.

We agree with the state that the question was proper. Apparently, the prosecutor was trying to elicit from defendant the admission that he was avoiding a criminal charge in New Jersey. He did not seek to put before the jury the specific nature of the charge; rather, he was attempting to question defendant about an act of misconduct, *i.e.*, avoiding criminal prosecution.

A witness, including a criminal defendant, may be questioned about specific acts of misconduct in order for the jury to better assess the witness's credibility. *State v. Small*, 301 N.C. 407, 433, 272 S.E. 2d 128, 144 (1980); *State v. Ferdinando*, 298 N.C. 737, 742, 260 S.E. 2d 423, 427 (1979); 1 Brandis, North Carolina Evidence § 111 (2d rev. ed. of Stansbury's N. C. Evidence 1982).

This Court held in *State v. Williams*, 279 N.C. 663, 672, 185 S.E. 2d 174, 180 (1971), however, that a defendant cannot be impeached by cross-examination on whether he has been *arrested*, *indicted* or *accused* of a criminal offense unrelated to the one for which he was being tried. *See also*, 1 Brandis, North Carolina Evidence § 112 (2d rev. ed. of Stansbury's N. C. Evidence 1982). The Court in *Williams* went on to distinguish impermissible questions from proper ones about prior bad acts:

> It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. Such questions relate to matters *within the knowledge of the witness*,

> not to accusations of any kind made by others. We do not undertake here to mark the limits of such cross-examination except to say generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith.

279 N.C. at 675, 185 S.E. 2d at 181 (emphasis original) (citations omitted) *quoted in State v. Purcell*, 296 N.C. 728, 732, 252 S.E. 2d 772, 775 (1979).

Under the holdings in *Williams* and *Purcell* the district attorney could not have asked defendant, "Have you been charged with possessing illegal drugs?" However, it was permissible to inquire if defendant was "avoiding matters" in New Jersey if the district attorney had a good-faith belief defendant was avoiding something, the very avoidance of which was an act of misconduct. The record gives no indication the prosecutor acted in bad faith in asking the question; defendant's own testimony indicates he was indeed avoiding a criminal charge.

The issue of whether the information actually given by defendant in response to the prosecutor's question was admissible, as distinguished from the propriety of the question itself, is not properly before us. After defendant's answer his attorney failed to move to strike the answer. The failure to move to strike the answer waives any objection to the information elicited when the inadmissibility of the testimony appears only in the response of the witness. The motion to strike the answer or the objectionable part of it should be made as soon as it is evident the witness's response is inadmissible. *State v. Goss*, 293 N.C. 147, 155, 235 S.E. 2d 844, 850 (1977); 1 Brandis, North Carolina Evidence § 27 (2d rev. ed. of Stansbury's N. C. Evidence 1982); 4 N. C. Index 3d, Criminal Law § 162.3 (Supp. 1982).

In defendant's trial, we find

No error.

IV-D CHILD SUPPORT ENFORCEMENT)
UNIT, COLUMBUS COUNTY DEPARTMENT)
OF SOCIAL SERVICES, EX REL. RUBY)
GRAINGER, PLAINTIFF)
ORDER
v.)
JIMMY EARL EDWARDS, DEFENDANT)

No. 264P83

(Filed 10 August 1983)

THIS cause is before the Court upon defendant's notice of appeal and upon defendant's petition for discretionary review under G.S. 7A-31.

1. Defendant's notice of appeal is DISMISSED.

2. Defendant's petition for discretionary review is ALLOWED for the sole purpose of entering the following order:

The Order Of Contempt entered herein on 29 March 1983 is VACATED and this cause is REMANDED to the District Court of Columbus County for a determination of whether defendant is entitled to counsel to assist him in addressing the questions whether: (1) the support orders survive defendant's marriage to the mother of the children and (2) if they do, whether defendant willfully violated the court's orders.

By order of the Court in Conference, this 9th day of August, 1983.

FRYE, J.
For the Court

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

BARBER v. DIXON

No. 328P83.

Case below: 62 N.C. App. 455.

Petition by defendant for discretionary review under G.S. 7A-31 denied 9 August 1983.

BELK v. ALISA, INC.

No. 312P83.

Case below: 62 N.C. App. 328.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 9 August 1983.

CHURCH v. G. G. PARSONS TRUCKING CO.

No. 295P83.

Case below: 62 N.C. App. 121.

Petition by defendant for discretionary review under G.S. 7A-31 denied 9 August 1983.

HARRELL v. HARRIETT AND HENDERSON YARNS

No. 198PA83.

Case below: 56 N.C. App. 697.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 9 August 1983.

HUTCHENS v. HANKINS

No. 367P83.

Case below: 63 N.C. App. 1.

Petition by defendant for discretionary review under G.S. 7A-31 denied 9 August 1983.

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

IN RE MONTGOMERY

No. 345PA83.

Case below: 62 N.C. App. 343.

Petition by Harnett County Department of Social Services for discretionary review under G.S. 7A-31 allowed 9 August 1983.

LAZENBY v. GODWIN

No. 296P83.

Case below: 62 N.C. App. 144.

Petition by defendant for discretionary review under G.S. 7A-31 denied 9 August 1983.

MAZZA v. HUFFAKER

No. 215P83.

Case below: 61 N.C. App. 170.

Petition by defendant for discretionary review under G.S. 7A-31 denied 9 August 1983.

MURPHY v. DAVIS

No. 249P83.

Case below: 61 N.C. App. 597.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 9 August 1983.

N.C. STATE BAR v. TALMAN

No. 346P83.

Case below: 62 N.C. App. 355.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1983.

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

NORTH CAROLINA EX REL. HORNE v. CHAFIN

No. 304PA83.

Case below: 62 N.C. App. 95.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 9 August 1983. Motion by defendants to dismiss the appeal for lack of significant public interest denied 9 August 1983.

SANDERS v. STOUT

No. 247P83.

Case below: 61 N.C. App. 576.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 9 August 1983.

STATE v. CHURCHILL

No. 282P83.

Case below: 62 N.C. App. 81.

Petition by defendant for discretionary review under G.S. 7A-31 denied 9 August 1983.

STATE v. PRATT

No. 202P83.

Case below: 61 N.C. App. 579.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 9 August 1983.

STATE v. WISE

No. 279P83.

Case below: 62 N.C. App. 328.

Petition by defendant for discretionary review under G.S. 7A-31 denied 14 July 1983.

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

WALL v. STOUT

No. 247P83.

Case below: 61 N.C. App. 576.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 9 August 1983.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; CAROLINA POWER AND LIGHT COMPANY (APPLICANT); CHAMPION INTERNATIONAL CORPORATION; AND RUFUS L. EDMISTEN, ATTORNEY GENERAL v. THE PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION; AND NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; CAROLINA POWER & LIGHT COMPANY (APPLICANT); KUDZU ALLIANCE; AND NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC. v. THE PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; VIRGINIA ELECTRIC AND POWER COMPANY (APPLICANT); AND NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC. v. THE PUBLIC STAFF

Nos. 529PA82 and 530A82

(Filed 7 September 1983)

1. **Electricity § 3; Utilities Commission § 38— fuel clause proceeding—cost of purchased power**

Former G.S. 62-134(e) did not permit an electric utility in a fuel clause proceeding to obtain any increase or adjustment in its rates or charges to recover any of its costs or expenses for purchased power, the cost of purchased power being recoverable only in a general rate case.

2. **Electricity § 3; Utilities Commission § 38— general rate case—reasonableness of cost of purchased and interchanged power**

In allocating the cost of purchased and interchanged power under former G.S. 62-134(e) in a general rate case, the Utilities Commission should hear and consider evidence as to the reasonableness of the utility's decision to make the purchases and exchanges in question and the reasonableness of the price paid for such purchases or the value of the power exchanged and should allow or disallow such expenses accordingly.

APPEALS by the Public Staff of the North Carolina Utilities Commission in case No. 529PA82, reported at 58 N.C. App. 480, 293 S.E. 2d 880 (1982), and by CP&L and VEPCO in case No. 530A82, reported at 58 N.C. App. 453, 293 S.E. 2d 888 (1982), from the decisions of the Court of Appeals reversing orders of the Utilities Commission (hereinafter Commission) in three separate fuel adjustment proceedings heard pursuant to former G.S. § 62-134(e) (repealed 17 June 1982 by Chapter 1197 of the Session Laws of 1981 (Regular Session 1982)).

Our case No. 529PA82 is the appeal in the Utilities Commission, CP&L Docket No. E-2, Sub 402, in which the Commission granted an increase in rates including the entire cost of purchased power and the Public Staff appealed. The appeal was heard by a panel of the Court of Appeals as case No. 8110UC392 and the order of the Commission was vacated and remanded. That panel of the Court of Appeals unanimously held in effect that only the fuel component of purchased power costs was recoverable in a fuel clause proceeding. Both CP&L and the Public Staff requested and received a writ of certiorari from this Court to review the decision of the Court of Appeals.

Our case No. 530A82 is the appeal in the consolidated Utilities Commission, CP&L Docket No. E-2, Sub 411, in which a subsequent increase for a later period was granted, and VEPCO Docket No. E-22, Sub 258, in which a reduction in rates due to a decrease in fuel costs was allowed. In both dockets the Commission allowed recovery of the fuel component of purchased power costs and the Public Staff appealed the Commission's order in both dockets. Docket Nos. Sub 411 and Sub 258 (hereinafter Sub 411/258) were consolidated by the Court of Appeals and were heard by a different panel of that court as case Nos. 8110UC812 and 8110UC865. A divided panel vacated the orders of the Commission and remanded the cases to the Commission. The majority of that divided panel held in effect that *no* part of the costs of purchased power could be recovered in a fuel clause proceeding.

Although the separate opinions of the two panels of the Court of Appeals were issued on the same day they were not consistent—one panel holding that only the fuel component of purchased power costs was recoverable in a fuel clause proceeding and the other panel holding that no part of purchased power costs was recoverable in a fuel clause proceeding.

Charles D. Barham, Jr.; Richard E. Jones; Robert S. Gillam; and Bode, Bode & Call, by John T. Bode, for CP&L (No. 529PA82).

Charles D. Barham, Jr.; Richard E. Jones; Robert S. Gillam; and Bode, Bode & Call, by John T. Bode, for CP&L (No. 530A82).

Hunton & Williams, by Robert C. Howison, Jr., Edward S. Finley, Jr., and Edgar M. Roach, Jr.; and Guy T. Tripp III, for VEPCO (No. 530A82).

Karen E. Long and Gisele L. Rankin, for Public Staff (Nos. 529PA82 and 530A82).

MEYER, Justice.

[1] The primary issue presented is whether G.S. § 62-134(e) as it existed at the time of the proceedings in question permitted a utility *in a fuel clause proceeding* to obtain any increase or adjustment in its rates and charges to recover any of its costs or expenses for purchased power. We hold that the statute as it then existed did not permit recovery for any portion of purchased power costs in a fuel clause proceeding and that the cost of purchased power, if recoverable, was recoverable only in the general rate cases. We hold that the Commission erred in CP&L Docket No. E-2, Sub 402, in allowing the recovery of the entire cost of purchased power and erred in CP&L Docket No. E-2, Sub 411, and in VEPCO Docket No. E-22, Sub 258, in allowing the recovery of the fuel component of purchased power costs. Because some portion of purchased power costs which the utilities were entitled to recover may not have been recovered in either a general rate case or a fuel clause proceeding, we find it necessary to remand this cause to the Utilities Commission for such a determination.

We note at the outset that the decision of this Court on the question presented will be of limited precedential value. G.S. § 62-134(e) was repealed on 17 June 1982. Thus, that statute will not be applicable in the future in adjusting fuel-related expenses. The same act which repealed G.S. § 62-134(e) enacted the new G.S. § 62-133.2 which provides an entirely new procedure for making fuel charge adjustments. We observe that the new G.S. § 62-133.2 procedure allows the Utilities Commission to permit an electric utility to charge as a rider to its rates the cost of fuel and the fuel component of purchased power used in providing its North Carolina customers with electricity as established in its previous general rate case. Having been enacted subsequent to the order of the Commission to which these appeals relate, the new G.S. § 62-133.2 has no application to these cases.

A review of the lengthy proceedings before the Utilities Commission in each of the cases before us is unnecessary. The issue presented in all three of the cases is so basic that the peculiar facts presented by the individual dockets are not determinative of the issue. For a review of the proceedings in the individual dockets the reader is referred to the opinion of the Court of Appeals in each case which is cited in the opening paragraphs of this opinion.

The proper treatment of purchased power costs can best be understood if one is cognizant of the characteristics and benefits of the interconnection between the various systems by which electric utilities are able to exchange and buy and sell electric power and energy with other electric utilities and the considerations which dictate or make advisable such exchanges, purchases or sales. We now examine very briefly that system and those considerations. Because the electric utility systems of our State are interconnected among themselves and with those of other states (and those in turn with others), electric power and energy can flow (or be exchanged) between systems over great distances across a vast power grid or network. These interconnections, and the interchange and exchange agreements that result, enhance reliability by allowing any particular interconnected utility to receive excess power from systems located anywhere on the grid. Such enhanced reliability obviates the need for the high reserve capacity that would otherwise be needed by the utility to meet its peak demand in times of highest usage or when generating units are out of service. By sharing reserves the interconnected systems not only enhance reliability but also reduce the need for capital expenditures necessary to fulfill their reserve needs if they were not interconnected. The ability to interchange and purchase and sell power among interconnected utilities also allows the utilities to schedule plant outages for necessary maintenance and repair at particular times when it might otherwise be impossible. It makes possible staggered construction of large new generating units among interconnected systems. Because it is less expense to build a few large units than many smaller ones and because the projected load of a particular utility would not justify the construction of a large economic unit, the utility could build the larger unit and sell the excess capacity to other intercon-

nected utilities, or delay construction and depend on the other systems until demand justifies construction.

More pertinent to the issue before us is the simple fact that the interconnection of systems allows utilities to purchase power for purely economic reasons. That is, even though a utility might have the available capacity to serve all of its needs at a particular time, it can purchase power at that time at a lower cost than it can generate it with its own units. Such purchases are referred to as purchases made on an economic dispatch basis. Whether power will be purchased may depend *solely* on whether the power needed can be purchased at a lower cost than the purchasing utility's cost of bringing on line its next most efficient, least cost generating unit to serve the need. Such purchases may be made for only an hour, a few hours, or for longer periods. The decision to purchase power from another utility is made by system dispatchers and may be based on one or a combination of reasons and involves consideration of factors such as plant availability (including planned as well as unplanned outages), efficiency of plant operations, heat rate, fuel inventories, etc. Such factors necessarily involve intricate management decisions which deserve close scrutiny as to reasonableness and motivation. The proper exchange with, sale to, or purchase of power from another utility promotes adequate, reliable and economical utility service at just and reasonable rates in accordance with the declared public policy of this State. G.S. § 62-2.

No one could seriously advocate that the cost of interchange and purchased power should be altogether disallowed as a legitimate expense of the utilities. Indeed, the Public Staff of the Commission does not contend that rates set to reflect purchased power expenses should be disallowed, but merely asserts that consideration of such expenses are better left to a general rate case proceeding and that the repealed G.S. § 62-134(e) did not authorize consideration of these expenses in an expedited fuel charge proceeding. It is only the question of the proper forum for allocating the cost of interchanged and purchased power under the former G.S. § 62-134(e) that is before us.

We will now examine the contentions of the parties and the actual practice and procedure of the Commission in allocating the costs of interchange and purchased power. It is the position of

the utility companies that *all* of the costs of purchased power (not just the fuel component) were recoverable in a fuel clause proceeding held pursuant to the now repealed G.S. § 62-134(e). It is the position of the Public Staff that *none* of the costs of purchased power were recoverable in a fuel clause proceeding but was recoverable only in a general rate case proceeding. Neither party's contentions reflect the actual procedure and practices of the Commission in allocating purchased power costs.

The cost of fuel to operate generating plants constitutes a large portion of an electric utility's operating expenses. With the advent of the 1973 Arab oil embargo and the resultant energy crisis, the utility companies experienced dramatic increases in both oil and coal prices. Not only did fuel costs escalate rapidly but they began to fluctuate rapidly. These fuel cost increases and fluctuations led to serious financial problems for the utilities and demanded attention. To protect the utilities and their customers, the Commission in early 1974 authorized a fossil fuel adjustment clause. Under this fuel adjustment clause the companies were permitted to adjust rates periodically to reflect the changes in the cost of fossil fuels. While fuel adjustment clauses had been used occasionally prior to 1974, the issue of their validity had not been addressed directly by this Court.[1] We did address the issue and found such a clause to be valid in *Utilities Comm. v. Edmisten, Attorney General*, 291 N.C. 327, 230 S.E. 2d 651 (1976).

The fuel clause adopted by the Commission in 1974 operated *automatically* on a monthly basis, with rate adjustments being implemented by the companies in accordance with a Commission approved formula without hearings. In 1975 the General Assembly adopted G.S. § 62-134(e) which required the Commission to hold a hearing on each proposed fuel adjustment and to rule on the proposed adjustment within ninety days of its filing. To implement the newly adopted statute and to provide rules for the hearings, the Commission adopted Rule R1-36. The rule originally required fuel clause proceedings every four months. That interval has been changed by amendment to the rule several times and has fluc-

1. *See Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 126 S.E. 2d 325 (1962); *Utilities Comm. v. Light Co. and Utilities Comm. v. Carolinas Committee*, 250 N.C. 421, 109 S.E. 2d 253 (1959); *Utilities Commission v. Municipal Corporations*, 243 N.C. 193, 90 S.E. 2d 519 (1955).

tuated from one month to six months. When the fuel charge changed each month, the rate set in a general rate case remained in effect only one month when it was then superseded by the next fuel clause adjustment. Following a 1978 amendment to Rule R1-36 which extended the period to six months, it became the practice in a general rate case to assume that the fuel-related costs continued at the same level as found in the most recent fuel adjustment proceeding, thus shifting the emphasis on consideration of fuel costs from the general rate case to the fuel clause proceeding.

The formula used by the Commission in calculating fuel adjustments was initially adopted for Vepco and CP&L in general rate cases in 1975 and 1976 respectively and was reaffirmed in a 1978 generic proceeding involving all three major electric utilities.[2] For the purpose of this opinion we will use the formula adopted for CP&L.[3] That formula remained unchanged from 1976 until the repeal of G.S. § 62-134(e) in June 1982 except for a change in the one-month test period which was lengthened or shortened from time to time. When these cases were decided Rule R1-36(c) of the Commission required each utility to file for a fuel adjustment every four months and to calculate the adjustment according to the formula. The Commission's formula was as follows:

2. Virtually identical formulas were adopted in 1975 for Vepco in Virginia Electric and Power Company, Docket No. E-22, Subs 161, 165 and 170, *Sixty-Fifth Report of the North Carolina Utilities Commission: Orders and Decisions* 304, 333, 345 (Oct. 22, 1975), for Duke Power in Duke Power Company, Docket No. E-7, Subs 161 and 173, *Sixty-Fifth Report of the North Carolina Utilities Commission: Orders and Decisions* 191, 223, 231-32 (Oct. 3, 1975), and for Carolina Power & Light Company, Docket No. E-2, Sub 264, *Sixty-Sixth Report of the North Carolina Utilities Commission: Orders and Decisions* 84, 115-17, 122-23 (Feb. 20, 1976). In Carolina Power & Light Company, Docket No. E-2, Sub 316, No. E-7, Sub 231, No. E-22, Sub 216, *Sixty-Eighth Report of the North Carolina Utilities Commission: Orders and Decisions* 129, 136, 139-42 (Aug. 31, 1978), a consolidated generic proceeding involving all three companies, the formulas were reaffirmed.

3. The original CP&L fuel adjustment clause dealt only with the costs of fossil fuel. However, in 1976 the subject matter of fuel adjustment proceedings was broadened to include the costs of nuclear fuel, as well as a portion of purchased power costs, in response to a proposal by the Commission Staff.

Fuel Cost Formula

$$F = \left(\frac{E}{S} - \$0.00850\right)(T)(100)$$

Where

F = Fuel adjustment in cents per kilowatt-hour.

E = Fuel costs experienced during the third month preceding the billing month, as follows:

(A) Fossil and nuclear fuel consumed in the utility's own plants, and the utility's share of fossil and nuclear fuel consumed in jointly owned or leased plants. The cost of fossil fuel shall include no items other than those listed in Account 151 of the Commission's Uniform System of Accounts for Public Utilities and Licensees. The cost of nuclear fuel shall be that as shown in Account 518 excluding rental payments on leased nuclear fuel and except that, if Account 518 also contains any expense for fossil fuel which has already been included in the cost of fossil fuel, it shall be deducted from this account.

Plus

(B) Purchased power fuel costs such as those incurred in unit power and Limited Term power purchases *where the fossil and nuclear fuel costs associated with energy purchased are identifiable and are identified in the billing statement.*

Plus

(C) Interchange power fuel costs such as Short Term, Economy and other *where the energy is purchased on economic dispatch basis; costs such as fuel handling, fuel additives and operating and maintenance may be included.*

Energy receipts that do not involve money payments such as Diversity energy and payback of stor-

age energy are not defined as purchased or Interchange power relative to the Fuel Clause.

Minus

(D) The cost of fossil and nuclear fuel recovered through intersystem sales including the fuel costs related to economy energy sales and other energy sold on an economic dispatch basis.

Energy deliveries that do not involve billing transactions such as Diversity energy and payback of storage are not defined as sales relative to the Fuel Clause.

S = total kilowatt-hour sales during the third month preceding the billing month.

$0.00850 = Base cost of fuel per KWH sold.

T = adjustment for state taxes measured by gross receipts: 1.06383.

(Emphasis added.)

Paragraphs (B) and (C) of the Commission formula dealt with purchased power. Paragraph (B) related to purchased power transactions which are required in order to enable a utility to meet its customers' demand when its own generation facilities are incapable of supplying that demand. Paragraph (B) provided that for this type of transaction only the selling utility's specifically identifiable fuel costs (the fuel component only) could be considered in adjusting the purchasing utility's rates pursuant to G.S. § 62-134(e). All other costs in this Paragraph (B) type of transaction were considered in general rate cases. Paragraph (B) costs were upheld by the Court of Appeals in Sub 402 but were disallowed by the Court in Sub 411/258.

In contrast to Paragraph (B), Paragraph (C) dealt with "[i]nterchange power fuel costs . . . where the energy is purchased on economic dispatch basis." Energy is purchased on an "economic dispatch" basis when one utility is able to produce electricity at a lower cost than another. Such purchases are a routine practice in the industry and are the subject of interchange agreements among utilities which create mutual obligations to

sell lower-cost electricity to one another under such circumstances. The common practice is to pay the selling utility 50% of the savings realized by the purchasing utility as a fee for providing the lower-cost electricity. This is referred to as a "share the savings" or "split the savings" basis.

In recognition of the unique advantages of economy purchases, Paragraph (C) of the formula provided that when energy was purchased on an economic dispatch basis, not only the selling utility's fuel cost but also "costs *such as* fuel handling, fuel additives and operating and maintenance may be included" in the fuel adjustment calculation (emphasis added). In addition to the specifically listed costs, the cost of the "sharing of the savings" with the selling utility has also been consistently included in the buying utility's costs in computing fuel costs for economic dispatch sales. Since Paragraph (C) allowed consideration of costs other than the selling utility's actual costs of fuel (the fuel component), this paragraph is inconsistent with, and thus impermissible under, the Court of Appeals' holdings in both Sub 402 and Sub 411/258.

Both opinions of the Court of Appeals held that the Commission erred in its allocation of purchased power costs in the fuel adjustment proceedings. As we have previously observed, the Court of Appeals in Sub 402 held that only "the fuel component" of purchased power could be considered in a fuel adjustment proceeding and a different panel in Sub 411/258 held that no part of purchased power costs may be recovered in such a proceeding. The effect of the Court of Appeals' holdings in Sub 402 and Sub 411/258 is to invalidate portions of the formula used by the Commission from 1976 until the repeal of G.S. § 62-134(e) in June 1982.

It is clear that the Commission believed its established practice of allowing the fuel component of purchased power and interchange power cost to be recovered in the fuel clause hearing was not only authorized by statute but was also fully in accord with the practice of the great majority of jurisdictions in the eastern United States. In its order in the VEPCO case (No. 530A82), the Commission found as facts:

> The capacity costs of purchased and interchange power were and are not included in said formula. The fuel cost adjust-

ment formula was adopted to enable the Commission and Staff to review more effectively the fuel cost filings made in accordance with G.S. 62-134(e) in the expedited proceedings provided for by that statute.

The inclusion of the allowed fuel costs of purchased power and interchange power has not been modified or altered since the adoption of the formula in 1976. In nearly forty individual proceedings and two generic proceedings concerning the formula and the recovery of fuel costs, this Commission has consistently allowed the recovery of CP&L's allowed fuel costs for purchased power and interchange power. As acknowledged in our Order dated May 18, 1978, in Docket No. E-2, Sub 316, the Public Staff has also heretofore recognized that '[p]roperly monitored, the formula accurately tracks changes in the cost of all fuel, nuclear as well as fossil, and the energy portion of purchased and interchange power.'

A review of our application of the language and procedures of G.S. 62-134(e) clearly indicates our uniform and undisturbed interpretation that the cost of a utility's fuel to be recovered in a fuel proceeding includes allowed fuel costs for purchased and interchange power which are described in the fuel costs adjustment formula. The formula's computation includes only the costs of fuel used to generate or produce power or the cost of equivalent energy purchased. For example, the cost of a ton of coal burned by Duke Power Company included in the price of power purchased by CP&L is just as much a cost of fuel to CP&L as if CP&L had actually burned the coal itself. Consequently, the cost of fuel burned by a selling utility should be considered a component of the fuel cost of the purchasing utility which may be recovered in a proceeding pursuant to G.S. 62-134(e) . . . . Any other conclusion is simply at odds with the language of G.S. 62-134(e) and our consistent construction of such language.

The Public Staff has urged the Commission to abandon that consistent construction of the provisions of G.S. 62-134(e) based on the Public Staff's interpretation of the recent decision of the Court of Appeals of North Carolina in *Virginia Electric and Power Company,* 48 N.C. App. 452, *supra* [Vepco]. While the Public Staff acknowledges that our pre-

viously adopted treatment of the costs of purchased and interchange power in fuel cost adjustment proceedings was the appropriate application of G.S. 62-134(e), the Public Staff now argues that as a consequence of the Vepco decision, the consideration of such costs must be reserved for a general ratemaking proceeding pursuant to G.S. 62-133.

The Commission also found that:

> In addition to North Carolina, twenty-two of the other twenty-four states east of the Mississippi River permit purchased power to be included in their fuel clauses. The Federal Energy Regulatory Commission (FERC) also includes purchased power in wholesale fuel clauses. The Public Utility Regulatory Policies Act (PURPA) of 1978, requires states with automatic fuel adjustment clauses 'to provide incentives for efficient use of resources (including incentives for economical *purchase* and use of fuel and electric energy) . . .' and authorizes the FERC to exempt electric utilities from any provision of state law, or from any state rule or regulation, which prohibits or prevents the voluntary coordination of electric utilities if the FERC determines that such voluntary coordination is designed to obtain economical utilization of facilities and resources.
>
> The energy portion of purchased and interchange power fuel costs has been allowed to be included in fuel clause proceedings for Carolina Power & Light Company since 1976; the capacity portion of such costs are not permitted to be recovered in the Commission's fuel cost adjustment formula. . . .

Because the Commission was not permitting recovery of the fuel component of purchased power in the general rate cases, it concluded in effect that if recovery of those expenses was not allowed in the fuel clause hearings, it would be denied altogether. It so stated in one of its findings of fact:

> Adoption of the adjustment proposed herein by the Public Staff would lead to the result that for the test period, Vepco would be denied the right to recover in its base fuel cost rates the amount which the Company expended for allowed fuel costs of purchased and interchange power in an ef-

> fort to reduce system fuel costs and thereby benefit the using and consuming public. . . .

We accept without reservation the Commission's good faith belief that its established practice of allowing the recovery of the fuel component in fuel clause proceedings was authorized by statute. If, however, the Commission's practice is not authorized by statute (*i.e.*, is in excess of statutory authority), it is the duty of this Court to declare it so. In analyzing our duty on this appellate review, we begin with the proposition that the Utilities Commission is vested with full power to regulate the rates charged by utilities. G.S. § 62-2.

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

Utilities Commission v. Duke Power Co., 305 N.C. 1, 10, 287 S.E. 2d 786, 792 (1982).

On appeal, the authority of the reviewing court, whether the Court of Appeals or this Court, to reverse or modify the order of the Commission, or to remand the matter to the Commission for further proceedings, is limited to that specified in G.S. § 62-94. *Utilities Commission v. Intervenor Residents*, 305 N.C. 62, 286 S.E. 2d 770 (1982); *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972). It is that statute which specifies the standard of judicial review.

> [G.S. § 62-94] provides, *inter alia*, that the reviewing court may (1) affirm, (2) reverse, (3) declare null and void, (4) modify, or (5) remand for further proceedings, decisions of the Commission. The Court's power to affirm or remand is not specifically circumscribed by the statute. However, the power of the court to reverse or modify and, *a fortiori*, to declare null and void, is substantially circumscribed to situa-

tions in which the court must find (a) that appellant's substantial rights, (b) have been prejudiced, (c) by Commission findings, inferences, conclusions or decisions which are

(1) in violation of constitutional provisions; or

(2) in excess of statutory authority or jurisdiction of the Commission, or

(3) made upon unlawful proceedings, or

(4) affected by other errors of law, or

(5) unsupported by competent, material and substantial evidence in view of the entire record as submitted, or

(6) arbitrary or capricious.

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

Pursuant to G.S. § 62-94(b)(2), the appellate court may reverse or modify the decision of the Commission if the substantial rights of the appellants have been prejudiced because the Commission's decision is in excess of statutory authority or jurisdiction of the Commission. Separate panels of our Court of Appeals differ on the issue of the statutory authority of the Commission to allow recovery of only the fuel component or none of the cost of purchased power in a fuel clause proceeding held pursuant to the repealed G.S. § 62-134(e). This Court's review of the decisions of the Court of Appeals in the cases before us is to determine whether those decisions are affected by errors of law. *See* Rule 16 of the North Carolina Rules of Appellate Procedure.

In *Utilities Comm. v. Power Co.*, 48 N.C. App. 453, 269 S.E. 2d 657, *disc. rev. denied*, 301 N.C. 531 (1980), the Court of Appeals held that the Commission's consideration *in a fuel clause proceeding* of Vepco's heat rate and plant availability exceeded the scope of the procedure authorized by G.S. § 62-134(e). The reasoning upon which that decision was based bears close examination as it reflects the very considerations which must be made on the issue of purchased power costs now before us:

[H]eat rate and capacity factor furnish convenient measuring devises by which to evaluate the overall efficiency with which a particular electrical utility system is operated.

Overall system efficiency ultimately depends upon management decisions made over a long period of time. These involve such questions as when and how often to replace expensive equipment, the number of maintenance employees to be kept on the payroll and the training to be given them, the amount and frequency of planned 'down time' to be devoted to preventive maintenance, and the amount and cost of standby equipment required for such planned maintenance 'down time.' In making these decisions management must also take into account such factors as the cost of capital and the availability of funds required to implement them and must balance the need for achieving maximum plant efficiency against the financial costs of achieving that goal.

Review of such management decisions by the Utilities Commission *in a general rate case* is not only entirely appropriate but even necessary, for poorly maintained equipment justifies a subtraction from both the original cost and the reproduction cost of existing plant before weighing these factors in ascertaining the present 'fair value' rate base of the utility's properties as required by G.S. 62-133, *see Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972), and serious inadequacy of a utility company's service, whether due to poor maintenance of its equipment or to other causes, is one of the facts which the Commission is required to take into account in determining what is a reasonable rate to be charged by the particular utility company for the service it proposes to render. *See Utilities Comm. v. Morgan, Attorney General*, 277 N.C. 255, 177 S.E. 2d 405 (1970).

We do not question that the efficiency with which a particular electrical utility company converts its fuel into electricity has a direct and significant bearing upon that company's fuel cost. Obviously it does. Nor do we question the necessity for the Utilities Commission to take into account the efficiency of the company's operations in fixing its rates in a general rate case as provided in G.S. 62-133. Obviously it should. We hold only that plant efficiency as it bears upon fuel cost is not a factor to be considered in the limited and expedited proceeding provided for by G.S. 62-134(e). After all, the legislature enacted that section, not as a substitute for a

> general rate case, but to provide an expedited procedure by which the extremely volatile and uncontrollable prices of fossil-fuels could be quickly taken into account in a utility's rates and charges. There is no such volatility in plant efficiency which depends upon long range maintenance decisions and practices carried out over a long period of time. . . .

48 N.C. App. at 461-62, 269 S.E. 2d at 662.

For the same reasons, the cost of purchased power, like heat rate and capacity factor, is not only an appropriate consideration in a general rate case, it is a necessary one.

The cardinal principle of statutory construction is that the intent of the legislature is controlling. *In re Brownlee*, 301 N.C. 532, 272 S.E. 2d 861 (1981); *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); *Housing Authority v. Farabee*, 284 N.C. 242, 200 S.E. 2d 12 (1973). In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). The words of G.S. § 62-134(e) make it clear that only changes in rates *based solely upon the increased cost of fuel* are to be considered in fuel clause proceedings. Those words are plain and unambiguous and interpretation of them by the Utilities Commission is not required. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E. 2d 184 (1977) (hereinafter Edmisten II). It is the spirit of the statute that fuel clause proceedings be not only limited in scope but that they be *expedited.* The statute itself provided "[t]he order responsive to an application *shall be issued promptly by the Commission but in no event later than 90 days from the date of filing of such application.* A proceeding under this subsection shall not be considered a general rate case." (Emphasis added.) The speedy approval of rate charges based solely on the increased cost of fuel sought to be accomplished by G.S. § 62-134(e) would be frustrated by the length of time required for a full consideration of all the factors bearing on the reasonableness of making the purchases and the costs of purchased power.

We are also required to consider the consequences which will follow from a construction of the statute one way or the other. *Campbell v. Church*, 298 N.C. 476, 259 S.E. 2d 558 (1979). It seems

apparent that without the opportunity for a thorough and searching examination of the reasonableness of the decision to make the purchases and the reasonableness of the cost of such purchases, the tendency would be that the utility would recover any purchased power costs it incurred without regard to their prudency.

Fuel clause proceedings under G.S. § 62-134(e) which were designedly of a limited and expedited nature are simply not the appropriate forum for the close scrutiny of the many considerations which relate to purchased and interchange power costs. The consequence of allowing the recovery of purchased power costs in an expedited fuel clause hearing is and has been the consideration of rate increases without a full evidentiary inquiry into the reasonableness of making the purchases and the reasonableness of their cost.

We specifically reject the notion that at least the cost of the "fuel component" of purchased power may be recovered by the purchasing utility in an expedited fuel clause proceeding under the repealed G.S. § 62-134(e). Assuming that it were possible to determine from the supplier of purchased power the fuel component of the price for such power or to extrapolate the fuel component, the Commission would have to rely upon the cost analysis and management decisions of the selling utility without the ability or opportunity to test their accuracy or reasonableness.

The utility companies point out to us that paragraphs (B) and (C) of the Commission's fuel cost formula remained in effect for approximately six years (1976 through June 1982) without change and were applied by the Commission in dozens of fuel clause proceedings during that period, unchallenged by the Public Staff. It is true that " '[t]he construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction . . . has been observed and acted upon for many years. . . .' " *Gill v. Commissioners*, 160 N.C. 176, 188, 76 S.E. 203, 208 (1912), *accord*, *State v. Best*, 292 N.C. 294, 233 S.E. 2d 544 (1977); *MacPherson v. City of Asheville*, 283 N.C. 299, 196 S.E. 2d 200 (1973). Nevertheless, it is ultimately the duty of the courts to construe administrative statutes and they may not defer that responsibility to the agency charged with administering those statutes. While the interpretation of the agency responsible for their administration may be helpful and entitled

to great consideration when the Court is called upon to construe the statutes, that interpretation is not controlling. *Faizan v. Insurance Co.*, 254 N.C. 47, 118 S.E. 2d 303 (1961). It is the Court and not the agency that is the final interpreter of legislation. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 28 L.Ed. 2d 136 (1971); *Campbell v. Currie, Commissioner of Revenue*, 251 N.C. 329, 111 S.E. 2d 319 (1959). We have carefully and thoughtfully considered the Commission's interpretation of G.S. § 62-134(e) as allowing the recovery of a portion of purchased power costs in the fuel clause proceedings and find that interpretation erroneous. We quote with approval the language of Judge (now Justice) Harry Martin in the majority opinion of the panel below in the Vepco case (530A82):

> N.C.G.S. 62-134(e) was properly adopted in 1975 by the General Assembly to allow then hard pressed utilities to compensate for rapidly increasing fuel prices. It was never intended to allow utilities to pass on to consumers the cost of power purchased from other utilities. The Commission states that it has allowed utilities to pass on to the consuming public the cost of purchased power in 'nearly forty individual proceedings' under the cost of fuel adjustment statute—all apparently without express court approval regarding this issue. It is time for the Court to place its interpretation upon the statute. A question of law is never settled until it is settled correctly.

58 N.C. App. at 459, 293 S.E. 2d at 892.

From our review of the language, purpose and history of the repealed G.S. § 62-134(e), we conclude that the Legislature intended that the Utilities Commission consider in the fuel adjustment proceedings only the fluctuations in the price of fossil fuels—oil, coal and natural gas—used by the utility in the production of electric power in its own generating units.[4] The Legislature did not intend to include in the expedited hearing proceedings the myriad of issues relating to purchased or interchange power which necessarily require closer scrutiny. Subsequent action by the Legislature in enacting G.S. § 62-133.2, which

4. The parties do not contend nor does the record demonstrate rapid fluctuations in the price of nuclear fuel during the period under consideration.

makes express provision for the consideration of such issues in the general rate cases, has now made its intent clear.

The Commission, in both of these cases, exceeded its statutory authority to the prejudice of the substantial rights of the ratepayers and thus the orders in both cases were affected by error of law. We cannot say that the error was harmless. We hold that the fuel component of the purchased power costs was improperly considered in the Vepco fuel adjustment proceeding under G.S. § 62-134(e). The decision of the Court of Appeals in case No. 529 in which it allowed recovery of the fuel component of purchased power costs to be recovered in a fuel clause proceeding was affected by error of law.

The cost of purchased power should have been considered during the period when G.S. § 62-134(e) was in effect in the general rate case proceedings. The purchased power costs at issue on this appeal may very well constitute legitimate operating expenses of these utilities. If shown to be reasonably and prudently incurred, the utilities are entitled to have these purchased power costs considered for rate-making purposes.

[2] This cause is remanded to the Court of Appeals for further remand to the North Carolina Utilities Commission for a hearing (or hearings as may be deemed by the Commission to be appropriate) in the nature of a general rate case, to determine whether, during the period covered by proceedings which are the subject of this appeal, the utility companies are entitled to recoup any of their costs for purchased and interchange power sought by such companies which have not previously been recovered. Should the Commission deem it appropriate, it may include in such hearing or hearings other electric utilities similarly affected though not parties to the actions reviewed herein. The Commission shall hear and consider evidence as to the reasonableness of the utilities' decision to make the purchases and exchanges in question and the reasonableness of the price paid for such purchases or the value of the power exchanged and will allow or disallow such expenses accordingly. If the Commission determines that the purchased power costs already recouped in the fuel clause proceedings were unreasonable or improper, it shall make appropriate adjustments in the rates. If the Commission determines that already recouped purchased power costs were in all respects

reasonable and proper, then it need make no such adjustments. It is the intent of this Court that on remand the Commission compare rates actually collected with rates it determines should have been collected in light of its determination as to the reasonableness and propriety of purchased power costs and make such adjustments in current rates as is necessary to true-up any discrepancy.

Case No. 529PA82, reversed and remanded.

Case No. 530A82, modified and affirmed and remanded.

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

STATE OF NORTH CAROLINA v. AARON JONES ALIAS AARON MILLER

No. 714A82

(Filed 7 September 1983)

1. **Criminal Law § 138— failure to consider mitigating factor—passive role in commission of murder**

Where the evidence before the court was both uncontradicted and manifestly credible that defendant played a passive role in the commission of a murder, the trial court erred in failing to consider it as a mitigating factor in defendant's sentencing hearing. G.S. 15A-1340.4(a)(2).

2. **Criminal Law § 138— aggravating factor that offense committed for pecuniary gain improperly considered**

In a prosecution for murder, felonious larcency, armed robbery and conspiracy, the trial court erroneously considered as an aggravating factor that the offenses were committed for pecuniary gain since there was no evidence that defendant was "hired" or "paid" to commit the offenses. G.S. 15A-1340.4(a)(1)c.

3. **Criminal Law § 138— aggravating factor that defendant occupied position of leadership or dominance properly considered**

The trial court properly considered as an aggravating factor in an armed robbery case that defendant "induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants" where the evidence showed that defendant was the one who initially grabbed the victim and forced her to the floor; that defendant obtained her keys, told a codefendant to start the car and was the driver of the car as they fled the scene.

BEFORE *Judge David Reid, Jr.*, presiding at the 28 March 1982 Criminal Session of CRAVEN Superior Court, defendant pled guilty to charges of second degree murder, armed robbery, conspiracy to commit armed robbery and felonious larceny. Defendant was sentenced by *Judge Bradford Tillery* at the 3 August 1982 Criminal Session of CRAVEN Superior Court. He received sentences of life imprisonment for the murder conviction, five years' imprisonment for the felonious larceny conviction, forty years' imprisonment for the armed robbery conviction, and three years' imprisonment for the conspiracy conviction, all sentences to run concurrently. Defendant appeals his life sentence to this Court pursuant to N.C. Rule of App. P. 4(b), as authorized by G.S. 15A-1444(al) & (d). His motion to bypass the Court of Appeals in his appeal of the other sentences was granted on 20 January 1983.

Rufus L. Edmisten, Attorney General, by George W. Lennon, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Marc D. Towler, Assistant Appellate Defender, for defendant appellant.

EXUM, Justice.

Defendant argues he is entitled to a new sentencing hearing because of errors committed by the sentencing judge. Specifically, he argues Judge Tillery should have found certain mitigating factors which were supported by the evidence, should not have found as an aggravating factor that the offenses were committed for pecuniary gain, and should not have found defendant "occupied a position of leadership or dominance of other participants" as an aggravating factor in sentencing on the armed robbery charge. We conclude defendant is entitled to a new sentencing hearing because of errors committed in the sentencing.

The state offered evidence at the sentencing hearing through the testimony of Sergeant Donald Sykes of the New Bern Police Department. He discovered the body of nineteen-year-old Patricia Phillips, the lone clerk in a Zip Mart convenience store in New Bern, shortly after midnight on 14 January 1982. She died of a single gunshot wound from a .38 caliber pistol. Her automobile had been stolen.

About 10:30 a.m. on 14 January her automobile, containing three adults and some children, was stopped by the Brunswick, Georgia, State Police. Arrested were defendant, Rosa Lee Gibbs, and Tonia Jamison. From the statements given by defendant and the two women, Sykes was able to ascertain the chain of events leading to the murder.

The three individuals were living together in a house not far from the Zip Mart; defendant and Rosa Gibbs were romantically involved. They had no money and their house was without heat. Gibbs possessed a .38 caliber pistol and after "casing" several convenience stores they decided to rob the Zip Mart because only one clerk worked at night. About 10 p.m. on 13 January they went to the store. The two women went to the beer cooler while defendant went behind the counter and knocked Phillips to the floor. The two women also went behind the counter; Gibbs threatened Phillips with the pistol, telling her, "[I]f you don't tell me the combination I'm going to have to hurt you." Phillips told them how to open the safe and defendant and Jamison began removing money from the safe and cash register. Defendant then took Phillips' car keys and told Jamison to start the car. Defendant pulled the phone receiver off the wall as he left the store. Gibbs followed him to the car. Gibbs then told the others she had to go back in and kill Phillips because Phillips could identify her; Jamison and defendant told her not to. However, Gibbs went back inside, killing Phillips with one shot. Gibbs returned and they drove away in the victim's car with defendant driving. They picked up Gibbs' children and some clothing and headed for Florida, where defendant had lived in the past. When they were stopped the pistol, the victim's pocketbook, and some of the stolen money were in the car.

Gibbs made a statement to the Georgia police that day; defendant confessed to Sykes the following day. Defendant and Jamison agreed to testify for the state should a trial of Gibbs be necessary.

A friend of defendant's, his mother and his sister testified about his quiet, non-violent disposition. It also appears from defense counsel's arguments that a presentence diagnostic report on defendant was before the sentencing judge, but the report is not in the transcript or record on appeal.

Defendant received sentences in each case greater than the presumptive terms of imprisonment prescribed in G.S. 15A-1340.4 (f). These presumptive terms are the result of the Fair Sentencing Act, which established a new sentencing scheme for felons whose offenses were committed on or after 1 July 1981. G.S. 15A-1340.1 (a). A sentencing judge may vary the sentence from the presumptive if he makes appropriate findings of aggravating or mitigating factors or if the sentence is pursuant to a plea arrangement. G.S. 15A-1340.4(a) & (b). Sentences which exceed the presumptive may be appealed by the defendant as a matter of right. G.S. 15A-1444 (a1).

The following chart shows the offenses of which defendant was convicted, the presumptive terms, the maximum terms permitted, and the prison terms defendant actually received:

Conviction	Presumptive (G.S. 15A-1340.6(f))	Maximum (G.S. 14-1.1)	Term Received
Second Degree Murder (Class C)	15 years	life or 50 years	life
Armed Robbery (Class D)	12 years	40 years	40 years
Felonious Larceny (Class H)	3 years	10 years	5 years
Conspiracy to commit armed robbery (Class J)	1 year	3 years	3 years

The terms imposed were all based on the aggravating factor that the offenses were committed for pecuniary gain, G.S. 15A-1340.4(a)(1)c, and the mitigating factor that "at an early stage of the criminal process, the defendant voluntarily acknowledged wrong-doing in connection with the offense to a law enforcement officer." G.S. 15A-1340.4(a)(2)l. In addition, the sentencing judge found as an aggravating factor in the armed robbery case that

"defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants." G.S. 15A-1340.4(a)(1)a.

[1] Defendant first argues he is entitled to a new sentencing hearing because the sentencing judge failed to find four of the mitigating factors listed in G.S. 15A-1340.4(a)(2). He argues the trial court ignored the statutory directive that before he imposes a prison term other than the presumptive he must consider all the aggravating and mitigating factors listed in G.S. 15A-1340.4(a). Defendant contends the following four mitigating factors were proved by a preponderance of the evidence and should have been found:

> G.S. 15A-1340.4(a)(2) . . .:
>
> . . . .
>
> c. The defendant was a passive participant or played a minor role in the commission of the offense.
>
> d. The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense.
>
> . . . .
>
> h. The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
>
> . . . .
>
> j. The defendant could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences.

We believe defendant's argument is correct to the extent that subsection (a)(2)c should have been found with respect to the murder charge. We do not believe the trial court erred in refusing to find any of the other mitigating circumstances.

When evidence in support of a particular mitigating or aggravating factor is uncontradicted, substantial, and there is no

reason to doubt its credibility, to permit the sentencing judge simply to ignore it would eviscerate the Fair Sentencing Act. The Act clearly states that unless the sentence is imposed pursuant to a plea arrangement "he *must* consider each of the [statutory] aggravating and mitigating factors." G.S. 15A-1340.4(a) (emphasis added). The Act further states that one of "[t]he primary purposes of sentencing a person convicted of a crime [is] to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability . . . ." G.S. 15A-1340.3. To allow the trial court to ignore uncontradicted, credible evidence of either an aggravating or a mitigating factor would render the requirement that he consider the statutory factors meaningless, and would be counter to the objective that the punishment imposed take "into account factors that may diminish or increase the offender's culpability." The sentencing judge, even when required to find factors proved by uncontradicted, credible evidence, may still attribute whatever weight he deems appropriate to the individual factors found when balancing them and arriving at a prison term. *State v. Ahearn*, 307 N.C. 584, 596-97, 300 S.E. 2d 689, 697 (1983) (quoting *State v. Davis*, 58 N.C. App. 330, 333-34, 293 S.E. 2d 658, 661, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982)); G.S. 15A-1340.4(b) (trial court must find aggravating factors outweigh mitigating if he imposes term greater than presumptive or that mitigating factors outweigh aggravating if he imposes term less than presumptive).

In determining whether the evidence compels that a particular factor be found the trial court may be guided by principles developed in civil cases for directing a verdict for the party with the burden of proof. In the sentencing scheme set forth in the Fair Sentencing Act the burden of proving aggravating or mitigating factors is not expressly allocated. We hold, however, that the state bears the burden of persuasion on aggravating factors if it seeks a term greater than the presumptive. Likewise, the defendant bears the burden of persuasion on mitigating factors if he seeks a term less than the presumptive. Thus, when a defendant argues, as in the case at bar, that the trial court erred in failing to find a mitigating factor proved by uncontradicted evidence, his position is analogous to that of a party with the burden of persuasion seeking a directed verdict. He is asking the

court to conclude that "the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn," and that the credibility of the evidence "is manifest as a matter of law." *North Carolina National Bank v. Burnette*, 297 N.C. 524, 536-37, 256 S.E. 2d 388, 395 (1979); *see also Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976) (discussed award of summary judgment to party with burden of persuasion).

It is easier to determine from a record on appeal whether evidence of a particular fact is uncontradicted than it is to determine whether the credibility of the evidence is manifest. Justice Huskins, writing for the Court in *North Carolina National Bank v. Burnette, supra*, 297 N.C. at 537-38, 256 S.E. 2d at 396, reviewed cases in which courts struggled with the question of whether credibility had been established. He found three situations in which courts found credibility to be manifest:

> (1) Where non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests. *Flintall v. Insurance Co.*, 259 N.C. 666, 131 S.E. 2d 312 (1963); *Davis v. Vaughn*, 243 N.C. 486, 91 S.E. 2d 165 (1956).
>
> (2) Where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents. *Watkins Products, Inc. v. Keane*, 185 Neb. 424, 176 N.W. 2d 230 (1970); *Commerce Trust Co. v. Howard*, 429 S.W. 2d 702 (Mo. 1968); 2 McIntosh, supra, 1488.20 at 26 (Phillips Supp. 1970).
>
> (3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has 'failed to point to specific areas of impeachment and contradictions.' *Kidd v. Early, supra*, 289 N.C. at 370. *See also*, Comment, [Directing Verdict for the Party with the Burden of Proof], 50 N.C. L. Rev. [843,] 844-46 (1972).

Determining the credibility of evidence is at the heart of the fact-finding function. Nevertheless, in order to give proper effect to the Fair Sentencing Act, we must find the sentencing judge in error if he fails to find a statutory factor when evidence of its existence is both uncontradicted and manifestly credible.

From all the evidence before us, particularly the testimony of Sergeant Sykes, it appears defendant played a passive role in the commission of the murder. All three perpetrators were preparing to leave in the victim's automobile when Gibbs announced she was going back into the store to kill Phillips. Defendant had apparently agreed with Gibbs and Jamison to rob the store but there was no agreement to kill the clerk. Defendant and Jamison tried to persuade Gibbs not to shoot Phillips; she ignored their plea. There is evidence that defendant was an active participant in the other offenses; he helped plan the robbery, subdued the clerk, took her keys and told Jamison to start the automobile, and jerked the phone receiver off the wall. But the state's testimony that defendant implored Gibbs not to kill Phillips and that she did so after her companions were in the car preparing to leave was neither impeached nor contradicted. The evidence is, then, both uncontradicted and manifestly credible.

The trial court erred, therefore, when it failed to find defendant had a passive role in the murder. The murder conviction must be remanded for a new sentencing hearing. *See State v. Ahearn*, *supra*, 307 N.C. at 602, 300 S.E. 2d at 700-01.

With regard to the three other mitigating factors, we find no evidentiary support for defendant's contention that they should have been found. Defendant in argument at the sentencing hearing refers to a presentencing report which may support factor G.S. 15A-1340.4(a)(2)d, *i.e.*, that defendant suffered from a mental condition which "significantly reduced his culpability." This argument does not constitute evidence; and, as noted, the presentencing report is not before us. Neither is there evidence in the record or transcript which would compel the trial court to find factor G.S. 15A-1340.4(a)(2)j, that "defendant could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences." That defendant protested Gibbs' plan to shoot Phillips is insufficient, in light of other evidence, to prove he "exercised caution" to avoid the threat of "serious bodily harm or fear" with respect to the murder. He had gone with Gibbs to the store to commit a felony, knowing she was armed with a gun. He fully participated in the conspiracy, robbery, and larceny during which Phillips was physically subdued and threatened with a gun. Although he did attempt to discourage Gibbs from killing Phillips,

his overall behavior does not mandate finding that he exercised caution to avoid serious bodily harm or fear to be caused another. Likewise, there is no evidence which would support a finding that defendant could not "reasonably foresee" his conduct would cause harm or the threat of harm to another.

The last component of defendant's argument on mitigating factors is that the trial court should have found G.S. 15A-1340.4(a)(2)h. This provision deems the fact that a defendant aided in apprehending another felon or testified truthfully for the prosecution in another felony prosecution to be a mitigating factor. Defendant has failed to demonstrate he aided in the apprehension of another felon; defendant and his companions in these crimes were all apprehended by the Georgia police at the same time. In addition, he has failed to show he "testified truthfully" against another felon for the prosecution. He *agreed* to testify against Gibbs as part of his plea bargain and this fact may be of some mitigating value should the trial court consider it to be such as he is permitted but not required to do under G.S. 15A-1340.4(a). But defendant was never actually called upon to testify; therefore the specific statutory circumstance that defendant must have "testified truthfully" does not exist.

[2] Defendant next argues the trial court erred in finding in each case the aggravating factor that the offense was committed for pecuniary gain. G.S. 15A-1340.4(a)(1)c. We believe defendant's argument is well taken for the reasons set forth in *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983). In *Abdullah* we held that "where there is no evidence that defendant was hired or paid to commit the crime," the legislature did not intend for defendant's sentence to be enhanced because money or valuable items were involved in the offense. *Id.* at 77, 306 S.E. 2d at 108; *see also State v. Thompson*, 62 N.C. App. 585, 586, 303 S.E. 2d 85, 86 (1983). In the instant case there is no evidence defendant was "hired" or "paid" to commit these offenses; therefore, the trial court should not have found the "pecuniary gain" aggravating factor in any of the cases. All of the cases must be remanded for a new sentencing hearing for this reason. *See State v. Ahearn*, *supra*, 307 N.C. at 602, 300 S.E. 2d at 700-01.

[3] Defendant's final argument is that the trial court erred in finding as an aggravating factor in the armed robbery case that

"defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants." G.S. 15A-1340.4(a)(1)a. He argues the evidence shows Gibbs was the moving force in all these offenses. While the evidence does show Gibbs "occupied a position of leadership or dominance" in these offenses, it also shows defendant to have been a leader in the robbery. Defendant was the one who initially grabbed Phillips and forced her to the floor. He also obtained her keys, told Jamison to start the car and was the driver of the car as they fled the scene. This was sufficient evidence to prove by a preponderance of evidence that defendant occupied a position of leadership or dominance over Jamison, if not over Gibbs, in the armed robbery.

Finally, it is appropriate, for the trial court's guidance at the new sentencing hearing, to repeat our holding in *State v. Ahearn*, *supra*, 307 N.C. at 598, 300 S.E. 2d at 698,

> that in every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense.

We also repeat the caution in *Ahearn* that when factors are listed in the disjunctive in the statute, the portions inapplicable to the particular case should be eliminated. *Id.* at 599, 300 S.E. 2d at 698.

For the reasons given the judgments and commitments entered below in all cases are vacated and all cases are remanded for a new sentencing hearing.

Remanded for a new sentencing hearing.

STATE OF NORTH CAROLINA v. JIMMY RAY WARREN

No. 676PA82

(Filed 7 September 1983)

1. **Searches and Seizures § 23— search of automobile—probable cause shown in affidavit**

In a prosecution for second degree murder and crime against nature, the trial court properly denied defendant's motion to suppress the results of a visual search and chemical tests performed on bloodstains in the car in which he and his accomplices were riding on the night of the murder since the affidavit in support of the search warrant provided a reasonable basis to believe that bloodstains might be found in or on the car as well as on defendant's clothing, and that the evidence sought would aid in the apprehension or conviction of the offender.

2. **Searches and Seizures § 39— second search of vehicle—several days following execution of warrant**

In a prosecution for murder, the trial court properly admitted evidence from a second visual search and chemical test on bloodstains in an automobile since (1) samples of the bloodstains were obtained from the vehicle that had been seized and stored, (2) as a general rule, "second looks" at items do not constitute additional searches subject to Fourth Amendment proscriptions, (3) defendant "specifically declined to come forward with any evidence of ownership or possession" of the automobile, and (4) defendant showed no prejudice in the admission of the evidence.

3. **Homicide § 23— instructions—summary of evidence—no plain error**

Where the trial judge instructed that "the State . . . says and contends that the defendant is guilty of first degree murder with malice, deliberation and premeditation. The defendant says he is not guilty." and where the defendant made no objection to this portion of the instructions, the Court found no plain error.

4. **Homicide § 23.1— jury returning for additional instructions—failure to reexplain imperfect self-defense—no error**

Where the jury, after deliberating for some time, returned to ask the judge to define second degree murder, voluntary manslaughter, and involuntary manslaughter, where the trial judge reinstructed on those offenses, and defendant did not object, the trial judge did not err by failing to reinstruct on the relationship between imperfect self-defense and voluntary manslaughter.

5. **Crime Against Nature § 4— instruction that crime against nature lesser offense of second degree sexual offense—error**

The trial court erred by submitting crime against nature as a lesser included offense of second degree sexual offense. G.S. 14-177 and G.S. 14-27.4.

DEFENDANT appeals pursuant to G.S. 7A-31 from a decision of the Court of Appeals, reported at 59 N.C. App. 264, 296 S.E. 2d

671 (1982), finding no error in his convictions of second degree murder and crime against nature. Judgments were entered by *Smith, J.*, at the 11 May 1981 Criminal Session of WAKE County Superior Court.

The charges against the defendant arose out of the 29 November 1980 murder of Byron Montizel Clarke. At trial Ray Lee Bost testified that he, the defendant, and defendant's brother Charles were driving through Raleigh on the night of the murder when they picked up the victim, a male, who was dressed as a female. The victim allegedly gave "samples" of sex to the defendant and Charles after the four had driven to the dead end of Raleigh Beach Road. Bost testified that the defendant then forced the victim from the car at gunpoint and ordered the victim to perform fellatio on Charles Warren, during the course of which defendant shot the victim in the head and then beat him.

Defendant testified that after they reached Raleigh Beach Road he left the car and when he returned he found the victim performing oral sex on Charles who was, at that time, asleep in the back seat of the car. Defendant pulled the victim out of the car, a struggle ensued and the gun discharged. Although defendant admitted pointing the gun at the victim's head, he testified that he believed that the gun was not loaded.

Additional facts necessary to a determination of the issues will be discussed where applicable.

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

Marc D. Towler, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

Defendant challenges the process of death qualifying the jury and assigns as error the trial court's denial of his motion for a separate trial jury and a separate sentencing jury. This Court has consistently rejected defendant's contentions. *See State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983) and cases cited therein. *See also State v. Jackson*, 309 N.C. 26, 30 n. 1, --- S.E. 2d ---, --- (1983), where we noted:

Attention is called to *Jones v. Barnes*, --- U.S. ---, --- L.Ed. 2d --- (filed 5 July 1983), in which the Court held that defense counsel assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant. As the Court stated, "[a] brief that raises every colorable issue runs the risk of burying good arguments—those that, in the words of the great advocate John W. Davis, 'go for the jugular,' Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 897 (1940)—in a verbal mound made up of strong and weak contentions. See generally, *e.g.*, Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 Sw. L. J. 801 (1976)." *Id.* at ---, --- L.Ed. 2d at --- (footnote omitted).

[1] Defendant next contends that the trial court erred in denying his motion to suppress the results of a visual search and chemical tests performed on bloodstains in the car in which he, Bost and Charles Warren were riding on the night of the murder. Defendant argues first that the affidavit accompanying the search warrant failed to show probable cause to believe that bloodstains would be found in the car. We disagree.

The affidavit in support of the search warrant stated as follows:

I, Det. Ken E. Dodd, Deputy Sheriff, Wake Co., being duly sworn, hereby request that the court issue a warrant to search the (person) (place) (vehicle) described in this application and to find and seize the items described in this application. There is probable cause to believe that certain property, to wit: Handgun(s), blood spatter clothing, or clothing worn during the commission of the crime, shoes or boots worn, handgun ammunition and other evidence used in the crime. (constitutes evidence of) (constitutes evidence of the identity of a person participating in) a crime, to wit: murder, and the property is located (in the place) (in the vehicle) (on the person) described as follows: vinal [sic] top removed, gray Buick Regal, CB antenna on trunk/with green tennis ball/ brick apts. 3221C Calumet Dr. Raleigh, N.C. Basement Apt. (S/W end), first stairwell, 2nd apt. on the right/ and the person of Jimmy Warren for any conceiled [sic] evidence.

> The applicant swears to the following acts to establish probable cause for the issuance of a search warrant: On December 29, 1980 applicant(s) were assigned to investigate the shooting death of Byron Montizel Clarke. The victim was shot and beaton [sic] on the 29th of December, 1980 at approximately 4:00 A.M. A witness to the above described crime (Roy Lee Bost) advised investigators that he was present along with Charles Warren and Jimmy Warren, when the victim was killed. Mr. Bost and the Warren brothers had picked up the victim at Morgan St. and S. Wilmington St. and latter [sic] transported the victim to Raleigh Beach Rd. (AKA—R.P.R. 2216). The victim was forced from the above described vehicle by Jimmy Warren at gunpoint. The victim was then shot at close range in the head and was also beaton [sic] by Mr. Jimmy Warren and left for dead. The victim died from the wound inflicted by Mr. Jimmy Warren.

It was reasonable to believe that bloodstains might be found in or on the car as well as on defendant's clothing, and that the evidence sought would aid in the apprehension or conviction of the offender. *See State v. Jones*, 299 N.C. 298, 261 S.E. 2d 860 (1980).

[2] Defendant further challenges the admissibility of this evidence because a second visual search and resultant chemical tests on bloodstains thereby obtained occurred several days following the execution of the warrant.

In *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979), *cert. denied*, 446 U.S. 929 (1980), this Court held that as a general rule "second looks" at items do not constitute additional searches subject to fourth amendment proscriptions. In *Nelson*, officers were permitted to re-examine property that had been inventoried and stored. In the case *sub judice*, samples of the bloodstains were obtained from a vehicle that had been seized and stored. The fact that bloodstains are later subjected to laboratory analysis does not violate the fourth amendment. *See United States v. Edwards*, 415 U.S. 800, 39 L.Ed. 2d 771 (1974).

Furthermore, as noted by the Court of Appeals, the automobile in question was owned by Carolyn Durham of Goldsboro and, as defendant "specifically declined to come forward with any evidence of ownership or possession" of the automobile, the trial

court was correct in concluding that defendant failed to show a legitimate expectation of privacy. *See State v. Greenwood*, 301 N.C. 705, 273 S.E. 2d 438 (1981); *State v. Jones*, 299 N.C. 298, 261 S.E. 2d 860; *State v. Alford*, 298 N.C. 465, 259 S.E. 2d 242 (1979).

Finally, we find that defendant has shown no prejudice in the admission of this evidence. On this point, defendant attempts to argue that the admission of evidence of bloodstains found in the car was prejudicial "because it may have weighed heavily in the credibility contest between defendant and Roy Bost at trial." To support his argument, defendant provides the following insight:

> Although defendant admitted being in a fight and shooting the victim accidentally during a struggle, defendant testified that he stepped on the victim before he was shot and that he only struck the victim with the gun four times during the struggle. Bost testified that defendant was stomping on the victim and beating him after he had been shot. The likelihood of defendant getting bood [sic] on his shoes or hands and depositing that blood in the car was therefore much more likely under Bost's version of the incident than defendant's. This evidence therefore may have affected the jury's decision as to which man was telling the truth, and the error in admitting the evidence cannot be deemed harmless. Thus, defendant must be awarded a new trial.

We will not engage in hairsplitting hypothesizing. The clear indication is that irrespective of whose version of the events was to be believed, it is likely that the victim's blood would be found in the automobile. The assignment of error has no merit.

[3] Defendant next assigns error to the trial court's summary of the evidence. As a basis for this alleged error, defendant challenges the following portion of the summary of the parties' contentions:

> Now, ladies and gentlemen, in this case very simply the State of North Carolina says and contends that the defendant is guilty of first degree murder with malice, deliberation and premeditation. The defendant says he is not guilty.

This, defendant argues, gave unequal stress to the contentions of the State by "omitting defendant's contentions of self-defense and accident." Defendant made no objection to this portion of the in-

struction and thereby waived objection. We find no plain error. *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). The trial judge fully instructed on self-defense and accident. The assignment of error is without merit.

[4] Defendant argues that the trial court erred "in failing to explain the relationship between imperfect self-defense and voluntary manslaughter in response to a question from the jury after it had retired."

The jury, after deliberating for some time, returned to ask the judge to define second degree murder, voluntary manslaughter, and involuntary manslaughter. Following a fifteen minute recess for discussion in chambers, the trial judge responded:

> Now, with regard to your question that I define for you second degree murder, voluntary manslaughter and involuntary manslaughter, I'm going to give you very brief definitions in an attempt to answer your question as it was asked. And if these instructions are too brief, I would ask please that you come back into the courtroom and I will elaborate further on second degree murder, voluntary manslaughter and involuntary manslaughter.
>
> Second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation.
>
> Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.
>
> Involuntary manslaughter is the unintentional killing of a human being by an unlawful act not amounting to a felony or an act done in a criminal negligent way.
>
> Mr. Foreman, I hope that I have answered the questions that the jury asked. If you need any additional questions asked or any guidance I will be glad to attempt to give it to you to the best of my ability.

Defendant contends that the foregoing deprived him of the benefit of the doctrine of imperfect self-defense. Defendant did not object at trial. We have held that when the jury requests additional instructions on a particular point, the court is not re-

quired to repeat the entire charge to the jury. Should defendant wish further instructions, he must request them at the time. By failing to do so, defendant waives their omission on appeal. *State v. Wilkins*, 297 N.C. 237, 254 S.E. 2d 598 (1979). The jury had earlier been instructed that the element of malice could be negated, reducing the crime to voluntary manslaughter, if the State failed to prove that defendant did not act in self-defense but did prove that defendant was the aggressor or used excessive force. As the jury apparently had no further questions after the trial judge's response to its question, it must be assumed that it followed the trial court's earlier instructions on this particular question. *See State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. denied*, 410 U.S. 958, *cert. denied*, 410 U.S. 987 (1973).

[5] Defendant's final assignments of error relate to his conviction of crime against nature, G.S. § 14-177. Defendant was indicted for committing "a sexual offense with Byron Montizel Clarke by force and against the victim's will by forcing the victim to perform fellatio, in violation of G.S. § 14-27.4." The trial court submitted crime against nature as a lesser included offense of second degree sexual offense. This was error.

We see no reason to stain the pages of our reports with an exposition of the sordid details giving rise to defendant's conviction for this crime, or by reviewing the anatomical details explicitly set out in the cases cited by both parties in support of their respective positions. The legal basis for our decision today is fully set forth in *State v. Ludlum*, 303 N.C. 666, 281 S.E. 2d 159 (1981). We have since reaffirmed our position in *Ludlum* by Order in *State v. Hill*, 59 N.C. App. 216, 296 S.E. 2d 17, *judgment arrested*, 307 N.C. 268, 306 S.E. 2d 115 (1982). In *State v. Barrett*, 58 N.C. App. 515, 293 S.E. 2d 896, *judgment arrested*, 307 N.C. 126 (1982), a case also involving the sexual act of fellatio, we foreclosed the issue whether crime against nature can be submitted as a lesser included offense of first (or second) degree sexual offense when we stated by Order that "the record on appeal before us discloses that defendant was convicted of crime against nature, *which is not a lesser included offense of a sexual offense* in the first degree. N.C. Gen. Stat. § 14-27.4 (1981). Therefore, we arrest judgment." (Emphasis added.)

In *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982), this Court rejected the argument that the facts of a particular case

should determine whether one crime is a lesser included offense of another. "Rather, the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime." *Id.* at 635, 295 S.E. 2d at 378. Thus, in the case *sub judice*, while there may be evidence of penetration in this particular act of fellatio, the evidence was relevant only as proof of the *anatomical nature* of the sexual offense alleged. It is not a determinative factor in deciding whether crime against nature is a lesser included offense of the sexual offense charged. The Court of Appeals erred in so holding. We arrest the judgment in case number 80CRS71822, defendant's conviction of crime against nature.

Case No. 80CRS71822—Judgment arrested.

Case No. 80CRS67791—Affirmed.

STATE OF NORTH CAROLINA v. JEFFREY STEVEN HEPTINSTALL AKA JEFFERY HEPINSTALL

No. 304A82

(Filed 7 September 1983)

1. Criminal Law § 5.1— competency to stand trial—sufficiency of evidence

In a prosecution for first degree murder, the trial court did not err in finding defendant competent to stand trial, although there was conflicting testimony, where there was expert testimony which indicated defendant had a good memory both present and distant; defendant had not suffered delusions for "five or six years," defendant told a psychiatrist about "the charges pending against him and some of the details," and defendant was "alert and well aware of his surroundings as to person, place and time." This testimony supported the trial court's findings which in turn supported the trial court's conclusions that defendant understood "the nature of the proceedings against him," his situation with regard to the proceedings, and that he was able to assist appropriately in his defense "should he choose to do so."

2. Criminal Law § 5— mental capacity at time of trial—no duty of trial court to reopen capacity question

Although portions of defendant's testimony at both phases of his trial were bizarre and nonsensical, almost all of his testimony during the guilt phase indicated that defendant was accurately oriented regarding his present circumstances in that he knew the offenses with which he was charged, he was

able to recall with great detail past events, and he was able to respond meaningfully to questions put to him regarding the present charges against him. Therefore, viewing defendant's testimony as a whole, in light of some of the purposes for which the testimony was offered, and taking into account defendant's high intelligence and tendency to be manipulative, the Court concluded the testimony would not have suggested to the trial court that defendant lacked capacity to proceed, and there was no duty of the trial court on its own motion to reopen the question.

3. Criminal Law § 5— insanity defense—burden of proof

The trial court properly instructed the jury that defendant bore the burden of proving to their satisfaction he was insane at the time of the offenses.

APPEAL from judgments entered by *Judge Preston Cornelius* at the 18 January 1982 Session of PITT Superior Court after defendant was found guilty by a jury of first degree murder, armed robbery, and felonious breaking or entering. After a sentencing hearing, Judge Cornelius imposed judgments sentencing defendant to life imprisonment for the murder conviction, forty years' imprisonment on the robbery conviction, and ten years' imprisonment on the felonious breaking or entering conviction, all sentences to run consecutively. Defendant appeals his murder conviction as a matter of right pursuant to G.S. 7A-27(a) (1981). This Court on 1 June 1982 allowed his motion to bypass the Court of Appeals for review of the other convictions.

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

William D. Spence and Fred W. Harrison, attorneys for defendant appellant.

EXUM, Justice.

Defendant raises three questions: whether the trial court erred in finding defendant competent to proceed to trial, in refusing to conduct a new hearing on defendant's competency after he testified, and in placing on defendant the burden of proving his insanity at the time of the incidents giving rise to the charges at issue. We conclude no error was committed and defendant received a fair trial.

Mrs. Rachel Albritton, a resident of the Lizzie community of Greene County,[1] was found by a neighbor in the yard of her home on 11 July 1981. She had been beaten and stabbed, but she was able to tell her neighbor and others summoned to the scene that her assailant was a large white man with a beard and mustache. She said he had beaten her and had stolen her car. Mrs. Albritton died from her injuries shortly after arriving at a local hospital.

Defendant was apprehended in the victim's car near New Bern about 7 p.m. on 11 July. At the time of his arrest defendant was an escapee from Maury Prison, a minimum security facility located a few miles from Mrs. Albritton's home. Defendant admitted at trial that he had been in Mrs. Albritton's home in search of food and had stolen her car; but he denied killing her.

During a voir dire on the issue of defendant's competency to proceed to trial, considerable evidence was adduced which indicated defendant had a significant history of mental illness. Specifically, defendant had been diagnosed as suffering from paranoid schizophrenia. Nevertheless, defendant was found competent to proceed to trial. The jury found defendant guilty of first degree murder of Mrs. Albritton on the basis of premeditation and deliberation. In so doing, they rejected his defense of insanity. The jury was unable to reach a unanimous recommendation on punishment for the murder conviction after deliberating for approximately five hours, and the foreman was of the opinion that the jury could not reach a determination on punishment within a reasonable time. Therefore, the trial court imposed a sentence of life imprisonment pursuant to G.S. 15A-2000(b).

[1] The first issue raised by defendant is whether the trial court erred in finding him competent to stand trial. The trial court held a lengthy voir dire in which various members of defendant's family testified regarding his behavior and mental stability during the ten years preceding the incidents in question. Defendant had exhibited bizarre behavior over the years and had been committed to Dorothea Dix Hospital and a mental institution in Florida

1. Although the offenses were committed in Greene County, the case was transferred for trial to Pitt County by Judge Napolean Barefoot on defendant's motion. Judge Barefoot concluded the transfer was necessary in order for defendant to receive a fair trial because of extensive pretrial publicity, and because Pitt County had accommodations for sequestering the jury should it be required.

on several occasions. In the opinions of the family members and others who knew him, defendant was not in his "right mind" and was not competent to aid in defending the charges against him.

Dr. James Groce, a forensic psychiatrist, testified he had examined defendant in Central Prison about five months before trial and again on 21 January 1982 during a recess in the trial. In Dr. Groce's opinion defendant was alert, aware of his surroundings and the charges against him, and had a good memory. He also appeared to be of normal intelligence, able to understand the seriousness of the charges against him and capable of assisting his attorneys in preparing his defense.

From the evidence presented, the trial court made findings which defendant admits "conform to the evidence." From these findings the trial court concluded defendant possessed the capacity to proceed to trial.

The test of a defendant's mental capacity to stand trial is set forth in G.S. 15A-1001(a) (1978):

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness . . . he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

This test had been stated in our cases before enactment of the statute as "whether [the defendant] has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to co-operate with his counsel to the end that any available defense may be interposed." *State v. Propst,* 274 N.C. 62, 70, 161 S.E. 2d 560, 566 (1968) (quoting 21 Am. Jur. 2d, Criminal Law, § 63 [currently at § 96 (1981)]); *see also State v. McCoy,* 303 N.C. 1, 18, 277 S.E. 2d 515, 528 (1981); *State v. Cooper,* 286 N.C. 549, 565, 213 S.E. 2d 305, 316 (1975).

When the trial court, without a jury, determines a defendant's capacity to proceed to trial, it is the court's duty to resolve conflicts in the evidence; the court's findings of fact are conclusive on appeal if there is competent evidence to support them, even if there is also evidence to the contrary. *State v. Mc-*

Coy, supra, 303 N.C. at 18, 277 S.E. 2d at 528; *State v. Willard*, 292 N.C. 567, 575, 234 S.E. 2d 587, 592 (1977). In the instant case there was conflicting testimony on defendant's capacity to stand trial, but there was expert testimony which supported these findings of the trial court: Defendant, when examined by Dr. Groce in August 1981, "had a good memory . . . both present and distant"; stated he had not suffered delusions for "five or six years"; told Dr. Groce about "the charges pending against him and some of the details"; and was "alert and well aware of surroundings as to person, place and time." Defendant, when examined by Dr. Groce in January 1982 after his trial had begun, knew Dr. Groce "by name"; told Dr. Groce "he had been kept in prison until he had been brought to Pitt County four days ago"; told Dr. Groce "he was accused of killing a woman by stabbing her . . . thought her name was Rachel"; "understood he might go to prison for a long time"; mentioned the word "execution"; and "indicated he met with his lawyer on two occasions and was satisfied with his attorneys." These findings in turn support the trial court's conclusions that defendant understood "the nature of the proceedings against him," his situation with regard to the proceedings, and that he was able to assist appropriately in his defense "should he choose to do so." Thus, the trial court did not err when it concluded ultimately that defendant was competent to proceed to trial.

[2] Defendant next assigns as error the trial court's failure, on its own motion, to conduct further hearings on defendant's capacity to proceed with the trial after defendant's testimony, first at the guilt phase, then during the sentencing phase of the trial. Defendant argues that his testimony "was so bizarre and incoherent that the trial court, on its own motion, should have halted the trial and inquired into the state of Defendant's mental health . . . . Defendant's testimony, in and of itself, should have caused the trial court to question the Defendant's capacity to proceed."

The trial court has the power on its own motion to make inquiry at any time during a trial regarding defendant's capacity to proceed. General Statute 15A-1002(a) provides that this question "may be raised at any time by the prosecutor, the defendant, the defense counsel, or the court on its own motion." Indeed, cir-

cumstances could exist where the trial court has a constitutional duty to make such an inquiry.

> [A] conviction cannot stand where defendant lacks capacity to defend himself. *Drope v. Missouri*, 420 U.S. 162, 43 L.Ed. 2d 103, 95 S.Ct. 896 (1975); *Pate v. Robinson*, 383 U.S. 375, 15 L.Ed. 2d 815, 86 S.Ct. 836 (1966). '[A] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent.' (Emphasis added.) *Crenshaw v. Wolff*, 504 F. 2d 377 (8th Cir. 1974), *cert. denied*, 420 U.S. 966 (1975). *See Wolf v. United States*, 430 F. 2d 443 (10th Cir. 1970) ('bona fide doubt' as to competency).

State v. Young, 291 N.C. 562, 568, 231 S.E. 2d 577, 581 (1977).

We have carefully examined defendant's testimony at both phases of his trial. Portions of defendant's testimony at both phases were bizarre and nonsensical. These portions of his testimony occurred when he was asked questions calling for abstract reasoning and inquiring about his views on morality and religion. Almost all of his testimony during the guilt phase indicates that defendant was accurately oriented regarding his present circumstances. He knew the offenses with which he was charged. He was able to recall with great detail past events and was able to respond meaningfully to questions put to him regarding the present charges against him. He admitted that he entered the victim's home for the purpose of getting food and that he took her automobile. He denied killing her. Defendant's sentencing phase testimony was similarly responsive and sensible when it related to the charges against him. It became nonsensical and bizarre when the subject turned to matters of morality and religion.

We note that during the guilt phase defendant's testimony was, in part at least, directed toward establishing his insanity defense. During the sentencing phase it was directed, again in part, toward establishing the mitigating circumstances that defendant was under the influence of mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired. *See* G.S. 15A-2000(f)(2) and (6) (Cum. Supp. 1981). Further, there was evidence in the case that defendant was both highly intelligent

and capable of manipulating other people. Indeed, the trial court in its judgments against defendant found "that this defendant has in the past been very manipulative and has bargained for privileges in return for accepting treatment."

Viewing defendant's testimony as a whole, in light of some of the purposes for which the testimony was offered, and taking into account defendant's tendency to be manipulative, we conclude the testimony would not have suggested to the trial court that defendant then lacked capacity to proceed. There was, therefore, no duty of the trial court on its own motion to reopen this question.

[3] Defendant's final argument is that the trial court erred in instructing the jury defendant bore the burden of proving to their satisfaction he was insane at the time of the offenses. Defendant concedes this Court has previously decided this issue against his position, but asks us to reconsider our precedents.

It is the long-standing common-law rule in North Carolina that "insanity is an affirmative defense which must be proved to the satisfaction of the jury by every accused who pleads it." *State v. Wetmore*, 298 N.C. 743, 745, 259 S.E. 2d 870, 872 (1979) (quoting *State v. Caldwell*, 293 N.C. 336, 339, 237 S.E. 2d 742, 744 (1977), *cert. denied*, 434 U.S. 1075 (1978)). In *Wetmore* the defendant also asked us to change the rule to require the state to bear the burden of proving the defendant's sanity when the issue has been properly raised. The Court declined to change our rule, believing it to be the better view while recognizing reasonable arguments could be made against it. *State v. Wetmore, supra*, 298 N.C. at 745-47, 259 S.E. 2d at 872-73. *See also State v. Leonard*, 296 N.C. 58, 248 S.E. 2d 853 (1978); *State v. Connley*, 295 N.C. 327, 245 S.E. 2d 663 (1978), *vacated on other grounds and remanded*, 441 U.S. 929 (1979). We again decline to change our rule, and hold the trial court did not err in the instructions.

No error.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; AND CAROLINA POWER AND LIGHT COMPANY (APPLICANT); RUFUS L. EDMISTEN, ATTORNEY GENERAL; EXECUTIVE AGENCIES OF THE UNITED STATES GOVERNMENT AND UNION CARBIDE CORPORATION v. NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC.; THE PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION; AND KUDZU ALLIANCE

No. 674A82

(Filed 7 September 1983)

Electricity § 3; Utilities Commission § 38— electric rates—reasonableness of cost of purchased power

The Utilities Commission erred in failing to determine in a general rate case the reasonable level of fuel expenses, including the cost of purchased power, used by an electric utility in the generation and production of power during the test period.

ON discretionary review of the decision of the Court of Appeals, 59 N.C. App. 240, 296 S.E. 2d 487 (1982), affirming the order of the North Carolina Utilities Commission entered 15 January 1982 in Docket No. E-2, Sub 391. Heard in the Supreme Court 15 March 1983.

Charles D. Barham, Jr., Richard E. Jones and Robert S. Gillam for plaintiff appellee Carolina Power & Light Company.

Karen E. Long for defendant appellant North Carolina Utilities Commission Public Staff.

PER CURIAM.

A recital of the evidence is not necessary in this opinion. See the decision of the Court of Appeals in this case for a statement of the facts.

This is a general rate case. The issue is whether the Court of Appeals erred in affirming the Utilities Commission's failure to determine the reasonable level of fuel expenses used in generation and production of power experienced during the twelve-month test period. This expense constituted approximately sixty-one percent of the company's operating and maintenance expenses.

The Commission in this case adopted the fuel costs from the Sub 402 fuel clause proceeding, which was based upon a four-

month test period. In the Sub 402 proceeding, which was consolidated with this proceeding, the reasonableness of the fuel expenses was not determined by the Commission.

For rate-making purposes, the reasonable operating expenses of the utility must be determined by the Commission. N.C. Gen. Stat. § 62-133(b)(3) (1982). These expenses include the costs of fuel and purchased power. The opinion of this Court by Meyer, J., in cases numbered 529PA82 and 530A82, *State ex rel. Utilities Commission v. Public Staff*, filed this date is controlling upon this issue.

The case must be remanded to the North Carolina Utilities Commission for a determination of the proper level of fuel expenses to be included in the applicant's rates and charges in Docket No. E-2, Sub 391.

The decision of the Court of Appeals is reversed, and the cause is remanded to the North Carolina Utilities Commission.

Reversed and remanded.

STATE OF NORTH CAROLINA v. BRUCE FRANKLIN JERRETT

No. 228A82

(Filed 27 September 1983)

1. **Criminal Law § 15.1— *test for change of venue for pretrial publicity***

A defendant's motion for a change of venue should be granted when he establishes that it is reasonably likely that prospective jurors will base their decision in the case upon pretrial information rather than the evidence presented at trial and will be unable to remove from their minds any preconceived impressions they might have formed. When such a likelihood is shown to exist, a defendant's right to a fair trial by an impartial jury far outweighs the interest local residents have in trying a defendant in that county.

2. **Criminal Law § 15.1— change of venue for pretrial publicity—showing of identifiable prejudice not required**

A showing of identifiable prejudice was not required to entitle defendant to a change of venue because of pretrial publicity where the totality of the circumstances showed that there was such a probability that prejudice would result that defendant would be denied due process if venue were not changed.

3. Criminal Law § 15.1— change of venue for pretrial publicity—likelihood of unfair trial—totality of circumstances

In a prosecution for first degree murder, felonious breaking and entering, kidnapping and armed robbery, defendant met his burden of showing by a totality of the circumstances that a reasonable likelihood existed that he could not receive a fair trial before an Alleghany County jury, and the court erred in denying defendant's motions for a change of venue made prior to trial and during the trial, where the crimes occurred in a small, rural, closely-knit county which in its entirety was, in effect, a neighborhood; defendant presented at the pretrial hearing the testimony of several attorneys, a magistrate, and a deputy sheriff who expressed opinions that it would be extremely difficult, if not impossible, to select a jury comprised of individuals who had not heard about the case, that due to the publicity surrounding the case, potential jurors were likely to have formed preconceived opinions about defendant's guilt, and that defendant would not receive a fair trial in the county; and the jury voir dire, conducted after the denial of defendant's motion that the jury be individually selected, revealed that many of the potential jurors stated that they knew the victim or potential State's witnesses, that they had already formed opinions in the case, or that they could not give defendant a fair trial.

4. Kidnapping § 1— indictment for first degree kidnapping

A proper indictment for first degree kidnapping must not only allege the elements of kidnapping set forth in G.S. 14-39(a) but must also allege one of the elements set forth in G.S. 14-39(b), to wit, that defendant did not release the victim in a safe place, that he seriously injured the victim, or that he sexually assaulted the victim.

5. Kidnapping § 1.3— instructions on "voluntarily" releasing victim in safe place

The trial court's instructions in a kidnapping case concerning whether defendant "voluntarily" released the victim in a safe place were not erroneous, even though G.S. 14-39(b) does not expressly require that defendant "voluntarily" release the victim in a safe place, since a requirement of voluntariness is inherent in the statute.

6. Kidnapping § 1.2— failure to release victim in safe place—sufficiency of evidence

The evidence in a kidnapping case presented a jury question as to whether defendant released the victim in a safe place or whether the victim escaped or was rescued by the presence and intervention of a police officer where it tended to show that, after arriving at a convenience store, defendant and the victim walked toward the store building; defendant, carrying a pistol concealed within his shirt, walked a few feet behind the victim; upon entering the store, the victim walked toward a police officer who was standing in the store and then to the rear of the building where she locked herself in a storage room; defendant did not attempt to stop the victim after they entered the store; and defendant went to the counter and was in the process of purchasing gas when he was confronted and subsequently arrested by the officer.

7. Robbery § 5.1— armed robbery—instructions—diminished capacity insufficient to negate specific intent

The trial court in an armed robbery case did not err in failing to instruct the jury that even if it did not find that defendant was legally insane at the time the crime was committed, it could find that due to his abnormal mental condition he did not have the requisite intent to commit armed robbery, since diminished capacity may not be used to negate specific intent.

8. Criminal Law § 5.2— necessity for instruction on unconsciousness

In a prosecution for first degree murder, felonious breaking and entering, kidnapping and armed robbery, the trial court erred in failing to instruct the jury on the defense of unconsciousness where defendant's testimony that he suffered from a blackout at the time of the crimes was corroborated by testimony of other witnesses that defendant had suffered blackouts on other occasions and by evidence of defendant's peculiar actions in permitting the kidnapping victim repeatedly to ignore his commands and finally to lead him docilely into the presence and custody of a police officer. The instruction given by the trial judge referring to defendant's blackouts amounted only to a partial instruction on the defense of insanity and did not explain the law of unconsciousness or apply that law to the facts of the case.

9. Criminal Law § 135.3; Jury § 7.11— exclusion of jurors for capital punishment views—failure to explain sentencing process

The trial court in a first degree murder case did not err in excluding for cause fourteen jurors who unequivocally stated their opposition to the death penalty without explaining prior to the voir dire examination the procedural and substantive aspects of the sentencing process in a capital case.

10. Criminal Law § 135.4; Privacy § 1— death penalty—no violation of right to privacy

Imposition of a sentence of death does not violate a defendant's right to privacy.

11. Criminal Law § 135.4; Homicide § 30— first degree murder—premeditation and deliberation—rule requiring submission of second degree murder—inapplicability to defendant

The death penalty was not unconstitutionally applied to defendant because at the time of defendant's trial the holding of *State v. Harris*, 290 N.C. 718 (1976), required the trial court in a prosecution for first degree murder on the theory of premeditation and deliberation to submit to the jury the offense of second degree murder, even though the evidence did not support this offense, where defendant was convicted of felony murder.

12. Criminal Law § 102.9— jury argument—characterizations of defendant unsupported by evidence

There was no evidence to support the prosecutor's jury argument characterizing defendant as a "conman" and a "disciple of Satan."

13. Criminal Law § 135.4— first degree murder—sentencing hearing—pecuniary gain aggravating circumstance

In a sentencing hearing in a first degree murder case, the evidence supported the trial court's submission of the pecuniary gain aggravating circumstance where it tended to show that defendant robbed one victim of $3.00, took cartridges from the victims' dwelling, took money from the murder victim's pockets and then stole the victims' automobile. G.S. 15A-2000(e)(6).

14. Criminal Law § 135.4— first degree murder—course of conduct aggravating circumstance—kidnapping as violent crime

Defendant's kidnapping of a murder victim's wife was a crime of violence which supported the trial court's submission of the aggravating circumstance that the murder was part of a course of conduct which included the commission by defendant of other crimes of violence against another person where the evidence tended to show that, after defendant shot the murder victim, he pointed the gun at the victim's wife and forced her to come to him; defendant then dragged the wife about the house and then to the victims' automobile; and during this time and during a drive in the automobile, defendant continued to threaten the wife verbally and by pointing the pistol at her.

15. Criminal Law § 135.4— first degree murder—instructions on aggravating circumstances outweighing mitigating circumstances

The trial court's instructions on the jury's duty to recommend the death penalty if it found beyond a reasonable doubt that one or more statutory aggravating circumstances existed, that the aggravating circumstance or circumstances found by it were sufficiently substantial to call for the imposition of the death penalty, and that the aggravating circumstance or circumstances found by it outweighed any mitigating circumstance or circumstances found by it, although not model instructions, were free from prejudicial error.

16. Criminal Law § 138— aggravating factor in sentencing—pattern of violent conduct which indicated serious danger to society

In imposing sentences on defendant for kidnapping and felonious breaking and entering, the trial court's finding as an aggravating factor that defendant engaged in a pattern of violent conduct which indicated a serious danger to society was supported by evidence of the bizarre manner in which defendant perpetrated the kidnapping and a crime of murder and by defendant's own testimony that he committed acts of violence upon his sister while "blacked-out."

17. Criminal Law § 138— aggravating factors in sentencing—sentence necessary to deter others—lesser sentence would depreciate seriousness of crime

In imposing sentences for kidnapping and felonious breaking and entering, the trial court erred in finding as aggravating factors that lesser sentences would depreciate the seriousness of the crimes and that the sentences were necessary to deter others from committing the same crimes since neither factor relates to the character or conduct of the offender.

Justice MITCHELL dissenting in part and concurring in part.

APPEAL by defendant from the judgment entered by *Rousseau, Judge*, at the 29 March 1982 Criminal Session of ALLEGHANY County Superior Court, and from a ruling by *Davis, Judge*, on 20 October 1981, denying defendant's motion for change of venue or a special venire.

Defendant, Bruce Franklin Jerrett, was charged with the first-degree murder of Dallas Parsons, felonious breaking and entering, kidnapping of Edith Parsons, and armed robbery of Edith Parsons and Tom Parsons.

Prior to trial, defendant moved for a change of venue or, in the alternative, for a special venire from another county. These motions were denied by Judge Davis. The motion for a change of venue was renewed both during and after jury selection and denied by Judge Rousseau.

The evidence presented by the State tended to show:

On 24 July 1981, Dallas Parsons and his wife, Edith Parsons, lived on a dairy farm in the Piney Creek Community near Sparta, North Carolina. Mr. Parsons' brother, Tom Parsons, and nephew, Tony Parsons, also lived at the residence. On that evening, Mrs. Parsons retired at around 11:30 p.m. Her husband, Tom Parsons, and Tony Parsons had gone to bed earlier.

Before retiring Mrs. Parsons locked the front door of the house, but she did not recall locking the back door. She then joined her husband in their bedroom. At around 3:00 a.m., Mrs. Parsons was wakened by gunfire and the lights in the bedroom being turned on. She heard her husband shout "Hey" and "Oh, God." She saw defendant standing by the bedroom door holding a gun in his left hand. His right hand was on the light switch. Defendant had shot Dallas Parsons. He then turned his gun on Mrs. Parsons and ordered her to come to him. Mrs. Parsons was screaming, crying and pleading with defendant not to shoot her. She repeatedly told defendant that he had killed her husband. Defendant again told her to come to him and Mrs. Parsons complied. Defendant then grabbed her by the arm, but at some point allowed Mrs. Parsons to dress.

Defendant picked up a box of .22 caliber cartridges from a chest of drawers in the bedroom and said, "That is what I am looking for."

Tom Parsons called from his room and asked what was going on. Defendant dragged Mrs. Parsons across the hall to Tom's room and pushed the door against Tom's body. He then pushed his gun around the door and demanded that Tom give him his wallet and money. Mr. Parsons gave defendant approximately three dollars in change. In compliance with defendant's order, Tom remained in his room.

Mrs. Parsons then pleaded with defendant to allow her to call the rescue squad. He refused, but agreed to make the call himself. Defendant went to a phone in the kitchen and dialed a number. He told the person he was speaking with to come to the Parsons' residence. He then asked Mrs. Parsons, "What Parsons?" She replied, "Dallas," and defendant relayed this information. He also stated, "You will have to find that out for yourself."

Defendant then took Mrs. Parsons back to her bedroom to get her husband's wallet. She gave defendant approximately eight or nine dollars from the wallet. Defendant and Mrs. Parsons then went outside to the Parsons' automobile but Mrs. Parsons was unable to find the keys. Defendant forced Mrs. Parsons back to the bedroom and obtained the car keys from Dallas Parsons' pants pocket. While in the bedroom, Mrs. Parsons saw that her husband's leg was hanging off the bed. Defendant told her not to touch him. Despite this warning, Mrs. Parsons put her husband's leg back on the bed and put the sheet and blanket over his wound.

Mrs. Parsons and defendant again left the house. Before they entered the car, defendant pulled Mrs. Parsons over to the porch and picked up a blue jean jacket and a milk jug which was half full of a liquid substance. As they returned to the car, defendant told Mrs. Parsons that he was going to drive but she convinced him to allow her to drive. Defendant sat in the right front passenger seat and held his pistol in his left hand pointed toward Mrs. Parsons. He told her that he wanted to go to Tennessee, but Mrs. Parsons disregarded his instruction and drove the car in the opposite direction toward Sparta.

After a short time, Mrs. Parsons told defendant that the car did not have enough gas and that the needle was on empty. As they passed a station defendant said, "Damn you, you passed the gas station." Mrs. Parsons told him that the only place that sold

gas that late in Sparta was "The Pantry." He accused her of lying but permitted her to continue to drive toward "The Pantry." In route, defendant told Mrs. Parsons to slow down because she might attract attention. He also told her to dim the dashboard lights. Before they reached "The Pantry," they met a rescue vehicle with its emergency lights on heading toward the Parsons' residence. When they arrived at "The Pantry," Mrs. Parsons turned the automobile into the parking lot and pulled up to the gas tanks. The lot was well-lighted and Mrs. Parsons saw a marked police car parked near the door. Defendant told Mrs. Parsons that she would pump the gas. She told him that they would have to pay for the gas before the clerk would turn on the pump. He accused her of lying but she assured him she was telling the truth. Defendant and Mrs. Parsons then left the car and walked toward the store. Mrs. Parsons was walking in front of defendant. Defendant had put the pistol in his shirt right above his belt. As Mrs. Parsons walked toward The Pantry, she saw Officer Caudle standing in the store at the counter.

Officer Caudle saw defendant and Mrs. Parsons walking toward the store entrance. Defendant was approximately two feet behind Mrs. Parsons, walking with his head down. Mrs. Parsons was holding her hands in front of her in a prayer-like position. As she neared the door and entered, she was repeating the words, "He's got a gun" and "He's going to kill me."

Defendant came through the door with his hand over his stomach and still looking down. When defendant looked up and saw Officer Caudle, he looked away and went up to the counter. Mrs. Parsons walked toward Officer Caudle and said in a low voice that defendant had a gun in his waistband area. Caudle stepped around her and went to the end of the counter. Mrs. Parsons continued to walk to the back of the store where she locked herself in a storage room.

Officer Caudle then approached defendant who was talking to the store clerk, Mrs. Mildred Pratt, about purchasing gasoline. Caudle asked defendant for his identification and driver's license. Defendant twice asked Caudle "Why?" before producing his license. Caudle then started to search defendant, who seemed surprised. He asked Caudle two or three times why he was being searched and told Caudle that he had no right to search him.

Upon being asked if he had a gun, defendant replied affirmatively and turned his pistol over to the officer. Defendant was then arrested for carrying a concealed weapon and was taken to the patrol car.

Mrs. Parsons told Mrs. Pratt that defendant had shot and killed her husband, and Mrs. Pratt relayed this information to Officer Caudle. Caudle thereupon put handcuffs on defendant who asked why Caudle was doing this. Caudle told defendant that "this lady" [Mrs. Parsons] said that he [defendant] had "shot and killed her husband." Defendant replied, "You can't pay any attention to her. She is half crazy."

Defendant testified in his own behalf. We summarize his testimony as follows:

On the night of 20 July 1981, he was at Delmer Bowens' house and left with the intention of going to Bessie Royal's house. On his way to the Royal house he fell in a creek. The next thing he remembered was walking into "The Pantry" and seeing the officer. Following his service in Vietnam he experienced blackouts, one being while he was still in the service and stationed in Germany. On that occasion he left his barracks and went downtown to talk to a friend. He stayed with the friend until three o'clock a.m. and then started back to the barracks. He recalled walking out the door, but the next thing he remembered was being two miles from the barracks at around 7:00 a.m. He had no recollection of what had transpired during the four hours between 3:00 and 7:00 a.m.

Some two years after he left the service, he was driving his car one night in Maryland. The next thing he remembered was waking the next morning in his bed in his parents' home. He looked out at his car and saw that the whole right side was damaged. He had no idea what had happened.

He had another blackout while visiting his mother. He was talking with his family and suddenly he didn't know what happened. His mother later told him that he got up and "went at [his] sister and pushed her down." He recalled seeing his mother's face and when he regained consciousness he saw his sister on the floor of the kitchen. He did not remember anything about pushing her down. He had not experienced blackouts prior to his tour of duty

in Vietnam. While he was in Vietnam, he was exposed to "Agent Orange," a defoliant used in that region. Defendant further stated that he was examined in Newport News, Virginia for the effects of Agent Orange and was diagnosed as exhibiting symptoms of exposure to the defoliant.

Defendant's mother testified that after he returned home from the service, he experienced numerous blackouts during which he would "throw a fit or something." Afterwards she would tell him about it and he would say that he did not remember the incident.

Defendant's father also testified that he had observed defendant on at least a half dozen occasions during which defendant was experiencing blackouts.

Two psychiatrists were called by defendant as witnesses. Dr. Groce, who examined defendant pursuant to a court order at Dorothea Dix Hospital, testified that he conducted a variety of tests on defendant; that he was familiar with a psychiatric disorder typically found among Vietnam veterans referred to as post-traumatic syndrome; that he did not diagnose defendant as suffering from this malady; and that in his opinion defendant would have been capable of forming the intent to commit the acts with which he was charged. His diagnosis was that defendant was suffering from (1) an adjustment disorder with depressed moods, and (2) episodic alcohol abuse.

Dr. Goode, a psychiatrist at the Bowman Gray Medical Center, testified on *voir dire* that he examined defendant at the courthouse pursuant to a court order; that he had reviewed Dr. Groce's report but felt that the tests conducted at Dix Hospital were inadequate to eliminate a complex partial seizure as a diagnosis of defendant's condition; and that extensive tests including a "CAT" scan would be necessary to make a proper diagnosis. Following the *voir dire*, the trial court refused to admit most of Dr. Goode's proffered testimony.

The jury returned verdicts of guilty of felony murder, armed robbery of Tom Parsons, armed robbery of Edith Parsons, first-degree kidnapping, and felonious breaking and entering.

A sentencing hearing was held pursuant to G.S. 15A-2000 *et seq.*, following the first-degree murder conviction. The evidence

presented by defendant tended to show that he had never been convicted of a serious crime. He was once convicted of "drinking in public" in Virginia. Defendant's employer, Mr. Kennedy, testified that defendant was a hard-working employee and that he had a good reputation. Two friends of defendant and his family from Maryland also testified. The essence of their testimony was that defendant experienced a decided personality change after returning home from Vietnam. He was depressed and troublesome and began drinking. Prior to his time in the service, defendant was a law-abiding citizen. He was described as a very likeable boy with a good reputation. He had also attended church regularly.

Johnny Coffin, who worked with defendant, testified that defendant lived with him for eight months. During this time defendant worked regularly, but drank intoxicants.

Three jailers at the Alleghany County jail also testified. Their testimony tended to show that during his incarceration, defendant was a model prisoner; that while he was in jail awaiting trial, defendant spent a great deal of time praying, reading the Bible and drawing religious pictures.

The State presented no evidence at the sentencing hearing.

The trial court submitted two aggravating circumstances:

1. Was the murder committed for pecuniary gain?

2. Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against another person?

The trial court submitted the following mitigating circumstances:

1. Does the defendant at the age of 33 years have no significant history of prior criminal activity?

2. Was the murder committed while the defendant was under the influence of mental or emotional disturbance?

3. Was the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law impaired?

4. Did the defendant call the ambulance for assistance of Mr. Parsons while at the Parson residence?

5. Did the defendant submit to arrest without resistance when approached by the police at the Pantry?

6. Did the defendant exhibit good conduct and act as a model prisoner while incarcerated in the county jail?

7. Did the defendant have a low IQ, it being 73?

8. Did the defendant exhibit religious beliefs and practices since being incarcerated in the county jail?

9. Was the defendant exposed to combat, chemicals, and stressful experiences while in Viet Nam?

10. You may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value.

The jury found beyond a reasonable doubt that both aggravating circumstances existed and that these were sufficiently substantial to call for the imposition of the death sentence. The jury also found that seven of the ten mitigating circumstances (numbers 1, 4, 5, 6, 7, 8, and 9) existed. The jury did not indicate answers to numbers 2, 3, and 10. The jury also found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances and recommended that defendant be sentenced to death.

The trial court sentenced defendant to die for the felony murder of Dallas Parsons. Since the underlying felony was armed robbery, the convictions of armed robbery of Tom Parsons and Edith Parsons were arrested.

In the first-degree kidnapping and the felonious breaking and entering convictions, the trial court found as a mitigating factor that defendant had no record of criminal convictions or a record consisting solely of misdemeanors punishable by not more than 60 days imprisonment. The court found as aggravating circumstances that defendant was armed with or used a deadly weapon at the time of each crime; that a lesser sentence would depreciate the seriousness of each crime; that the sentence imposed for each crime was necessary to deter others from committing the same

crime; and that defendant engaged in a pattern of violent conduct which indicated a serious danger to society. The court imposed a sentence of 40 years imprisonment (the maximum allowed) for the first-degree kidnapping and a sentence of 10 years imprisonment (the maximum allowed) for the felonious breaking and entering.

Defendant gave notice of appeal. He appealed his death sentence to this Court pursuant to G.S. 7A-27(a). We allowed his motion to bypass the Court of Appeals pursuant to G.S. 7A-31(a) on the kidnapping and felonious breaking and entering convictions on 23 July 1982.

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

Smith, Patterson, Follin, Curtis, James and Harkavy, by Norman B. Smith, Martha E. Johnston, and Donnell Van Noppen, III, for defendant-appellant.

BRANCH, Chief Justice.

Defendant assigns as error the denial of his pretrial motion for change of venue by Judge Davis and the denial of his motion for change of venue by the trial judge. We find merit in these assignments of error and hold that the denial of these motions requires a new trial.

A motion for a change of venue, or for a venire from another county, is addressed to the sound discretion of the trial court and its ruling thereon will not be disturbed absent a showing of abuse of discretion. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. See*, 301 N.C. 388, 271 S.E. 2d 282 (1980). 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.

This Court has consistently held that the burden of proving that a fair and impartial trial cannot be received due to pretrial publicity falls on the defendant. *State v. Dobbins*, 306 N.C. 342, 293 S.E. 2d 162 (1982); *State v. Oliver, supra.* 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 due process mandates that criminal defendants receive a trial by an impartial jury free from outside influences. The Court also held that where there is a reasonable likelihood that prejudicial pretrial publicity will prevent a fair trial, the trial court should remove the case to another county not so permeated with publicity. In *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976), we adopted this test and held that it applied not only to cases involving pretrial publicity by the media, but also to cases "where the prejudice alleged is attributable to word-of-mouth publicity." *Id.* at 269-70, 229 S.E. 2d at 918.

In support of his motion in instant case, defendant introduced eight newspaper articles which he contends were highly prejudicial and inflammatory. He also presented evidence from Mr. Nelson Harrill, sales manager of WCOK radio station, of radio broadcasts about the murder. These broadcasts were aired numerous times during the weekend following the murder. The contents of these broadcasts were not included in the record. We have reviewed the articles in question and conclude that they were factual, informative, and noninflammatory in nature. Accordingly, these articles do not provide a basis for our holding that the trial court abused its discretion in denying defendant's motion. *See State v. Oliver, supra.*

Had these articles been the extent of defendant's evidence in support of his motion, resolution of this assignment of error would be short and simple. There was, however, additional evidence pertinent to decision of this assignment of error tending to show that Judge Davis erred in denying defendant's pretrial motion.

After Mr. Harrill testified concerning the broadcasts, he was questioned by the court. In response to these questions, Mr. Harrill indicated that his employment took him to various points

throughout Alleghany County.[1] In his opinion, most county residents had heard about and discussed the case. He did not believe defendant could get a fair trial in the county.

Deputy Sheriff Joe Vickerman also testified. He stated:

> In my duties I get a lot of unsolicited information talking to people. They request my views on things, and I have never given my view on the case in question but they give me theirs and I don't attempt to stop them. I've heard it discussed by nearly everyone out in the county who knows I'm a law enforcement officer.

Vickerman stated that he did not believe a jury without prior knowledge of the case could be found. He also stated that he believed "quite a few people" had made up their minds on the ultimate issue in the case.

Woodros Estep, a magistrate, testified that in his capacity as a judicial officer, as well as in other jobs, he had occasions to talk with people throughout the county; that he had heard a lot of discussion about this case from all over the county; and that he did not believe a jury could be found that would be impartial. On cross-examination and recross-examination, he stated that the jury would follow the law and do their duty as jurors. On redirect-examination, he stated that he did not think a jury could be obtained in Alleghany County which would be totally independent and not know anything about the case.

Mr. Edmund Adams, an attorney who was subsequently appointed to serve as co-counsel for defendant but who had no connection with the case at the time of the hearing, testified that he had often heard this case discussed and that people in the community were intensely interested in the case. In his opinion, it was not possible for defendant to get a fair trial in Alleghany County. He also stated that he believed it would be very difficult to get an impartial jury and that the people in the community were mad about the murder of Mr. Parsons. He recalled at least three occasions when people came into his office and said, "I sure do hope they fry this man" (referring to defendant). Adams had

1. The 1980 federal census disclosed that Alleghany County contained an area of 225 square miles and a population of 9,587 people. 1981 N.C. Manual, p. 129.

also talked to people who purported to know what the actual facts in the case were. Before he was excused, the trial court asked Mr. Adams:

> Based on the information which you have heard, . . . don't you think the people in this county have a right to be mad?

Adams answered affirmatively.

Mr. Arnold Young, also an Alleghany County attorney, testified that he had heard the case discussed and commented upon by people from all over the county. In his opinion, defendant could not obtain a fair and impartial jury or a fair trial in Alleghany County. The reason for his opinion was that:

> Everyone in the county, or at least a great majority of the people, have heard of the case, and, as Mr. Adams said, they're mad about it.

The Court then engaged in the following dialogue with Mr. Young:

> COURT: I'd like to ask you a question.
>
> You said the people in this county are real mad about somebody committing the crime which was committed, not at this particular individual. Is that correct?
>
> WITNESS: Yes, Sir.
>
> COURT: Don't you think that the people who live in Alleghany County have the unbridled right to try anybody that commits a crime in this county?
>
> WITNESS: Yes, Sir, but I feel that the defendant does have a right to an impartial jury and I don't feel that an impartial jury can be found in Alleghany County in this particular case, Your Honor.

Defendant then indicated that he was prepared to call more witnesses. He stated, however, that their testimony would be merely cumulative.

The trial judge questioned Mr. Murray, an attorney who was appearing with the State in behalf of the Parsons family. Mr. Murray stated that he believed it would be difficult to find a jury

which "had not heard anything about the case and therefore have formed an opinion." Mr. Murray informed the court that he heard people throughout the county talking about this case. He referred to it as a *cause celebre*. He further stated:

> The combination of events, the combination of the person who was killed, the combination of the regard in which the family is held, I think would make it extremely difficult, if not impossible, to get that many people to make a jury. I think if you got a jury you could be assured of a fair jury. I'm just not sure you could ever find enough people who had not heard something about it and therefore formed an opinion.

Thereafter, the court heard arguments from, and engaged in discussions with, attorneys representing the State and defendant. At one point His Honor stated:

> I just don't like to move cases. I think people who live in a county ought to try everybody that commits a crime in that county.

Later on in the discussion, the court said that:

> [T]he citizens of this county are entitled to consideration, too, and they shouldn't have to travel all the way to some other county to see a trial of one of their friends and neighbors being tried.

A review of the motion transcript compels us to conclude that in ruling on the motion, the trial court placed undue and prejudicial emphasis on the right of county residents to try a defendant in the county where a crime was committed, even referring to this right as "unbridled." We agree that county residents have a significant interest in seeing criminals who commit local crimes being brought to justice. For this reason, only in rare cases should a trial be held in a county different from the one in which a crime was allegedly committed.

[1] The legitimate concern of county residents in trying criminal defendants locally is not, however, the test for determining whether venue should be changed. The test, as stated above, is whether, due to pretrial publicity, there is a reasonable likelihood that the defendant will not receive a fair trial. *Sheppard v. Maxwell, supra; State v. Boykin, supra.* Stated otherwise, a de-

fendant's motion for a change of venue should be granted when he establishes that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed. *See State v. McDougald*, 38 N.C. App. 244, 248 S.E. 2d 72 (1978), *disc. rev. denied, appeal dismissed*, 296 N.C. 413, 251 S.E. 2d 472 (1979). When such a likelihood is shown to exist, a defendant's right to a fair trial by an impartial jury far outweighs the interest local residents have in trying a defendant in that county.

The evidence presented by defendant prior to jury selection was clearly sufficient to show that there was considerable discussion of this case throughout Alleghany County. Every witness who testified at the hearing on defendant's motion indicated that they believed it would be extremely difficult, if not impossible, to select a jury comprised of individuals who had not heard about the case. The evidence also indicated that due to the publicity surrounding this case, potential jurors were likely to have formed preconceived opinions about defendant's guilt and that defendant would not receive a fair trial by an impartial jury.

This evidence notwithstanding, the State, in effect, contends that the application of recognized principles of law regarding the selection of jurors in a homicide case requires that we find that defendant's motions for change of venue were properly denied.

Our cases indicate that a defendant, in meeting his burden of showing that pretrial publicity precluded him from receiving a fair trial, must show that jurors have prior knowledge concerning the case, that he exhausted peremptory challenges and that a juror objectionable to the defendant sat on the jury. *State v. Dobbins, supra; State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325, *death sentence vacated*, 428 U.S. 904, 96 S.Ct. 3212, 49 L.Ed. 2d 1211 (1976). In deciding whether a defendant has met his burden of showing prejudice, it is relevant to consider that the chosen jurors stated that they could ignore their prior knowledge or earlier formed opinions and decide the case solely on the evidence presented at trial. *See State v. Richardson*, 308 N.C. 470, 302 S.E. 2d 799 (1983).

[2] We are of the opinion that the holdings in the cases above referred to are correct and are consistent with the language in *Estes v. Texas*, 381 U.S. 532, 542, 85 S.Ct. 1628, 1632-33, 14 L.Ed. 2d 543, 550, *reh. denied*, 382 U.S. 875, 86 S.Ct. 18, 15 L.Ed. 2d 118 (1965), that "in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused." However, under the particular circumstances of this case, we are not convinced that a showing of identifiable prejudice is required.

In *Sheppard v. Maxwell*, *supra*, after acknowledging that a defendant must show identifiable prejudice, the Court qualified this acknowledgment with the following language:

> Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result *that it is deemed inherently lacking in due process.*

384 U.S. at 352, 86 S.Ct. at 1517, 16 L.Ed. 2d at 614 [quoting *Estes v. Texas*, 381 U.S. 532, 542-43, 85 S.Ct. 1628, 1633, 14 L.Ed. 2d 543, 550 (1965) (emphasis added)]. The Court emphasized that "our system of law has always endeavored to prevent even the probability of unfairness." 384 U.S. at 352, 86 S.Ct. at 1517, 16 L.Ed. 2d at 614 [quoting *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942, 946 (1955)].

In *Sheppard*, the Court viewed the totality of the circumstances and concluded that under the facts of that case, there was such a probability that prejudice would result that defendant was denied due process. It is clear that the totality of the circumstances in this case mandate a similar conclusion.

[3] The evidence at the pretrial hearing, standing alone, was sufficient to reveal a reasonable likelihood that defendant could not receive a fair trial in Alleghany County due to the deep-seated prejudice against him.[2] In so concluding, we think it extremely significant to note that here, the crime occurred in a small, rural and closely-knit county where the entire county was, in effect, a neighborhood. This fact distinguishes instant case from *United States v. Haldeman*, 559 F. 2d 31 (D.C. Cir. 1976), *cert. denied*, 431

2. In all fairness to the trial judge, it does not appear that he had before him the evidence that was offered at the pretrial hearing for change of venue.

U.S. 933, 97 S.Ct. 2641, 53 L.Ed. 2d 250, *rehearing denied*, 433 U.S. 916, 97 S.Ct. 2992, 53 L.Ed. 2d 1103 (1977), and others where although the publicity was great, the crimes occurred and the trials were held in large urban areas.

The probability of irreversible prejudice in instant case is further illustrated by the actual jury *voir dire*. The record of the *voir dire* reveals more than the fact that a great number of the potential jurors had some prior knowledge of this case.[3] Approximately one-third of the potential jurors stated that, in some manner, they knew or were familiar with Mr. Parsons or some member of the Parsons family. At least two of the potential jurors summoned were related in some way to the Parsons family. Many of the potential jurors stated that due to the fact that they knew Mr. Parsons or his family they could not give defendant a fair trial or that they would at least be influenced by their relationship with the Parsons. Many of the persons summoned stated that they knew potential State's witnesses. Of this group, some indicated that they would give more weight to the testimony of these witnesses. Some potential jurors indicated that they had already formed an opinion or that they felt they already knew what the facts of the case were. At least one person examined stated that he had visited the Parsons home shortly after the incident and talked with Tom Parsons, a robbery victim. At least one person stated that she was a neighbor of the Parsons.

Of the jury that actually decided the case, as noted above, ten of the twelve and both alternate jurors had heard about the case. Four of the twelve jurors who decided the question of defendant's guilt knew or were at least familiar with the Parsons family or relatives. The foreman of the jury, Mr. Tom Douglas, stated that he heard a relative of Mrs. Parsons emotionally discussing the case. Six members of the twelve-person jury knew or were at least familiar with State's witnesses.

Additionally, we point out that the jury was examined collectively. Prior to jury selection defendant moved that the jury be individually selected pursuant to G.S. 15A-1214(j). The trial judge

3. Many of the potential jurors called were never asked about whether they had been exposed to pretrial publicity because they were excused when they indicated that they could not vote to impose the death penalty under any circumstances or that they could not give defendant a fair trial.

denied this motion. Though the denial of this motion is a separate assignment of error brought forward by defendant, we consider it only in relation to our review of the totality of the circumstances in instant case.

The adverse effect of the denial of defendant's motion is apparent on the facts. Potential jurors and jurors previously selected were seated in the courtroom where they heard many other potential jurors state that they knew the victim, that they knew potential State's witnesses, that they had already formed opinions in the case or that they could not give defendant a fair trial. Potential jurors and jurors previously selected heard the statement by Mr. Douglas that he heard a relative of Mrs. Parsons emotionally discussing the case and were further exposed to a statement by a potential juror that the opinions he heard were "not to [defendant's] benefit." We also note that counsel's inquiry into the extent of the familiarity many jurors had with the case was limited due to the presence in the courtroom of previously selected jurors and potential jurors.

The totality of the circumstances in the case before us clearly reveals that the population of Alleghany County was infected with prejudice against this defendant. Based on the evidence presented at the pretrial hearing and our review of the *voir dire* examination of potential jurors, we conclude that defendant fulfilled his burden of showing that a reasonable likelihood existed that he would not receive a fair trial before an Alleghany County jury.

We therefore hold that the totality of the particular circumstances in this case requires that defendant be awarded a new trial before a jury drawn from a county other than Alleghany.

Notwithstanding the necessity for a new trial, we deem it necessary to discuss certain questions which may arise at the next trial.

Guilt-Innocence Phase

Defendant argues that the trial court erred in submitting the issue of first-degree kidnapping to the jury. Defendant contends that the indictment charging him with kidnapping was insufficient

to allege kidnapping in the first degree and that the evidence was insufficient to support a conviction of first-degree kidnapping.

[4] We first consider whether the indictment was sufficient to allege first-degree kidnapping.[4]

The established rule is that an indictment will not support a conviction for a crime unless all the elements of the crime are accurately and clearly alleged in the indictment. *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977); *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972). The Legislature may prescribe a form of indictment sufficient to allege an offense even though not all of the elements of a particular crime are required to be alleged. *See, e.g.*, G.S. 15-144.1 (authorizing a short-form indictment for rape) and G.S. 15-144 (authorizing a short-form indictment for homicide). The Legislature has not, however, established a short-form indictment for kidnapping. Accordingly, the general rule governs the sufficiency of the indictment to charge the crime of kidnapping.

The challenged indictment reads as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 25th day of July, 1981, in Alleghany County Bruce Franklin Jerrett unlawfully and wilfully did feloniously kidnap Edith Parsons, a person who had attained the age of 16 years, by unlawfully removing her from one place to another, without her consent and for the purpose of facilitating the flight of Bruce Franklin Jerrett following his participation in the commission of a felony, Murder.

The North Carolina kidnapping statute, G.S. 14-39, in pertinent part, provides:

4. Our review of the record discloses that defendant did not challenge at trial the sufficiency of the indictment to allege first-degree kidnapping. This, however, does not preclude review by this Court. Under G.S. 15A-1446(d)(4), a party may assert as error in this Court that the pleading failed to state essential elements of an alleged violation even though no objection, exception or motion was made at trial. Further, in *State v. Partlow*, 272 N.C. 60, 157 S.E. 2d 688 (1967), we held that "if the offense is not sufficiently charged in the indictment, this Court, *ex mero motu*, will arrest the judgment." *Id.* at 63, 157 S.E. 2d at 691. *See also State v. Fowler*, 266 N.C. 528, 146 S.E. 2d 418 (1966).

(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 the 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.

(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

Defendant contends that the language of G.S. 14-39(b) not only creates two degrees of kidnapping, but also creates and establishes the elements of each degree. He maintains that in order to have properly indicted him for first-degree kidnapping, it was necessary for the State, in addition to having alleged the essential elements of kidnapping provided in G.S. 14-39(a), to have alleged at least one of the elements of *first-degree kidnapping* listed in G.S. 14-39(b), to wit, that he did not release Mrs. Parsons in a safe place, that he seriously injured Mrs. Parsons or that he sexually assaulted her. The failure to so allege, he contends, requires the reversal of his conviction for first-degree kidnapping.

Urging this Court to apply the rule of *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978) to instant case, the State maintains that the indictment was sufficient to allege first-degree kidnapping.

In *Williams*, this Court was called upon to determine whether the language of then existing G.S. 14-39(b) created essential elements of "aggravated kidnapping." At the time of the *Williams* decision, G.S. 14-39(b) provided:

> Any person convicted of kidnapping shall be guilty of a felony and shall be punished by imprisonment for not less than 25 years nor more than life. If the person kidnapped, as defined in subsection (a), was released by the defendant in a safe place and had not been sexually assaulted or seriously injured, the person so convicted shall be punished by imprisonment for not more than 25 years, or by a fine of not more than ten thousand dollars ($10,000), or both, in the discretion of the court.

This Court held that subsection (b) did not create two kidnapping offenses—simple kidnapping and aggravated kidnapping. Subsection (a) was held to create the offense of kidnapping. Subsection (b) was held to relate *only* to matters which could be shown in mitigation of punishment and not to create separate offenses or add any additional elements to the offense of *kidnapping.*

State v. Williams, supra, is not dispositive of the questions here presented. By amending G.S. 14-39(b), the Legislature manifested its intent that there would be two degrees of kidnapping. The language of subsection (a) creates and defines the offense of kidnapping. The language of subsection (b) addresses the degree of the crime and dictates that the kidnapping will be first-degree kidnapping if the defendant does not release the victim in a safe place, or if he seriously injures the victim or sexually assaults the victim. The two subsections must be read together to determine the elements of first-degree kidnapping.

We therefore hold that the language of G.S. 14-39(b) states essential elements of the offense of first-degree kidnapping and does not relate to matters in mitigation of punishment. In order for the State to properly indict a defendant for first-degree kidnapping, the State must allege the applicable elements of both subsection (a) and subsection (b). *See State v. Baldwin,* 61 N.C. App. 688, 301 S.E. 2d 725 (1983).

[5] By this assignment of error, defendant also contends that the trial court's instruction on first-degree kidnapping was erroneous.

The particular instruction defendant contends was error is as follows:

> Members of the Jury, if you find that the defendant did not release her, that is let her go *voluntarily* in a safe place and you find those other elements, that would be first degree kidnapping.
>
> However, if you find that the defendant *voluntarily* turned her loose down at the Pantry, that would reduce it to second degree kidnapping if you find all the other elements that I enumerated.

(Emphasis added.)

Defendant argues that the court's instruction added the element of *voluntary* release to the definition of the offense of kidnapping. We do not agree.

While it is true that G.S. 14-39(b) does not expressly state that defendant must *voluntarily* release the victim in a safe place, we are of the opinion that a requirement of "voluntariness" is inherent in the statute. G.S. 14-39(b) provides that in order for the offense to constitute kidnapping in the second degree, the person kidnapped must be released "in a safe place *by the defendant* . . ." (emphasis added). This implies a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety.

We further note that defendant's argument is more theoretical than real for it is difficult to envision a situation when a release of the victim *by the defendant* could be other than voluntary. It seems the defendant would either release the victim voluntarily, or the victim would reach a place of safety by effecting an escape or by being rescued.

[6] We now consider whether the evidence was sufficient to sustain defendant's conviction of first-degree kidnapping. Defendant does not dispute the fact that the evidence was sufficient to allow the jury to reasonably find that he kidnapped Mrs. Parsons. Rather, his contention is that the State failed to prove the existence of any of the elements of first-degree kidnapping provided in G.S. 14-39(b).

Here there is no evidence of sexual assault or serious injury to the victim. Therefore, we only decide whether there was sufficient evidence from which the jury could reasonably infer that defendant did not release Mrs. Parsons in a safe place.

In resolving this question, we must be guided by the familiar rule that the evidence must be considered in the light most favorable to the State, giving the State every reasonable inference which may be drawn therefrom. *State v. Williams*, 307 N.C. 452, 298 S.E. 2d 372 (1983). The evidence relevant to the question presented by this assignment of error tends to show that after arriving at "The Pantry," defendant and Mrs. Parsons walked toward the store building. Defendant, carrying a pistol concealed within his shirt, walked a few feet behind Mrs. Parsons. Upon entering the store, Mrs. Parsons walked toward Officer Caudle and then to the rear of the building where she locked herself in a storage room. Defendant did not attempt to stop Mrs. Parsons after they entered the store. Meanwhile, defendant went to the counter and was in the process of purchasing gas when he was confronted and subsequently arrested by Officer Caudle.

Although this evidence presents a close question as to whether defendant released Mrs. Parsons in a safe place, we are of the opinion that it was sufficient to permit the jury to reasonably infer that Mrs. Parsons escaped or that she was rescued by the presence and intervention of the police officer. Conversely, this evidence would have permitted the jury to reasonably infer that defendant released Mrs. Parsons in a safe place. It was for the jury to resolve the conflicting inferences arising from this evidence.

We therefore hold that the evidence was sufficient to carry the case to the jury on the question of first-degree kidnapping.

[7] By his next assignment of error, defendant contends that the trial court should have instructed the jury that even if it did not find that he was legally insane at the time the crimes were committed, it could find that, due to his abnormal mental condition, he did not have the requisite intent to commit armed robbery.

Defendant did not request this instruction and according to Rule 10(b)(2), he thereby waived his right to assign as error the trial judge's failure to give the instruction. Considering the gravi-

ty of the crime charged, however, we elect in our discretion to review this question. *See State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308 (1983).

In essence, defendant maintains that he was entitled to an instruction upon diminished capacity or responsibility. We have consistently held that an instruction on diminished capacity is not required in first-degree murder cases involving specific intent to kill. *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983); *State v. Anderson*, 303 N.C. 185, 278 S.E. 2d 238 (1981); *State v. Shepherd*, 288 N.C. 346, 218 S.E. 2d 176 (1975). We believe it appropriate to apply the same rule to armed robbery since specific intent is also an issue in such cases. We therefore hold that the failure of the trial court to instruct on diminished capacity or responsibility was not error.

[8] Defendant next assigns as error the trial court's refusal to instruct on the defense of unconsciousness.

Although the trial judge failed to give the requested instruction, he did instruct the jury as follows:

> Now, Members of the Jury, it would also be your duty to return a verdict of not guilty if you are satisfied from the evidence that the defendant was suffering from blackouts at the time of those alleged offenses and that the defect so impaired his mental capacity that he either did not know the nature or quality of those acts as he was committing them and if he did know, he did not know those acts were wrong, it would be your duty to return a verdict of not guilty.

The rule in this jurisdiction is that where a person commits an act without being conscious thereof, the act is not a criminal act even though it would be a crime if it had been committed by a person who was conscious. *State v. Boone*, 307 N.C. 198, 297 S.E. 2d 585 (1982); *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975); *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969). The defense, while related to insanity, is different from insanity inasmuch as unconsciousness at the time of the act need not be the result of a mental disease or defect. *State v. Caddell, supra.* Unconsciousness, sometimes referred to as automatism, is a complete defense to a criminal charge. *State v. Mercer, supra.* This is so because "[t]he absence of consciousness not only precludes the

existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability." *Id.* at 116, 165 S.E. 2d at 334 [quoting 1 Wharton's Criminal Law and Procedure (Anderson), § 50, p. 116]. Unconsciousness is an affirmative defense and the burden is on the defendant to prove its existence to the satisfaction of the jury. *State v. Caddell, supra; State v. Williams,* 296 N.C. 693, 252 S.E. 2d 739 (1979).

The State takes the position that the only evidence that defendant suffered from a blackout in the morning hours of 25 July 1981 is his own self-serving and uncorroborated testimony. The State urges us to adopt the rule formulated in *Bratty v. Attorney General for Northern Ireland,* All E.R. 3 (1961) 523, and quoted in *State v. Caddell,* 287 N.C. 266, 288, 215 S.E. 2d 348, 362 (1975), that:

> The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity. It is not sufficient for a man to say "I had a black-out:" for "black-out" as Stable, J., said in *Cooper v. McKenna* [1960] Qd. R. at p. 419, "is one of the first refuges of a guilty conscience and a popular excuse." The words of Devlin, J., in *Hill v. Baxter* [1958], 1 All E.R. at p. 197 [1958], 1 Q.B. at 285, should be remembered:
>
> > "I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent."

In *State v. Mercer, supra,* Justice Bobbitt (later Chief Justice), speaking for the Court, stated:

> Where defendant's evidence, if accepted, discloses facts sufficient in law to constitute a defense to the crime for which he is indicted, the court is required to instruct the jury as to the legal principles applicable thereto. What weight, if any, is to be given such evidence, is for determination by the jury.

275 N.C. at 116, 165 S.E. 2d at 334. *See also State v. Lawrence,* 262 N.C. 162, 136 S.E. 2d 595 (1964).

We are cognizant of the fact that in *State v. Caddell, supra,* this Court, relying on *Bratty, questioned* whether the uncor-

roborated and unexplained testimony of a defendant that he was unconscious at the time the alleged crime was committed was sufficient to require an instruction on the defense of unconsciousness. We need not determine, however, whether *Mercer* was correctly decided because here there was corroborating evidence tending to support the defense of unconsciousness. In addition to the testimonial corroborating evidence, defendant's very peculiar actions in permitting the kidnapped victim to repeatedly ignore his commands and finally lead him docilely into the presence and custody of a police officer lends credence to his defense of unconsciousness.

We therefore hold that the trial judge should have instructed the jury on the defense of unconsciousness. The instruction given by Judge Rousseau referring to defendant's blackouts amounted only to a partial instruction on the defense of insanity and did not explain the law of unconsciousness or apply that law to the facts of the case.[5]

Defendant's argument that the trial judge prejudicially misstated his contentions in instructing the jury does not warrant discussion. At trial, defendant did not object to the instruction he now maintains was erroneous. At the new trial, defendant should adhere to the dictates of Appellate Rule 10(b)(2) and our case law to insure that his contentions are fully and correctly stated. *See State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981).

[9] Defendant next takes the position that it was error to exclude for cause fourteen jurors who unequivocally stated their opposition to the death penalty. The thrust of defendant's argument is that prior to *voir dire* examination of prospective jurors, the trial court must explain in detail the procedural and substantive aspects of the sentencing process.

Defendant acknowledges that a similar argument was addressed to this Court, but not discussed, 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). He requests that we reconsider the

5. For guidance on the instruction of unconsciousness, *see* Pattern Jury Instructions, N.C.P.I.-Crim.-302.10; *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969); *State v. Boone*, 307 N.C. 198, 297 S.E. 2d 585 (1982).

"implicit" rejection of this argument in *Pinch* and vacate his death sentence.

Defendant cites no authority on point and we find his reasoning unpersuasive. This assignment of error is without merit.

Sentencing Phase (Murder)

Our holding that defendant is entitled to a new trial also entitles him to a new sentencing hearing if convicted of first-degree murder. *State v. Jones*, 296 N.C. 495, 251 S.E. 2d 425 (1979). Even so, there are several issues raised by defendant relating to sentencing which we deem necessary to discuss.

We first consider defendant's broadside assault on the constitutionality of G.S. 15A-2000 *et seq.*, the North Carolina death penalty statute. We find these arguments to be meritless and discuss them only briefly.

[10] Defendant contends that the death penalty statute violates his constitutional right to privacy, a right recognized by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147, *reh. denied*, 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed. 2d 694 (1973).

Defendant has failed to cite a decision by any court holding or even suggesting that the imposition of a death sentence violates a defendant's right to privacy. We find defendant's argument to be without merit.

[11] Defendant also argues that the North Carolina death penalty scheme is unconstitutional because of our holding in *State v. Harris*, 290 N.C. 718, 228 S.E. 2d 424 (1976). In *Harris*, we held that when a defendant is tried for first-degree murder on the theory of premeditation and deliberation, the trial judge *must* submit to the jury the offense of second-degree murder, even though the evidence does not support this offense. It is his position that the holding in *Harris* permits the jury to capriciously, arbitrarily, and subjectively decide which defendants charged with first-degree murder will live and which will die. The *Harris* rule, which was in effect when defendant was tried, was overruled by this Court in *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983).

In instant case, defendant was convicted of felony murder and found not guilty of murder based upon premeditation and

deliberation. A person convicted of felony murder is guilty of murder in the first degree, irrespective of premeditation and deliberation or malice aforethought. *State v. Hairston*, 280 N.C. 220, 185 S.E. 2d 633, *cert. denied, sub nom., McIntyre v. North Carolina*, 409 U.S. 888, 93 S.Ct. 194, 34 L.Ed. 2d 145 (1972).

In all probability, defendant will be tried on the theory of felony murder at the new trial. If so, *Harris* has no application. Even if the State should elect to try defendant on the theory of premeditation and deliberation, *Harris* would have no application in light of our ruling in *State v. Strickland, supra.*[6]

We now consider defendant's contention that in the course of his closing argument, the prosecutor made improper disparaging characterizations of him which were not supported by the evidence and which were calculated to prejudice the jury.

[12] We do not consider it necessary to discuss defendant's contention at length since such an argument may not be made at the new trial. Suffice it to say that we find no evidence in this record to support the prosecutor's characterizations of defendant as a "conman" and a "disciple of Satan." *See State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

Defendant contends that the judge erred in submitting the following aggravating circumstances to the jury:

> 1. Was the murder committed for pecuniary gain? G.S. 15A-2000(e)(6).
>
> 2. Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against another person? G.S. 15A-2000(e)(11).

6. Query—Is the State precluded from prosecuting on the theory of premeditation and deliberation on retrial of this case? This question has not been briefed or argued and is therefore not properly before us. We find no North Carolina authority on this point. However, for discussion of this issue, *see generally, Jackson v. Follette*, 462 F. 2d 1041 (2d Cir.), *cert. denied*, 409 U.S. 1045, 93 S.Ct. 544, 34 L.Ed. 2d 496 (1972); *People v. Jackson*, 20 N.Y. 2d 440, 231 N.E. 2d 722 (1967), *cert. denied*, 391 U.S. 928, 88 S.Ct. 1815, 20 L.Ed. 2d 668 (1968); *People v. Bloeth*, 16 N.Y. 2d 505, 208 N.E. 2d 177 (1965), *cert. denied*, 384 U.S. 1007, 86 S.Ct. 1940, 16 L.Ed. 2d 1020 (1966).

These were the only aggravating circumstances submitted to the jury, and the jury found both to exist. Defendant argues that there was insufficient evidence to support either aggravating circumstance and therefore his death sentence should be vacated.

We first consider whether the aggravating circumstance set forth in G.S. 15A-2000(e)(6) was properly submitted.

It is now well established that when a defendant is convicted of felony murder in which the underlying felony was robbery, the court may submit the aggravating circumstance that the murder was committed for pecuniary gain if the circumstance is supported by the evidence. *State v. Oliver, supra; State v. Taylor,* 304 N.C. 249, 283 S.E. 2d 761 (1981); *State v. Irwin,* 304 N.C. 93, 282 S.E. 2d 439 (1981).

[13] We therefore must determine whether there was sufficient evidence to support the submission of this aggravating circumstance.

The evidence tends to show that defendant robbed Tom Parsons of three dollars, took cartridges from the dwelling, took money from the murder victim's pockets and then stole the Parsons' automobile. Thus, there was plenary evidence to support a finding that the murder was committed for pecuniary gain.

[14] We likewise find that there was ample evidence to support the submission of the aggravating circumstance that the murder of Dallas Parsons was part of a course of conduct in which defendant engaged, and the course of conduct included the commission by defendant of other crimes of violence against another person. G.S. 15A-2000(e)(11). Although defendant does not challenge the sufficiency of the evidence to support the charge that he kidnapped Mrs. Parsons, he argues that this was not a crime of violence. We disagree.

The evidence clearly shows that after defendant shot Dallas Parsons he pointed the gun at Mrs. Parsons and forced her to come to him. He then dragged her about the house and then to the Parsons' automobile. During this time and during the drive to Sparta, he continued to threaten Mrs. Parsons verbally and by pointing the pistol at her.

We therefore hold that the trial judge properly submitted the aggravating circumstances set forth in G.S. 15A-2000(e)(6) and G.S. 15A-2000(e)(11).

[15] We next consider defendant's contention that the trial court erred by instructing the jury that it must return a verdict of death if it found that the aggravating circumstances outweighed the mitigating circumstances, thereby lowering the State's burden of proof. The trial court instructed, in part, as follows:

> So I charge that for you to recommend that the defendant be sentenced to death, the State must prove three things beyond a reasonable doubt. A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies you or entirely convinces you of each of the following things:
>
> First, that one or more statutory aggravating circumstances existed;
>
> Second, that the aggravating circumstance or circumstances found by you are sufficiently substantial to call for the imposition of the death penalty;
>
> And third, that the aggravating circumstance or circumstances found by you outweigh any mitigating circumstance or circumstances found by you.
>
> [If you unanimously find all three of these things beyond a reasonable doubt, it would be your duty to recommend that 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.]
>
> EXCEPTION NO. 37

Defendant argues that the trial court should have also instructed the jury that before they could recommend a death sentence, they would have to determine that the aggravating circumstances outweighed the mitigating circumstances so substantially as to justify the death penalty beyond a reasonable doubt.

In *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308 (1983), *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335 (1983), and *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983), we held that instructions substantially similar to that given in instant case were free from prejudicial error, but were not model instructions. The instruction approved by this Court in *McDougall* is one which includes an instruction to the jury that they must find the aggravating circumstance or circumstances sufficiently substantial to call for the imposition of death when considered with the mitigating circumstance or circumstances before the death penalty may be imposed. If, on retrial, defendant is convicted of first-degree murder, the trial court should instruct the jury at the sentencing hearing in accordance with the instruction approved in *State v. McDougall, supra.*

Sentencing (kidnapping and felonious breaking and entering)

Defendant assigns as error the trial court's imposition of maximum sentences on the kidnapping and felonious breaking and entering charges.

In sentencing defendant for kidnapping and felonious breaking and entering, the trial judge imposed the maximum sentence allowed for each offense under the Fair Sentencing Act. He did so after finding that the aggravating factors in each case outweighed the mitigating factors. The trial judge found the same aggravating and mitigating factors in each case. The aggravating factors found were:

1. The defendant was armed with or used a deadly weapon at the time of the crime.

2. Lesser sentence would depreciate the seriousness of the crime.

3. This sentence is necessary to deter others from committing the same crime.

4. The defendant engaged in a pattern of violent conduct which indicated a serious danger to society.

The first aggravating factor was found to exist pursuant to G.S. 15A-1340.4(a)(1)i which states that "the defendant was armed with or used a deadly weapon at the time of the crime."

The remaining three aggravating factors were found to exist pursuant to the language of G.S. 15A-1340.4(a) which, in pertinent part, provides:

> In imposing a prison term, the judge, under the procedures provided in G.S. 15A-1334(b), may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing, *whether or not such aggravating or mitigating factors are set forth herein*, . . .

(emphasis added).

Clearly, the trial judge properly found the aggravating factor provided for in G.S. 1340.4(a)(1)i since all of the evidence shows that defendant was armed with a deadly weapon.

[16] The aggravating factor that defendant engaged in a pattern of violent conduct which indicated a serious danger to society was also correctly found. In *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), we held that a defendant's dangerousness to others was reasonably related to "the purposes of sentencing one of which is 'to protect the public by restraining offenders.' G.S. § 15A-1340.3." *Id.* at 604, 300 S.E. 2d at 702, and could be considered as a factor in aggravation. *Accord State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983).

In instant case, the bizarre manner in which defendant perpetrated the crimes of murder and kidnapping was sufficient to support this finding. Further, his own testimony that he committed acts of violence upon his sister while "blacked-out" would support a finding that defendant engaged in a pattern of conduct which indicated a serious danger to society.

[17] The second and third aggravating factors, however, are contrary to this Court's recent decision in *State v. Chatman*, *supra*. In *Chatman*, as in instant case, the trial judge found as aggravating factors that the sentence imposed was necessary to deter others, and that a lesser sentence would unduly depreciate the seriousness of the crime. We held that the consideration of these factors in aggravation was error. Justice Meyer, writing for the Court, stated:

> 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)].

Id. at 180, 301 S.E. 2d at 78.

We therefore hold that the trial judge erred in finding the second and third aggravating factors in the kidnapping and felonious breaking and entering cases.

We do not discuss defendant's remaining assignments of error, all of which concern questions which have been heretofore decided by this Court or questions which in all probability will not recur at defendant's next trial. For the reasons stated, there must be a new trial in both the guilt-innocence phase and the sentencing phase.

New trial.

Justice MITCHELL dissenting in part and concurring in part.

I cannot agree with either the majority's conclusion that the "defendant fulfilled his burden of showing that a reasonable likelihood existed that he would not receive a fair trial before an Alleghany County jury" or with the majority's holding that the defendant must receive a new trial on this basis. As to these points, I must respectfully dissent. Otherwise, I concur in the opinion of the majority.

The majority appears to base its holding in this regard, at least in part, upon the Constitution of the United States, as it relies heavily upon cases decided by the Supreme Court of the United States on constitutional grounds. Particularly for this reason, I fear that the precedent established by the majority in this case inevitably creates the "potential for needless friction between the rights of a free press guaranteed by the First Amendment to the Constitution of the United States and the defendant's right to trial by an impartial jury guaranteed by the Sixth Amendment." *State v. McDougald*, 38 N.C. App. 244, 249, 248 S.E. 2d 72, 78 (1978), *discretionary review denied, appeal*

dismissed, 296 N.C. 413, 251 S.E. 2d 472 (1979). By its opinion today, I believe the majority tends to destroy the delicate balance between the First Amendment and the Sixth Amendment and to give the Sixth Amendment clear priority status over the First Amendment.

Certainly there was no error in denying the defendant's *pretrial* motion for a change of venue or special venire from another county. I have found only one case, *Rideau v. Louisiana*, 373 U.S. 723 (1963), in which the Supreme Court of the United States determined that, no matter what could be shown during the selection of the jury, the community in which the defendant was tried must be presumed to be so prejudiced as a result of pretrial publicity that the defendant could not receive a fair trial. That case is unique, however, in that it involved a factual situation in which the defendant's pretrial showing revealed that his televised confession without benefit of counsel was participated in by law enforcement authorities and was shown repeatedly to the local viewing audience in the small community from which the jury was drawn. I believe that case is "an aberration which should be confined to its facts and not brought into play here." *State v. McDougald*, 38 N.C. App. at 249, 248 S.E. 2d at 78 (1978). Even in *Rideau* Justices Clark and Harland dissented on the ground that there was no showing that the jury which actually heard the case had been affected by the publicity.

To the extent the majority relies upon *Sheppard v. Maxwell*, 384 U.S. 333 (1966) and *Estes v. Texas*, 381 U.S. 532 (1965) as support for its holding that the trial court erred in failing to allow a change of venue or special venire, I believe the majority's reliance is misplaced. In each of those cases, the Supreme Court of the United States discussed the heavy pretrial publicity involved but emphasized the trial court's failure to take measures to insulate the jury from massive publicity *during the trial* and disruptive conduct of reporters and others *during the trial*. *United States v. Haldeman*, 559 F. 2d 31, 61 n. 32 (D.C. Cir. 1976), *certiorari denied*, 431 U.S. 933, *rehearing denied*, 433 U.S. 916 (1977). No such failure by the trial court is before us in the present case, and neither *Sheppard* nor *Estes* is controlling authority given the facts of this case.

I can conceive of almost no circumstance in which an appellate court should reverse a trial court for its refusal to grant a

change of venue or special venire prior to the *voir dire* during which the jury is selected. In my view, "If an impartial jury actually cannot be selected, that fact should become evident at the *voir dire*. The defendant will then be entitled to any actions necessary to assure that he receives a fair trial." *United States v. Haldeman*, 559 F. 2d at 63.

Further, I do not think that anything in the record before us in the present case indicates that the defendant bore his burden under either the totality of the circumstances test or the actual prejudice test of showing a reasonable likelihood that he would not receive a fair trial before an Alleghany County jury. As the majority points out, the defendant sought to support his pretrial motion by introducing the testimony of several attorneys, a magistrate and a deputy sheriff in which each gave his opinion that the defendant could not receive a fair trial in Alleghany County. Assuming *arguendo* that a sufficient groundwork had been laid to make such opinion testimony admissible, it was insufficient to show a reasonable likelihood that the defendant could not receive a fair trial in Alleghany County.

In *United States v. Haldeman*, 559 F. 2d 31 (D.C. Cir 1976), *certiorari denied*, 431 U.S. 933, *rehearing denied*, 433 U.S. 916 (1977), a former Attorney General of the United States and the two highest advisors to President Nixon were on trial for their participation in the Watergate affair. This scandal and the defendants' participation therein received massive daily publicity for more than twenty-two months. The crimes for which the defendants were on trial received in all probability the most extensive news media coverage in the history of the United States. Clearly admissible scientific sampling revealed that sixty-one percent of the population of the District of Columbia thought the defendants were in fact guilty and that this percentage was significantly higher than the corresponding national average. *Id.*, 559 F. 2d at 144, MacKinnon, Circuit Judge, concurring in part and dissenting in part. Newspaper coverage alone in the District of Columbia consumed an average of thirty to one hundred twenty column inches a day for a total of more than fifty thousand column inches during the entire twenty-two month period between the disclosure of the Watergate break-in and the defendants' motion for a change of venue. Nevertheless, the United States Court of Appeals for the District of Columbia Circuit held that:

> In short, unlike the situation faced by the Court in *Rideau*, we find in the publicity here no reason for concluding that the population of Washington, D. C. was so aroused against appellants and so unlikely to be able objectively to judge their guilt or innocence on the basis of the evidence presented at trial that their due process rights were violated by the District Court's refusal to grant a lengthy continuance or a change of venue prior to attempting selection of a jury.

559 F. 2d 31 at 61-2. The effect of the pretrial publicity in the present case, whether by word of mouth or through the news media, was insignificant by comparison to that shown by competent evidence to exist in *Haldeman*. The opinion testimony of the defendant's witnesses concerning their perception as to whether he could receive a fair trial in Alleghany County was not such as to require the trial court to allow the defendant's motion for change of venue or for a special venire.

Similarly, nothing occurring during the *voir dire* at which the twelve jurors who convicted the defendant were selected revealed a reasonable likelihood that he would not receive a fair trial. It is true, of course, that:

> In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it.

Murphy v. Florida, 421 U.S. 794, 803 (1975). During the selection of the twelve jurors who served in the present case, the defendant challenged four veniremen for cause when they indicated that they would have difficulty in disabusing themselves of any preconceived opinions they may have formed as a result of pretrial publicity. The trial court on its own motion excused twelve veniremen for this reason. Thus, a total of sixteen veniremen were excused because they indicated that they had formed or might have formed opinions as a result of their familiarity with the parties or pretrial publicity. No juror who participated in the determination of the defendant's guilt indicated that he or she had formed any opinion as to the defendant's guilt prior to hearing evidence. Each stated affirmatively

that he or she could base a decision as to the defendant's guilt solely upon the evidence introduced at trial and uninfluenced by any other factors.

Therefore, the present case is not controlled by *Irvin v. Dowd*, 366 U.S. 717 (1961). In *Irvin* sensational publicity adverse to the accused permeated the small town in which the trial was held. The *voir dire* examination indicated that ninety percent of the veniremen and eight of the twelve jurors who actually determined the defendant's guilt had a preconceived opinion as to the defendant's guilt, and the defendant unsuccessfully challenged for this cause several people who sat on the jury. The trial court had excused for this cause 268 of the 430 veniremen. No such situation is presented by the present case.

In my view, this case is controlled, instead, by *Murphy v. Florida*. There, Mr. Justice Marshall speaking for the Court distinguished *Irvin v. Dowd* and stated that:

> In the present case, by contrast, 20 of the 78 persons questioned were excused because they indicated an opinion as to the petitioner's guilt. This may indeed be 20 more than would occur in the trial of a totally obscure person, but it by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own.

421 U.S. at 803. Here, as in *Murphy*, the jurors *who participated in the trial* "displayed no animus of their own." The exclusion of 16 veniremen for preconceived opinions, like the exclusion of 20 veniremen for the same reason in *Murphy*, "by no means suggests a community with sentiment so poisoned against [the defendant] as to impeach the indifference of jurors who displayed no animus of their own." *Id.* Therefore, the defendant failed to carry his burden.

I respectfully suggest that the majority has lost sight of the fact that jurors need not be totally ignorant of the facts and issues involved in the case to be tried and are not required to come to their duties without having formed any impressions or opinions concerning the case. As the Supreme Court of the United States has clearly stated:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective jurors's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. at 723. Here, the defendant entirely failed to carry his burden of showing that any juror who passed upon his guilt was unable to lay aside any impression or opinion and render a verdict based on the evidence presented in court. Each of the jurors affirmatively stated that he or she could lay aside any such impressions or opinions and, as previously pointed out, the defendant offered nothing sufficient to impeach the jurors' indications of indifference and lack of animus.

Additionally, the majority has correctly stated that, in order to meet the burden of showing that pretrial publicity precluded a fair trial, a defendant must show "that he exhausted peremptory challenges and that a juror objectionable to the defendant sat on the jury." In my view, no such showing was made in the present case.

When the jury of twelve had been selected, the defendant had not exhausted his peremptory challenges. Although one juror, Mrs. Maxwell, was challenged for cause when she indicated that she did not believe in the insanity defense but could apply it if the trial court instructed her on the law, no juror was seated over the defendant's objection who indicated that he or she had formed or might have formed an opinion concerning the case to be tried. The fact that the defendant later exhausted his peremptory challenges during the selection of two alternate jurors is irrelevant since neither of the alternates sat on the jury which determined the defendant's guilt.

No juror who passed upon the defendant's guilt was challenged for cause by the defendant for having formed an opinion concerning the case to be tried. "The fact that [the defendant] did not challenge for cause any of the jurors so selected is strong evidence that he was convinced the jurors were not biased and had not formed any opinions as to his guilt." *Beck v. Washington*, 369 U.S. 541, 558 (1962). The defendant's failure to show that he

exhausted his peremptory challenges during selection of the jury which tried him is fatal to his assignment of error.

For the foregoing reasons I dissent in part from the opinion of the majority and vote to find no error in the guilt-innocence determination phase of the defendant's trial. As the opinion of the majority makes it unnecessary for this Court to reach its statutory duty of proportionality review, I express no opinion as to the appropriateness of the sentence of death.

MICHAEL H. MEISELMAN v. IRA S. MEISELMAN, LAWRENCE A. POSTON, PAUL EDWARD LLOYD, EASTERN FEDERAL CORPORATION, RADIO CITY BUILDING, INC., CENTER THEATRE BUILDING, INC., COLONY SHOPPING CENTER, INC., GENERAL SHOPPING CENTERS, INC., M & S SHOPPING CENTERS OF FLORIDA, INC., MARTHA WASHINGTON HOMES, INC., AND TRY-WILK REALTY COMPANY, INC.

No. 594A82

(Filed 27 September 1983)

1. **Corporations § 13— closely held corporations—standard of review for cases coming under G.S. 55-125(a)(4) and G.S. 55-125.1**

In an action by a minority stockholder in a closely held corporation, the trial court misapplied the applicable law in denying plaintiff's claim for relief under G.S. 55-125(a)(4) and G.S. 55-125.1. Under G.S. 55-125(a)(4) a trial court is: (1) to define the "rights or interests" the complaining shareholder has in the corporation; and (2) to determine whether some form of relief is "reasonably necessary" for the protection of those "rights or interests." For plaintiff to obtain relief under the expectations analysis, he must prove that (1) he had one or more substantial reasonable expectations known or assumed by the other participants; (2) the expectation had been frustrated; (3) the frustration was without fault of plaintiff and was in large part beyond his control; and (4) under all of the circumstances of the case plaintiff is entitled to some form of equitable relief.

2. **Corporations § 13— closely held corporations—summary judgment for majority stockholder improper—findings of fact failing to address "rights or interests" of minority stockholder**

In an action brought by a minority stockholder in a closely held corporation where the trial court entered summary judgment for the majority stockholder, the trial court's findings of fact failed to address the "rights or interests" of the minority stockholder in the family corporations, and the case must be remanded to the trial court for an evidentiary hearing to resolve the issue. On remand after hearing the evidence, the trial court is to: (1) articulate the minority stockholder's "rights or interests"—his "reasonable expectations"

—in the corporate defendant; and (2) determine if these "rights or interests" are in need of protection, and thus, that relief of some sort should be granted. In addition, the trial court is to prescribe the form of relief which the evidence indicates is most appropriate, should it find that relief is warranted.

3. **Corporations § 12— claim that majority stockholder usurped corporate opportunity—findings of fact by trial court insufficient on issue**

In an action in which plaintiff claimed that defendant, majority stockholder, breached his fiduciary duty to the corporate defendant, in which plaintiff and the individual defendant both had interests, by usurping a corporate opportunity which belonged to them—the opportunity to buy stock of a corporation solely owned by the individual defendant—the trial court failed to focus on the appropriate issue and the findings of fact were not sufficient. When an officer or director is charged with having usurped a corporate opportunity, he or she must establish under G.S. 55-30(b)(3) that the "corporate transaction" in which he or she was engaged is "just and reasonable" to the corporation because it was not an opportunity or "corporate transaction" which the corporation itself would have wanted.

Justice MARTIN concurring in the result.

Chief Justice BRANCH and Justice COPELAND join in this concurring opinion.

APPEAL as a matter of right from a decision of the Court of Appeals, one judge dissenting.

This case was tried before *Judge Robert D. Lewis* during the 26 January 1981 Civil Session of Superior Court, MECKLENBURG County. In his memorandum of judgment, *Judge Lewis* denied plaintiff's claims for relief; plaintiff then appealed to the Court of Appeals. In an opinion written by *Judge Becton* with *Judge Wells* concurring, the Court of Appeals reversed. *Meiselman v. Meiselman*, 58 N.C. App. 758, 295 S.E. 2d 249 (1982). Because *Judge Hill* dissented in the case, defendants appeal to this Court as a matter of right under N.C.G.S. § 7A-30(2) (1981).

Fleming, Robinson, Bradshaw & Hinson, P.A., by Russell M. Robinson, II, Attorney for plaintiff-appellee.

Blakeney, Alexander and Machen, by J. W. Alexander, Jr., Attorney for individual defendants; Farris, Mallard & Underwood, P.A., by Ray S. Farris and David B. Hamilton, Attorneys for corporate defendants.

FRYE, Justice.

In this appeal, we must determine whether Michael Meiselman, a minority shareholder with a substantial percentage of the outstanding stock in a group of family-owned close corporations, is entitled to relief under N.C.G.S. § 55-125(a)(4) and N.C.G.S. § 55-125.1, the statutes granting trial courts the authority to order dissolution or another more appropriate remedy when "reasonably necessary" for the protection of the "rights or interests" of the complaining shareholder. In so doing, we will articulate for the first time the analysis a trial court is to apply in resolving suits brought under these two statutes. We must also determine whether the trial court erred in concluding that Ira Meiselman, Michael's brother, committed "no actionable breach of fiduciary responsibility" as an officer or director of the defendant corporations through his sole ownership of the stock in a corporation holding a management contract with one of the family corporations. After outlining in detail the pertinent facts in this case and the development of the law in the area of corporate dissolution, we will address first the question of whether the trial court erred in denying Michael's claim for relief under N.C.G.S. § 55-125(a)(4) and N.C.G.S. § 55-125.1.

I.

Michael Meiselman, the plaintiff and complaining minority shareholder in this action, and Ira Meiselman, one of the defendants in this action, are brothers. Michael, the older of the two, was born in 1932 and has never married. Ira was born ten years later. He is married and has two children. The two men are the only surviving children of Mr. H. B. Meiselman, who immigrated to the United States from Austria in 1913. Over the years, Mr. Meiselman accumulated substantial wealth through his development of several family business enterprises. Specifically, Mr. Meiselman invested in and developed movie theaters and real estate. Several of the enterprises were merged into Eastern Federal Corporation [hereinafter referred to as Eastern Federal], a close corporation, most of the stock of which is owned by Ira and Michael. In addition, there are seven other corporations[1] which,

1. The seven other corporations are: Radio City Building, Inc.; Center Theatre Building, Inc.; Colony Shopping Center, Inc.; General Shopping Centers, Inc.;

together with Eastern Federal, comprise the Meiselman family business and are the corporate defendants in this case.

Beginning in 1951, Mr. Meiselman started a series of *inter vivos* transfers of corporate stock in the various corporations which, generally speaking, he divided equally between his two sons. However, in March 1971 Mr. Meiselman transferred 83,072 shares of stock in Eastern Federal to Ira, while Michael received only 1,966 shares in the corporation. The next month Michael transferred the control of his stock in the family corporations to his father in trust, a trust Michael could revoke without his father's consent only if he married a Jewish woman.[2]

The effect, then, of these transfers of stock from Mr. Meiselman to his two sons was to give Ira, the younger son, majority shareholder status in Eastern Federal while relegating Michael, the older son, to the position of minority shareholder. In addition, Ira owns a controlling interest in all of the other family corporations except General Shopping Centers, Inc., the corporation in which he and Michael hold an equal number of shares.

Michael owns 29.82 percent of the total shares in the family corporations, although he contends that once the shares attributed to intercorporate ownership (shares the various corporations own in each other) are distributed between himself and Ira, his ownership would amount to about 43 percent of the family business. The book value of all of the corporations was $11,168,778 as of 31 December 1978. The book value of Michael's shares in all of the corporations using the 29.82 percent figure, was $3,330,303 as of that date.

As is true of many close corporations, the two shareholders—Michael and Ira—were employed by the family corporations. Michael began working for the family business in 1956 and Ira began nine years later in 1965. The extent of Michael's participation in the family corporations from 1961 until 1973 is not clear. Michael contends that he has worked continuously for the family business except for an interim of about one and one-half

M & S Shopping Centers of Florida, Inc.; Martha Washington Homes, Inc.; and Try-Wilk Realty Co., Inc.

2. Michael and his father revoked the trust by agreement in February 1976.

years. Ira would characterize Michael's participation differently. At any rate, both sides agree that from 1973 until 1979 Michael was employed by the family business. It is also clear that Ira fired Michael in September 1979, less than one month after Michael filed suit against Ira in connection with Ira's sole ownership of the stock in a corporation which held a management contract with Eastern Federal.

In the certified letter Ira sent to Michael informing Michael that he was being fired, Ira also notified his brother that his car insurance, his hospital insurance and his life insurance policies were all being terminated. In addition, Ira asked his brother in that same letter to return his "Air Travel credit card" and "any other corporate cards you might have as any further use of them is not authorized." Ira then sent his brother a second certified letter demanding payment within ten days to Eastern Federal of Michael's note of $61,500 plus interest of $2,028.66 and the balance of Michael's open account, $19,000. Furthermore, Lawrence A. Poston, Vice President and Treasurer of Eastern Federal stated that the effect of the letter terminating Michael's employment "also was to terminate Michael's participation in the profit-sharing trust."

In his deposition, Ira essentially admitted that he fired his brother in response to the lawsuit Michael had brought challenging Ira's sole ownership of Republic Management Corporation [hereinafter referred to as Republic], the corporation with which Eastern Federal had contracted to provide management services. However, Ira indicated that Michael's loss of employment was only an incidental effect of his termination of the employment contract between the two corporations, a corporate decision he felt was justified in light of the threat of continuing litigation on this matter. Ira stated that "[t]he purpose and the effect of the letter [terminating Michael's employment] were principally to advise [Michael] that we were terminating the arrangement between Eastern Federal and Republic and, correspondingly, that it would alter, affect, or eliminate his source of compensation as applied to Republic."

Republic was formed in 1973. As Ira stated, Republic was a "successor to two, or possibly three, previous companies of the same genre that had operated within the family framework back

to 1951." Ira also stated that he did not own all of the stock in those predecessor corporations, that "there were some that I remember in the early years that Michael might have owned 100% of that I didn't." The record indicates that Michael was one of the initial shareholders in 1951 of Fran-Mack Management, Inc., one of those predecessor corporations and that Ira did not become a shareholder in that particular corporation until 31 December 1963.

According to Ira, the function of Republic "was to provide a means whereby, primarily now, administrative and primarily home office expenses utilized on behalf of all the companies, or all the individual operating units, were apportioned back to those individual operating units or operating companies." In short, Republic was "nothing more than a tool" through which the administrative costs incurred in operating the various Meiselman business units—including over 30 theaters—were apportioned.

As noted above, Republic agreed to perform these management services as a result of a contract entered into between it and Eastern Federal. Specifically, Republic agreed to perform the management services in exchange for 5.5 percent of Eastern Federal's theater admissions and concession sales. Although Republic paid Michael an annual salary from 1973 until he was fired in 1979, Michael did not own any of the stock in the management corporation; Ira owned all of it. Although Republic earned profits some years while losing money in others, the net result was that it had retained earnings of over $65,000, earnings which only Ira as sole shareholder in Republic would enjoy and in which Michael claims he is entitled to share. It is this ownership to which Michael objects and upon which he bases his shareholder's derivative claim that Ira has breached the fiduciary duty he owes to the corporate defendants.

We turn now to an examination of the tenor of the relationship existing between Michael and Ira. In his brief, Ira contends "[t]he Record on Appeal reflects no bitterness and hostility between Michael and Ira, other than that which Michael generated after Mr. Meiselman's death in an effort to secure a redistribution of his father's patrimony." Further, he contends that "Michael was never denied participation in the management of the corporate defendants," that, on the contrary, Michael "voluntarily limited his participation in their affairs."

On the other hand, Michael vehemently denies Ira's characterization of their relationship and of his participation in the management of the corporations. In his deposition, Michael stated that his job has been "out in the field," and that when he had a recommendation to make he was, for the most part, to report it to his brother. Michael indicated that he was allowed to participate in the management of Eastern Federal in this manner apparently until the corporation entered into the management contract with Republic at issue here. Michael characterized this alleged change in his participation of the management of Eastern Federal as follows:

> My brother had the majority of stock in Eastern Federal Corporation before this management contract. As to whether he had the final say in the control of Eastern Federal Corporation, that is the point. He might have been the final say, but when Republic Management started, I lost all say-so because he wouldn't listen to anybody.

In addition, Michael contends that, among other things, he has not been "allowed to even come up to the office and have [sic] been discouraged in getting the full details as to what they [the companies] borrow"; that Ira "will not let me walk in the office where the film buyer is and talk to him, not even [to] help"; that "theaters are being sold without my knowledge and theaters are being built without my knowledge"; and that "my brother solely and without my consent, not only develops but closes, sells, does anything he wants with all of the properties." Finally, Michael claims that although he previously worked 60 to 70 hours a week, he has been "discouraged systematically over a number of years to where I cannot exert the time and effort that I want to."

In examining the record, we are struck by the tone of Ira's comments when referring to his dealings with his brother. Indeed, many of his statements indicate that although Michael may not have been actively prevented from entering the corporate offices, his participation in the decision-making carried on within those offices was less than welcome. For example, in testifying that Michael has never been barred from the home offices of the company, Ira stated that Michael "has exercised the privilege of going there on frequent occasions, *unannounced*, whenever he felt like it." (Emphasis added.) He also stated that "[w]e have never

failed, *when he is entitled to notice*, to give him adequate notice of stockholders' meetings." (Emphasis added.) Furthermore, in a letter to Michael's lawyer concerning, among other things, the possibility of Michael's serving on the boards of directors of the family enterprises, Ira's lawyer stated that, "[w]e have no desire to see the productive efforts of the boards be affected by possibly allowing them to function as a forum for airing personal hurts and slights; and we all recognize that the course of business activity for the companies is not going to be altered by Michael's representation."

Apparently in an attempt to further support his contention that Michael has never been excluded from participating in the management of the corporations, Ira testified that two corporate decisions were made or changed on the basis of objections Michael had lodged. In describing the abandonment of a proposed merger to which Michael had objected, Ira testified as follows:

> I don't mean to belittle him. In one of those instances, as a sign we were not completely ignoring him, we made some changes. Specifically, I know of one single complaint and that was a proposed merger of some of these defendants [in] 1976, regarding a real estate company similar to our previous merger with Eastern Federal. Unfortunately, my timing was very poor because he was taking his first what he called his pre-test, I'm not sure, I guess it's preparation for the bar exam. He did very poorly with it and it came at the same time, and he just raised cain with me.

The second corporate action to which Michael objected was Ira's sole ownership of the stock in Republic. Ira contends that he terminated the management contract between Republic and Eastern Federal (and in so doing fired Michael) in response to Michael's objections to Ira's sole ownership of Republic. We note, however, that in responding to Michael's objections, Ira terminated the employment contract between the two corporations, and, thus, Michael's employment, even though it was Ira's sole ownership of the stock in Republic and not the contract between Republic and Eastern Federal which was the source of their disagreement.

Perhaps most indicative of the tenor of the relationship between the two brothers is Ira's comment that "[y]es, it is my posi-

tion in this case that my brother, Michael, suffers as stated there [in defendant's brief] from crippling mental disorders and that was a reason that my father put me in control of the family corporations." Apparently in support of his allegations that his brother suffers from "crippling mental disorders," Ira presented evidence of an argument Michael had with his father which took place about 20 years ago during which Mr. Meiselman castigated Michael for having a non-Jewish woman at a family function. In addition, Ira testified to another fight which occurred between himself and Michael after he had failed to invite Michael to a football game to which all of the males in the family traditionally had been invited.

Finally, it appears the history of this litigation itself indicates a breakdown of the personal relationship between Michael and Ira. In June 1978, about two months after their father's death, Michael and Ira began negotiations in an effort to work out their differences. Over one year later, in August 1979, Michael filed suit. He was fired the next month. In short, this litigation and the tensions inherent in such activity have been going on for over four years now.

We turn now to the history of this litigation as it developed in the courts. In his amended complaint, Michael asked that the trial court "dissolve the Corporate Defendants under the provisions of G.S. 55-125(a) or, in the alternative, order such other relief under the provisions of G.S. 55-125.1 as the Court may deem just and equitable" because such relief is "reasonably necessary" for the protection of Michael's "rights and interests." Before this Court, Michael is requesting relief specifically under N.C.G.S. § 55-125.1(a)(4), a buy-out at fair value of Michael's interest in the corporate defendants. He is not seeking dissolution.

With respect to the derivative claim he brought asserting that Ira had breached the fiduciary duty he owes to the corporate defendants through his sole ownership of the stock in Republic, Michael asked that the "profits wrongfully diverted from the Corporate Defendants into Republic Management Corporation" be recovered.

The trial court denied both of Michael's claims. Michael then appealed to the Court of Appeals. In its well-written majority opinion, the Court of Appeals interpreted N.C.G.S. § 55-125(a)(4)

as authorizing liquidation in cases where the complaining shareholder has shown that "basic 'fairness' compels dissolution." *Meiselman v. Meiselman, supra,* 58 N.C. App. at 766, 295 S.E. 2d at 254-55. The Court of Appeals concluded that the complaining shareholder is not required to show "bad faith, mismanagement or wrongful conduct, but only real harm." *Id.* In finding "a plethora of evidence to suggest that Ira's actions have irreparably harmed Michael," the Court of Appeals further concluded that the trial court "misapplied the applicable law *and* abused its discretion by concluding that relief, other than dissolution, under G.S. 55-125.1 was not reasonably necessary for Michael's protection." *Id.* at 772, 295 S.E. 2d at 258 (emphasis in original). In so doing, it reversed the trial court judgment and remanded the case to the trial court "for the determination of an appropriate remedy under G.S. 55-125.1 that is reasonably necessary to protect Michael's rights and interests." *Id.* at 775-776, 295 S.E. 2d at 260.

In addition, the Court of Appeals also determined that the trial court erred in concluding that Ira had not breached the fiduciary duty he owes to the corporate defendants through his sole ownership of Republic. It reversed the judgment of the trial court on this derivative claim and remanded the case to the trial court "for entry of judgment on behalf of the defendant corporation against Ira, as sole owner of Republic, in the total amount of the profits accumulated to date in Republic plus interest and cost of this action." *Id.*

Judge Hill dissented in this case on both issues. Therefore, defendants appeal to this Court as a matter of right under N.C.G.S. § 7A-30(2).

II.

We note at the outset that the enterprises with which we are dealing are close corporations, not publicly held corporations. This distinction is crucial because the two types of corporations are functionally quite different. Indeed, the commentators all appear to agree that "[c]lose corporations are often little more than incorporated partnerships." Comment, *Oppression as a Statutory Ground for Corporate Dissolution,* 1965 Duke L.J. 128, 138 (1965) [hereinafter cited as Comment, *Oppression*]. *See also* 2 F. O'Neal, *Close Corporations* § 9.02 (2d ed. 1971); Hetherington and Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the*

Remaining Close Corporation Problem, 63 Va. L. Rev. 1, 2 (1977); Israels, *The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. Chi. L. Rev. 778, 778-79 (1952); Comment, *Deadlock and Dissolution in the Close Corporation: Has the Sacred Cow Been Butchered?*, 58 Neb. L. Rev. 791, 796 (1979) [hereinafter cited as Comment, *Deadlock and Dissolution*].

Israels, a recognized expert in this area, succinctly defines a close corporation as a "corporate entity typically organized by an individual, or a group of individuals, seeking the recognized advantages of incorporation, limited liability, perpetual existence and easy transferability of interests—but regarding themselves basically as partners and seeking veto powers as among themselves much more akin to the partnership relation than to the statutory scheme of representative corporate government." Israels, *supra*, at 778-79.

This characterization of close corporations as little more than "incorporated partnerships" rests primarily on the fact that the "relationship between the participants [in a close corporation], like that among partners, is one which requires close cooperation and a high degree of good faith and mutual respect . . . ." 2 F. O'Neal, *Close Corporations* § 9.02. *See also* Hetherington and Dooley, *supra*, at 2; Note, *Corporations—Dissolution—Denial of Right to Participate in Management of Close Corporation Entitles Shareholder to Liquidation*, 74 Harv. L. Rev. 1461, 1463 (1961) [hereinafter cited as Note, *Corporations—Dissolution*]. Indeed, one commentator noted that "[a]n organizational structure of this nature—in which the investment interests are interwoven with continuous, often daily, interaction among the principals—necessarily requires substantial trust among the individuals." Comment, *Deadlock and Dissolution*, *supra*, at 795.

Professor O'Neal, perhaps the foremost authority on close corporations, points out that many close corporations are companies based on personal relationships that give rise to certain "reasonable expectations" on the part of those acquiring an interest in the close corporation. Those "reasonable expectations" include, for example, the parties' expectation that they will participate in the management of the business or be employed by the company. O'Neal, *Close Corporations: Existing Legislation and Recommended Reform*, 33 Bus. Law 873, 885 (1978). Other com-

mentators have also noted that those investing in close corporations have some of these same "reasonable expectations." Afterman, *Statutory Protection for Oppressed Minority Shareholders: A Model for Reform*, 55 Va. L. Rev. 1043, 1064 (1969); Comment, *Oppression*, *supra*, at 141; Comment, *Deadlock and Dissolution*, *supra*, at 795; Comment, *Dissolution Under the California Corporations Code: A Remedy for Minority Shareholders*, 22 U.C.L.A. L. Rev. 595, 616 (1975) [hereinafter cited as Comment, *Dissolution Under the California Corporations Code*].

Thus, when personal relations among the participants in a close corporation break down, the "reasonable expectations" the participants had, for example, an expectation that their employment would be secure, or that they would enjoy meaningful participation in the management of the business—become difficult if not impossible to fulfill. In other words, when the personal relationships among the participants break down, the majority shareholder, because of his greater voting power, is in a position to terminate the minority shareholder's employment and to exclude him from participation in management decisions.

Some may argue that the minority shareholder should have bargained for greater protection before agreeing to accept his minority shareholder position in a close corporation. However, the practical realities of this particular business situation oftentimes do not allow for such negotiations. In his article, *Special Characteristics, Problems, and Needs of the Close Corporation*, 1969 U. Ill. L.F. 1 (1969), Professor Hetherington, another recognized authority in this field, explains the situation as follows:

> . . . the circumstances under which a party takes a minority stock position in a close corporation vary widely. Many involve situations where the minority party, because of lack of awareness of the risks, or because of the weakness of his bargaining position, fails to negotiate for protection. Probably a common instance of this kind occurs where an employee or an outsider is given an opportunity to buy stock in a close corporation wholly or substantially owned by a single stockholder or a small group of associates, often a family. Typically, the controlling individual or group retains a substantial majority position. The opportunity to buy into the

> business is highly valued by the recipient; his enthusiasm and weak bargaining position make it unlikely almost to a certainty that he will ask for—let alone insist upon—protection for his position as a minority stockholder. Purchases of stock in such situations are likely to be arranged without either party consulting a lawyer. The result is the assumption of a minority stock position without, or with only limited, appreciation of the risks involved.

Id. at 17-18 (footnote omitted).

In short, then, the "minority shareholder who acquired his shares to secure his position with the firm may have lacked sufficient bargaining power to force the majority to agree to terms which would enable him to protect his interests." Comment, *Dissolution Under the California Corporations Code*, *supra*, at 603-04. Indeed, as one commentator notes, "close corporations are often formed by friends or family members who simply may not believe that disagreements could ever arise." *Id.* Furthermore, when a minority shareholder receives his shares in a close corporation from another in the form of a gift or inheritance, as did plaintiff here, the minority shareholder never had the opportunity to negotiate for any sort of protection with respect to the "reasonable expectations" he had or hoped to enjoy in the close corporation.

Unfortunately, when dissension develops in such a situation, as Professor O'Neal notes, "American courts traditionally have been reluctant to interfere in the internal affairs of corporations . . . ." F. O'Neal, *Oppression of Minority Shareholders* § 9.04, at 582 (1975). This reluctance, as applied to a minority shareholder holding an interest in a close corporation, places the minority shareholder in a remediless situation. As Professor O'Neal points out, when the personal relationship among the participants in a close corporation breaks down, the minority shareholder has neither the power to dissolve the business unit at will, as does a partner in a partnership, nor does he have the "way out" which is open to a shareholder in a publicly held corporation, the opportunity to sell his shares on the open market. 2 F. O'Neal, *Close Corporations* § 9.02. Thus, the illiquidity of a minority shareholder's interest in a close corporation renders him vulnerable to exploitation by the majority shareholders. *E.g.*,

Hetherington and Dooley, *supra*, at 3-6. Professor Hetherington succinctly outlines in one of his articles the uniquely vulnerable position a minority shareholder occupies in a close corporation:

> The right of the majority to control the enterprise achieves a meaning and has an impact in close corporations that it has in no other major form of business organization under our law. Only in the close corporation does the power to manage carry with it the de facto power to allocate the benefits of ownership arbitrarily among the shareholders and to discriminate against a minority whose investment is imprisoned in the enterprise. The essential basis of this power in the close corporation is the inability of those so excluded from the benefits of proprietorship to withdraw their investment at will. The power to withdraw one's capital from a publicly held corporation or from a partnership is unqualified in the sense that the participant's right is not dependent upon misconduct by the management or upon the occurrence of any other event. The shareholder or partner can withdraw his capital for any or no reason.

Hetherington, *supra*, at 21.

According to Professor O'Neal, the "two principal conceptualistic barriers to the courts' granting relief to aggrieved shareholders" in such a situation are: "(1) the principle of majority rule in corporate management and (2) the business judgment rule." F. O'Neal, *Oppression of Minority Shareholders* § 9.04 at 582. In explaining the inapplicability of the legal construct firmly established in corporate law that when outvoted the minority must submit to the will of the majority, he writes as follows:

> Apparently without close examination, courts accord the principle of majority rule the same sanctity in corporate enterprises, including small businesses, that it enjoys in the political world. The principle of majority rule is in traditional legal thought a firmly established attribute of the corporate form. Yet not uncommonly a person, unsophisticated in business and financial matters, invests all his assets in a closely held enterprise with an expectation, often reasonable under the circumstances even in the absence of express contract, that he will be a key employee in the company and will have a voice in business decisions. Thus, when courts apply the

> principle of majority rule in close corporations, they often disappoint the reasonable expectations of the participants.

Id. at 582-83.

In short, then, when the courts fail to provide a remedy for a minority shareholder whose "reasonable expectations" have been disappointed in the close corporation situation, the court, in effect, "compels a continuation of the association by legal constraint—what was once called 'togetherness by injunction'—a prospect which scarcely seems a desirable policy goal." Hetherington, *supra*, at 29. In other words, an "insistence that the antagonistic parties resolve their differences within the corporate framework" would seem "inconsistent with the traditional hesitance of courts of equity to enforce unwelcome personal relationships." Note, *Corporations—Dissolution*, *supra*, at 1463.

Apparently in response to these commentators' uniform calls for reform in this area of corporate law, many state legislatures have enacted statutes giving the tribunals in their states the power to grant relief to minority shareholders under more liberal circumstances. For example, at least seven states have given their courts the authority to grant dissolution of a corporation when the acts of the directors or those in control of the corporation are "oppressive" to the shareholders. Ill. Ann. Stat. ch. 32, § 157.86(a)(3) (Smith-Hurd Cum. Supp. 1983); Md. Corps. & Ass'ns Code Ann. § 3-413(b)(2) (1975); Mich. Comp. Laws Ann. § 450.1825(1) (1973); N. J. Stat. Ann. § 14A:12-7(1)(c) (West Cum. Supp. 1983); N. Y. Bus. Corp. Law § 1104-a(a)(1) (McKinney Cum. Supp. 1983); S. C. Code Ann. § 33-21-150(a)(4)(B) (Law. Co-op. Cum. Supp. 1982); Va. Code § 13.1-94(a)(2) (1978).

In interpreting the term "oppressive" as used in its dissolution statute, a New York Trial Court recently held in a case of first impression that where two controlling shareholders discharged the minority shareholder as an employee and officer of the two corporations in which he had an interest, thus severely damaging the minority shareholder's "reasonable expectations," their actions were deemed to be "oppressive" under New York Law. *In re the Application of Topper*, 107 Misc. 2d 25, 433 N.Y.S. 2d 359 (1980).

Furthermore, the Supreme Court of Illinois affirmed a Superior Court decree of dissolution where one shareholder was

deemed to have engaged in "oppressive" conduct within the meaning of its dissolution statute in depriving the other shareholders of participation in the management of the corporation. *Gidwitz v. Lanzit Corrugated Box Co.*, 20 Ill. 2d 208, 220, 170 N.E. 2d 131, 138 (1960). In defining the term "oppressive" in *Gidwitz*, the Supreme Court of Illinois wrote that the "word does not necessarily savor of fraud, and the absence of 'mismanagement, or misapplication of assets,' does not prevent a finding that the conduct of the dominant directors or officers has been oppressive." *Id.* at 214-15, 170 N.E. 2d at 135. The court also stated that the term is "not synonymous with 'illegal' and 'fraudulent.'" *Id. See also* Afterman, *supra*, at 1063 ("oppression" is "probably best defined in terms of the reasonable expectations of the minority shareholders in the particular circumstances at hand"); Comment, *Oppression*, *supra*, at 137-38 ("oppression" provision of corporate dissolution statutes "may be expected to afford relief in a variety of situations that range from exclusion from management in a family corporation to deliberate destruction of a subsidiary by the parent corporation"); Annot., 56 A.L.R. 3d 358 (1974). Indeed, one commentator noted that the result in *Gidwitz* "seems responsive to the special characteristics of a close corporation, the dissolution of which has increasingly been recognized as desirable whenever its shareholders have ceased to cooperate." Note, *Corporations—Dissolution*, *supra*, at 1463.

Similarly, at least three states have statutes authorizing a court to grant dissolution when those in control of the corporation are guilty of treating the corporate shareholders "unfairly." Cal. Corp. Code § 1800(b)(4) (West 1977) ("persistent unfairness"); Mich. Comp. Laws Ann. § 450.1825(1) (West 1973) ("wilfully unfair"); N. J. Stat. Ann. § 14A:12-7(1)(c) (West Cum. Supp. 1983).

In helping to establish this growing trend toward enactment of more liberal grounds under which dissolution will be granted to a complaining shareholder, the legislature in this State enacted in 1955 N.C.G.S. § 55-125(a)(4), the statute granting superior court judges the "power to liquidate the assets and business of a corporation in an action by a shareholder when it is established" that "[l]iquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder." Two other states have similar statutes—California and New York. Cal. Corp. Code § 1800(b)(5) (West 1977) (formerly § 4651(f)); N. Y. Bus. Corp.

Law § 1104-a(b)(2) (McKinney Cum. Supp. 1983). Indeed, one of the members of the drafting committee of the new Business Corporation Act, the Act which included N.C.G.S. § 55-125(a)(4), stated that in drafting the Act the committee "drew heavily on the Model Act of the American Bar Association and on the corporation laws of other states, particularly *California* and Ohio." Latty, *The History, Purpose, Spirit and Philosophy of the New Act, North Carolina Corporation Manual* (1960) (emphasis added). Furthermore, in commenting upon the new Act, Professor Latty stated that "[t]here would seem, then, to be no reason under the new Act for a court to approach the problem of liquidation of the business of a close corporation with substantially more conservatism than it would show in dissolving a partnership, free from any carry-over of the 'sacred cow' tradition of corporate existence." Latty, *The Close Corporation and the New North Carolina Business Corporation Act*, 34 N.C. L. Rev. 432, 449-50 (1956).

In interpreting the provision of its corporate dissolution statute which provides that such relief will be ordered where "liquidation is reasonably necessary for the protection of the rights or interests" of the shareholders, a California Appellate Court affirmed in *Stumpf v. C. E. Stumpf & Sons, Inc.*, 47 Cal. App. 3d 230, 120 Cal. Rptr. 671 (1975), a trial court's conclusion that relief was appropriate when supported by the following evidence: "The hostility between the two brothers had grown so extreme that respondent severed contact with his family and was allowed no say in the operation of the business. After respondent's withdrawal from the business, he received no salary, dividends, or other revenue from his investment in the corporation." *Id.* at 235, 120 Cal. Rptr. at 675. *See also In re the Application of Topper*, 433 N.Y.S. 2d at 366 ("rights and interests" of a minority shareholder in a close corporation "derive from the expectations of the parties and special circumstances that underlie the formation of close corporations").

In short, then, it appears that these new statutory schemes which permit involuntary dissolution of corporations pursuant to actions brought by minority shareholders—and which "virtually every state has"—"represent a concerted effort and recognition by the states that the perpetual existence of the corporate structure at common law is ill-suited to the functional realities of the

closely held corporation." Comment, *Deadlock and Dissolution, supra,* at 793. However, it is important to recognize that the statutes in question apply to *all* corporations, not just "close" corporations.[3] Of course, "the rights or interests of the complaining shareholder" will vary according to the circumstances, including the circumstance of the nature of the corporation, whether public or a close corporation. Likewise, whether liquidation (or some alternate form of relief) "is reasonably necessary for the protection of" those "rights or interests" will also depend, to a great extent, on whether the corporation is a public corporation or a close corporation.

III.

[1] With this background in mind, we turn now to the primary issue in this case: whether the trial court misapplied the applicable law by concluding that relief under N.C.G.S. § 55-125(a)(4) and N.C.G.S. § 55-125.1 was not "reasonably necessary" for the protection of Michael's "rights or interests" in the defendant corporations. However, before we can decide whether the trial court "misapplied the applicable law" we must first determine what the applicable law is. In so doing, we will set out for the first time the analysis a trial court is to apply in determining whether relief should be granted to a complaining shareholder seeking relief under N.C.G.S. § 55-125(a)(4).

The basic question at issue is what standard we should adopt to determine whether a minority shareholder is entitled to dissolution or other relief. The statutes require a standard in which all of the circumstances surrounding the parties are considered in

3. "The first really extensive and imaginative statutory innovations on close corporations occurred in the North Carolina Business Corporation Act, enacted in 1955. The commission which drafted that act made a diligent study of the peculiarities of close corporations, and many sections of the act (although not limited in their application to close corporations) are designed to meet the special needs of close corporations." 1 F. O'Neal, *Close Corporations* § 1.14a. "One finds in legal writings from time to time the suggestion that there be a separate statute for close corporations. . . . In drafting the new Business Corporation Act, however, the General Statutes Commission felt that a single piece of legislation could embody the essential needs and safeguards with respect to both the closely held and the publicly held corporation. To attempt to define generally a category of close corporations is no easy matter." Latty, *The Close Corporation and the New North Carolina Business Corporation Act,* 34 N.C. L. Rev. 432, 455 (1956).

deciding whether relief should be granted and, if so, the nature and method of such relief.

When a shareholder brings suit seeking relief under N.C.G.S. § 55-125(a)(4) and N.C.G.S. § 55-125.1, he has the burden of proving that his "rights or interests" as a shareholder are being contravened. However, once the shareholder has established this, the trial court, in deciding whether to grant relief, "must exercise its equitable discretion, and consider the actual benefit and injury to [all of] the shareholders resulting from dissolution" or other possible relief. *Henry George & Sons, Inc. v. Cooper-George, Inc.*, Wash., 632 P. 2d 512, 516 (1981). "The question is essentially one for resolution through the familiar balancing process and flexible remedial resources of courts of equity." *Id.* To hold otherwise would allow a plaintiff to demand at will dissolution of a corporation or a forced buy out of his shares or other relief at the expense of the corporation and without regard to the rights and interests of the other shareholders.

Michael, as the complaining shareholder in this case, brought an action under N.C.G.S. § 55-125(a), the statutory provision which articulates four situations, one of which must be "established" before a Superior Court Judge has the power to liquidate a corporation in an action brought by a shareholder. Specifically, N.C.G.S. § 55-125(a) provides as follows:

> The superior court shall have power to liquidate the assets and business of a corporation in an action by a shareholder when it is established that:
>
> (1) The directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, so that the business can no longer be conducted to the advantage of all the shareholders; or
>
> (2) The shareholders are deadlocked in voting power, otherwise than by virtue of special provisions or arrangements designed to create veto power among the shareholders, and for that reason have been unable at two consecutive annual meetings to elect successors to directors whose terms had expired; or
>
> (3) All of the present shareholders are parties to, or are transferees or subscribers of shares with actual notice of a

written agreement, whether embodied in the charter or separate therefrom, entitling the complaining shareholder to liquidation or dissolution of the corporation at will or upon the occurrence of some event which has subsequently occurred; or

(4) Liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder.

Michael alleged that he was entitled to relief under subsection (4); in effect, he is claiming that liquidation is "reasonably necessary" for the protection of his "rights or interests." However, before it can be determined whether, in any given case, it has been "established" that liquidation is "reasonably necessary" to protect the complaining shareholder's "rights or interest," the particular "rights or interests" of the complaining shareholder must be articulated. This is so because N.C.G.S. § 55-125(a)(4) refers to the "rights or interests" of *"the complaining shareholder"*; the statute does not refer to the "rights or interests" of shareholders generally. Therefore, the "rights or interests" which Michael has in these family-run, close corporations must be determined with reference to the specific facts in this case. In so doing, we hold that a complaining shareholder's "rights or interests" in a close corporation include the "reasonable expectations" the complaining shareholder has in the corporation. These "reasonable expectations" are to be ascertained by examining the entire history of the participants' relationship. That history will include the "reasonable expectations" created at the inception of the participants' relationship; those "reasonable expectations" as altered over time; and the "reasonable expectations" which develop as the participants engage in a course of dealing in conducting the affairs of the corporation. The interests and views of the other participants must be considered in determining "reasonable expectations." The key is *"reasonable."* In order for plaintiff's expectations to be reasonable, they must be known to or assumed by the other shareholders and concurred in by them. Privately held expectations which are not made known to the other participants are not "reasonable." Only expectations embodied in understandings, express or implied, among the participants should be recognized by the court. Hillman, *The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relative Permanence of*

Partnerships and Close Corporations, 67 Minn. L. Rev. 1, 77-81 (1982). Also, only substantial expectations should be considered and this must be determined on a case-by-case basis. These requirements provide needed protection to potential defendants in this type case. *Cf. Capitol Toyota v. Gerwin, Miss.*, 381 So. 2d 1038 (1980). (Dissolution denied and relief limited to purchase of plaintiff's shares at book value as of the date he left employment with the corporation.)

In short, then, the "rights or interests" of a shareholder in any given case will not necessarily be the same "rights or interests" of any other shareholder. An articulation of those "rights or interests" will necessarily require a case-by-case determination based on an examination of the entire history of the participants' relationship—an examination not only of the "expectations generated by the participants' original business bargain," but also of the "history of the participants' relationship as expectations alter and new expectations develop over the course of the participants' cooperative efforts in operating the business." O'Neal, *supra*, at 888. In so holding, we recognize the rule that Professor O'Neal suggests should be applied in a corporation based on a "personal relationship":

> [A] court should give relief, dissolution or some other remedy to a minority shareholder whenever corporate managers or controlling shareholders act in a way that disappoints the minority shareholder's reasonable expectations, even though the acts of the managers or controlling shareholders fall within the literal scope of powers or rights granted them by the corporation act or the corporation's charter or bylaws.
>
> The reasonable expectations of the shareholders, as they exist at the inception of the enterprise, and as they develop thereafter through a course of dealing concurred in by all of them, is perhaps the most reliable guide to a just solution of a dispute among shareholders, at least a dispute among shareholders in the typical close corporation. In a close corporation, the corporation's charter and bylaws almost never reflect the full business bargain of the participants.

O'Neal, *supra*, at 886.

After articulating the "rights or interests" of the complaining shareholder, the trial court is then to determine if liquidation is

"reasonably necessary" for the protection of those "rights or interests." Although a literal reading of N.C.G.S. § 55-125(a)(4) would suggest that liquidation is the only relief which may be given if a remedy is "reasonably necessary" for the protection of the shareholder's "rights or interests," this is not the case. This statute granting trial courts the power to dissolve a corporation is not to be read in isolation. Under N.C.G.S. § 55-125.1, the trial court is given the power to order alternative forms of relief for actions brought under N.C.G.S. § 55-125(a). N.C.G.S. § 55-125.1 provides as follows:

> (a) In any action filed by a shareholder to dissolve the corporation under G.S. 55-125(a), the court may make such order or grant such relief, other than dissolution, as in its discretion it deems appropriate, including, without limitation, an order:
>
> (1) Canceling or altering any provision contained in the charter or the bylaws of the corporation; or
>
> (2) Canceling, altering, or enjoining any resolution or other act of the corporation; or
>
> (3) Directing or prohibiting any act of the corporation or of shareholders, directors, officers or other persons party to the action; or
>
> (4) Providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders, such fair value to be determined in accordance with such procedures as the court may provide.
>
> (b) Such relief may be granted as an alternative to a decree of dissolution, or *may be granted whenever the circumstances of the case are such that relief, but not dissolution, would be appropriate.* (1973, c. 496, s. 41.)

(Emphasis added.)

Thus, when an action is brought under N.C.G.S. § 55-125(a)(4), the trial court is to examine all of the following possibilities: 1) whether, under N.C.G.S. § 55-125(a)(4) *liquidation* is reasonably necessary; 2) whether, under N.C.G.S. § 55-125.1(a)(1)-(4), *any of the four listed alternatives* are more appropriate than liquidation;

3) whether, under N.C.G.S. § 55-125.1(b), *any other "alternative" relief* is more appropriate than dissolution; or 4) whether, under N.C.G.S. § 55-125.1(b), *any other "alternative" relief, but not dissolution*, is appropriate. As noted, N.C.G.S. § 55-125.1(b) provides that the trial court has the authority to grant any other alternative relief whenever such relief, *but not dissolution*, is appropriate. It is clear, then, that when N.C.G.S. § 55-125(a)(4) and 55-125.1(b) are read in conjunction, it must only be "established" under N.C.G.S. § 55-125(a)(4) that *relief of some kind*, and not just liquidation, is "reasonably necessary" for the protection of the complaining shareholder's "rights or interests." To interpret N.C.G.S. § 55-125(a)(4) as providing that relief can be given only when *liquidation* is "reasonably necessary" for the protection of the complaining shareholder's "rights or interests" would, in effect, fail to recognize the existence of N.C.G.S. § 55-125.1(b) to the extent that it grants trial courts the power to order alternative relief where relief of some kind *but not dissolution* is appropriate.[4]

In sum, therefore, we hold that under N.C.G.S. § 55-125(a)(4) a trial court is: (1) to define the "rights or interests" the complaining shareholder has in the corporation; and (2) to determine whether some form of relief is "reasonably necessary" for the protection of those "rights or interests." For plaintiff to obtain relief under the expectations' analysis, he must prove that (1) he had one or more substantial reasonable expectations known or assumed by the other participants; (2) the expectation has been frustrated; (3) the frustration was without fault of plaintiff and was in large part beyond his control; and (4) under all of the circumstances of the case, plaintiff is entitled to some form of equitable relief.

IV.

[2] We will now review the "rights or interests" each party contends Michael has in the family corporations. Michael suggests in his brief that the "rights or interests" he has as a shareholder in

4. We are aware that, strictly speaking, the terms "liquidation" and "dissolution" are not identical terms of art. However, N.C.G.S. § 55-125.1(a) refers to actions brought under N.C.G.S. § 55-125(a) as actions to "dissolve" the corporation, even though N.C.G.S. § 55-125(a) literally grants trial courts the power to "liquidate" the assets and business of a corporation. Thus, we are interpreting the two terms, for purposes of this opinion, as synonyms in the broad sense that they connote termination of a corporation's existence.

these close corporations include "rights or interests" in secure employment, fringe benefits which flow from his association with the corporations, and meaningful participation in the management of the family business. As noted above, several commentators have suggested that the "reasonable expectations" of shareholders in close corporations often include some of these same "rights or interests." Afterman, *supra*, at 1064; O'Neal, *supra*, at 885; Comment, *Deadlock and Dissolution*, *supra*, at 795; Comment, *Dissolution Under the California Corporations Code*, *supra*, at 616; Comment, *Oppression*, *supra*, at 141. Further, Michael indicates that these "rights or interests" are in need of protection: Michael was fired from his job after suing his brother; his fringe benefits were terminated at that time as well; he has been "systematically" excluded from any meaningful participation in management decisions apparently since the inception of the management contract between Eastern Federal and Republic.

Defendants argue, however, that Michael, as a shareholder, is only entitled to relief if his traditional shareholder rights have been infringed. They contend that those traditional shareholder rights include the right to notice of stockholders' meetings, the right to vote cumulatively, the right of access to the corporate offices and to corporate financial information, and the right to compel the payment of dividends. Because these rights have not been violated, they argue, Michael is not entitled to relief. Indeed, defendants contend that the dividends distributed to Michael have been generous.[5]

While it may be true that a shareholder in, for example, a publicly held corporation may have "rights or interests" defined as defendants argue, a shareholder's rights in a closely held corporation may not necessarily be so narrowly defined. In short, we hold that the shareholder in this case—one who owns stock worth well over $3,000,000 and which accounts for a 30 to 40 percent ownership in these closely held, family-run corporations worth well over $11,000,000 and who also has been employed by the corporations, provided with fringe benefits, and, to some extent, allowed to participate in management decisions—has "rights or interests" more broadly defined than defendants contend. Put

5. From 1951 until 1976 Michael received no dividends. In 1977, he received $1,603.69; in 1978 he received $41,693.05; in 1979 he received $54,591.08; and in 1980 he received $61,845.36.

another way, Michael's "reasonable expectations" are not as limited as defendants contend.

Again, we note that N.C.G.S. § 55-125(a)(4) speaks in terms of the "rights or interests" of *"the complaining shareholder."* Thus, those "rights or interests" must be defined with reference to the "rights or interests" the complaining shareholder has under the facts of the particular case—the "reasonable expectations" the participants' relationship has generated. Indeed, the legislature would not have had reason to enact N.C.G.S. § 55-125 (a)(4) if "rights or interests" were to always comprise only the traditional shareholder rights: other statutes already address the traditional rights and remedies to which shareholders have been entitled. *See e.g.*, N.C.G.S. § 55-62(a) (notice of shareholder's meetings); N.C.G.S. § 55-67(c) (right to cumulative voting); N.C.G.S. § 55-37(a)(4) and N.C.G.S. § 55-38(b) (right to examine books and records); and N.C.G.S. § 55-50(1) and (m) (right to compel payment of dividends).

Our task at this juncture, then, is to determine, in light of each party's contentions and the analysis articulated above that is to be applied to suits brought under N.C.G.S. § 55-125(a)(4), whether the trial court made appropriate findings of fact.[6] Specifically, we must determine whether the trial court defined the "rights or interests" Michael does have in these family-run corporations, and whether it determined that some form of relief is "reasonably necessary" to protect those particular "rights or interests."

In denying Michael's claim for relief, the trial court made the following findings of fact:

> A. The corporate philosophy of all the defendants has remained the same under Ira S. Meiselman as it was under H. B. Meiselman, to wit, a "pay as you go" or conservative approach to business management.

6. Defendants argue that because Michael failed to specifically except to each finding of fact the trial court made, a violation of Rule 10(b)(2), N. C. Rules App. Proc., this Court should not review the trial court's findings. Although we agree that Michael did not adhere to this procedural rule, we will overlook this failure in order "to expedite decision in the public interest," Rule 2, N. C. Rules App. Proc. We are aware that guidance from this Court is needed in this, as yet, uncharted area of corporate law.

B. The record is silent and there is an absence of evidence (indeed, there is no cross examination by plaintiff) direct or on cross nor any suggestion that corporate financial policy has resulted in any inequities to minority stockholder Michael H. Meiselman.

C. There is no evidence of unexplained:

1. Increases of salaries of corporate officers including Ira S. Meiselman;

2. Increase in corporate reserves such as depreciation, capital improvement or any other reserve;

3. Changes in dividend policy to the detriment of the minority stockholder;

4. Retention of earnings (an area closely monitored by IRS) to the detriment of the minority stockholder, Michael H. Meiselman;

5. Purchases of assets to obtain long term appreciation of asset values for the benefit of second-generation heirs.

D. There is no evidence of bad faith or the adoption of unduly expansive growth requiring capital outlays to the detriment of the majority or minority stockholders.

E. H. B. Meiselman did not subscribe or resort to long-term debt assumption for the purpose of financing growth projects, and this policy has remained unaltered.

F. The management of these companies has resulted in a ten-year growth from 1968 to 1978 in book value of the minority shareholder's equity of $2,500,000.00; such book value increased further in 1979.

G. There is a lack of evidence to support a finding of fact that personal differences between the majority and minority stockholders have in any way influenced corporate policy, financial or otherwise; and to the contrary the record indicates that objections by minority stockholder, Michael H. Meiselman, apparently motivated the corporations and the individual defendants to:

1. Abandon a merger; and

2. Terminate a management agreement between Republic Management Corporation and Eastern Federal Corporation.

H. There is no evidence to support a finding of fact that there was oppression, overreaching on the part of management, the taking of any unfair advantage of the minority stockholder by the majority stockholder or any other wrongful conduct on the part of the majority stockholder, Ira S. Meiselman.

I. In the absence of gross abuse or the taking of gross unfair advantage by the majority stockholder, the Court's exercise of discretion to require a sale would be, as a practical matter, difficult to effectuate.

1. Book value is not the same as market value.

2. The shares of a closely held corporation are not marketable generally.

3. If the businesses are to continue, ordinarily a majority stockholder would prefer to pay a premium to avoid an uncooperative holder of the outstanding shares.

J. There is no deadlock in the management of the corporate affairs of any defendant corporation.

K. There is no evidence of the financial ability of or the appropriateness of any other individual stockholder purchasing the shares of Michael Meiselman.

We note that the findings set out above do not address or define the "rights or interests" Michael has in these close corporations. It appears that the trial court focused instead on any possible egregious wrongdoing on Ira's part. For example, the trial court found, in part, that there is "no evidence to support a finding of fact that there was oppression, overreaching on the part of management, the taking of any unfair advantages of the minority stockholder by the majority stockholder or any other wrongful conduct on the part of the majority stockholder, Ira S. Meiselman." Further, the trial court found that there is an "absence of gross abuse or the taking of gross unfair advantage . . ." and that there is "no evidence of bad faith . . . to the detri-

ment of the majority or minority stockholders." These findings indicate that the trial court applied incorrect legal standards in determining whether Michael was entitled to relief under N.C.G.S. § 55-125(a)(4). Under the analysis this Court articulated above, the trial court is to focus instead on the "rights or interests" the complaining shareholder has in the corporation and whether those "rights or interests" are in need of protection. The trial court's use of the standards of "oppression," "overreaching," "gross abuse," "unfair advantage," and the like with respect to Ira's actions was erroneous. This error is understandable, however, since at that time this Court had not articulated the analysis to be applied in suits brought under N.C.G.S. § 55-125(a)(4).

Because the trial court's findings of fact failed to address the "rights or interests" Michael has in these family corporations, we must remand the case to the trial court for an evidentiary hearing to resolve this issue. On remand, after hearing the evidence, the trial court is to: (1) articulate specifically Michael's "rights or interests"—his "reasonable expectations"—in the corporate defendants; and (2) determine if these "rights or interests" are in need of protection, and, thus, that relief of some sort should be granted. In addition, the trial court is to prescribe the form of relief which the evidence indicates is most appropriate, should it find that relief is warranted. In remanding this case for an evidentiary hearing and new findings, we need not address the issue of whether the trial court abused its discretion in refusing to grant relief to Michael.

V.

[3] Michael also contends that Ira breached the fiduciary duty he owes as a director and officer of the corporate defendants through his sole ownership of the stock in Republic, the corporation with which Eastern Federal contracted to provide management services. Michael concedes that the trial court was correct when it found that the management contract between Republic and Eastern Federal was just and reasonable at the time it was executed. He states that he has "never complained about Republic management itself nor about the management contract." It is only Ira's sole ownership of the stock in Republic to which he objects.

In essence, then, Michael is claiming that Ira breached his fiduciary duty to the corporate defendants by usurping a corporate opportunity which belonged to them—the opportunity to buy the stock of Republic. Having thus framed Michael's claim that Ira breached his fiduciary duty to the corporate defendants as one involving a usurpation of a corporate opportunity, we will first set out the rules governing this area of the law before examining the trial court's finding of fact to determine if it adequately addressed this issue.

In order for plaintiff to succeed in this claim, he must prove that (a) he has standing as a shareholder in the corporate defendants to bring suit on this claim against Ira as a director and officer of the defendant corporations, and (b) Ira, in his role as a corporate director and officer, breached a fiduciary duty owed to the corporate defendants not to usurp a corporate opportunity of the corporate defendants.

It appears that this Court has alluded to the "corporate opportunity doctrine" in only one instance. In *Brite v. Penny*, 157 N.C. 110, 72 S.E. 964 (1911), this Court stated that "[t]he law would not permit him [a corporate officer] to act in any such double capacity to appropriate business for himself belonging legitimately to his corporation and to reap the profits of it. Good faith to the stockholders forb[ids] it." *Id.* at 115, 72 S.E. at 966. This Court apparently has not addressed the doctrine of corporate opportunity since that time. Therefore, in articulating the rules which should be applied in this area of the law, we will first examine the rules other courts have adopted.

The doctrine of corporate opportunity is "a species of the duty of a fiduciary to act with undivided loyalty; it is one of the manifestations of the general rule that demands of an officer or director the utmost good faith in his relations with the corporation that he represents; in general, a corporate officer or director is under a fiduciary obligation not to divert a corporate business opportunity for his own personal gain." Annot., 77 A.L.R. 3d 961, 965 (1977). Stated more simply, the "corporate opportunity doctrine provides that a corporate fiduciary may not appropriate to himself an opportunity that rightfully belongs to his corporation." Note, *Corporate Opportunity and Corporate Competition: A Double-Barreled Theory of Fiduciary Liability*, 10 Hofstra L. Rev.

1193 (1982) [hereinafter cited as Note, *Corporate Opportunity*], *citing Guth v. Loft, Inc.*, 23 Del. Ch. 255, 271-73, 5 A. 2d 503, 510-11 (1939).

In *Guth v. Loft, Inc., supra*, a leading case in this area of the law, the Supreme Court of Delaware articulated the corporate opportunity doctrine as follows:

> Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest. The occasions for the determination of honesty, good faith and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale.

23 Del. Ch. at 270, 5 A. 2d at 510.

Generally speaking, there are three types of business opportunities a corporate fiduciary can attempt to take advantage of: "those entirely extraneous to the corporation's business, those in the same or a direct line with it, and finally, those complementary to it." Note, *Liability of Directors for Taking Corporate Opportunities, Using Corporate Facilities, or Engaging in a Competing Business*, 39 Colum. L. Rev. 219, 220 (1939). The courts have formulated three tests to differentiate between an extraneous opportunity and those upon which a corporation would wish to act. *See e.g.*, Note, *Corporate Opportunity, supra*, at 1196. The first test focuses on whether the corporation had an "interest or expectancy" in the opportunity. *Id.* at 1196-97. The second test considers

whether the opportunity was within the corporation's "line of business." *Id.* at 1197. The third test asks whether considerations of "fairness" indicate that the opportunity is one which belonged to the corporation. *Id.* We find it unnecessary to label the North Carolina test because the General Assembly, in its wisdom, has enacted a statutory standard, N.C.G.S. § 55-30(b). The specific part of that statute applicable to this case, N.C.G.S. § 55-30(b)(3) provides as follows:

> (b) No corporate transaction in which a director has an adverse interest is either void or voidable, if:
>
> . . .
>
> (3) The adversely interested party proves that the transaction was just and reasonable to the corporation at the time when entered into or approved. In the case of compensation paid or voted for services of a director as director or as officer or employee the standard of what is "just and reasonable" is what would be paid for such services at arm's length under competitive conditions.

In support of his contention that Ira's sole ownership of the stock in Republic constitutes a breach of the fiduciary duty Ira owes the corporate defendants, Michael cites *Highland Cotton Mills v. Ragan Knitting Co.*, 194 N.C. 80, 138 S.E. 428 (1927), for the proposition that Ira's "liability has now been conclusively established because of the well-settled rule in North Carolina that a transaction between a corporation and its directors or officers is presumed to be invalid unless those seeking to sustain it prove that it was 'just and reasonable.' " This presents the question as to whether the common law rule stated in *Highland Cotton Mills* is a rule substantially different from that set out in N.C.G.S. § 55-30(b)(3). We hold that the two standards are the same. Under both N.C.G.S. § 55-30(b)(3) and this Court's holding in *Highland Cotton Mills* the adversely interested party must demonstrate that the transaction at issue was "just and reasonable."[7] Thus,

7. We note that in his excellent treatise on North Carolina corporate law, Russell Robinson, Michael's lawyer in this case, does indeed cite *Highland Cotton Mills* for the common law rule that a "transaction between a corporation and its directors or officers is presumed to be invalid so that those seeking to sustain it

once an adversely interested party proves that the transaction at issue was "just and reasonable to the corporation at the time when entered into or approved," N.C.G.S. § 55-30(b)(3), it follows that the interested party has satisfied its burden under this Court's decision in *Highland Cotton Mills.*

In essence, then, when an officer or director is charged with having usurped a corporate opportunity, he or she must establish under N.C.G.S. § 55-30(b)(3) that the "corporate transaction" in which he or she has engaged is "just and reasonable" to the corporation because it was not an opportunity or "corporate transaction" which the corporation itself would have wanted. A determination of what is "just and reasonable" and, thus, whether a corporate opportunity has indeed been usurped, is, of course, one in which "no hard and fast rule can be formulated." *See Guth v. Loft, Inc., supra,* 23 Del. Ch. at 270, 5 A. 2d at 510.

As one commentator noted, the courts determine whether a corporate opportunity has been usurped by examining the facts of each particular case. Comment, *The Corporate Opportunity Doctrine,* 18 Sw. L.J. 96, 100 (1964). However, some of the "recurring circumstances" which courts continually find relevant in determining whether a corporate opportunity has been usurped include the following: 1) the ability, financial or otherwise, of the corporation to take advantage of the opportunity; 2) whether the corporation engaged in prior negotiations for the opportunity; 3) whether the corporate director or officer was made aware of the opportunity by virtue of his or her fiduciary position; 4) whether the existence of the opportunity was disclosed to the corporation; 5) whether the corporation rejected the opportunity; and 6) whether the corporate facilities were used to acquire the opportunity. *Id.* at 100-107.

In attempting to give substance to its fiduciary duty standard in this area, the Delaware Supreme Court set out in *Guth* sev-

must prove that it was openly and fairly made." R. Robinson, *North Carolina Corporation Law and Practice* § 12-11, at 184 (3d ed. 1983). Immediately after setting out this common law rule, however, Mr. Robinson then suggests, in citing N.C.G.S. § 55-30(b), that the "Business Corporation Act now purports to clarify this frequently uncertain area of the law." *Id.* In a footnote he writes that "[t]he purpose of [N.C.G.S. § 55-30(b)] was stated by the General Statutes Commission as follows: 'To attempt to clarify the largely-uncodified law relating to interested directors, and in particular to define areas of validity.' " *Id.* at 186, n. 6.

eral circumstances under which a corporate director or officer will be deemed to have appropriated for him or herself an opportunity rightfully belonging to the corporation:

> [I]f there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself.

23 Del. Ch. at 272-73, 5 A. 2d at 511.

In taking into account the fact that a corporate opportunity may arise not only in the same or direct line with a corporation's business, but also in a line complementary to it, we hold that in determining whether a corporate fiduciary had usurped a corporate opportunity—and thus that the "corporate transaction" in which he or she has entered is not "just and reasonable" to the corporation—a trial court is to approach the problem from two perspectives. It is to examine not only whether the disputed opportunity is functionally related to the corporation's business, but also whether the corporation has an interest or expectancy in the opportunity. In so doing, the trial court is to examine all of the facts in the particular case, including the "recurring circumstances" other courts have found relevant, in determining whether a corporate opportunity has indeed been usurped.

We turn now to the findings of fact the trial court made to support its conclusion of law that there had been "no actionable breach of fiduciary responsibility by any of the defendants."

The trial court made the following seven findings of fact:

> A. The name of Republic Management Corporation was selected by H. B. Meiselman;
>
> B. The elder Meiselman (H. B. Meiselman) had a management corporation involved in his business dealings for a number of years prior to the chartering of Republic Management Corporation;

C. The evidence is silent as to any bad faith exercised by Ira S. Meiselman in connection with the management company, and this Court makes this finding with full knowledge that Ira S. Meiselman signed the management agreement in his capacity as chief executive officer of the defendant corporations and as President of Republic Management Corporation;

D. Republic Management Corporation has retained earnings resulting from the management contract in the approximate amount of $61,000.00 covering a period of time of some five years, which earnings reached a peak in 1974 of $57,000.00 and plunged to a loss of $11,000.00 in 1975;

E. The uncontradicted evidence shows that virtually all of the retained earnings were accumulated during the exceptionally good years of 1973 and 1974 and that the corporation has since that time suffered losses of approximately $10,000.00 for which Republic Management Corporation has not sought reimbursement;

F. The plaintiff himself received salary from Republic Management Corporation, a company in which he has no equity and for which he has provided no compensable work;

G. The management contract between Republic Management Corporation and defendant Eastern Federal Corporation was just and reasonable at the time it was executed.

The above findings do not address the issue of whether Ira usurped a corporate opportunity from the corporate defendants. Although we agree with the Court of Appeals' determination that "[i]t does not matter that Republic was a successor to previous management companies which performed management services for the defendant corporations," *Meiselman v. Meiselman, supra*, 58 N.C. App. at 774, 295 S.E. 2d at 259, the *identity of the shareholders* who owned the successor corporations may be crucial in determining if Ira usurped a corporate opportunity with his purchase for himself of all of the stock in Republic.

We also agree with the Court of Appeals in its holding that the trial court based its conclusion that there was no actionable breach of fiduciary responsibility, in part, upon what was "in reality, a conclusion of law," that is, that the "management con-

tract between Republic Management Corporation and defendant Eastern Federal Corporation was just and reasonable at the time it was executed." *Id.* at 775, 295 S.E. 2d at 259-60. At any rate, Michael concedes that the trial court was correct in this "finding." However, as Michael contends in his brief, the fairness of the contract is not at issue. The "corporate transaction" at issue here is not Ira's and the other director's execution of a management contract between Republic and Eastern Federal. Rather, the "corporate transaction" in which Ira has an "adverse interest" as an officer and director of Eastern Federal and the other corporate defendants, is his purchase for himself of all of the stock in Republic, a corporation which stands to benefit from profits produced as a result of a management contract it is to perform for Eastern Federal. Thus, the trial court failed to focus on the appropriate issue here. In so doing, its findings of fact necessarily failed to address the appropriate issue as well. Thus, we must remand this case to the Court of Appeals to be remanded to the trial court for further findings. In making its findings, the trial court must determine whether the opportunity to purchase the stock in Republic rightfully belonged to the corporate defendants rather than to Ira personally. In so doing, the trial court will examine the facts and decide if the corporate defendants would have had an interest or expectancy in purchasing all of the shares of stock in a corporation whose sole function appears to be the management of the Meiselman family business. It also is to determine whether Ira's acquisition of all of the stock in this type of corporation is an activity functionally related to those of the corporate defendants. Under either approach, the trial court may find that Ira usurped a business opportunity which rightfully belonged to the corporate defendants.

VI.

In sum, therefore, we hold that the order of the trial court denying plaintiff's claim for relief under N.C.G.S. § 55-125(a)(4) and N.C.G.S. § 55-125.1 must be vacated. Thus, we affirm the decision of the Court of Appeals on this issue, but modify it to the extent its analysis under N.C.G.S. § 55-125(a)(4) and N.C.G.S. § 55-125.1 is not in conformance with the analysis this Court has articulated herein. We also affirm the decision of the Court of Appeals to the extent it held that the trial court erred in determining Ira Meiselman had not breached the fiduciary duty he owed to

the corporate defendants through his sole ownership of the stock in Republic. The case is remanded to the Court of Appeals for remand to the Superior Court, Mecklenburg County, for further proceedings consistent with this opinion.

Modified, affirmed and remanded.

Justice MARTIN concurring in the result.

Except as herein set forth, I concur in the majority opinion. There are, however, certain aspects of the case that should be discussed that the majority does not address.

In determining whether plaintiff's expectations have been frustrated, the actions of all the participants, including plaintiff, must be considered. The majority fails to address this aspect of the case. In *Exadaktilos v. Cinnaminson Realty Co.*, 167 N.J. Super. 141, 400 A. 2d 554 (1979), *aff'd*, 173 N.J. Super. 559, 414 A. 2d 994 (1980), plaintiff acquired a twenty percent interest in a corporation that operated a restaurant. He expected to learn the restaurant business and participate in management. Unfortunately, he did not get along with the other employees and stockholders and was fired for what the court viewed as "unsatisfactory performance." In deciding plaintiff's claim for relief, the court considered the propriety of the actions by the controlling shareholders. The court found that the opportunity had been offered plaintiff and it was lost through *no fault* of the defendants. In weighing plaintiff's claim against the disruptive effects the grant of relief would have upon the business, the court found it appropriate to consider the actions of all parties in determining the cause of the frustration of plaintiff's expectations.

The approach in *Exadaktilos* is appropriate under the law of North Carolina. The statute itself, N.C.G.S. 55-125.1(b), provides relief may be granted "whenever the circumstances of the case are such that relief, but not dissolution, would be appropriate." This mandates a consideration and balancing of all the circumstances of the case in determining whether relief should be granted and, if so, the extent, nature and method of such relief.

This Court forecast this procedure in *Dowd v. Foundry Co.*, 263 N.C. 101, 139 S.E. 2d 10 (1964), a case involving N.C.G.S. 55-125 (a)(4). We stated: "We are not required, at this stage, to de-

termine to what extent the interests of other shareholders may be balanced against those of one complaining shareholder who seeks liquidation and dissolution." The clear holding of *Dowd* is that the interests of the other shareholders must be considered and balanced against those of the complaining shareholder in determining whether to grant relief and, if so, the nature, extent and method of relief. This principle should be applied in the present appeal.

The decision whether to grant the statutory relief involves equity and the discretionary power of the court. *Id.* "Equity cannot permit itself to be used by a stockholder who simply wishes to get out of a bad bargain . . . ." Hornstein, *A Remedy for Corporate Abuse—Judicial Power to Wind Up a Corporation at the Suit of a Minority Shareholder,* 40 Col. L. Rev. 220, 235 (1940). *Cf. Jackson v. Nicolai-Neppach Co.*, 219 Or. 560, 348 P. 2d 9 (1959) (plaintiff has burden of proving equitable grounds for relief).

Another factor to be considered by the court in determining whether to grant relief is whether the minority shareholder has diligently pursued all of the other available statutory means for the protection of his rights and that after doing so "[l]iquidation [or alternative relief under N.C.G.S. 55-125.1] is reasonably necessary for the protection of [his] rights or interests . . . ." N.C. Gen. Stat. § 55-125(a)(4) (1982). *See Murphy v. Greensboro,* 190 N.C. 268, 129 S.E. 614 (1925). The majority shareholders and the corporation should not be subject to dissolution, the most drastic form of relief available, where other statutory rights may provide an adequate remedy for the minority shareholder. This is in accord with the general rule that equitable relief will not ordinarily be granted when plaintiff has an adequate remedy at law. *A.E.P. Industries v. McClure,* 308 N.C. 393, 302 S.E. 2d 754 (1983). Such statutory rights include, e.g., the minority's right to attempt to gain representation on the board of directors under N.C.G.S. 55-25 and the right to compel the payment of dividends under N.C.G.S. 55-50.

In determining whether to grant equitable relief under N.C.G.S. 55-125.1, the trial court must consider all the circumstances of the case. If it is determined that plaintiff's rights or interests require protection because of plaintiff's own conduct, it would be improper to grant equitable relief. He who seeks

equity must do equity. *Transit, Inc. v. Casualty Co.*, 285 N.C. 541, 206 S.E. 2d 155 (1974); *Roberson v. Pruden*, 242 N.C. 632, 89 S.E. 2d 250 (1955); Hillman, *The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relative Permanence of Partnerships and Close Corporations*, 67 Minn. L. Rev. 1 (1982). The reasons *why* the complaining shareholder's interests require protection is highly relevant in the resolution of the case.

The court should also consider what effect the granting of relief will have upon the corporation and other shareholders. Will it interfere with the corporation's ability to attract financing for its business? Will it interfere with its ability to attract additional capital? Will it require burdensome financing upon the corporation or the shareholders? Will it interfere with the rights of creditors? If a buy-out of plaintiff's shares is forced upon the company, it may be far from painless. If it is determined that the granting of relief will be unduly burdensome to the corporation or other shareholders, the trial court should consider this in determining whether to grant relief and, if so, whether this should affect the purchase price or value attached to plaintiff's shares or the method of payment. It is an equitable proceeding. *Dowd v. Foundry Co., supra*, 263 N.C. 101, 139 S.E. 2d 10.

Another circumstance to be considered is whether plaintiff's condition is a result of oppression or bad conduct by the other shareholders. Oppression for these purposes may be defined as: burdensome, harsh and wrongful conduct; a lack of fair dealing in the affairs of the company to the detriment of other shareholders; a violation of fair play on which every shareholder is entitled to rely. *See, e.g., Exadaktilos, supra; White v. Perkins*, 213 Va. 129, 189 S.E. 2d 315 (1972). In making this determination, the court will consider the substance of the conduct rather than its form. *Polikoff v. Dole & Clark Building Corp.*, 37 Ill. App. 2d 29, 184 N.E. 2d 792 (1962).

Oppression in this context is close to a breach of fiduciary duty. The West Virginia Supreme Court, in a "reasonable expectations" case, analyzed oppression from the point of view of breach of a fiduciary duty. It held in substance that oppressive conduct in a close corporation is closely related to the fiduciary duty of good faith and fair dealing owed by majority stockholders to minority stockholders. *Masinter v. Webco Co.*, 262 S.E. 2d 433

(W. Va. 1980). *See also, Fox v. 7L Bar Ranch Co.*, 645 P. 2d 929 (Mont. 1982).

In this connection, I cannot agree that merely because plaintiff's expectations were not fulfilled it necessarily follows that the majority stockholders were guilty of oppression.

Another circumstance to be considered is the fact that most, if not all, of plaintiff's stock was given to him by his father. He did not contribute his own hard-earned cash to the enterprise. This could indicate that he did not assume the risk of having his investment held hostage by the majority, or it could be that one has to accept what one gets by gift—in this case, a locked-in minority interest in a family corporation.

With respect to the Republic management issue, in order for plaintiff to succeed, he must prove that (a) he has standing as an Eastern shareholder to bring suit on this claim against Ira as an Eastern director and officer, and (b) Ira in his role as an Eastern director and officer breached a fiduciary duty owed to Eastern not to usurp a corporate opportunity of Eastern. To establish the usurpation of a corporate opportunity, plaintiff must prove that: (1) the opportunity was either essential to the corporation or was one in which it had an interest or expectancy; (2) the corporation was financially able to take advantage of the opportunity itself; and (3) the party charged with usurping the opportunity did so in an official rather than an individual capacity. Upon such showing, the burden shifts to the defendant to prove the entire fairness of the transaction and that it was free from oppression, imposition and actual or constructive fraud. *Thompson v. Shepherd*, 203 N.C. 310, 165 S.E. 796 (1932); *Schreiber v. Bryan*, 396 A. 2d 512 (Del. Ch. 1978). *See generally* 56 Nw. U. L. Rev. 608 (1961); 16 A.L.R. 4th 784 (1982).

The foregoing are additional circumstances the trial judge should consider in determining the reasonable expectations of plaintiff and whether to grant equitable relief to plaintiff and, if so, the nature and method of such relief. They are required by the "circumstances of the case" standard of N.C.G.S. 55-125.1(b), the rules governing the exercise of discretionary power by the trial judge, N.C.G.S. 55-125.1(a), and the rules for granting equitable relief, and they are supported by *Dowd v. Foundry Co.*,

supra, 263 N.C. 101, 139 S.E. 2d 10. *See generally Dissatisfied Participant, supra.*

Chief Justice BRANCH and Justice COPELAND join in this concurring opinion.

ELIZABETH M. BRADLEY	)	
	)	
v.	)	ORDER
	)	
EARL T. BRADLEY, JR.	)	

No. 140P83

(Filed 1 June 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

ADAIR v. ADAIR

No. 369P83.

Case below: 62 N.C. App. 493.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 September 1983.

AYDEN TRACTORS v. GASKINS

No. 266P83.

Case below: 61 N.C. App. 654.

Petition by plaintiff and third-party defendant for discretionary review under G.S. 7A-31 denied 7 September 1983.

BELLEFONTE UNDERWRITERS INSUR. CO. v. ALFA AVIATION

No. 237PA83.

Case below: 61 N.C. App. 544.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 7 September 1983.

BLUE CROSS AND BLUE SHIELD v. ODELL ASSOCIATES

No. 236P83.

Case below: 61 N.C. App. 350.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 September 1983.

BRUCE v. N.C.N.B.

No. 376P83.

Case below: 62 N.C. App. 724.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 September 1983.

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

BURNS v. COLONY DODGE, INC.

No. 319P83.

Case below: 61 N.C. App. 752.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 7 September 1983. Motion by defendants to dismiss the appeal for lack of substantial constitutional question allowed 7 September 1983.

DAVIDSON v. WINSTON-SALEM/FORSYTH CO. BD. OF EDUCATION

No. 347P83.

Case below: 62 N.C. App. 489.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 September 1983.

HOMEOWNERS' ASSOCIATION v. PARKER AND HOMEOWNERS' ASSOCIATION v. LAING

No. 330P83.

Case below: 62 N.C. App. 367.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 September 1983.

HUGHES v. CITY OF HIGH POINT

No. 294P83.

Case below: 62 N.C. App. 107.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 September 1983.

IN RE GRAHAM

No. 389P83.

Case below: 63 N.C. App. 146.

Petition by Graham for discretionary review under G.S. 7A-31 denied 7 September 1983.

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

IN RE MILLER v. GUILFORD COUNTY SCHOOLS

No. 371P83.

Case below: 62 N.C. App. 729.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 September 1983.

IN THE MATTER OF THE ESTATE OF ANGELIKA KATSOS

No. 351P83.

Case below: 62 N.C. App. 551.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 September 1983. Motion by defendants to dismiss the appeal for lack of substantial constitutional question allowed 7 September 1983.

KENNEDY v. STARR

No. 326P83.

Case below: 62 N.C. App. 182.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 September 1983.

LIBBY HILL SEAFOOD RESTAURANTS, INC. v. OWENS

No. 377P83.

Case below: 62 N.C. App. 695.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 September 1983.

MASON v. RUMPLE

No. 375P83.

Case below: 62 N.C. App. 758.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 September 1983.

PLEMMONS v. CITY OF GASTONIA

No. 318P83.

Case below: 62 N.C. App. 470.

Petitions by defendants and plaintiffs for discretionary review under G.S. 7A-31 denied 7 September 1983.

PLEMMONS v. HUFFSTICKLER

No. 341P83.

Case below: 61 N.C. App. 348.

Petition by defendant City for writ of certiorari to North Carolina Court of Appeals denied 7 September 1983.

POWELL v. PARKER

No. 362P83.

Case below: 62 N.C. App. 465.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 September 1983.

PYLES v. CP&L CO.

No. 382P83.

Case below: 62 N.C. App. 758.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 September 1983.

SEDBERRY v. JOHNSON

No. 348P83.

Case below: 62 N.C. App. 425.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 September 1983.

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

STATE v. EDMONDS

No. 344P83.

Case below: 62 N.C. App. 551.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 September 1983.

STATE v. JONES

No. 418P83.

Case below: 63 N.C. App. 411.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 September 1983. Notice of appeal dismissed 7 September 1983.

STATE v. MARSHBURN

No. 273P83.

Case below: 61 N.C. App. 752.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 September 1983.

STATE v. NICKERSON

No. 393P83.

Case below: 62 N.C. App. 754.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 7 September 1983.

STATE v. SMITH

No. 270P83.

Case below: 62 N.C. App. 145.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 September 1983.

STATE v. TAVARES

No. 438P83.

Case below: 63 N.C. App. 567.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 September 1983. Notice of appeal dismissed 7 September 1983.

STATE v. TEDDER

No. 301P83.

Case below: 62 N.C. App. 12.

Petition by defendant for discretionary review under G.S. 7A-31 denied 9 August 1983. Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 9 August 1983.

STATE EX REL. UTILITIES COMM. v. SEABOARD COAST LINE RAILROAD

No. 386P83.

Case below: 62 N.C. App. 631.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 September 1983. Motion by Public Staff to dismiss the appeal for lack of substantial constitutional question allowed 7 September 1983.

THOMPSON v. HOME INSURANCE CO.

No. 349P83.

Case below: 62 N.C. App. 562.

Petitions by defendant and plaintiffs for discretionary review under G.S. 7A-31 denied 7 September 1983.

WEST v. SLICK

No. 111PA83.

Case below: 60 N.C. App. 345.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 7 September 1983.

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

WHITE v. BATTLEGROUND VETERINARY HOSP.

No. 374P83.

Case below: 62 N.C. App. 720.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 September 1983.

STATE OF NORTH CAROLINA v. JOHN WESLEY OLIVER AND GEORGE MOORE, JR.

No. 133A82

(Filed 27 September 1983)

1. **Criminal Law § 161— assignment of error—no objection or exception taken at trial—subsequent insertion of the notation "exception" placed throughout record and transcript—review limited**

Under App. R. 10(b)(1), defendants did not properly object to errors at trial where close to one-half of the errors assigned by defendants involved matters to which no objection or exception was taken at trial, and where the assignments of error were brought forward solely on the basis of defendants' subsequent insertion of the notation "exception" placed throughout the record and the trial transcript. A party may not, after trial and judgment, comb through the transcript of the proceedings and randomly insert an exception notation in disregard of the mandates of Rule 10(b). Where no action was taken by counsel during the course of the proceedings, the burden is on the party alleging error to establish its right to review; that is, that an exception, "by rule or law was deemed preserved or taken without any such action," or that the alleged error constitutes plain error. In so doing, a party must, prior to arguing the alleged error in his brief, (a) alert the appellate court that no action was taken by counsel at the trial level, and (b) establish his right to review by asserting in what manner the exception is preserved by rule or law or, when applicable, how the error amounted to a plain error or defect affecting a substantial right which may be noticed although not brought to the attention of the trial court.

2. **Constitutional Law § 31— denial of funds for defendants to retain social psychologist—no error**

The trial court did not err in denying defendants' motions for funds to retain a social psychologist to assist defense counsel during jury selection where defendants made no showing that there was a reasonable likelihood that a social psychologist would materially assist in the preparation of their defenses or that they would not receive a fair trial without a social psychologist's aid. G.S. 7A-450(b).

3. **Jury § 6.4— excusal of jurors for capital punishment views—no error**

There was no error in the systematic exclusion of jurors who stated that they would "automatically" vote against the imposition of capital punishment, and the lack of individual voir dires did not produce a jury comprised of persons who were of the opinion that the death penalty was necessary.

4. **Criminal Law § 43— use of photograph of victim at resentencing hearing and in closing arguments—no error**

In a first degree murder case it was not improper for a jury considering capital resentencing to view photographs, which depicted the manner in which two victims were shot, the precise location of the gunshot wounds, and the scene of one victim's murder behind the counter in the store, which they

would have seen had they also determined the defendants' guilt. Nor was it improper for the State to use the photographs of the victims' bodies and the crime scene during closing arguments.

5. Criminal Law § 113.1— recapitulation of evidence—no plain error

There was no plain error in the court's recapitulation of the evidence for failure to state to the jury that the evidence showed that one victim was unconscious immediately upon being shot since similar testimony was before the jury and was argued to the jury, and since the evidence was not material to the aggravating factor of "especially heinous, atrocious, or cruel" in that the State relied on the evidence that the victim begged for his life in establishing this aggravating factor. G.S. 15A-1232 and G.S. 15A-2000(e)(9).

6. Criminal Law § 135.4— evidence that each defendant personally shot a victim—death sentence not excessive

In a prosecution for first degree murder, applying the decision in *Enmund v. Florida*, --- U.S. --- (1982), imposition of the death sentence on each defendant was not excessive since the evidence showed that one defendant killed one victim and the other defendant killed the other victim.

7. Criminal Law § 135.4— first degree murder—sentencing hearing—aggravating circumstance of especially heinous, atrocious, or cruel

In a prosecution for first degree murder, the trial court correctly submitted as an aggravating factor that the murder of a victim was "especially heinous, atrocious, or cruel" pursuant to G.S. 15A-2000(e)(9) with respect to defendant Moore since the evidence showed that the murder was committed in total disregard for the value of human life, was a senseless murder, executed in cold blood as the victim pleaded "please don't shoot me"; and that defendant showed no remorse but in fact later laughingly boasted to his fellow inmates that he pointed the gun at the victim who begged not to be shot and offered defendant more money, and that defendant "kind of liked the idea of it." As to the defendant Oliver, however, the aggravating circumstance was erroneously submitted since defendant Moore's statement concerning what the victim said prior to his death was made after the murder took place, and the statement was inadmissible against defendant Oliver.

8. Criminal Law § 135.4— first degree murder—sentencing hearing—instructions on aggravating circumstance erroneous

In a sentencing hearing for a first degree murder conviction, the trial judge's statement essentially defining an especially heinous, atrocious, or cruel murder as one "occurring while a man is begging for his life," was erroneous since evidence of a victim's begging for his life is, like torture, one factor for jury consideration in determining whether a murder is especially heinous, atrocious, or cruel. However, it is not necessarily a determinative factor, and this factor alone does not always necessitate a finding that a murder was especially heinous, atrocious, or cruel.

9. Criminal Law § 135.4— first degree murder—sentencing hearing—aggravating factor of motivated by desire to avoid detection and apprehension

In prosecutions for the murders of two victims, the evidence supported the submission of the aggravating factor that the crime was motivated by a

desire to avoid detection and apprehension pursuant to G.S. 15A-2000(e)(4) with respect to defendant Moore in the Watts' murder since Moore was credited with saying "you would have to be crazy to leave any witnesses." Defendant Oliver's act in murdering Hodge and attempting to murder Hodge's seven year old grandson, the only other witness, justified submission of this aggravating factor in Oliver's sentence with respect to Hodge. However, the evidence was insufficient to support submission of G.S. 15A-2000(e)(4) upon defendant Oliver's conviction of the murder of Watts.

10. Criminal Law § 135.4— first degree murder—sentencing hearing—aggravating factor of pecuniary gain

Double jeopardy does not preclude the submission of pecuniary gain as an aggravating factor when the underlying felony is armed robbery, and G.S. 15A-2000(e)(6) is not unconstitutionally vague.

11. Criminal Law § 135.4— first degree murder—sentencing hearing—reminder that guilt already determined

Instructions and comments to the jury that its function was punishment, not a determination of guilt or innocence, in a sentencing hearing for a first degree murder conviction was in all respects proper.

12. Criminal Law § 135.4— first degree murder—sentencing hearing—burden to prove mitigating circumstances on defendants

In a sentencing hearing upon conviction of first degree murder, the burden of persuasion as to the existence of mitigating circumstances is on the defendant.

13. Criminal Law § 135.4— first degree murder—sentencing hearing—jury unanimity requirement

In a sentencing hearing upon a conviction of first degree murder, the unanimity requirement of a jury is only placed upon the finding of whether an aggravating or mitigating circumstance exists.

14. Criminal Law § 135.4— first degree murder—sentencing hearing—prosecutor's questions of prospective jurors

Statements of a prosecutor asking one juror if she had the "backbone" to impose a sentence of death, and another juror if he had the "intestinal fortitude," were not made to badger or intimidate the witnesses, but rather to determine, in light of their equivocation concerning the death penalty, whether they could comply with the law. As such, these comments could be viewed as favorable, rather than unfavorable to defendants' position and defendants failed to show prejudice.

15. Criminal Law § 135.4— first degree murder—sentencing hearing—questioning witness concerning his being in protective custody

Defendant showed no prejudice by the erroneous submission of a witness's testimony, that he was in protective custody, on direct examination, since the legitimate purpose for which the testimony was admitted was established during cross-examination.

16. Criminal Law § 135.4— first degree murder—sentencing hearing—prosecutor's argument to jury—burden on defendants improperly stated—no prejudicial error

Although a prosecutor in a first degree murder sentencing hearing improperly argued that the burden was on defendants to satisfy the jury that there "is something about these defendants of a redeeming value that gives rise to the mitigation that will cause you to drop it down to life imprisonment," in the context of the fact that the prosecutor then proceeded to work through each of the four steps necessary to reach a recommendation of death, that the counsel for both defendants also worked through each of the four steps and that the trial judge, essentially for the fourth time, reviewed the procedure set out in G.S. 15A-2000, and in the absence of an objection, the statement did not amount to such gross impropriety as to require the trial judge to act *ex mero motu*, or to recall that the statement had been made and later caution the jury to disregard it during his instructions to the jury later that day.

17. Criminal Law § 135.4— first degree murder—sentencing hearing—"divine law" argument to jury

Where, in anticipation of defense counsel's similar argument, a prosecutor stated that the death penalty was not inconsistent with scriptures of the Bible, there was nothing, in the absence of objection, that amounted to plain error which would justify reversal.

18. Criminal Law § 135.4— first degree murder—sentencing hearing—emphasizing victims' rights in closing argument

There was no error in the prosecutor emphasizing the victims' rights in his closing arguments to the jury since during a sentencing hearing the emphasis is on the circumstances of the crime and the character of the criminal.

19. Criminal Law § 135.4— first degree murder—joint resentencing hearing—no error

Inasmuch as G.S. 15A-2000 provides that the same jury may determine both guilt and sentence in a capital case, and accepting an argument that a jury, properly instructed, can in fact give individualized consideration to each defendant's culpability, and did so at the first sentencing hearing, the Court holds that defendants were not prejudiced by a joint trial in the first instance. With respect to resentencing, defendants have failed to show any greater prejudice by holding a joint resentencing trial. Defendants are entitled to no greater advantage than they enjoyed at the initial sentencing.

20. Criminal Law § 135.4— first degree murder—resentencing hearing—admission of testimony concerning defendant's behavior on death row—no prejudicial error

In a resentencing hearing for a first degree murder conviction, a defendant's admission that he had killed whites before was introduced solely for the purpose of corroborating the testimony of another witness that the defendant had, in fact, been the "trigger man" in the murder of the victim. Under these circumstances, the testimony was relevant and admissible for the purpose for which it was offered. Further, testimony concerning defendant's assaultive

behavior and uncooperative attitude in prison was relevant to explain or rebut evidence put on by defense attorneys concerning a prison officer's inability to remember an exact date of an incident or the names of the other inmates and it would also have been proper to rebut the statutory mitigating factor of G.S. 15A-2000(f)(7), the age of the defendant at the time of the crime.

21. Criminal Law § 135.4— first degree murder—resentencing hearing—admission of testimony concerning defendant's prior criminal record

There was no plain error sufficient to justify awarding defendant a new trial on the basis of a witness being asked, on cross-examination, whether he was aware of defendant's prior convictions on charges of larceny, trespass, damage to real property, and breaking or entering and larceny where the witness had testified on direct that the defendant had never engaged in fighting; had never carried a gun; and had never carried a knife.

22. Criminal Law § 135.4— first degree murder—resentencing hearing—limiting cross-examination of witness

There was no prejudicial error in the failure of the trial judge to allow defense counsel to question a witness concerning his earlier inability to identify one defendant since the defendant's guilt had already been determined, and the substance of the question was collateral to sentencing.

23. Constitutional Law § 48— first degree murder—resentencing hearing—effective assistance of counsel

Defendant failed to show he was denied effective assistance of counsel where his attorney had represented the State's witness on the witness's appeal to the Court on an unrelated second-degree murder charge.

24. Criminal Law § 135.4— first degree murder—resentencing hearing—failure to instruct on age as mitigating factor

There was no error in the trial judge's failure to peremptorily instruct on defendant's age as a mitigating factor. G.S. 15A-2000(f)(7).

25. Criminal Law § 135.4— first degree murder—resentencing hearing—limiting reputation testimony

In light of previous testimony concerning the reputation of one defendant, the trial court did not err in ruling that one witness's testimony had become repetitive and in sustaining an objection concerning that testimony.

26. Criminal Law § 135.4— first degree murder—resentencing hearing—failure to reiterate all instructions for both defendants

Defendant failed to show how he was prejudiced by the trial judge's stating that his instructions remained the same for defendant Oliver as he had just given for defendant Moore where the trial judge handed out written instruction sheets as to each defendant and each case, and where the trial judge explained Moore's instructions and explained where Oliver's instructions differed.

27. Criminal Law § 135.4—first degree murder—resentencing hearing—sentence of death not disproportionate

A defendant's sentence of death was neither disproportionate nor excessive where the murder was the result of a deliberate plan to seek out a business establishment to rob, and without the slightest provocation or excuse, to callously and in cold blood shoot at close range anyone unfortunate enough to be present at the time.

Justice MARTIN dissenting in part and concurring in part.

Justice FRYE joins in this opinion.

Justice EXUM dissenting.

DEFENDANTS appeal from judgments imposing sentences of death entered by *Bailey, J.*, at the 25 January 1982 Criminal Session of Superior Court, ROBESON County.

These cases came on for resentencing following a decision of this Court reported at 302 N.C. 28, 274 S.E. 2d 183 (1981). At the first trial defendants were convicted of the first degree murder of Allen Watts and Dayton Hodge. The murders of Watts, a store attendant, and Hodge, a customer at the gas pump, were committed during the course of the armed robbery of a convenience store. Defendant Moore was sentenced to death for the murder of Allen Watts and to life imprisonment for the murder of Dayton Hodge. Defendant Oliver was sentenced to death in both murders. Writing for a unanimous court, Justice Exum found no error in the first degree murder convictions. However, for error found in the sentencing phase of both the Watts and Hodge murders as to defendant Oliver, and the Watts murder as to defendant Moore, the cases were remanded for a new sentencing hearing. Defendant Moore's life sentence for the murder of Dayton Hodge was unaffected by the remand for resentencing.

After considering the evidence at a second sentencing hearing, a jury recommended that defendant Moore be sentenced to death for the Watts murder and that defendant Oliver be sentenced to death for the Watts murder and the Hodge murder.

Facts pertinent to the guilt/innocence phase of the trial are fully discussed in the opinion reported at 302 N.C. 28, 274 S.E. 2d 183 (hereinafter referred to as *Oliver I*). As the issues raised on this appeal relate only to the resentencing, we deem it unnecessary to repeat the facts. Facts necessary to an understand-

ing of the issues raised on this appeal will be discussed in the context of each assignment of error. Because a number of these assignments of error are common to both defendants, the arguments will be consolidated for discussion. Those assignments of error raised by only one defendant or the other will be discussed separately.

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

Richard A. Rosen, Attorney for defendant-appellant George Moore, Jr.

Frank B. Gibson, Jr., Attorney for defendant-appellant John Wesley Oliver.

MEYER, Justice.

I

COMMON ISSUES

1. Jury selection
2. Photographs
3. Summary of evidence
4. Enmund issue
5. Strickland issue
6. Instructions
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II

DEFENDANT MOORE

1. Evidentiary issues

2. Ineffective assistance of counsel

3. Peremptory instruction on age in mitigation

III

DEFENDANT OLIVER

1. Evidentiary issues

2. Inadequate jury instruction

IV

PROPORTIONALITY

[1] We note at the outset that of the over twenty errors assigned by these defendants, close to one-half of these involve matters to which no objection or exception was taken at trial. These assignments of error are brought forward solely on the basis of the defendants' subsequent insertion of the notation "exception" placed throughout the record and the trial transcript. We disapprove of this practice.

Under Rule 10(b)(1) of our Rules of Appellate Procedure:

> 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. . . .

The official commentary to Rule 10 explains that exceptions cannot be later placed into the record at random:

> The sifting function which is implicit in this statement might be expressed in more specific form as follows. 1) Every judicial action at the trial court level constitutes potentially prejudicial error to the party disfavored by it; hence the total of

such actions which disfavor the eventually losing or 'aggrieved' party constitute the pool of potentially reversible errors on appeal. 2) But no such error ought be subject of appellate review unless it has been first suggested to the trial judge in time for him to avoid it or to correct it or unless it is of such a fundamental nature that no such prior suggestion should be required of counsel.

The official commentary further states:

Subdivision (b)(1). The first sentence builds upon the point developed in the commentary to subdivision (a), that only those 'exceptions' may be set out in the record on appeal and so made the basis of assignments of error which were taken in the trial court by the classic mode of the spoken or written word 'exception'; or 'deemed' taken from other conduct, as by objecting to the admission of evidence, N.C.R. Civ. P. 46(a)(2), or from other action plainly indicating opposition to judicial action taken or proposed, N.C.R. Civ. P. 46(b); or 'deemed' taken without *any* action by counsel simply because the error is considered sufficiently fundamental, as in instructions to the jury, N.C.R. Civ. P. 46(c).

Rule 10 functions as an important vehicle to insure that errors are not "built into" the record, thereby causing unnecessary appellate review. We have stated on numerous occasions, most recently in *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982), that a failure to except or object to errors at trial constitutes a waiver of the right to assert the alleged error on appeal. *See State v. Jenkins*, 300 N.C. 578, 268 S.E. 2d 458 (1980); *State v. Roberts*, 293 N.C. 1, 235 S.E. 2d 203 (1971).

We have addressed this problem twice during this Spring Session. 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 was made at trial to instructions to the jury, and adopted there the "plain error" rule. In *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983), we adopted the plain error rule "with equal force" with regard to Rule 10(b)(1) when no objection or exception was made at trial to evidence presented and admitted, stating that:

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.

Id. at 740, 303 S.E. 2d at 806.

Reading the language of Rule 10(b)(1) that an exception may be properly preserved "by objection noted *or which by rule or law was deemed preserved or taken without any such action,*" together with the language of *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804, and *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375, we conclude as follows:

1. A party may not, after trial and judgment, comb through the transcript of the proceedings and randomly insert an exception notation in disregard of the mandates of Rule 10(b).

2. Where no action was taken by counsel during the course of the proceedings, the burden is on the party alleging error to establish its right to review; that is, that an exception, "by rule or law was deemed preserved or taken without any such action," or that the alleged error constitutes plain error.

In so doing, a party must, prior to arguing the alleged error in his brief, (a) alert the appellate court that no action was taken by counsel at the trial level, and (b) establish his right to review by asserting in what manner the exception is preserved by rule or law or, when applicable, how the error amounted to a plain error or defect affecting a substantial right which may be noticed although not brought to the attention of the trial court. We caution that our review will be carefully limited to those errors

> '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." '

State v. Odom, 307 N.C. at 660, 300 S.E. 2d at 378 (emphasis in original).

Because the record in the case under consideration was filed prior to *Odom* and *Black*, and because the case involves sentences of death, we have elected to review all errors assigned, whether properly objected to at trial or alleged for the first time on this appeal. Those errors considered under the plain error rule will be reviewed under the standard set forth in *Black*.

I

COMMON ISSUES

1. JURY SELECTION

[2] Defendants contend that the trial court erred in denying their motions for funds to retain a social psychologist to assist defense counsel during jury selection. Pursuant to G.S. § 7A-450(b), defendants, as indigents, were entitled to counsel and other necessary expenses of representation at State expense. The defendants here made no showing that there was a reasonable likelihood that a social psychologist would materially assist in the preparation of their defenses or that they would not receive a fair trial without a social psychologist's aid. Absent such a showing, we can find no error. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 642 (1982); *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 622 (1982), *reh. denied*, --- U.S. ---, 103 S.Ct. 839 (1983); *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981).

[3] Each defendant now questions the jury selection process, although neither requested an individual voir dire, presumably based on our holding in *Oliver I*. Nor did either defendant object, during the jury voir dire, to the excusal of any juror. Defendant Oliver contends that no State interest justifies the systematic exclusion of jurors who would never vote for the death penalty and

each defendant argues that these jurors' exclusion denied him his rights to due process and to a trial by a jury drawn from a representative, fair cross-section of the community. We have repeatedly rejected these arguments and reject them here. *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569; *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 622 (1982), *reh. denied*, --- U.S. ---, 103 S.Ct. 839 (1983); *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243; *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183; *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980); *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551, *cert. denied*, 446 U.S. 941 (1979).

Both defendants contend that the jury selection violated the mandate of *Witherspoon v. Illinois*, 391 U.S. 510, 522, 20 L.Ed. 2d 776, 784-85 (1968), that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Defendants now argue that the State did not question veniremen concerning their capital punishment views with sufficient specificity or clarity, contending that thirty-three potential jurors were excused for cause based upon answers elicited only by the State and not elicited by either of the defendants or the trial court. We conclude from our examination of the record that each of the thirty-three jurors challenged and excused for cause made it "unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them. . . ." *Id.* at 522, 20 L.Ed. 2d at 785, n. 21 (emphasis in original). *See State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144; *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203; *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183; *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979); *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551; *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975).

Defendants further contend that the lack of an individual voir dire and the questioning of jurors in front of their fellow veniremen allowed jurors themselves to determine, through the answers others gave to the State's patterned questions, whether they would sit on the jury, thus producing a jury comprised of persons who were of the opinion that the death penalty was nec-

essary. This "domino" effect has been argued to this Court repeatedly, and we have rejected it repeatedly. We do so again. *See State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569; *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183; *State v. Taylor*, 298 N.C. 405, 259 S.E. 2d 502 (1979); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, reh. denied, 448 U.S. 918 (1980). The record here shows that the excused jurors in question admitted that they would not vote for or recommend the death penalty under any circumstance. Their exclusion was not improper, and we find no error.

2. PHOTOGRAPHS

[4] Defendants contend that the trial court erred in admitting into evidence photographs of the deceased victims. Without objecting at trial, they now argue that the photographs were improperly shown to the jury and improperly used during the prosecutor's closing argument. It is the defendants' contention that the State's use of the photographs exceeded the use for which they were admitted, namely, to illustrate the testimony of the S.B.I. crime scene expert, and that the photographs were irrelevant to sentencing, inflammatory, and highly prejudicial. They rely on *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752; and *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969).

We disagree with the defendants' interpretation of our precedents and find no error in either the trial court's admission into evidence of the photographs or the State's use of the photographs during closing argument.

In *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328, this Court stated that a new trial may be warranted when an excessive number of photographs illustrating the same scene and with no additional probative value is used to inflame the jury. Defendants here have failed to show that the four photographs in question, two of each of the victims' bodies, constituted an excessive number, were repetitive depictions of the same scene, had no additional probative value, or were inflammatory. These four photographs depicted for the jury the manner in which the two victims were shot, the precise location of the gunshot wounds, and the scene of the Watts' murder behind the counter in the store.

Defendants' reliance on *Johnson* is also misplaced. There we found improper the admission into evidence of photographs depicting the mutilated, dismembered body of the victim when the defendant was not responsible for the mutilation or dismemberment. However, we found proper the admission of a photograph showing the defendant's instrument of strangulation around the victim's neck. The photographs in the case sub judice are not gory and gruesume as were those in *Johnson.* They are otherwise relevant to show the circumstances of the two murders, an especially appropriate consideration for the jury in reaching its capital sentence recommendation. *Gregg v. Georgia*, 428 U.S. 153, 49 L.Ed. 2d 859 (1976).

On remand from the United States Supreme Court, *Godfrey v. Georgia*, 446 U.S. 420, 64 L.Ed. 2d 398 (1980), the Georgia Supreme Court held that the resentencing court properly admitted photographs similar to those at issue here.

> In order to enable the resentencing jury to fulfill its responsibility, the state is authorized to offer evidence for the purpose of putting the jury in a position of having at least as much knowledge of the circumstances as the original jury which heard both the guilt-innocence and sentencing phases of the trial. The photographs represented the crime scene and the victims' injuries, and the defendant may not prevent the jury from viewing them.

Godfrey v. State, 248 Ga. 616, 622, 284 S.E. 2d 422, 428 (1981), *cert. denied*, 456 U.S. 919 (1982), *reh. denied*, --- U.S. --- (1983).

We, too, find that it is not improper for a jury considering only capital resentencing to view photographs which they would have seen had they also determined the defendants' guilt. Nor do we find it improper that the State used the photographs of the victims' bodies and the crime scene during closing argument. *See Smith v. State*, 419 So. 2d 563 (Miss. 1982), *cert. denied*, --- U.S. ---, 103 S.Ct. 1449 (1983) (proper use of photographic slides during State's capital sentencing closing argument). The prosecutor used the photographs to argue the facts and circumstances of the murder so that the jury might reach a proper sentence recommendation. The facts and circumstances, including the photographs which illustrated them, were properly admitted into

evidence and the prosecutor could argue all reasonable inferences to be drawn therefrom.

3. SUMMARY OF EVIDENCE

[5] For the first time, defendants now object to the trial court's recapitulation of the evidence and assign error to the trial court's failure to state to the jury that the evidence showed that Allen Watts was unconscious immediately upon being shot. There was testimony at the sentencing hearing to this effect in the form of the opinion of Dr. Andrews, the examining pathologist. Defendants failed to bring the omission to the trial court's attention thereby waiving their objection on appeal. *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978). Our review is therefore limited to plain error.

The trial court "is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence." G.S. § 15A-1232. Although he need not recapitulate all of the evidence, *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978), the trial judge is required to instruct on all material or substantive features of a case. *State v. Ward*, 300 N.C. 150, 266 S.E. 2d 581 (1980).

Defendants argue that the fact that Watts was unconscious was material with regard to whether the murder of Watts was especially heinous, atrocious or cruel within the meaning of G.S. § 15A-2000(e)(9). This argument fails in light of the State's reliance, in establishing this aggravating factor, on the evidence that Watts begged for his life. The prosecutor, in fact, never argued that Watts might have been conscious prior to his death, although there was evidence to support such an argument.[1] Both defendants, however, argued that Watts was "unconscious and . . . didn't suffer after the shot was fired." Thus, the failure of

1. Mitchell Ivey arrived at the scene shortly after the murders. He went into the store, looked around, and when he did not see Mr. Watts, he assumed he was outside. As he began to leave, he "heard something groan," and when he looked behind the counter, he saw Watts. Fanny Lawson arrived in response to an emergency ambulance call. She observed Mr. Hodge and then went into the store after being told there was another victim inside. She testified, "I ran in, and as I went in at the front door, the cash register was on the left, . . . and I had to go around a bar back there to get back to where he was, and as I started around, I heard him make a fuss, and I ran back out to where Mr. Hodge and my partner was, and I picked up by jump kit and I went back in. . . ."

the trial court to remind the jury of the pathologist's opinion that Watts was unconscious does not constitute plain error. This testimony was before the jury and was argued to the jury.

4. *ENMUND* ISSUE

[6] Both defendants argue a failure to comply with the recent United States Supreme Court decision in *Enmund v. Florida*, 458 U.S. 782, 73 L.Ed. 2d 1140 (1982). In that case, it was held that a sentence of death was excessive under the cruel and unusual punishment clause of the eighth amendment when it was imposed on a defendant who did not personally kill the victims; who was not actually present during the killings; and who did not intend that the victims be killed. In so holding, the court emphasized (1) the absence of any evidence to show that Enmund personally intended to kill the victims, and (2) the need for the sentence to be based on the individualized character and conduct of the accused.

Defendant Moore contends that there was significant circumstantial evidence to show that defendant Oliver actually shot Mr. Watts, apparently because the murder weapon was purchased by Oliver. Defendant Oliver contends that there was no direct evidence that he took part in the killing of Allen Watts, but that the evidence showed that defendant Moore personally shot Watts. These contentions are without merit since all the evidence clearly showed that Moore killed Watts, that Oliver killed Hodge, and that Oliver was present and supplied the pistol for both killings, obviously intending that lethal force be employed. Moore was overheard in jail bragging that he killed Watts and that he had killed whites before. The jury failed to find the mitigating factor, as to either defendant, that he was only an accomplice with relatively minor participation. We therefore find no violation of the *Enmund* rule. We do, however, direct the attention of the bench and the bar to our recent decision in *State v. Stokes*, 308 N.C. 634, 304 S.E. 2d 184 (1983), discussing this issue and recommending a procedure for complying with the *Enmund* rule.

5. *STRICKLAND* ISSUE

Defendants contend that the North Carolina capital murder statutory scheme is unconstitutional under *Roberts v. Louisiana*, 428 U.S. 325, 49 L.Ed. 2d 974 (1976); and *Furman v. Georgia*, 408 U.S. 238, 33 L.Ed. 2d 346 (1972), in that it permits subjective

discretion and discrimination in imposing the death penalty. Under this assignment of error, defendants challenge the requirement for the automatic submission of the lesser included offense of second degree murder whenever a defendant is tried for first degree murder on the theory of premeditation and deliberation. *See State v. Harris*, 290 N.C. 718, 228 S.E. 2d 424 (1976). The defendants in this case were charged and convicted of first degree murder under the felony murder theory, thus the *Harris* rule, which we recently overruled in *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983), was not applicable to their cases. Furthermore, this issue is not properly before this Court as it was not raised at the guilt determination phase of the trial, in the original appeal, or during either sentencing hearing.

6. INSTRUCTIONS

(a) Aggravating factors

i. Heinous, atrocious or cruel

[7] Defendants next contend that the trial judge committed reversible error by instructing the jury that it could find as an aggravating factor that the murder of Allen Watts was "especially heinous, atrocious, or cruel." G.S. § 15A-2000(e)(9). Defendants did not object to the submission of this factor at trial.

This question was presented and decided against the defendants in *Oliver I.* In that case, Justice Exum, after reviewing those cases interpreting the language of G.S. § 15A-2000(e)(9) concluded that "[a]t least one court has determined that the murder of one pleading for mercy may fall within the category of an 'especially heinous' offense. *Lucas v. State*, 376 So. 2d 1149 (Fla. 1979)." *State v. Oliver*, 302 N.C. at 60, 274 S.E. 2d at 203. Significantly, Justice Exum pointed out that in *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551, a felony murder case, this aggravating factor was submitted and rejected by a jury because "circumstances indicat[ed] that the shooting may not have been intentional, although defendant was threatening the deceased and others with his pistol at the time. . . ." *Id.* at 61, 274 S.E. 2d at 203. Thus, held Justice Exum,

> In the Watts murder cases the state's evidence shows that Watts, after opening his cash register in response to defendants' demands, begged for his life. Watts said, 'Please don't shoot me. Go ahead and take the money.' With Watts

> pleading for his life defendant Moore, according to his evidence, mercilessly shot him to death. In our view the jury could find from these circumstances that the murder of Watts was especially heinous, atrocious or cruel. This aggravating circumstance was appropriately submitted in the Watts cases.

Id., 274 S.E. 2d at 204.

We emphasize that this assignment of error raises only the question of whether the aggravating factor that the Watts murder was "especially heinous, atrocious, or cruel" was properly submitted to the jury given the circumstances of the murder. *Cherry* represents a clear indication that a jury, under proper instruction, remains free to reject this factor and will do so when appropriate. Of equal significance pointing to the effectiveness of the built-in safeguards implicit in our capital punishment statute is the result reached by the jury in *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979). In that case defendant was convicted of first degree murder on a felony-murder theory. Submitted at the sentencing phase, and found by the jury, were the aggravating factors that the murder (1) was especially heinous, atrocious, or cruel and (2) was committed in the course of a robbery. The jury found one mitigating factor but further found that although the mitigating circumstance was insufficient to outweigh the aggravating circumstances, the latter *were not sufficiently substantial to call for the imposition of the death penalty.*

Although we could justifiably rely on our determination of this issue in *Oliver I*, we nevertheless review our earlier position and hold that this factor was improperly submitted for jury consideration as to defendant Oliver, but reaffirm our position as to its admission as to defendant Moore.

In support of the aggravating factor against Oliver that the crime was "especially heinous, atrocious, or cruel," the State submitted evidence, at the guilt phase and at resentencing, of defendant Moore's subsequent statement to Lewis that Allen Watts had pleaded, "Please don't shoot me." As the statement had no bearing on defendant Oliver's guilt, any error in its admission at the guilt phase was harmless. We agree that the use of this statement against defendant Oliver to support the aggravating factor of heinous, atrocious, or cruel was erroneous. Under our rules of

evidence, the acts and declarations of any one conspirator, *made while the conspiracy exists*, and in furtherance of it, are admissible against other conspirators. 2 Brandis on North Carolina Evidence § 173 (2d rev. ed. 1982). In *State v. Covington*, 290 N.C. 313, 325-26, 226 S.E. 2d 629, 639 (1976), Justice Branch, now Chief Justice, wrote:

> When the State shows a *prima facie* conspiracy, the declarations of the co-conspirators in furtherance of the common plan are competent against each of them. *State v. Crump*, 280 N.C. 491, 186 S.E. 2d 369; *State v. Hairston*, 280 N.C. 220, 185 S.E. 2d 633. This is so even where the defendants are not formally charged with a criminal conspiracy. *State v. Absher*, 230 N.C. 598, 54 S.E. 2d 922. A criminal conspiracy is the unlawful conference of two or more persons in a scheme or agreement to do an unlawful act or to do a lawful act in an unlawful way.

However, "a declaration made before the conspiracy was formed, or after consummation of its object, is not admissible against the other conspirators. . . ." 2 Brandis on North Carolina Evidence § 173; Annot., 4 A.L.R. 3d 671 (1965). As Moore's statement to Lewis concerning what Watts said prior to his death was made after the murder took place, the statement was inadmissible against Oliver. Thus, while this statement was properly considered at sentencing repecting Moore's culpability for the Watts murder, it was improperly considered in Oliver's case. Without this evidence we find a "doubtful case" to support the submission of this aggravating factor with respect to defendant Oliver. *See State v. Oliver*, 302 N.C. at 61, 274 S.E. 2d at 204 (insufficient evidence to support this factor in the Hodge murder); *see also State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (1981).

Turning then to the submission of the aggravating factor of heinous, atrocious, or cruel in defendant's Moore's case, we hold that on the facts before us, there was sufficient evidence to submit this factor for jury consideration. Based on *Godfrey v. Georgia*, 446 U.S. 420, 64 L.Ed. 2d 398, defendant Moore suggests that this Court interpret G.S. § 15A-2000(e)(9) to require the infliction of physical injury prior to death in order to support the submission of this factor. We decline to limit our interpretation of an especially heinous, atrocious, or cruel murder to one which in-

volves only physical injury or torture prior to death or to physical injury alone in any event.

We are cognizant of the fact that G.S. § 15A-2000(e)(9) must not be viewed as a "catchall" provision submitted when there is no evidence of other aggravating factors. *Godfrey v. Georgia*, 446 U.S. 420, 64 L.Ed. 2d 398; *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, 454 U.S. 933, *reh. denied*, 454 U.S. 1117 (1981). In the present case, other aggravating factors were properly submitted and found.

In North Carolina, the submission of the aggravating factor that the murder was "especially heinous, atrocious, or cruel" has been approved in the following cases: *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569 (two victims, whose bodies were grossly mutilated, died as the result of multiple stab wounds); *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (defendant, through the execution of a deliberate plan and with a grin on his face, shot two victims, one of whom pleaded for his life); *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, --- U.S. ---, 74 L.Ed. 2d 622 (1982) (in an ordeal lasting several hours in extremely cold weather, defendant kidnapped, robbed, and raped his victim prior to his deliberate and senseless murder of her by striking her on the head with a cinderblock); *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982) (defendant beat his victim, hit her with a tire tool, deliberately and carefully cut her with a knife, raped her, ran over her with a car, and then left her alone to die); *State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214 (during a twenty-five minute ordeal, as defendant's wife continually pled for her life, defendant fired shots at her, one of which severed her spine, dragged her across a room, threw her against a wall, hit her on the head and face repeatedly with his fist and pistol, and fired shots at her in the presence of her small son prior to shooting her to death); *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981) (the victim was stripped from the waist down, had her hands tied behind her back and her brassiere tied around her neck, was marched at knife-point into nearby woods, and was forced to lie on the ground while she was beaten and murdered); *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025, *reh. denied*, 451 U.S. 1012 (1981) (with a two-foot machete, defendant entered the victim's house, threatened to rape the victim's fourteen year old sister, and struck at

the four year old victim while she was in her sister's arms, wounding her nine times); *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (defendant offered money to a ten year old boy for sex, and upon the boy's refusal, strangled him to death with a nylon fish stringer); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (defendant placed arsenic in the victim's tea and beer for fear that the victim would report the defendant's forgery of checks drawn on the victim's bank account); *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979) (defendant tried to strangle his victim, rendered her unconscious, sexually molested her, and realizing she was not dead, stabbed her to death); *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979) (the victim was shot several times and cut repeatedly with a knife, and while still alive was placed in the trunk of a car for several hours during which time he begged for his life, was driven to another county, taken out of the trunk, placed on the ground with his head on a rock, and shot twice through the head).

As can be seen from a review of these cases approving the submission of G.S. § 15A-2000(e)(9), the crimes range from the most gruesome and violent, focusing on the general dehumanizing aspects of the crime or on the physical agony of the victims to those which are less violent but nonetheless calculated to leave the victim in his last moments as a sentient being, aware but helpless to prevent impending death, focusing on the deliberate, intentional and senseless aspect of a conscienceless and pitiless murder inflicting psychological torture.

The murder of Allen Watts falls into the second category and on its facts is similar to *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, a case decided after *Oliver I.* In *Pinch*, the defendant raised his shotgun and pointed it at one victim who stated " 'I will go down laughing.' Without saying a word, defendant shot him in the chest." Defendant then turned to the second victim who said, "don't shoot me," "no, not me." Defendant, with " 'a sort of grin' on his face," shot anyway, and shortly afterwards commented that he had just " 'blown away' two dudes." *Id.* at 6, 292 S.E. 2d at 211. At trial, the State argued that the murders were especially heinous because defendant committed them for sport and amusement. The State also contended that the murder of the second victim, Ausley, was particularly despicable because defendant shot him in cold blood as he begged and pleaded for his life. In

addressing the issue of whether this evidence supported the existence of the aggravating factor that the murders were especially heinous, atrocious, or cruel, this Court found that "[t]he evidence showed that defendant carefully executed a deliberate and premeditated plan for murder." With respect to the second victim, Ausley, the murder "was merciless and conscienceless in that defendant shot him as he begged and pleaded for his life. Defendant seemed to enjoy the killings, and he showed no remorse for what he had done at that time. In fact, defendant callously evaluated his conduct in his subsequent announcement to his companions that he had 'just blown away two dudes.' " *Id.* at 35, 292 S.E. 2d at 228.

In the case sub judice, the evidence justifies a conclusion that the murder of Allen Watts, committed in total disregard for the value of human life, was a senseless murder, executed in cold blood as the victim pleaded "please don't shoot me"; and that defendant showed no remorse. In fact, defendant Moore later laughingly boasted to his fellow inmates that he pointed the gun at Watts who begged not to be shot and offered defendant more money, and that defendant "kind of liked the idea of it." As recently stated in *Magill v. State*, 428 So. 2d 649, 651 (Fla. 1983), "[i]t is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious, and cruel; rather, it is the entire set of circumstances surrounding the killing." We therefore hold with respect to defendant Moore's murder of Watts that under the peculiar circumstances of this case, including but not limited to the victim's imploring "please don't shoot me," the evidence was sufficient to support the submission to the jury of the factor that the murder was especially heinous, atrocious, or cruel.[2]

[8] Defendants further contend that the trial judge improperly instructed on the aggravating factor that the Watts' murder was especially heinous, atrocious, or cruel. We agree. The trial court instructed as follows:

2. It would seem, moreover, that the submission of this factor alone may not have been critical to the jury's decision to impose the death sentence. In *Oliver I* we held that the heinous, atrocious, or cruel aggravating factor was erroneously submitted as to defendant Oliver in the Hodge murder. Nevertheless, at resentencing, in the *absence* of this factor, Oliver again received a death sentence for that murder.

In this context, heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile; and cruel means to inflict a high degree or (sic) pain. You will notice that that says 'especially heinous, atrocious or cruel.' All three do not have to exist.

Cruel means designed to inflict a high degree or (sic) pain, with utter indifference to, or even an enjoyment of the suffering of others. It is not enough that the murder be heinous, atrocious or cruel, as I have just defined these terms, this murder must have been especially heinous, atrocious or cruel.

Not every murder is especially, so for this murder to have been especially heinous, atrocious or cruel, any brutality which was involved must have been exercised—must have exceeded that which is normally present in any killing. The murder must have been a conscienceless or pitiless crime, or one which was unnecessarily tortuous to the victim.

If you find from the evidence, beyond a reasonable doubt that this murder was an especially heinous, atrocious or cruel, *such as occurring while a man is begging for his life,* you would find this aggravating circumstance, and would so indicate by having your moderator write 'Yes' as an answer to number three.

(Emphasis added.)

As a basis for this assignment of error, defendants argue that by this instruction the jury was not correctly or adequately guided in its determination of this factor and that inserting the words "such as occurring while a man is begging for his life" constituted an expression of opinion in violation of G.S. § 15A-1222 and § 15A-1232. Defendants also point to the fact that Oliver's attorney was not permitted to argue to the jury that one of the factors it could consider in determining whether the murder was especially heinous, atrocious, or cruel was "whether or not there was some kind of torture involved in the murder of Mr. Watts." As we have held that the trial court improperly submitted the aggravating factor that the Watts' murder was especially heinous, atrocious, or cruel in Oliver's case, our review of this issue pertains only to defendant Moore.

We first note that by his own instruction to the jury, the trial judge acknowledged that one factor for jury consideration in determining whether a murder is especially heinous, atrocious, or cruel is whether some kind of torture was involved. The trial judge properly stated that "[t]he murder must have been a conscienceless or pitiless crime, or one which was *unnecessarily tortuous to the victim.*" (Emphasis added.) Thus it was error to prohibit defense attorney's argument to this effect.

The more serious error, and one which entitles defendant Moore to a new sentencing hearing for the Watts' murder, is the trial judge's statement essentially defining an especially heinous, atrocious, or cruel murder as one "occurring while a man is begging for his life." We have held that evidence of a victim's begging for his life is, like torture, one factor for jury consideration in determining whether a murder is especially heinous, atrocious, or cruel. However, it is not necessarily a determinative factor. Nor does this factor alone always necessitate a finding that a murder was especially heinous, atrocious, or cruel. The facts of this case do not support an instruction that this murder was especially heinous, atrocious, or cruel based solely on evidence that the victim begged for his life. Rather, on the evidence in this case, the trial judge should have instructed the jury substantially as follows:

Members of the jury, there is evidence in this case that tends to show that Mr. Watts was begging for his life at the time he was killed. What the evidence does show is, of course, for you to determine. If the State has satisfied you beyond a reasonable doubt that Mr. Watts was begging for his life at the time he was killed, you may consider that evidence, along with all the other evidence in the case, in determining whether the killing was especially heinous, atrocious, or cruel.

ii. Avoiding arrest

[9] Defendants next contend that the trial court erred in submitting as an aggravating factor that the crime was motivated by a desire to avoid detection and apprehension. G.S. § 15A-2000(e)(4). Each defendant now alleges that G.S. § 15A-2000(e)(4) is unconstitutionally vague as applied and that the alleged error deprived them of their constitutional rights.

This Court has approved the submission of G.S. § 15A-2000 (e)(4) to the jury when there is evidence that one of the purposes behind the killing was the desire by the defendant to avoid detection and apprehension for some underlying crime as opposed to submitting it only if the killing took place *during* an escape from custody or lawful arrest situations. In *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569, we held that evidence of a death is alone insufficient for submission to the jury of this factor and that such evidence must be coupled with "evidence from which the jury can infer that at least one of the purposes motivating the killing was defendant's desire to avoid subsequent detection and apprehension for his crime." *Id.* at 27, 257 S.E. 2d at 586. *See State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510.

The evidence supports the submission of this aggravating factor with respect to defendant Moore in the Watts' murder. Moore was credited with saying "you would have to be crazy to leave any witnesses." Oliver's act in murdering Hodge and attempting to murder Hodge's seven year old grandson, the only other witness, justifies submission of this aggravating factor in Oliver's sentence with respect to Hodge. *See State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569.

However, relying on the same reasoning which resulted in our finding error in the submission of G.S. § 15A-2000(e)(9) (heinous, atrocious, or cruel) on Oliver's individual culpability for the Watts' murder, we agree, for the same reason, that the trial court committed error in submitting G.S. § 15A-2000(e)(4) (killing to avoid detection) upon Oliver's conviction of the murder of Allen Watts, the store attendant. We noted earlier that the only evidence justifying the submission of G.S. § 15A-2000(e)(9) was the fact that Moore had stated to Johnny Lee Lewis that Watts begged for his life prior to being murdered. The only evidence to justify the submission of G.S. § 15A-2000(e)(4) was Moore's statement to Lewis that "you would have to be crazy to leave any witnesses." This, too, was inadmissible hearsay against Oliver, spoken after the conspiracy had been completed and out of the presence of Oliver. Thus, we hold, as we did in our discussion of G.S. § 15A-2000(e)(9), that the use of Moore's statement against Oliver to support the aggravating factor (G.S. § 15A-2000(e)(4)) was improper. Without this statement, there was only the weak-

est evidence upon which the trial court could have predicated the submission of G.S. § 15A-2000(e)(4) as to Oliver's individual culpability in the murder of Watts. That is, the evidence that Oliver intended to eliminate Watts as a witness, given the clear indication that Moore was the "trigger man" in that murder is insufficient to support the submission of this factor.

iii. Pecuniary gain

[10] Defendants next contend that the submission of the aggravating factor "pecuniary gain," G.S. § 15A-2000(e)(6), violated the double jeopardy clause and otherwise denied these defendants their constitutional rights. No objection was made at trial. They now argue that the submission of this aggravating factor was improper as substantially it was a submission of the underlying felony of armed robbery, the underlying felony which merged with the killings to support the first degree murder verdicts.

This Court in *Oliver I* specifically held that double jeopardy does not preclude the submission of pecuniary gain when the underlying felony is armed robbery. This Court has reiterated its position in *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), and *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981). As Justice Exum stated in *Oliver I*, "[t]he hope of pecuniary gain provided the impetus for the murder of both Watts and Hodge." 302 N.C. at 62, 274 S.E. 2d at 204. Defendants advance no reason for this Court to abandon its prior rulings on this issue.

Nor do we find that G.S. § 15A-2000(e)(6) is unconstitutionally vague. While the vagueness of this factor has not been specifically ruled on, this Court has repeatedly rejected broadside assertions that all the aggravating factors in G.S. § 15A-2000(e) are vague and overlapping. *See State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732; *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510; *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569.

(b) Guilt determination

[11] Again, without having objected at trial, the defendants now complain that the prosecutor repeatedly asked the jury during voir dire if they understood that the question of guilt had already been established. They further complain that the trial court charged the jury that the defendants had already been found guilty of the murders in question.

It is uncontroverted that the purpose of the resentencing hearing was solely for sentencing. The guilt of these two defendants had been conclusively determined and affirmed on appeal. *See Oliver I.* The case was not before the jury for a finding of guilt or innocence. It is defendant's contention, however, that barring the jury from redetermining guilt or innocence was tantamount to limiting the jury's consideration of evidence in mitigation. We do not agree. The jury was simply precluded from determining guilt or innocence. Thus, the instructions and comments to the jury that its function was punishment, not a determination of guilt or innocence, was in all respects proper.

(c) Burden on mitigating factors

[12] Defendants contend that the trial court erred in placing the burden on the defendants to prove each mitigating circumstance by a preponderance of the evidence. Defendants did not object to this instruction at trial. This Court has repeatedly ruled that the burden of persuasion as to the existence of mitigating circumstances is on the defendant. *See State v. Kirkley,* 308 N.C. 196, 302 S.E. 2d 144; *State v. Brown,* 306 N.C. 151, 293 S.E. 2d 569; *State v. Pinch,* 306 N.C. 1, 292 S.E. 2d 203; *State v. Williams,* 305 N.C. 656, 292 S.E. 2d 243; *State v. Hutchins,* 303 N.C. 321, 279 S.E. 2d 788. There is no reason for this Court to disturb these well-established and well-reasoned precedents.

(d) G.S. § 15A-2000 violative of Eighth Amendment

Defendants contend that North Carolina's death penalty statute, G.S. § 15A-2000, constitutes cruel and unusual punishment, is applied in a discriminatory and subjective manner, and is unconstitutionally vague. This issue has been litigated in this Court on numerous occasions and has been resolved adversely to these defendants. *See State v. Brown,* 306 N.C. 151, 293 S.E. 2d 569; *State v. Pinch,* 306 N.C. 1, 292 S.E. 2d 203; *State v. Barfield,* 298 N.C. 306, 259 S.E. 2d 510. Defendants have advanced no reasoned argument for this Court to disregard its prior decisions.

(e) Sentence recommendation

For the first time both defendants now object to the manner in which the trial court charged the jury concerning how to reach a sentence recommendation. The alleged error was, according to these defendants, charging the jury that if they found aggravat-

ing circumstances existed, and if they found that the aggravating circumstances were sufficiently substantial to warrant imposition of the death penalty, and if the aggravating circumstances outweighed any mitigating circumstances, then the jury must recommend a death sentence. Defendants argue that this instruction constitutes a mandatory imposition of the death penalty. Although defendants concede that the issue has been decided by this Court against them in *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569; *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, and in cases filed subsequently, defendants ask us to reconsider our decision in light of Justice Stevens' opinion respecting the denial of certiorari in *Pinch*.

In *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308 (1983), we addressed this issue in light of Justice Stevens' remarks in *Pinch*, and recommended a new instruction. However, Justice Stevens' concern dealt with whether mitigating circumstances were considered during all stages of the recommendation procedure. Since in these cases now before the Court, no mitigating circumstances were found, the alleged problem, now resolved in *McDougall*, does not arise. The assignment of error is rejected.

(f) Unanimity

[13] Defendants assign as error the trial court's failure to instruct the jury that if all twelve of them failed to agree that a mitigating circumstance existed or did not exist, then they were deadlocked; in failing to instruct the jurors that they need only be unanimous in their finding that mitigating circumstances existed; and in failing to instruct the jury that each juror could decide for himself which mitigating circumstance existed and the weight to be given to each mitgating circumstance.

We approved the instructions as given in *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732. Furthermore, in *State v. Kirkley*, 308 N.C. at 218, 302 S.E. 2d at 157, we held that "consistency and fairness dictate that a jury unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing." In *Kirkley* defendant argued that 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. On this question, we noted 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." *Id.* Thus, we held that the unanimity requirement is only placed upon the finding of whether an aggravating or mitigating circumstance exists. We find no error here.

7. PROSECUTORIAL MISCONDUCT

Defendants contend that the prosecutor continually injected "prejudice, irrelevant, and inflammatory matters into the resentencing trial." Inasmuch as we have yet to find error in defendant Oliver's case for the murder of Dayton Hodge, and as these issues may recur at resentencing on the Watts' murder, we will discuss each of these contentions. As a basis for this assignment of error, defendants point to the following instances of alleged prosecutorial misconduct:

1. During jury voir dire, the prosecutor asked one juror whether she had the "backbone" to be part of the machinery to bring about the death penalty, and asked another juror if she had the "intestinal fortitude" to be part of this machinery.

2. The prosecutor elicited testimony that Lewis was being held in protective custody.

3. In his closing argument, the prosecutor:

   a. Misstated the evidence that Mr. Watts had been working sixteen hours a day to build up his business.

   b. Misstated the evidence that Lewis had been responsible for the recovery of the gun.

   c. Improperly argued that the burden was on defendants to satisfy the jury that there "is something about these defendants of a redeeming value that gives rise to the mitigation that will cause you to drop it down to life imprisonment."

   d. Argued "divine law" to support the death penalty.

   e. Argued that too much attention was paid to the rights of defendants and not enough to the rights of the victims and argued the reality of the deaths of the two victims.

We will discuss each of defendants' contentions in the order presented above, noting at the outset that

> prosecutorial statements are not placed in an isolated vacuum on appeal. Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred. Moreover, it must be remembered that the prosecutor of a capital case has a duty to pursue ardently the goal of persuading the jury that the facts in evidence warrant imposition of the ultimate penalty.

State v. Pinch, 306 N.C. at 24, 292 S.E. 2d at 221-22.

[14] Defendants argue that in asking one juror if she had the "backbone" to impose a sentence of death, and another juror if he had the "intestinal fortitude," the prosecutor was "telegraphing" to the other jurors that only courageous people return a death penalty. Taken in context, the argument is neither supportable nor logical.

The first juror, Miss Jones, had stated that she believed in capital punishment as a necessary law, but she was "not quite sure" if she "could be a part of it." The prosecutor then responded, "What you are saying is that you believe it's necessary law, but you just don't know whether you have the backbone to be part of the machinery to bring it about; is that right?" The "intestinal fortitude" statement was made in the same context. The inquiry, reduced to layman's terms, was whether these jurors had the strength of their convictions to be able to return a sentence of death if the evidence required such a verdict. The statements were made not to badger or intimidate these witnesses, but rather to determine, in light of their equivocation, whether they could comply with the law. As such, these comments could be viewed as favorable, rather than unfavorable to defendants' position as they tended to encourage jurors who equivocated on imposition of the death penalty to serve. Defendants fail to show prejudice.

[15] Defendants next argue that it was improper for the prosecutor to question Johnny Lee Lewis concerning his being in protective custody. Lewis was permitted to testify on direct that he was being held in protective custody, and to explain that protec-

tive custody "means I have to be kept away from the regular population of inmates because of me testifying."

We find nothing in this answer to suggest, as defendants contend, that Lewis was in protective custody because of threats which Moore had made against him. While evidence in the original trial record shows that the witness Lewis had, in fact, been threatened by Moore, the prosecutor, at resentencing, did not place this information before the jury. Instead he allowed Lewis' answer to stand without comment.

We agree that the testimony concerning Lewis' being in protective custody was more properly the subject for re-direct following defense counsel's cross-examination of Lewis when, in an effort to show interest, this witness was asked whether he was receiving special treatment in return for his willingness to testify. The prosecutor simply anticipated that questions concerning the special treatment Lewis was receiving would be asked on cross. Defendant has shown no prejudice by the erroneous admission of this testimony on direct examination, however, because the legitimate purpose for which the testimony was admitted was established during cross-examination. *See State v. Rothwell*, 308 N.C. 782, 303 S.E. 2d 798 1983).

We now examine the prosecutor's closing argument and defendants' multifaceted allegations of prosecutorial misconduct with respect to that argument. No objection was made to any portion of this argument at the resentencing hearing. Upon failure to object to statements made during closing argument, the standard we employ is whether the statements amounted to such gross impropriety as to require the trial judge to act *ex mero motu*. *State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740 (1983); *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144.

With respect to the first alleged "misstatement," that Watts worked sixteen hours a day to build up his business, the prosecutor's embellishment can only be described as innocuous. The evidence supports, by inference, that Allen Watts worked long hours in his store. With respect to the second alleged "misstatement," that Johnny Lee Lewis was responsible for the recovery of the murder weapon, the record discloses that a search of the area south of the canal, where defendants were found, did not uncover the gun; Moore told Lewis that he hid the gun "across the

canal, partially buried." Officers then searched the canal area; the gun was found on the north side of the canal after Lewis had spoken to the authorities. The evidence fully supports the inference that Lewis' information led to the recovery of the gun. A prosecutor may argue the evidence and any inferences to be drawn therefrom. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125.

[16] We agree with the defendants that the prosecutor's statement with reference to their burden to "drop" the sentence to life imprisonment was, if viewed out of context, erroneous. When viewed in the context in which it was made, we cannot say that the statement constitutes prejudicial error.

The prosecutor began his final argument to the jury by reviewing the history of the death penalty in North Carolina. In this context, he stated that the United States Supreme Court had determined the need for "some sort of balancing for the jury, some sort of standard for the jury to follow in determining *whether a particular defendant deserves the death penalty.*" (Emphasis added.) He went on to comment that:

> There may be mitigating factors; that is, factors which tend to soften the type of crime that he committed in some way. And because of that we have come up with a list—the State has come up with a list of aggravating factors, factors which the law says aggravates a homicide or murder, and places it in the category where the death penalty is appropriate.
>
> It also lists some mitigating circumstances which you may take into consideration in balancing against the aggravating circumstances.

Following a discussion of the aggravating factors upon which the State intended to rely, the prosecutor made the following comments, including the one to which defendants now object:

> Now, that, basically, is the State's side of the case. The defense have presented some evidence to attempt to raise some mitigating circumstances in this case, and I will be very frank with you, I don't quarrel with anything they have put on. What have they put on that would mitigate or soften the affects of the acts of these two defendants on the 12th of December, 1978? The burden is on them, not beyond a reasonable doubt, but the burden is on them by the prepon-

derance of the evidence to satisfy you that there is something about these defendants of a redeeming value that gives rise to the mitigation that will cause you to drop it down to life imprisonment.

The prosecutor then proceeded to work through each of the four steps necessary to reach a recommendation of death, noting at the outset that the jury would be given verdict sheets by the trial judge,

a checklist of standards that you will apply in this case. Some you will apply beyond a reasonable doubt, some you will apply only by the preponderance of the evidence, but you will follow in this logical sequence you will end up with the result at the bottom, Ladies and Gentlemen of the Jury. You will either end up with either death or life, *if you follow the law in these sheets.* (Emphasis added.)

In arguing the substantiality question, the prosecutor stated:

We suggest to you that not one aggravating factor—which is *sufficient to give rise to the death penalty*—not two aggravating factors—which are certainly *sufficient to give rise to the death penalty*—but three separate aggravating factors should have been answered yes. Even if you answer some of these aggravating factors no, all it takes is one, folks, *to give rise to the death penalty.* The State is saying that you should answer that issue yes, that the aggravating factors or factor is *sufficiently substantial to call for the imposition of the death penalty.* (Emphasis added.)

Finally, the prosecutor advised the jury as follows:

Just remember the evidence and reason your way down through the checklists. Don't worry about what the bottom line is going to be, and when you get down there, you will find out what the bottom line will be, and *you will have followed the law* and you will have done justice in this case. (Emphasis added.)

Following the prosecutor's argument, counsel for both defendants worked through each of the four steps necessary to reach a recommendation of death, applying the evidence as they viewed it and asking that the jury recommend sentences of life

imprisonment. The trial judge then reviewed, essentially for the fourth time, the procedure set out in G.S. § 15A-2000, providing the jury with complete, concise, and correct written instructions which left no doubt as to the burden of the State on each issue relating to aggravation; the burden of the defendant as to factors in mitigation; the burden of the State to prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances; and that under all the circumstances of the case the aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty. Under these circumstances it is inconceivable that the jury did not scrupulously apply the law in reaching the recommendation that the defendants be sentenced to death. The inaccuracy of the prosecutor's one statement to the jury, in the context of his entire argument, does not constitute prejudicial error. Furthermore, in the absence of an objection, the statement did not amount to such gross impropriety as to require the trial judge to act *ex mero motu*, or to recall that the statement had been made and later caution the jury to disregard it during his instructions to the jury later that day.

[17] Defendants argue strenuously that the prosecutor's "divine law" argument was prejudicial, inflammatory, and not supported by the evidence. The prosecutor argued that the Bible does not prohibit the death penalty. He quoted portions of scripture to support his statement. He did not suggest that North Carolina's death penalty was "divinely" inspired; he simply stated that it was not inconsistent with scriptures of the Bible.

We first note, with some interest, that defense counsel stated in his closing argument that "[t]he State, again, has picked up on my arguments before. *We have been through this before, and we know pretty much what one is going to argue, and what the other is going to argue.*"[3] With this in mind, we turn to defense counsel's prepared argument:

3. We include this comment not only in reference to the present contention, but also because it clearly reflects that unless a resentencing hearing is conducted in a complete, sterile vacuum, with no human element injected into it, it is not possible to ignore certain facts, *i.e.*, that the defendant has been found guilty by another jury; that a sentencing hearing had been conducted; and that for some reason, the defendant was being resentenced. We are also not unmindful of the fact the between sentencings, time passes; events occur (such as defendant Moore's

> There's an Old Testament and New Testament. The New Testament is based on the teachings of Jesus Christ. He teaches us to forgive our trespassers. He teaches us mercy. He teaches us that the only sin that cannot be forgiven is blasphemy against the Church, against the Holy Spirit; that George Moore will not go unpunished if you find a life sentence in this case.

Thus, given defense counsel's anticipated argument that the New Testament teaches forgiveness and mercy, and reading the prosecutor's argument as it was intended, we find nothing, in the absence of objection, that amounts to plain error which would justify reversal.

[18] Finally, we address defendant's argument as to the impropriety of the prosecutor's emphasizing the victims' rights. In support of their argument defendants cite to a number of cases dealing with the guilt/innocence phase of a trial. We find these cases inapposite.

During the guilt phase of a trial, the focus is on guilt versus innocence. Mercy is not a consideration, just as prejudice, pity for the victim, or fear may be an inappropriate basis for a jury decision as to guilt or innocence. Arguments which emphasize these factors are properly deemed prejudicial. *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283; *State v. Graves*, 252 N.C. 779, 114 S.E. 2d 770 (1960). However, during sentencing, considerations are different. The emphasis is on the circumstances of the crime and the character of the criminal. In *State v. Pinch*, 306 N.C. at 25, 292 S.E. 2d at 222, this Court approved of the prosecutor's remarks concerning the victims and their aspirations and families. This Court stated:

> The district attorney was merely reminding the jury that, although it did not know much about him, [the jury] should also carefully consider the value of the victim's life in making its life or death decision about defendant.

We find no error.

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behavior while on death row); and these events cannot realistically be ignored if relevant.

8. JOINT RESENTENCING

[19] Finally, each defendant contends that his rights to due process and to a particularized and individualized consideration by the jury of the appropriateness of the death penalty in his case were violated by the holding of a joint resentencing trial. Defendants point out that the North Carolina death penalty statute, G.S. § 15A-2000, makes no specific reference to the question of whether co-defendants who are tried and convicted at a joint trial should be sentenced at a joint or separate sentencing trial. Defendants further point out that theirs is the first case in which a death penalty was imposed, an appeal heard, and a subsequent joint resentencing trial held.

Prior to the first trial, the State moved for joinder pursuant to G.S. § 15A-926. Defendant Oliver objected. The issue was not briefed and apparently not argued before this Court in *Oliver I.* That opinion makes no reference to the fact that defendants were convicted and sentenced at a joint trial. Thus, at least by implication, we did not disapprove of the joint trial.

The issue is properly before us by way of defendant Oliver's objection to a joinder. Should we find error in Oliver's case, the error will be equally applicable to defendant Moore. *See State v. Boykin,* 307 N.C. 87, 296 S.E. 2d 258 (1982) (non-complaining co-defendant's case remanded "to prevent manifest injustice" where consolidation of cases was found erroneous). While this assignment of error bears serious consideration and raises important questions under G.S. § 15A-2000, we find no error.

We begin with the general proposition that pursuant to G.S. § 15A-926(b)(2), the State may move and the Court may permit joinder of charges against two or more defendants for the guilt determination phase of a 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.

The present case was particularly suited for joinder. The defendants, acting in concert, and both being present, robbed a convenience store, murdering the store attendant and an innocent bystander. The acts of one were attributable to the other. In order to convict defendant Oliver of the first degree murder of Watts, the attendant, it was necessary to show that the murder was either committed by, or in the actual or constructive presence of Oliver in pursuance of a common plan or purpose. *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979). Defendant Moore's conviction for the first degree murder of Hodge rested on the State's evidence that he and Oliver had formed a common plan to commit a crime and Hodge's murder was a probable consequence thereof. *Id.* In fact, in *Oliver I*, this Court considered as "frivolous," defendant Moore's contention that the trial judge should have instructed as to him on the offenses of accessory before and accessory after the fact to the crimes of armed robbery and murder. In *Oliver I* we stated that:

> There is no evidence here that Moore was an accessory. The evidence shows that both defendants were present at the scene and were acting together in the commission of the armed robbery. The murders occurred in furtherance of their common purpose to commit this crime or as a natural consequence thereof. Where two or more persons 'join in a purpose to commit a crime, each of them, *if actually or constructively present*, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.' *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E. 2d 572, 586 (1971), *death sentence vacated*, 408 U.S. 939 (1972) (emphasis supplied); *accord, State v. Lovelace*, 272 N.C. 496, 158 S.E. 2d 624 (1968).

State v. Oliver, 302 N.C. at 55, 274 S.E. 2d at 200.

We also note that at the guilt phase of the trial, defendants were protected under *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476 (1968), in that out-of-court statements made by

Moore which tended to implicate defendant Oliver were not before the jury. 302 N.C. at 35, 274 S.E. 2d at 188 fn. 3.

The threshold question, then, is whether, with a view toward the necessity of death qualifying a jury pursuant to G.S. § 15A-2000, a joint trial at the guilt phase is appropriate under any circumstance.[4] Thus, although defendant Moore asserts in his brief that he is not "challenging the propriety of the joint trial on guilt or innocence, or even of the joint sentencing hearing held immediately after this trial, but only the propriety of the subsequent joint resentencing trial," we view the issue differently. If the joint trial on guilt or innocence and the first joint sentencing hearing were proper, a joint resentencing hearing, as we will illustrate below, would of necessity, be equally proper.

In arguing that these defendants were not prejudiced by the trial court's decision to permit a joint sentencing hearing in the first instance, the State points out that defendant Moore was given a life sentence for his conviction in the Hodge murder. Clearly the jury gave individual consideration to each defendant's *participation* in the murders. While the argument is persuasive, it is not determinative of the issue. As defendant Moore's participation in the Hodge murder was not an issue at resentencing, the State's argument is, at best, only an illustration that a joint sentencing hearing does not preclude individualized consideration of the appropriateness of the death penalty in each case.

We focus on each defendant's arguments in support of his contention that he was prejudiced by a joint resentencing hearing. In so doing, we note first that neither defendant attempts to argue that there is a *greater need* for separate sentencing trials at resentencing than at an original sentencing. Secondly, defendants' arguments in support of separate resentencing hearings are

4. The alternative of permitting a joint trial at the guilt phase, but requiring separate trials for sentencing, would do much to further defense attorney's position that death qualifying a jury results in a "guilt prone" jury. *See State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203; *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183. We have consistently upheld the requirement of G.S. § 15A-2000(a)(2) that in capital cases, the jury be death qualified. That question aside, whatever advantage there may be to requiring separate sentencing trials, is clearly outweighed by the result of having to empanel three separate juries and conducting what would essentially be three separate trials.

equally applicable to sentencing in the first instance, and it is these arguments that we now reject.

The thrust of these arguments is that pursuant to G.S. § 15A-2000, a defendant is constitutionally entitled to individualized consideration of his character, his record, and his particular acts. *Lockett v. Ohio*, 438 U.S. 586, 57 L.Ed. 2d 973 (1978). Thus, argue defendants, a jury should not be allowed to hear the evidence admissible only against a co-defendant. Both defendants implore: "As difficult as it is for a defendant to defend his life against the state, no defendant should have to fight for his life against a co-defendant as well as the state." We are further asked, in evaluating this question, "to try to picture what the proceeding below would have been like" had each defendant been separately sentenced. Defendants then state that "[i]t would certainly not be stretching a point to say that the proceeding would have been far different and far fairer."

To illustrate, defendant Oliver argues that the aggravating factors that the murder of Allen Watts was especially heinous, atrocious or cruel and that it was committed for the purpose of avoiding a lawful arrest were erroneously submitted in his case, having been based on hearsay evidence admitted against defendant Moore. As noted earlier in this opinion, we agree that the submission of these factors, at sentencing, with respect to Oliver's individual culpability for the murder of Watts was error. The fact that the statement was admitted as a basis for submitting an aggravating factor against Oliver at both the sentencing and resentencing hearings does not *per se* render the joint trial so prejudicial as to require separate trials. The error lies not in granting the State's motion for a joint trial, but in basing an aggravating factor on evidence erroneously admitted as to the co-defendant Oliver.

Defendant Moore contends that the Hodge killing should not even have been mentioned before the jury at resentencing, where the only issue as to Moore was the penalty for the murder of Allen Watts. He states that "the jury was given the impression that they were punishing defendant Moore for both the Hodge and Watts murders." At the initial sentencing hearing, the jury determined that Moore's participation in the Hodge murder was "relatively minor," and he received a life sentence. At resentenc-

ing, the jury made appropriate findings in aggravation and mitigation, none of which included a consideration of the Hodge murder. Moore's own statements, coupled with his active part in the Watts' murder, were sufficient to support the jury's decision. In fact, in response to the prosecutor's request at resentencing that the trial judge "integrate" a standard charge on acting in concert into the charge on the aggravating and mitigating factors, the trial judge astutely commented:

> I don't think we have to. I'm a little scary on it. I do intend to tell them right at the outset, 'Now, Ladies and Gentlemen, you simply are not concerned with guilt or innocence. That has already been determined. Oliver is guilty of the murder of Watts and guilty of the murder of Hodge. Moore is guilty of the murder of Watts. He is not involved, as far as you are concerning (sic), in the murder of Hodge.'

It can be seen from the foregoing that the "evils" of which these defendants now complain were not peculiar to the resentencing trial, but were present at the original trial. That is, if facts were properly before the jury at the guilt phase, they were properly before the jury at sentencing and therefore at resentencing. *See* G.S. § 15A-2000(a)(3).

By their arguments, each defendant would ask that his respective culpability be viewed in a vacuum, somehow isolated and unconnected to the acts of the other. Yet, defendants' culpability for these crimes is inextricably intertwined and all evidence relevant to the circumstances of these crimes was properly before the jury at the guilt phase. We have held that the State is entitled to rely upon evidence which it produced at the guilt phase of the trial at the sentencing hearing. G.S. § 15A-2000 (a)(3); *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788, or at resentencing.

To summarize: Inasmuch as G.S. § 15A-2000 provides that the same jury may determine both guilt and sentence in a capital case; and accepting the State's argument that a jury, properly instructed, can in fact give individualized consideration to each defendant's culpability, and did so at the first sentencing hearing, we hold that defendants were not prejudiced by a joint trial in the first instance. With respect to resentencing, defendants have failed to show any greater prejudice by the holding of a joint

resentencing trial. Defendants, moreover, are entitled to no greater advantage than they enjoyed at the initial sentencing. This is so even when, as the circumstances present themselves in this case, a jury has previously determined that one defendant is to be given a life sentence in one murder. That is, there is absolutely no basis for finding as a matter of law, or on these facts, that a jury will impose a sentence of death based on a co-defendant's participation in a murder for which he alone must be sentenced. This Court is charged with the duty of carefully reviewing every capital case in which a sentence of death is imposed, *see State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (decision of the jury should be "searchingly" reviewed to insure absence of "unfairness, arbitrariness, or caprice"). It is not our role to second-guess a jury before whom evidence is properly presented and which has been properly instructed.

Finally, we have relied in part on the recent Supreme Court decision in *Enmund v. Florida*, 458 U.S. 782, 73 L.Ed. 2d 1140. That case involved a joint trial in a first degree murder case which, like the case before us, was tried on a felony-murder theory. Enmund was tried and sentenced jointly with his co-defendant. On appeal to the Supreme Court, Enmund argued successfully that in order to justify the imposition of the death penalty, the jury must consider each co-defendant's individual culpability in the murder; that is, whether a defendant who participated in a robbery actually killed, attempted to kill, or intended the death of the victim or that lethal force be employed. Implied in *Enmund* is approval of joint sentencing hearings with the caveat that there be individualized consideration given to each defendant's culpability.

II

DEFENDANT MOORE

1. EVIDENTIARY ISSUES

[20] Defendant Moore assigns as error the admission of testimony concerning incidents that occurred in prison after his conviction for this offense. He argues that the evidence was irrelevant, inflammatory and prejudicial, constitutes impermissible hearsay, and that it permitted the jury to consider evidence of non-statutory aggravating factors. As it is possible that these

evidentiary issues may recur at resentencing, we will comment upon each of them.

We begin with the proposition that in order to prevent arbitrary or erratic imposition of the death penalty, the State must be permitted to present, by competent, relevant evidence, any aspect of a defendant's character or record and any circumstances of the offense that will substantially support the imposition of the death penalty. *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308.

Turning then to the testimony complained of, we consider the following:

William Bennett Dillard, Jr., an employee of the North Carolina Department of Correction at Central Prison, testified as to an incident that occurred as the "death row inmates" were being removed from the recreation yard. Moore allegedly hit another inmate on the side of the head and as the inmate turned around, Moore stated "I have killed white mother f----- before, and I can kill you—I will kill again." On cross-examination Mr. Dillard was asked and did not recall the name of the other inmate or inmates involved in the incident. On redirect, Mr. Dillard was asked how it was that he had known Moore's name, but had trouble remembering the names of other inmates. Dillard responded that "If they do keep causing trouble, you know, officers learn their names quicker than other inmates' names, and inmate Moore has been wrote up for several charges, for two or three assaults."

Edward Alline, a correction officer at Central Prison, testified as a witness for defendant Oliver. On cross-examination, Officer Alline was questioned concerning Moore's reputation in prison. He testified that Moore was the "kind of a person that you have to talk to in order to be obedient."

With respect to Officer Dillard's reference to "death row inmates," defendant objected to that portion of the answer as being nonresponsive. The objection was overruled. Defendant did not move to strike. *See State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983). Defendant contends, under the authority of *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283, that this statement constituted reversible error.

Britt dealt with a deliberate and repeated reference which made it abundantly clear to the jury that the defendant had been

on death row. The jury was then apprised, by the trial judge's "curative" instruction, that defendant had, in fact, been sentenced to death by another jury in the same case. In finding the challenged questions by the district attorney to be "highly improper and incurably prejudicial," this Court wrote that:

> [N]o instruction by the court could have removed from the minds of the jurors the prejudicial effect that flowed from knowledge of the fact that defendant had been on death row as a result of his prior conviction of first degree murder in this very case. The probability that the jury's burden was unfairly eased by that knowledge is so great that we cannot assume an absence of prejudice. *State v. Hines, supra.*

Id. at 713, 220 S.E. 2d at 292.

Thus, the evil addressed in *Britt* was the potential danger that this knowledge, *i.e.*, that another jury had sentenced defendant to death in "this very case," would unfairly ease the second jury's burden in deciding to impose the death sentence.

While we find the facts in the present case distinguishable, we must caution prosecutors to scrupulously avoid any reference to death row or death row inmates, and to fully instruct their witnesses to avoid any reference to death row or death row inmates whenever it is appropriate to do so.

Moore's admission that he had killed whites before was introduced solely for the purpose of corroborating the testimony of Johnny Lee Lewis that Moore had, in fact, been the "trigger man" in the murder of Watts. This was the argument made at voir dire, prior to the introduction of the testimony, and was again made during the prosecutor's final argument to the jury.[5] We hold that under these circumstances, the testimony was relevant and admissible for the purpose for which it was offered. *See State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569 (defendant's statement to fellow inmate held admissible); *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970) (defendant's admission to jailmate that he had shot the deceased held admissible); as to corroboration, *see*

5. "I have killed white M.F.'s before and I will kill again." If you look at his record, Ladies and Gentlemen of the Jury, you see no previous convictions for homicide. What is he talking about? He's talking about Allen Watts. He's admitting, in effect, that he was the trigger man in that killing.

generally 1 Brandis on North Carolina Evidence § 49 (2d Rev. Ed. 1982).

We note that although *Enmund v. Florida*, 458 U.S. 782, 73 L.Ed. 2d 1140, was not decided until after this sentencing hearing, under that case, the burden would be on the State to prove that defendant Moore personally killed Watts, was actually present, or intended that Watts be killed. Thus, Lewis's testimony has become highly relevant, as is the corroborative testimony offered by Dillard.

In cross-examining Officer Dillard concerning Moore's admission, defense counsel questioned Dillard closely about his inability to remember the exact date of the incident or the names of the other inmates. Thus, it was proper on redirect examination for the district attorney to ask Dillard how he had remembered only Moore's name. Under these circumstances, Officer Dillard's response was admissible. *See State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980) (evidence which might not otherwise be admissible may become admissible to explain or rebut evidence put in by the defendant himself).

Finally, defendant objects to the admission of testimony elicited from Edward Alline that Moore had a reputation for being uncooperative at Central Prison. The State responds that this reputation evidence was admissible to rebut evidence of good character which Moore *later* intended to introduce. We held in *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761, that only after defendant has offered evidence of mitigating circumstances may the State offer evidence in rebuttal. We find it irrelevant that "the prosecutor knew already Moore would put on good character evidence from the last hearing." While the admission of this testimony, offered by the State solely to refute a mitigating circumstance upon which defendant might later rely, was error, the error was not prejudicial. Officer Dillard had testified that Moore had assaulted and threatened a fellow inmate and that he remembered him as a troublemaker who had been "wrote up." Officer Alline's testimony offered nothing not already properly elicited from Officer Dillard.

Furthermore, properly presented, much of the testimony concerning Moore's assaultive behavior and uncooperative attitude in prison would have been relevant to rebut the statutory mitigating

factor G.S. § 15A-2000(f)(7), the age of the defendant at the time of the crime. Relevant to this inquiry is not only the chronological age of the defendant, but also his experience, criminal tendencies, and presumably the rehabilitative aspects of his character. *See Giles v. State*, 261 Ariz. 413, 549 S.W. 2d 479, *cert. denied*, 434 U.S. 894 (1977).

[21] Defendant Moore next assigns as error the admission of testimony elicited on cross-examination of a character witness concerning defendant's prior criminal record. Larry Vaught testified in Moore's defense. He testified that the defendant had never engaged in fighting; had never carried a gun; and had never carried a knife. On cross-examination, the witness was asked if he was aware of defendant's prior convictions on charges of larceny, trespassing, damage to real property, and breaking or entering and larceny. The witness was aware that defendant had served time in prison but was not familiar with the various charges on particular dates. He then stated, in response to the prosecutor's question, that he did not know everything about the defendant.

Defendant had, prior to this testimony, stipulated to his criminal record and it was before the jury. Furthermore, defendant failed to object to any of the questions or responses. While we agree that a character witness may not be questioned on cross-examination as to a defendant's particular acts of misconduct, *State v. Hunt*, 287 N.C. 360, 215 S.E. 2d 40 (1975), we find no plain error sufficient to justify awarding defendant a new trial on this issue. The error was not brought to the attention of the trial judge, and as the jury had previously been apprised of the information elicited on this exchange, the error here complained of does not rise to the status of one so grave as amounts to a denial of a fundamental right of the accused. *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804.

[22] Defendant Moore next argues that the trial judge improperly limited his cross-examination of Bobby Hodge and Johnny Lee Lewis.

Bobby Hodge was the grandson of the deceased, Dayton Hodge. He was present at the time of the killings. He testified that he saw defendant Moore come out of the store after the Watts' shooting. At the first trial, Bobby had testified that he did

not recognize Moore as the man who came out of the store. On cross-examination at resentencing, defense counsel asked Bobby if he remembered his testimony at the first trial that he hadn't recognized Moore. The child answered "Yes, sir." Defense counsel then asked "But you didn't recognize him at that time, but you do recognize him now?" Bobby answered, "No, sir." The prosecutor objected and the objection was sustained, at which time the trial judge correctly pointed out that "a question of guilt" was not at issue.

This assignment of error is without merit. The child's answer was before the jury. The jury was never instructed to disregard the question or answer. The information sought to be elicited was already before the jury; that is, that Bobby Hodge had earlier been unable to identify Moore. Because Moore's guilt had already been determined, the substance of the question was collateral to sentencing. We have stated repeatedly that the scope of cross-examination lies largely within the sound discretion of the trial court, and its rulings will not be disturbed absent a showing of prejudicial error. *State v. Atkins*, 304 N.C. 582, 284 S.E. 2d 296 (1981). We find no such error here.

Likewise, we find no error in the trial judge's ruling in the cross-examination of Johnny Lee Lewis. Defense counsel questioned Lewis about the shooting death of his wife, for which he was serving a prison sentence for second degree murder. The objected to testimony concerned how many times Lewis had shot his wife. The trial judge correctly stated "We are not trying that case."

2. INEFFECTIVE ASSISTANCE OF COUNSEL

[23] Defendant contends that he was denied effective assistance of counsel inasmuch as his attorney, Robert D. Jacobson, had represented the State's witness, Johnny Lee Lewis, on Lewis's appeal to this Court. *See State v. Lewis*, 298 N.C. 771, 259 S.E. 2d 876 (1979). He therefore alleges a "conflict of interest." Defendant Moore was aware of this "conflict of interest" at the first trial. *See* Record, *Oliver I*, pp. 461-62. This knowledge apparently did not concern him sufficiently to retain new counsel prior to resentencing. Furthermore, defendant fails to enunciate in what way he was prejudiced by this "dual representation." In *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979), *cert. denied*, 446 U.S.

929 (1980), we rejected a *per se* rule that would compel counsel to withdraw completely from any case wherein a conflict developed and we declined to award a new trial in the absence of a showing of actual prejudice. This defendant Moore has failed to do. He neither suggests nor discusses how Attorney Jacobson's representation on Lewis's appeal rendered Jacobson's representation of Moore ineffective. In fact, Jacobson's familiarity with Lewis's prior criminal record, including the shooting death of his wife, worked to defendant's advantage in Jacobson's cross-examination of Lewis.

3. PEREMPTORY INSTRUCTION ON AGE IN MITIGATION

[24] Finally, defendant Moore contends that the trial judge erred in failing to peremptorily instruct that Moore's age was a mitigating factor. This assignment of error is meritless. At the time of the crime defendant was nineteen years eleven months of age. As we stated earlier, the chronological age of a defendant is not the determinative factor under G.S. § 15A-2000(f)(7). To this effect we cite with approval the language in *Giles v. State*, 261 Ariz. at 483, 549 S.W. 2d at 483:

> Any hard and fast rule as to age would tend to defeat the ends of justice, so the term youth must be considered as relative and this factor weighed in the light of varying conditions and circumstances. It is well known that two young persons may vary greatly in mental and physical development, experience and criminal tendencies (citation omitted). One of these factors may have greater significance than the others in some cases, depending on the circumstances.

III

DEFENDANT OLIVER

1. EVIDENTIARY ISSUES

[25] Defendant Oliver contends that the trial judge erred in not permitting him to elicit testimony concerning his reputation in the community.

The defendant offered testimony of eight character witnesses. Both Officer Dillard and Officer Alline testified that defendant Oliver, unlike defendant Moore, did not have a reputation as a disciplinary problem at Central Prison. Marion Eaddy, de-

fendant's brother-in-law, testified that defendant worked for him at his used car lot and was a good worker. Defendant was a "fine person," "most mannerly," and "raised up in a well home." "His father is a deacon." Joanne Eaddy testified that defendant was "well mannered"; that "his reputation has always been good." Reverend Anderson testified that defendant was a "good worker," "a respectable boy," and an "honorable boy." Reverend English testified that defendant had a good reputation in his community as did Isaac Oliver, defendant's father. Doris Harley, a school friend, testified that defendant was well mannered and polite. He would hold open doors for people and was willing to help others.

The substance of defendant's contention on this issue occurred during direct examination of Reverend Anderson. The Reverend testified that defendant was "a respectable boy, but something went wrong somewhere down the road. I don't know what, but he's an honorable boy. He's honorable. He's honored all people that's older than he is, in my establishment—in our establishment." Objection was taken to "a continued remark." At this point the testimony had become repetitive and the trial court acted properly and within its discretion in sustaining the objection. *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788.

Reverend Anderson was then asked if he had "heard other people in the Fair Bluff community say other things about him [Oliver], anything else about him?" An objection to this question was sustained. The witness had previously stated that the "big majority of the people think well of J. W." Thus, the objected to question, in light of all the previous testimony, had essentially been answered. We have held that the statute governing evidence admissible at the sentencing phase of a bifurcated capital felony case does not alter the usual rules of evidence or impair the trial judge's power to rule on the admissibility of evidence. *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551. We find no error in the trial court's ruling.

We note, however, in reviewing the testimony of these character witnesses, that the prosecutor's cross-examination arguably exceeded the bounds of propriety, was at best inappropriate, and, as discussed earlier, was contrary to law in that repeated reference was made to Oliver's criminal record and specific acts of mis-

conduct. We caution again that cross-examination of a criminal defendant's character witness may not extend to particular instances of misconduct. *See State v. Hunt*, 287 N.C. 360, 215 S.E. 2d 40; *see also State v. Lefevers*, 216 N.C. 494, 5 S.E. 2d 552 (1939); *State v. Cathey*, 170 N.C. 794, 87 S.E. 532 (1916); *see generally* 1 Brandis on North Carolina Evidence § 115 (2d Rev. Ed. 1982).

2. INADEQUATE JURY INSTRUCTION

[26] Defendant Oliver argues that the trial judge erred in failing to fully instruct the jury because, rather than repeating his instructions after instructing as to Moore, the trial judge stated that his instructions remained the same for Oliver as he had just given for Moore. Defendant made no objection to his procedure at trial.

The trial judge handed out written instruction sheets as to each defendant and each case. Thus, the jury received three sets of instructions. The trial judge then explained Moore's instructions and explained where Oliver's instructions differed. Considering the fact that each set of instructions was fully written out and was before the jury, defendant has failed to show how he was prejudiced. In fact, the trial judge is to be commended for providing the jurors with instructions in written form. *See State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569 (holding no error in the trial court's failure to submit the charge in writing, at the request of the defendant). We approve of this procedure in a joint sentencing hearing should either defendant so request and should the number, complexity, and nature of the aggravating and mitigating factors so dictate.

IV

PROPORTIONALITY

[27] By this opinion we are affirming defendant Oliver's sentence of death for the murder of Dayton Hodge. It is therefore necessary that we review the record, pursuant to G.S. § 15A-2000 (d)(2), to determine (1) whether the record supports the jury's finding 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 the aggravating circumstances in defendant Oliver's case for the Hodge murder. 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.

Finally we must determine whether the sentence of death in this case is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. For purposes of this proportionality review, we have used as a pool for comparison

> *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.

State v. Williams, 308 N.C. 47, 79, 301 S.E. 2d 335, 355 (1983).

In the case of defendant Oliver's murder of Dayton Hodge, we hold as a matter of law that the sentence is neither disproportionate nor excessive considering both the crime and this defendant. Murder can be motivated by emotions such as greed, jealousy, hate, revenge, or passion. The motive of witness elimination lacks even the excuse of emotion. We are persuaded by the fact, as we were in *State v. Williams*, 305 N.C. 656, 292 S.E. 2d 243, that the Hodge murder was the result of a deliberate plan to seek out a business establishment to rob and, without the slightest provocation or excuse, to callously and in cold blood shoot at close range anyone unfortunate enough to be present at the time. Dayton Hodge was murdered. His grandson's life was miraculously spared. With this holding, the statutory death sentence must be affirmed.

To summarize our holding:

1. As to defendant Oliver for the murder of Dayton Hodge, the sentence of death is affirmed.

2. As to defendant Oliver for the murder of Allen Watts, for error found in the submission of two aggravating factors, and due to the peculiar facts surrounding this defendant's participation in this murder, the case is remanded to Superior Court, Robeson County, for resentencing.

3. As to defendant Moore for the murder of Allen Watts, for error found in the jury instruction on one aggravating factor, the case is remanded to Superior Court, Robeson County, for resentencing.

Case 78CRS25575 State v. John Wesley Oliver—no error.

Case 78CRS25576 State v. John Wesley Oliver—remanded for resentencing.

Case 78CRS25578 State v. George Moore, Jr.—remanded for resentencing.

Justice MARTIN dissenting in part and concurring in part.

I dissent from the portion of the majority opinion that holds the solicitor's argument, improperly placing the burden of proof on defendants with respect to the jury's recommendation of life imprisonment, was error but not prejudicial. I find it to be prejudicial error. This error requires a new sentencing hearing.

Otherwise, I concur in the well-reasoned majority opinion.

Justice FRYE joins in this opinion.

Justice EXUM dissenting.

In my view both defendants are entitled to new sentencing hearings (Moore in the Watts murder and Oliver in both murders) because the district attorney was permitted to say in his final argument that defendants had the burden of satisfying the jury they deserved life imprisonment:

> The burden is on them, not beyond a reasonable doubt, but the burden is on them by the preponderance of the evidence to satisfy you that there is something about these defendants of a redeeming value that gives rise to the mitigation that will cause you to drop it down to life imprisonment.

A defendant in a capital case does have the burden to satisfy the jury by a preponderance of the evidence that particular mitigating circumstances exist, *State v. Johnson*, 298 N.C. 47, 257 S.E. 2d 597 (1979); but our capital sentencing statute makes it abundantly clear that even though defendant bears this burden, the burden of persuading the jury that the crime and defendant are deserving of death remains always with the state. The majority concedes that, standing alone, the argument was error; but it concludes that when considered in context of the prosecutor's entire argument and the trial court's instructions to the jury on the various burdens of persuasion, the error was harmless.

I cannot join in this conclusion. Nowhere in the trial court's instructions did it call attention to the particular erroneous statement by the prosecutor or direct the jury to disregard it. Nowhere did the trial court instruct generally that if his instructions on questions of law differed from the law as argued by counsel, the jury would be guided solely by what the court, not the lawyers, said. Indeed, the trial court told the jury to do just the opposite:

> It is your duty, not only to consider all of the evidence, but also to consider all of the arguments, the contentions and positions urged by the State's attorney and by the defense attorneys in their speeches to you, and any other contention that arises from the evidence; to weigh them in the light of your common sense and to make your recommendations as to punishment.

It is true that the trial court's instructions were correct on the various burdens of persuasion arising under the statute and that the court did tell the jury to apply the law "as I give it to you." It is extremely doubtful, however, that in the absence of a specific instruction to do so, the jury on its own motion disregarded what the prosecutor said on this point. It is particularly unlikely in light of his subsequent instruction that it was the jury's "duty . . . to consider all of the arguments, the contentions

and positions urged by the State's attorney." Indeed, depending on the relative force and vigor with which the point was made by the prosecutor and the trial court, respectively, the jury might well have given more weight to the prosecutor's version than it did to the trial court's, at least in the absence of more specific instructions on the defect in the prosecutor's version of the law.

Neither do I see how the prosecutor's other arguments made before and after the offending statement detract from its prejudicial effect. The majority seems to conclude that the prosecutor intended merely to argue that the burden of persuasion on the existence of specific mitigating circumstances was on defendants. Since this is what the prosecutor meant to say, the majority concludes the jury must have so understood his words. His words, however, unequivocally assign to defendants the burden of persuading the jury that the sentences should be "dropped down" to life imprisonment once the state has persuaded it of the existence of aggravating circumstances. Without cautionary jury instructions directed specifically and expressly to the error in the prosecutor's statement and in light of instructions which directed the jury to consider "all of the arguments . . .," I am unable to conclude that the statement did not mislead the jury to defendants' prejudice as to which party bore the burden of persuasion on the ultimate question whether defendants should live or die.

Even if it is conceded that the death penalty is not an inappropriate punishment as a matter of law, the case for a death sentence here is not overwhelming. There is little to distinguish these cases from other armed robberies where the victims, or others, were murdered and life imprisonment was imposed. *See e.g., State v. Barnett* [, *Barnett and Wilder*], 307 N.C. 608, 300 S.E. 2d 340 (1983) (armed robbery of convenience store and murder of clerk; one defendant shot at patron leaving the store); *State v. Miller* [*and Williams*], 302 N.C. 572, 276 S.E. 2d 417 (1981) (armed robbery of convenience store and murder of operator); *State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980) (defendant shot manager of supermarket in armed robbery of the store with an accomplice); *State v. Weimer*, 300 N.C. 642, 268 S.E. 2d 216 (1980) (defendant drove getaway car in armed robbery of supermarket and murder of manager); *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979) (armed robbery of grocery store and murder of operator by beating with baseball bat); *State v. Cherry*,

298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980) (received death penalty at original trial but received life imprisonment on resentencing for armed robbery of convenience store and murder of an employee); *State v. Crews* [*and Turpin*], 296 N.C. 607, 252 S.E. 2d 745 (1979) (two defendants shot and killed two strangers to obtain their money and vehicle; one of the victims begged Turpin three times not to shoot him but Turpin shot him once in the arm and then in the head). In close cases, placement of the burden of persuasion is critical to the outcome. I cannot conclude, therefore, that the error could not have affected the outcome of the sentencing hearing. *See* G.S. 15A-1443 (1978).

Defendant Moore is entitled to a new sentencing hearing in the Watts murder on the separate ground that inadmissible and highly prejudicial evidence was offered against him. The jury knew: both Moore and Oliver had been previously convicted of the capital crime of first degree murder; the question of their guilt had been finally determined; and it was to determine only the punishment to be imposed for that conviction. Yet the prosecutor was permitted to elicit evidence, over defendant's objection, that Moore was on "death row," clearly indicating that Moore had been sentenced to death at his first trial.

In *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975), tried by the same prosecutor who tried the instant case, defendant had been convicted of a capital crime and sentenced to death. He won a new trial. At his second trial the prosecutor put before the jury the fact that defendant had been on "death row." The trial judge instructed the jury not to consider this fact nor the fact that defendant had been previously convicted. This Court, in a thoroughly documented opinion by Justice Huskins, concluded that this kind of error could not be cured by cautionary instructions and gave defendant still another trial. The Court said:

> A fair consideration of the principles established and applied in these cases constrains us to hold that no instruction by the court could have removed from the minds of the jurors the prejudicial effect that flowed from knowledge of the fact that defendant had been on death row as a result of his prior conviction of first degree murder in this very case. The probability that the jury's burden was unfairly eased by that knowledge is so great that we cannot assume an absence of

prejudice. *State v. Hines, supra.* We hold the challenged questions by the district attorney were highly improper and incurably prejudicial.

288 N.C. at 713, 220 S.E. 2d at 292.

The majority cautions prosecutors "to scrupulously avoid any reference to death row or death row inmates" but fails to say whether the evidence that Moore was on death row constituted error entitling Moore to a new sentencing hearing. The majority says *Britt* is distinguishable, but it fails to distinguish it. The question, not answered by the majority, is whether it is reversible error to inform the jury that a defendant in a capital case at a resentencing hearing is on "death row." *Britt* held that it is. *Britt* controls this issue. The majority wrongly fails to follow *Britt* and to declare that this error warrants a new sentencing hearing for Moore.

Finally, not only Oliver but Moore also is entitled to a new sentencing hearing in the Watts murder because there is no evidence to support submission of the "especially heinous" aggravating circumstance in these cases. I recognize that we held to the contrary in an opinion I authored for the Court on the first appeal of this case. *State v. Oliver* [*and Moore*], 302 N.C. 28, 274 S.E. 2d 183 (1981) (*Oliver I*). I am now satisfied this holding was wrong and we should now acknowledge our error. "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters National Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

I accept the majority's definition of the "especially heinous" aggravating circumstance. The majority recognizes that an "especially heinous, atrocious or cruel" murder is one which essentially inflicts unusual physical or psychological suffering upon the victim prior to the infliction of death. The majority says this is a case of psychological suffering because the victim Watts said "please don't shoot me" immediately before defendant Moore fired the fatal shot. This plea is really all there is, although the majority vaguely refers to "the entire set of circumstances surrounding the killing." Apparently these circumstances which the majority deems important are the planning of the robbery and Moore's later boasts about the killing. Neither of these things has any bearing on whether Moore inflicted physical or psychological

suffering upon Watts. It is clear there was no physical suffering. Since the fatal shot was fired immediately after Watts said, "Please don't shoot me," and instantly rendered Watts either dead or unconscious, I can discern no psychological suffering in this case. All the cases cited by the majority had elements of either physical or psychological suffering before death. This case has none. In *State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203 (1982), relied on by the majority, this Court said:

> In accordance with the dictates of the Eighth Amendment, our Court has adhered to the position that the aggravating circumstance of G.S. 15A-2000(e)(9) 'does not arise in cases in which death was immediate and in which there was no unusual infliction of suffering upon the victim.' *State v. Rook*, 304 N.C. 201, 226, 283 S.E. 2d 732, 747 (1981), *cert. denied*, 455 U.S. 1038, 102 S.Ct. 1741, 72 L.Ed. 2d 155 (1982); *see Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed. 2d 398 (1980); *see, e.g., State v. Hamlette*, 302 N.C. 490, 504, 276 S.E. 2d 338, 347 (1981) (submission of G.S. 15A-2000(e)(9) was erroneous). Instead, our Court has made it clear that the submission of G.S. 15A-2000(e)(9) is appropriate only when there is evidence of excessive brutality, beyond that normally present in any killing, or when the facts as a whole portray the commission of a crime which was conscienceless, pitiless or unnecessarily tortuous to the victim. *State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979); *see e.g., State v. Martin*, 303 N.C. 246, 278 S.E. 2d 214, *cert. denied*, 454 U.S. 933, 102 S.Ct. 431, 70 L.Ed. 2d 240 (1981); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981).

306 N.C. at 34-35, 292 S.E. 2d at 227-28. The Court sustained the submission of the "especially heinous" circumstance because it found:

> It suffices to say that the deaths of the unsuspecting victims were not instantaneous and that both killings involved the infliction of unusual physical or psychological torture. Each victim essentially witnessed (or heard) the shooting of the other and was helpless to prevent this unprovoked horror.

306 N.C. at 35, 292 S.E. 2d at 228. This case involves neither physical nor psychological torture. Death, or at least unconsciousness, was immediate, and "there was no unusual infliction of

suffering upon the victim." The "especially heinous" circumstance, therefore, should not have been submitted.

For all the foregoing reasons I vote to give defendant Oliver a new sentencing hearing in both murder cases and defendant Moore a new sentencing hearing in the Watts murder case.

STATE OF NORTH CAROLINA v. FREDERICK W. CORBETT

No. 198A82

(Filed 27 September 1983)

1. **Criminal Law § 128.2— statement by prospective juror—denial of mistrial**

A statement by a prospective juror who was later excused for cause that in his opinion defendant was guilty did not cause the remaining prospective jurors to become unable to render a verdict based on the evidence presented in court so as to require the trial court to grant defendant's motion for a mistrial.

2. **Criminal Law § 92.3— consolidation of multiple charges against same defendant—harmless error**

The trial court erred in granting the State's motion to consolidate charges against defendant for kidnapping and rape of one victim on 16 August, kidnapping and rape of a second victim on 2 September, and kidnapping of a third victim on 10 September, since the events arising on each of the three dates were separate and distinct and not part of a single scheme or plan. However, the erroneous consolidation of the charges was not prejudicial error since evidence of each of the offenses would have been admissible in the separate trials of the others in order to prove the identity of the assailant, and the record did not support a conclusion that the consolidation unjustly and prejudicially hindered or deprived defendant of his ability to defend one or more of the charges. G.S. 15A-926.

3. **Jury § 7.9— prospective jurors who had formed opinion before trial—denial of challenge for cause**

The trial court did not err in the denial of defendant's challenge for cause under G.S. 15A-1212 of three prospective jurors who stated they had formed an opinion before trial as to defendant's guilt or innocence where each of these jurors thereafter stated without equivocation that she could set aside her prior opinion and try the cases solely on the evidence presented in court.

4. **Criminal Law § 15.1— pretrial publicity—denial of change of venue or special venire**

The trial court did not err in the denial of defendant's motion for a change of venue or special venire because of pretrial publicity where newspaper articles presented by defendant in support of his motion were not inflammatory

and did not impede defendant from receiving a fair and impartial trial, and where three prospective jurors who initially stated that they had formed an opinion as to defendant's guilt or innocence declared upon further questioning that they could base their conclusions solely upon evidence and arguments presented in court.

5. Criminal Law §§ 66.9, 66.15— viewing of newspaper photograph of defendant—effect on lineup and in-court identifications

A kidnapping victim's viewing of a newspaper photograph of defendant did not result in a very substantial likelihood of irreparable misidentification of defendant as her assailant so as to taint her identification of defendant in a subsequent pretrial lineup where the evidence tended to show that the victim observed her assailant's face in adequate light for at least five minutes during the twenty minutes he confined her; at the time of the kidnapping, the victim was paying sufficient attention to see and remember her assailant; the victim unequivocably identified defendant during the lineup as her assailant; and the crime occurred only one month before the lineup and three months before trial. Furthermore, even if the newspaper photograph was suggestive, the evidence supported the trial court's determination that the victim's in-court identification of defendant was based on her viewing of defendant at the time of the crimes and was of independent origin from the pretrial procedures.

6. Criminal Law § 66.1— photographic, lineup and in-court identifications—consumption of beer and LSD by victim

Photographic, lineup and in-court identifications of defendant by a kidnapping and rape victim were not inherently incredible because the victim may have consumed several beers and may have taken a dose of LSD during the day prior to the crimes where the evidence tended to show that the victim had the opportunity to observe defendant's face when he abducted her from a telephone booth and when she later tried to get out of his car, and that the victim paid attention to her assailant's voice and later based her identification of defendant in a lineup on both his observable appearance and the sound of his voice after all those in the lineup were directed to speak a few words. Whether the victim's faculties of perception were impaired, and the degree to which they were, if any, was an appropriate subject for cross-examination.

7. Rape and Allied Offenses § 5— first degree rape—sufficiency of evidence

The State's evidence was sufficient to support conviction of defendant for first degree rape where it tended to show that defendant abducted the victim from a telephone booth and forced her into his car; when the victim attempted to get out of the car, defendant grabbed her and pulled her back in; defendant blindfolded the victim, made her place her head on his lap and drove off holding a knife to the victim's throat; defendant drove to a wooded area where he forced the victim to drink two cups of liquor; still holding the knife, defendant made the victim crawl into the backseat of the car; defendant then got into the backseat, held the knife to the victim's throat, and forced her to remove her clothing; defendant then undressed himself and had forcible intercourse with the victim; and during this time the victim was crying and told defendant to please not hurt her.

8. **Criminal Law §§ 50.2, 89.4— opinion as to inconsistencies in victim's statement**

The trial court properly excluded an officer's opinion or conclusion that there were inconsistencies in a kidnapping and rape victim's statement to him about the events in question.

9. **Rape and Allied Offenses § 6— first degree rape—failure to charge on second degree rape**

In a prosecution for first degree rape, the trial court did not err in failing to charge the jury on second degree rape where all of the evidence showed that defendant used a knife while raping the victim. G.S. 14-27.2(a)(2)(a); G.S. 14-27.3.

10. **Criminal Law § 112— instructions—no shifting of burden of proof to defendant**

The trial court's instruction that "[i]f you find the facts to be as defendant's evidence tends to show them, then you are to acquit the defendant" did not place on defendant the burden of proving his innocence when considered in context.

Justice EXUM dissenting.

Justice FRYE dissenting.

ON appeal from judgments entered by *McLelland, J.*, at the 14 December 1981 Criminal Session of Superior Court, ALAMANCE County. Heard in the Supreme Court 9 May 1983.

Defendant was charged in indictments proper in form with kidnapping in the first degree of Sheila Burns Ray, kidnapping in the first degree and rape in the second degree of C. Overby, and kidnapping in the first degree and rape in the first degree of Barbara M. Small. Defendant was convicted of kidnapping in the second degree of Sheila Ray, kidnapping in the first degree and rape in the second degree of Cheryl Overby, and kidnapping in the first degree and rape in the first degree of Barbara Small.

Evidence presented by the state tends to show the following. On 10 September 1981 about 1:00 a.m., Sheila Ray had just parked her car in the parking lot of her apartment complex when defendant forced his way into her automobile. Defendant was armed with a knife and struggled with Ms. Ray. During the struggle Ms. Ray bit defendant on his thumb as he put his fingers into or over her mouth to stop her from screaming. Ms. Ray managed to escape from defendant and ran into her apartment where she called the police. Defendant's wallet and fingerprints were found inside Ms. Ray's car. When arrested at his residence several blocks from Ms. Ray's apartment two hours after the assault, defendant's thumb bore a wound identified as a human bite mark.

The state's evidence further tends to show that on 2 September 1981 between 2:00 and 4:00 a.m., defendant abducted Ms. Barbara Small from a telephone booth in the City of Burlington. He forced Ms. Small into a small white car, blindfolded her, and drove her out into the country. Defendant forced Ms. Small to drink two cups of liquor and then raped her at knifepoint.

In addition, the state's evidence shows that about midnight on 16 August 1981, Ms. Cheryl Overby was driving along a road in Graham when defendant, driving a small white car, forced her off the road. Defendant got out of his car, forced himself into Ms. Overby's car, and drove the two behind a house. Defendant raped Ms. Overby and then let her go.

Defendant sought to prove alibi as a defense to each charge.

Rufus L. Edmisten, Attorney General, by Christopher P. Brewer, Assistant Attorney General, for the state.

Daniel H. Monroe for defendant.

MARTIN, Justice.

We have carefully reviewed each of defendant's assignments of error and conclude that he received a fair trial, free of prejudicial error.

[1] Defendant first contends that the trial court ruled erroneously with respect to several of his motions during the jury selection process. During the state's questioning of prospective juror Little, the state asked the following:

> [STATE]: All right. Have you prior to coming to court heard or read anything that you think pertains to these charges from any source?
>
> MR. LITTLE: Been following it pretty close.
>
> [STATE]: In the newspapers?
>
> MR. LITTLE: Newspapers and . . .
>
> [STATE]: Based on what you've read in the papers, sir, did you form any kind of opinion about how the cases ought to come out?
>
> MR. LITTLE: Guilty as far as I'm concerned.

At this juncture, defendant moved for a mistrial, which the court denied. Shortly thereafter, defendant moved to excuse Mr. Little for cause, and this motion was also denied. Mr. Little was excused for cause on other grounds later in the proceedings. Defendant argues that Mr. Little's remark that he believed defendant was guilty so prejudiced his defense that it was impossible for defendant to receive a fair trial by the jury that was eventually impaneled. Defendant assumes that the remark of one prospective juror before jury selection was completed so infected the ability of the remaining prospective jurors to exercise their own judgment that a mistrial ought to have been granted.

"[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 6 L.Ed. 2d 751, 755 (1961). Generally, a juror who has formed an opinion as to defendant's guilt or innocence is not impartial and ought not serve. N.C. Gen. Stat. § 15A-1212(6) (1978). The defendant must prove the existence of an opinion in the mind of a juror that will raise a presumption of partiality. *Murphy v. Florida*, 421 U.S. 794, 800, 44 L.Ed. 2d 589, 595 (1975).

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, supra, 366 U.S. at 722-23, 6 L.Ed. 2d at 756.

Defendant has failed to establish that the mere fact that one prospective juror who was later excused for cause stated that in his opinion defendant was guilty caused the remaining prospective jurors to become unable to render a verdict based on the

evidence presented in court. Defendant has presented no evidence that Mr. Little's opinion carried *any* weight with the jurors selected. Mr. Little did not serve as a juror. The trial court's denial of defendant's motion for a mistrial was not error.

[2] Defendant next argues that the trial court erred in granting the state's motion to consolidate defendant's five cases for trial. N.C.G.S. 15A-926 provides in part as follows:

> § 15A-926. Joinder of offenses and defendants.—(a) Joinder of Offenses.—Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

This statute, which became effective in 1975, differs from its predecessor, in part by disallowing joinder on the basis that the acts were of the same class of crime or offense when there is no transactional connection among the offenses. *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978). *See also State v. Silva*, 304 N.C. 122, 282 S.E. 2d 449 (1981); *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981); *State v. Powell*, 297 N.C. 419, 255 S.E. 2d 154 (1979). As we stated in *Silva*:

> A mere finding of the transactional connection required by the statute is not enough, however. In ruling on a motion to consolidate, the trial judge must consider whether the accused can receive a fair hearing on more than one charge at the same trial; if consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated. *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978); *State v. Davis*, 289 N.C. 500, 508, 223 S.E. 2d 296, 301, *death sentence vacated*, 429 U.S. 809, 97 S.Ct. 47, 50 L.Ed. 2d 69 (1976). A motion to consolidate charges for trial is addressed to the sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion. *E.g., State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981); *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296. If, however, the charges consolidated for trial possess no transactional connection, then the consolidation is improper as a matter of law. *See* G.S. § 15A-926(a).

304 N.C. at 126, 282 S.E. 2d at 452.

In the instant case, the state's evidence tends to show that during the early morning of 16 August 1981, defendant forced Ms. Overby's car off the road in Graham. He then kidnapped Ms. Overby, drove her behind a house, and raped her. Further, on 2 September 1981 between 2:00 a.m. and 4:00 a.m., defendant kidnapped Ms. Small at knifepoint from a telephone booth in Burlington and drove her out into the country. He then forced her to drink two cups of liquor and raped her at knifepoint. Finally, in the early morning hours of 10 September 1981, defendant forced himself into Ms. Ray's car just after she had pulled into a parking place. He forcibly restrained Ms. Ray and unsuccessfully attempted to start her car before running from the scene. While the events occurring on each of these three dates appear to have common characteristics, N.C.G.S. 15A-926 does not allow joinder merely if the offenses are of the same class of crime. While it would have been permissible to join the charges arising out of the crimes committed on 16 August for one trial and those arising from the 2 September incident for another, it was error to join all five charges for a single trial. The events arising on each of the three dates were separate and distinct and not obviously part of a single scheme or plan. *State v. Wilson*, 57 N.C. App. 444, 291 S.E. 2d 830, *disc. rev. denied*, 306 N.C. 563 (1982). *Compare State v. Greene, supra*, 294 N.C. 418, 241 S.E. 2d 662 (rape of two different women within three hours held parts of a single scheme or plan of defendant to satisfy his sexual desires on the afternoon of 3 May 1976). Thus, under the statute it was error to consolidate all five charges against defendant for trial.

However, we have determined that although consolidation of the charges was error, it was not prejudicial error. Evidence of each of these offenses would have been admissible in the separate trials of the others in order to prove the identity of the assailant. Although, generally, evidence of crimes other than the one charged is inadmissible to show the character of the accused or his disposition to commit an offense of the nature of the one charged, such evidence is admissible if it is relevant to show the identity of the perpetrator of the crime charged. *E.g., State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). In each of the instant cases, defendant relied on alibi as a defense, thereby "[making] the ques-

tion of whether defendant was, indeed, the perpetrator the very heart of the case." *State v. Freeman*, 303 N.C. 299, 302, 278 S.E. 2d 207, 208-09 (1981). The crimes occurring on 16 August, 2 September, and 10 September were sufficiently similar to permit evidence of their occurrence to be admissible on the question of the identity of the assailant.

Although in determining whether a defendant has been prejudiced by joinder the test is not whether the evidence at trial in one case would be competent and admissible at the trial of the other, this factor may be considered in determining whether the consolidation was unjust and prejudicial to the defendant. The test to be applied is whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant. In so doing we must look to whether defendant was hindered or deprived of his ability to defend one or more of the charges. *State v. Greene, supra*, 294 N.C. 418, 241 S.E. 2d 662. Although we hold that the consolidation violated the statute, the record does not support a conclusion that the defendant was thereby unjustly and prejudicially hindered or deprived of his ability to defend one or more of the charges. *Id.*

[3] Defendant next contends that the trial court erred in denying his challenges for cause of prospective jurors Thompson, Butler and McRainey. Defendant argues that each of these jurors had formed an opinion before trial as to his guilt or innocence and therefore ought to have been excused under N.C.G.S. 15A-1212.

Defendant would have us interpret this statute to require dismissal of any juror who has ever formed an opinion as to the guilt or innocence of a defendant. We do not agree. This interpretation would remove all discretion from the trial judge in determining whether the juror could render a fair, impartial, and unbiased judgment. *State v. Wright*, 52 N.C. App. 166, 278 S.E. 2d 579, *disc. rev. denied*, 303 N.C. 319 (1981).

N.C.G.S. 15A-1211(b) requires the trial judge to decide all challenges concerning the competency of jurors. N.C.G.S. 15A-1212 merely lists the various grounds for making challenges to jurors.

> The official commentary to N.C.G.S. 15A-1212 contains the following: "To the extent possible the Commission has at-

tempted to *restate* in this Article the rules governing selecting and impaneling the jury in a criminal case. This section incorporates the disqualifications set out in G.S. 9-3 and adds a number of additional grounds for challenge for cause." (Emphasis ours.)

Thus, N.C.G.S. 15A-1212(6) apparently is a codification of the case law which requires that a juror be excused when he is, in the trial judge's opinion, unable to render a fair and impartial verdict because of preconceived opinions as to defendant's guilt or innocence. This interpretation is consistent with subsection (9), which permits a challenge to be made on the grounds that a juror "[f]or any other cause is unable to render a fair and impartial verdict." N.C. Gen. Stat. 15A-1212(9). It seems unlikely that anyone who read or heard about a criminal case through the media would not form some sort of notion regarding an accused's guilt or innocence. To demand dismissal of every prospective juror who had prior knowledge of a case because he kept himself informed of current affairs arguably would "require our courts to exclude from service those best qualified to hear and deal with evidence and to understand instructions upon the law."

Id. at 171-72, 278 S.E. 2d at 584-85 (citations omitted).

Defendant's argument is specious at best.

As discussed above, if a prospective juror has stated that he has an opinion as to how the case should come out, he may serve if it is established that he can "lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd, supra*, 366 U.S. at 723, 6 L.Ed. 2d at 756. *See State v. Wright, supra*, 52 N.C. App. 166, 278 S.E. 2d 579, *disc. rev. denied*, 303 N.C. 319. The transcript of jury selection contains the following dialogue between the prosecutor, Mr. Johnson, and the jurors about whom defendant complains:

MR. JOHNSON: If you as you sit there in the box now have any opinion about how the cases ought to come out based on what you've read, raise your hand.

Mrs. Butler, you feel that you now have an opinion about how it ought to come out?

MRS. BUTLER: Yes, I do.

MR. JOHNSON: All right. And Mrs. McRainey.

Anyone else?

Mrs. Thompson.

And I take it there's no one else that feels that they now have an opinion about how the cases ought to come out.

All right. Speaking to Mrs. Butler, Mrs. Thompson, and Mrs. McRainey, let me ask you this then. Do you each understand that a case is supposed to be decided on the evidence that's presented in court?

(Jurors 5, 6, and 9 nod indicating affirmatively.)

MR. JOHNSON: Do you agree with that proposition?

MRS. BUTLER: Yes, sir.

MR. JOHNSON: Do you each understand that one reason for that is that it gives the person accused the opportunity to cross-examine those who are accusing him and that whatever appeared in the paper is not something that's subject to his being able to cross-examine it? Do you understand that?

(Jurors 5, 6, and 9 nod indicating affirmatively.)

MR. JOHNSON: It's not sworn testimony. Do you further understand that no matter how well intentioned some reporter might have been about presenting the case in the paper that he might have gotten some of the facts wrong or he might have misquoted somebody? You understand that?

(Jurors 5, 6, and 9 nod indicating affirmatively.)

MR. JOHNSON: Do you feel then that if the evidence presented in court is different in some respect from what you might have read in the paper that you would base your decision about what the facts are on the evidence as presented or what you might have read?

MRS. THOMPSON: Evidence.

MRS. MCRAINEY: Evidence.

MRS. BUTLER: (Nods indicating affirmatively.)

MR. JOHNSON: Can you keep it separate in your own minds as to what you might have read from what you hear in open court?

MRS. THOMPSON: Yes.

MRS. BUTLER: Yes.

MRS. MCRAINEY: (Nods indicating affirmatively.)

MR. JOHNSON: Will you to your utmost, if you're left to sit on this jury, strive to base your verdicts solely on the evidence as presented in court and not on something you might have read outside the courtroom, understanding the reason for that is that it may be faulty information?

MRS. THOMPSON: Yes.

MRS. BUTLER: Yes.

MRS. MCRAINEY: Yes.

MR. JOHNSON: I take it then that you're—what you're saying is you do not have a fixed opinion as to how the case ought to come out but that you will base your decision solely on the evidence presented in court, is that correct, ladies?

MRS. THOMPSON: Yes.

MRS. BUTLER: Yes.

MRS. MCRAINEY: Yes.

The transcript further contains the following questioning by Mr. Monroe, the defense attorney:

MR. MONROE: You also indicated, I believe, that—in response to Mr. Johnson's questions that you had formed an opinion as to how the case ought to come out—when he first asked you that question—

MRS. THOMPSON: Yes.

MR. MONROE: —based on the newspaper articles you had read? Do you still have an opinion as to how the case ought to come out?

MRS. THOMPSON: No.

MR. MONROE: What caused—

MRS. THOMPSON: Because I haven't heard the evidence.

MR. MONROE: What caused you to change your mind?

MRS. THOMPSON: Well, I think personally in reading these when you sit down and read a newspaper then you form—right off you form your opinion. I think everybody is guilty of that.

MR. MONROE: Uh huh.

MRS. THOMPSON: And—but I think a man is innocent until proven guilty.

MR. MONROE: And you would—

MRS. THOMPSON: And I would definitely listen to the State's evidence. . . .

. . . .

MR. MONROE: . . . Now then you'll base your verdict on the evidence and not any newspaper articles,—

MRS. THOMPSON: Yes. Yes.

Mr. Monroe then questioned prospective juror Butler:

MR. MONROE: . . . Now you also indicated, I believe, in response to Mr. Johnson's questions that you had formed an opinion as to the guilt or innocence of the defendant based on news accounts you had read. Do you still have an opinion as to his guilt or innocence without having heard any of the evidence?

MRS. BUTLER: I don't believe so.

MR. MONROE: You don't believe so. Do you have some—some doubt in your mind?

MRS. BUTLER: Well, I have some reservations, yes, sir.

MR. MONROE: Um huh. And you would find it hard then to disabuse yourself of anything you might have read about this—about this case, is that correct?

MRS. BUTLER: Well, the things I've read were not—they were kind of after the case.

MR. MONROE: Um huh.

MRS. BUTLER: Consideration of the defendant as for regard to be tried in Alamance County again.

MR. MONROE: Um huh.

MRS. BUTLER: Now that's basically all I've read and I have some questions—

MR. MONROE: Um huh.

MRS. BUTLER: —in my mind as to why that was a concern here.

MR. MONROE: Right.

The court then questioned Mrs. Butler.

COURT: Are you able to follow the process required of jurors, as I've explained it a number of times, and make a determination of truth solely from the evidence, disregarding any information you may have heard—had earlier and disregarding any opinion you may have formed from that information earlier? It it [the question] still too long?

MRS. BUTLER: No. Yes, I think I can.

Finally, Mr. Monroe questioned Mrs. McRainey:

MR. MONROE: Yes, ... All right. Would it be a fair statement that—to say that before you came today and sat on the jury panel you had formed an opinion as to the guilt or innocence of Mr. Corbett from these news accounts?

MRS. MCRAINEY: Yeah.

MR. MONROE: You had?

MRS. MCRAINEY: Yeah.

MR. MONROE: Do you still have that opinion?

MRS. MCRAINEY: Not that much, no.

MR. MONROE: Why have you changed your mind if you can tell me?

MRS. MCRAINEY: Well, I wasn't being fair. I was reading from the paper rather than listening to him or to—

MR. MONROE: Um huh.

MRS. MCRAINEY: —to the truth I guess.

MR. MONROE: Does that mean that—you say reading—I'm not trying—

MRS. MCRAINEY: I think—well, I think that I can listen to both sides and be fair.

. . . .

MR. MONROE: [W]ill you base your verdict solely upon the evidence you hear in the courtroom and not consider any newspaper articles?

MRS. MCRAINEY: Oh, no, on—on just what I hear.

Each of these jurors stated without equivocation that she could set aside her prior opinion and try the cases solely on the evidence presented in court. We hold that the trial court did not abuse its discretion in denying defendant's challenges for cause of these three jurors. *E.g., State v. Wright, supra,* 52 N.C. App. 166, 278 S.E. 2d 579, *disc. rev. denied,* 303 N.C. 319 (1981).

[4] Defendant next contends that the trial court erred in denying his motion for a change of venue or special venire. Defendant contends that publicity before and during the trial concerning Corbett and the charges against him was so inflammatory that an impartial jury could not have been impaneled from Alamance County. Defendant observes that a number of prospective jurors admitted having read news accounts of the charges prior to trial. Further, prospective jurors Thompson, Butler, and McRainey stated when questioned during jury selection that they had formed an opinion as to "how the cases ought to come out." Defendant concludes that this demonstrates that it was reasonably likely that the jurors hearing his trial would base their verdicts upon information to which they were exposed before trial rather than evidence presented in court. Thus, the trial court erred in failing to grant his motion for a change of venue or special venire.

N.C.G.S. 15A-957 provides:

§ 15A-957. 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.

The procedure for change of venue is in accordance with the provisions of Article 3 of this Chapter, Venue.

Defendant has the burden of proving so great a prejudice that he cannot obtain a fair and impartial trial. *State v. Richardson*, 308 N.C. 470, 302 S.E. 2d 799 (1983); *State v. McDougald*, 38 N.C. App. 244, 248 S.E. 2d 72 (1978), *disc. rev. denied*, 296 N.C. 413 (1979). He must establish that prospective jurors in his case were reasonably likely to base their verdict upon conclusions induced by outside influences rather than upon conclusions induced solely by evidence and arguments presented in court. *Sheppard v. Maxwell*, 384 U.S. 333, 16 L.Ed. 2d 600 (1966); *State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976); *State v. McDougald, supra*. The determination whether the defendant has met his burden of proof on a motion for change of venue rests in the sound discretion of the trial court. Absent a showing of gross abuse of discretion, its ruling will not be reversed. *State v. Richardson, supra; State v. Matthews*, 295 N.C. 265, 245 S.E. 2d 727 (1978), *cert. denied*, 439 U.S. 1128 (1979); *State v. McDougald, supra*.

We have examined carefully the newspaper clippings defendant has alleged were so inflammatory as to prevent him from receiving a fair and impartial trial. We find them not to be inflammatory and hold that they did not impede defendant from receiving a fair and impartial trial. *See State v. Dobbins*, 306 N.C. 342, 293 S.E. 2d 162 (1982). As discussed above, the jurors who initially stated that before trial they had formed an opinion as to defendant's guilt or innocence declared upon further questioning that they would base their conclusions solely upon evidence and arguments presented in court. Defendant has failed to establish that the trial court abused its discretion in denying his motion for a change of venue or special venire. Defendant's assignment of error is overruled.

[5] Defendant next contends that the trial court erred in denying his motion to suppress testimony concerning Sheila Ray's view of a pretrial lineup in which Ms. Ray identified defendant as her assailant. Defendant contends that this identification procedure was tainted because five days before the lineup occurred Ms. Ray saw a photograph of defendant in the Burlington Times-News. Further, before viewing the lineup Ms. Ray was told that a man named Frederick Corbett would be in the lineup. Defendant also argues that because the pretrial identification procedure was tainted, the trial court erred in denying his motion to suppress Ms. Ray's identification of him in court as her assailant.

Upon the making of these motions, a voir dire was held to determine the basis of Ms. Ray's identification of defendant as her assailant. At the conclusion of the voir dire, the court found that

> [Ms. Ray's] identification of the defendant at the police lineup was based on her recollection of his appearance at the time of the assault independent of her seeing his photograph in a newspaper or of any other circumstances existing at the time of the lineup, that her opportunity to observe the defendant for an extended time at the assault did not lead to her misidentification.

Even though the newspaper photograph of defendant may have been suggestive, testimony concerning the pretrial lineup would have been inadmissible only if all of the circumstances indicate that Ms. Ray's view of the photograph resulted in a very substantial likelihood of subsequent irreparable misidentification of defendant as her assailant. *See Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247 (1968); *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983).

> 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).

State v. Harris, supra, 308 N.C. at 164, 301 S.E. 2d at 95.

The evidence in the present case tends to show that Ms. Ray observed her assailant's face in adequate light for at least five minutes during the twenty minutes he confined her. Ms. Ray's testimony reveals that at the time of the kidnapping she was paying sufficient attention to see and remember her assailant. Ms. Ray's description of her assailant as being somewhat taller and heavier than defendant was at the time of the lineup was not so different as to indicate a very substantial likelihood of a misidentification. Ms. Ray unequivocably identified defendant during the lineup as her assailant. The crime occurred about one month before the lineup and three months before trial. We find that the trial court's finding that Ms. Ray's view of the newspaper photograph did not give rise to a very substantial likelihood of irreparable misidentification was supported by competent evidence and thus is binding upon this Court. *E.g., State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1983). The trial court did not err in denying defendant's motion to suppress testimony concerning the pretrial lineup.

In addition, we hold that the trial court did not err in allowing Ms. Ray to identify defendant in court as her assailant. Even assuming arguendo that the newspaper photograph could be found suggestive, we find more than adequate evidence in the record to support the trial court's decision to hold Ms. Ray's in-court identification as being of independent origin:

> 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.

State v. Thompson, 303 N.C. 169, 172, 277 S.E. 2d 431, 434 (1981). Considering Ms. Ray's in-court identification of defendant in light of all the circumstances mentioned earlier, we have determined

that this identification of Corbett was based on Ms. Ray's observation of him on the day of the assaults. The trial court did not err in denying defendant's motion to suppress Ms. Ray's identification of defendant as her assailant.

[6] Defendant next argues that the trial court erred in denying his motions to suppress identification testimony of Barbara Small. As in the case in which defendant was charged with kidnapping Ms. Ray, a voir dire to determine the admissibility of identification evidence was held in the cases in which defendant was charged with kidnapping and raping Ms. Small. At the conclusion of this voir dire, the trial court ruled that Ms. Small's identification testimony and her in-court identification of defendant would be admissible.

Defendant does not argue, nor does the record reveal, that there was anything suggestive about the pretrial identification procedures in which Ms. Small participated. Rather, defendant contends that the circumstances under which Ms. Small observed her assailant at the time of the crimes were such that her identifications of defendant from the photographic display and later in court were inherently incredible. *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967) (witness's identification of defendant inherently incredible when based on observation of man at scene of crime at night and from distance of 286 feet). Defendant relies on the allegation that within twenty-four hours of the time of her kidnapping Ms. Small had consumed several beers and may have been feeling the effects of a dose of LSD she had taken the day before the assault. Defendant argues that when she was assaulted Ms. Small's senses must have been so impaired that she could not formulate or remember an impression of the physical features of her assailant.

Identification evidence is not inherently incredible if "there is a reasonable possibility of observation sufficient to permit subsequent identification." *Id.* at 732, 154 S.E. 2d at 906. Where such a possibility exists, the credibility of the witness and the weight to be given to his identification testimony is for the jury to decide. *E.g., id.; State v. Turner*, 305 N.C. 356, 289 S.E. 2d 368 (1982). In the present case, Ms. Small testified that she had had the opportunity to observe defendant's face on two occasions: first, when he abducted her from the telephone booth and forced

her into his car, and second, when she later tried to get out of the car. Ms. Small also paid attention to her assailant's voice and later based her identification of defendant in a show-up lineup on both his observable appearance and the sound of his voice after all those in the lineup were directed to speak a few words. We hold that this evidence supports the finding of a reasonable possibility that Ms. Small sufficiently observed her assailant at the time of the crimes to permit subsequent identification. Whether Ms. Small's faculties of perception were impaired, and the degree to which they were, if any, was an appropriate subject for cross-examination. The trial court did not err in denying defendant's motions to suppress testimony concerning Ms. Small's identification of defendant before trial from a photographic display and from a pretrial show-up. In addition, the trial court did not err in permitting Ms. Small to identify defendant in court as being her assailant.

[7] Defendant next contends that the trial court erred in denying his motions to dismiss the charge accusing him of rape in the first degree of Ms. Small. Defendant argues that the state failed to prove beyond a reasonable doubt that Ms. Small did not consent to having intercourse with him.

N.C.G.S. 14-27.2(a)(2)(a) provides as follows:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> . . . .
>
> (2) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon;
>
> . . .

The victim's consent is a defense available to defendant. The state does, however, have the burden of proving that the intercourse was achieved by force and against the victim's will. In ruling on a motion to dismiss based upon insufficiency of the evidence, all of the evidence must be considered in the light most favorable to the state. *E.g., State v. Jackson*, 309 N.C. 26, 305

S.E. 2d 703 (1983); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). If there is substantial evidence of each element of the offense, the motion to dismiss must be denied. *Id.*

In the present case, the evidence most favorable to the state tends to show that on 2 September 1981 between 2:00 and 4:00 a.m., Ms. Small was making a telephone call in a telephone booth at the corner of Trollinger and Webb streets in Burlington. Defendant drove up to the phone booth in a white automobile, grabbed Ms. Small, and forced her into his car. Defendant then forced Ms. Small to put her head down, and they drove to Peele Street. When Ms. Small attempted to get out of the car, defendant grabbed her and pulled her back in. He blindfolded her and made her place her head on his lap; he then drove off, holding a knife to Ms. Small's throat. Defendant drove to a wooded area where he forced Ms. Small to drink two cups of liquor. Still holding the knife, defendant made Ms. Small crawl into the backseat of the car. Defendant got into the backseat, held the knife to Ms. Small's throat, and forced her to remove her clothing. Defendant then undressed himself and had forcible intercourse with Ms. Small. Ms. Small testified that during this time she "was wanting to scream" and was crying and told defendant "please don't hurt me." She testified that she had wanted to get out, but defendant kept telling her to shut up. After raping Ms. Small, defendant told her to put her clothes back on and get out of the car. When she did so, defendant drove away. The evidence is ample to support a finding of each element of the crime of rape. *State v. Felton*, 283 N.C. 368, 196 S.E. 2d 239 (1973). We hold that the trial court did not err in denying defendant's motions to dismiss the charge of rape in the first degree of Barbara Small.

[8] Defendant next argues that the trial court erred in excluding testimony of Detective Cozart to the effect that when he spoke with Ms. Small after her assaults he noted some "problems" or inconsistencies with her account of the events. Defendant contends that Detective Cozart's impression of Ms. Small's account was relevant to Ms. Small's credibility and thus ought to have been allowed before the jury.

Both Ms. Small and Detective Cozart were witnesses for the state whom defendant cross-examined extensively. Any inconsistencies in Ms. Small's accounts of the kidnapping and rape

were before the jury for its consideration. As the fact finder, the jury was able to determine whether any inconsistencies existed in Ms. Small's testimony and to weigh these appropriately. Detective Cozart's opinion or conclusion whether there were inconsistencies in Ms. Small's statement to him was properly excluded. *E.g., State v. Miller*, 302 N.C. 572, 276 S.E. 2d 417 (1981); *State v. McLaughlin*, 126 N.C. 1080, 35 S.E. 1037 (1900).

[9] Next, defendant argues that the trial court erred in failing to charge the jury on rape in the second degree in the case in which defendant was accused of rape in the first degree of Ms. Small. One difference between rape in the first degree under N.C.G.S. 14-27.2(a)(2)(a) and rape in the second degree under N.C.G.S. 14-27.3 is that in the former but not in the latter a deadly weapon must have been used to effectuate the rape. Defendant contends that the evidence presented would have permitted the jury to conclude that Corbett did not use the knife he held in order to rape Ms. Small.

Upon examination of the transcript and record, we find no evidence that would have entitled defendant to an instruction on rape in the second degree. *Cf. State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983); *State v. Jones*, 304 N.C. 323, 283 S.E. 2d 483 (1981). All of the evidence shows that defendant used the knife, a deadly weapon, when raping Ms. Small. The trial court did not err in failing to submit the lesser offense of rape in the second degree to the jury in the Barbara Small rape case.

[10] Defendant next argues that the trial court erred when it instructed the jury that "[i]f you find the facts to be as the defendant's evidence tends to show them, then you are to acquit the defendant." Defendant contends that he is entitled to a new trial because this statement improperly shifted to him a burden of proving his innocence of the charges against him. This argument is untenable.

A jury charge must be read in context and in its entirety. *E.g., State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335 (1983). If the charge as a whole is correct and presents the law fairly and clearly to the jury, merely technical errors or slight misstatements will not mandate retrial. *E.g., State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977); *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). We have reviewed the jury charge in context and find that

the trial court emphatically placed the burden of proving defendant's guilt beyond reasonable doubt on the state. The court did not place the burden of proving his innocence on the defendant.

Finally, defendant claims that during defendant's sentencing hearing the trial court improperly considered evidence of crimes of which he had been previously acquitted. While it is true that such evidence was presented during the sentencing hearing, there is no indication that the trial court considered it when sentencing defendant. The trial court was aware that defendant had been acquitted of the charges at issue and did not sentence defendant under an erroneous assumption as to his criminal record. *See State v. Spicer*, 299 N.C. 309, 261 S.E. 2d 893 (1980). Defendant received the presumptive sentence for each of the charges of which he was convicted. Defendant's assignment of error is without merit.

For reasons stated above, we find that defendant received a fair trial, free from prejudicial error.

No error.

Justice EXUM dissenting.

Believing the trial court erred in denying defendant's motion for change of venue and challenges for cause of jurors Thompson, Butler and McRainey, I dissent.

My disagreement with the majority stems from my belief that the extensive and prejudicial publicity involved in this case renders it manifestly impossible for us to say that defendant received a fair trial. I find both the prejudicial nature of the publicity and its magnitude significant. I also believe the denial of the challenges for cause clearly violated our statute on the subject. N.C. Gen. Stat. § 15A-1212(6) (1978).

Without stating the articles' contents, the majority blithely concludes on the change of venue issue, "We have examined carefully the newspaper clippings defendant has alleged were so inflammatory as to prevent him from receiving a fair and impartial trial. We find them not to be inflammatory and hold that they did not impede defendant from receiving a fair and impartial trial." The newspaper articles complained of are, indeed, in-

flammatory. Furthermore, they had been read by enough of the prospective jurors that, even after defendant exhausted his peremptory challenges, eight of the twelve jurors who tried him had been exposed to the publicity.

The newspaper articles did not merely report the fact that defendant was charged in these crimes. Defendant has brought forward, either in the record on appeal or as separate exhibits, fourteen articles concerning the defendant Corbett. These articles appeared in local papers having large general circulations in Alamance County from 11 July 1981 through 3 December 1981, just four days before the instant trial began. Among other things, many articles flaunt defendant's prior acquittal of a similar offense some six months before this trial. A follow-up article criticizes the jury's performance in that case, citing the prosecutor's "surprise" with the verdict and an admission by one of the jurors that the jury had made a mistake.

The 11 July 1981 article is headlined "Not Guilty is Verdict in Rape, Kidnap Trial." The article reports that Corbett was acquitted on charges of kidnapping and raping a seventeen-year-old Altamahaw woman on a northern Alamance County road during the early morning hours. On 19 November 1981, less than a month before defendant's trial, the most prominent article on the front page of *The Alamance News* was headlined, "Are Jurors What is Wrong with the Courts?" This article contains a lengthy account of Corbett's earlier acquittal on the unrelated kidnapping and rape charges. The article quotes the Assistant District Attorney, William Johnson, who prosecuted defendant in the instant cases, as saying that he was surprised the jury found Corbett not guilty in July. "Let's just say I was astonished," he said. "I expect that if I talked to some of those people [the jurors] it wouldn't have been a nice conversation." Johnson continued: "My main feeling is that it's probably a situation where the jury felt that the prosecuting witness didn't make a credible witness," adding that a polygraph test proved the truth of the victim's testimony but that this evidence was not admissible. The lead paragraphs of this article read:

> Are jurors what is wrong in the court system?
>
> This is a common question voiced by many persons in view of trials which result in the acquittal of a defendant and

his being set free in light of substantial evidence indicating his or her guilt.

On 3 December 1981 another featured article in *The Alamance News* appeared, headlined "Jurors Defend 'Not Guilty' Corbett Verdict." Prominent in this article were the names and addresses of the jurors who had earlier acquitted Corbett. The article made clear that the newspaper had tried to reach all twelve jurors to get their versions of the not guilty verdict. The jurors were quoted extensively in the article as they attempted to defend their verdict for the newspaper.

Of the eight articles which appeared in September and October 1981 (the latest on 27 October 1981) and dealt with the present charges against defendant, all except one prominently mentioned defendant's earlier acquittal in an unrelated rape and kidnapping case. Typical of the references in these articles is one contained in the 27 October 1981 edition of *The Burlington Daily Times-News.* This article dealt essentially with Corbett's assertion that he was suffering from "Vietnam Veterans' Syndrome" and was moving for psychiatric evaluation to determine his competency to stand trial. The article said:

> Monday's motion apparently marks the first time Corbett has claimed a mental illness after being charged with a serious crime. In 1979, he was tried on a charge of assault with a deadly weapon, and was found innocent. Earlier this year, he was tried on charges of aggravated kidnapping and second degree rape, with the trial ending in a deadlock.
>
> In a second trial he was found innocent. In each of the three trials, neither Corbett nor his attorney made mention of any mental problems, court records show.

Of greater concern to me is the newspaper article appearing on 19 November 1981 shortly before defendant's trial on the present charges, criticizing the jury system and, in particular, the jury which had acquitted Corbett of similar charges in July. This article was then followed by one in which the jurors in the earlier Corbett case were called upon individually to defend their verdict, their names and addresses being prominently published. Because of the nature and timing of these articles in *The Alamance News*, it appears the paper might indeed have wanted to intimidate the jurors in defendant's upcoming trial into returning a guilty verdict.

An important factor in analyzing the need for a change of venue is, of course, the extent to which the pretrial publicity has infected the venire. *Irvin v. Dowd*, 366 U.S. 717 (1961); *State v. Jerrett*, 309 N.C. 239 (1983). During the jury selection procedure, ten of the first twelve jurors called into the box indicated that they had read about the Corbett case in the local newspapers. The state elected to keep all of these jurors on the panel, excusing only one of the two jurors who had not read the articles. The excused juror's replacement, Mr. Little, said he had been following the case pretty closely in the newspapers and that, based on what he had read about it, the defendant was "guilty as far as I'm concerned." After Mr. Little indicated that he could give the defendant a fair trial "if they put a pretty good case for him," the state accepted him and passed the jury to defendant. Of the jurors passed to defendant, McRainey, Thompson, and Butler said they had formed an opinion on the question of defendant's guilt from news accounts which they had read. Juror Williams indicated she had read all of the newspaper articles and, when asked whether she had formed an opinion as to Corbett's guilt, replied, "Yeah, I probably thought he was." Other jurors indicated that while they had read one or more of the articles about Corbett, they had formed no opinion regarding his guilt.

After defendant completed his challenges, six replacement jurors were tendered to the state. Of these, four had read newspaper articles about the case. One said, "I've heard a lot of comment about it. I've seen it on the TV and heard it on the radio and read it in the paper." Of the twelve jurors who actually sat and determined these charges against defendant, eight of them had read one or more of the news articles appearing about the case. Defendant exhausted his peremptory challenges and sought unsuccessfully to challenge two additional jurors.

Thus, not only was much of the pretrial publicity inflammatory and intimidating to prospective jurors (particularly the articles appearing within several weeks of defendant's trial), but this pretrial publicity also permeated the jury box. A majority of the jury had been exposed to this adverse pretrial publicity. Defendant was unable, through the exercise of his peremptory challenges, to select a jury none of whom had been exposed to the publicity. We held in *State v. Jerrett*, 309 N.C. 239 (1983) that, under similar circumstances, it was error warranting a new trial

not to allow defendant's motion for a change of venue. While the county involved in *Jerrett*, Alleghany, was smaller and generally more rural than Alamance, the difference was not so substantial that Alamance can be characterized as a "large urban area." *See Jerrett*, 309 N.C. at 257, 307 S.E. 2d at 348. Even if the nature of the two counties is somewhat different, the publicity in *Jerrett* was generated largely by word-of-mouth. Here, it was by newspapers, generally circulated throughout the county, and local television and radio broadcasts. Likely, the dissemination of this information reached more people than did the oral statements in *Jerrett*. The most important circumstances common to both cases is that the pretrial publicity was strongly inimical to a fair trial and this publicity had permeated the jury box.

Further, in *Jerrett*, as here, the jurors were examined on *voir dire* collectively so that all prospective jurors heard the damaging responses made by other prospective jurors. In *Jerrett*, we stressed this collective *voir dire* as an important circumstance to be considered on the change of venue question. We concluded that because Alleghany County was "infected with prejudice against" the defendant and the jury *voir dire* revealed that the prejudice had permeated the jury box, defendant "fulfilled his burden of showing that a reasonable likelihood existed that he would not receive a fair trial before an Alleghany County jury." *Jerrett*, 309 N.C. at 258, 307 S.E. 2d at 349.

I think we should conclude here that prejudicial and intimidating pretrial publicity had been circulated throughout the county and the jury *voir dire* demonstrated that it permeated the jury box. Therefore defendant has shown a reasonable likelihood that he could not receive a fair trial before an Alamance County jury in December 1981. To deny defendant a change of venue was error.

Jurors McRainey, Butler and Thompson said their exposure to pretrial publicity caused them to form an opinion about defendant's guilt. It was error, therefore, not to sustain defendant's challenges for cause to these jurors. N.C. Gen. Stat. § 15A-1212(6) (1978). The majority reasons that since each of these jurors ultimately stated that they would not let their previously formed opinions intrude on their consideration of the case, the trial judge

properly denied the challenges for cause. The majority relies on the statement from *Irvin v. Dowd*, 366 U.S. 717, 723 (1961), that if a juror "can lay aside his impression or opinion and render a verdict based on the evidence presented in court," defendant has not been denied a fair trial on the basis that the juror had previously formed an opinion.

Irvin was a habeas corpus proceeding challenging Irvin's state court conviction of murder and death sentence. The question was whether Irvin's conviction violated the Due Process Clause of the Fourteenth Amendment. The Court held that the Due Process Clause did not require that jurors be totally ignorant of the case nor that they had never formed any preconceived notion as to the accused's guilt. It only required that the juror be able to lay aside such notions. The Court went on to say that "the adoption of such a rule . . . 'cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law.' " The Court then concluded that the extensive pretrial publicity for six or seven months preceding Irvin's trial coupled with the difficulty of obtaining jurors who had no preconceived notions about Irvin's guilt (eight out of the twelve jurors who ultimately sat had once formed an opinion that Irvin was guilty) resulted in a denial of due process in Irvin's case.

Rather than supporting the majority's position, the holding in *Irvin* is some authority for giving defendant a new trial on due process grounds. At best *Irvin* has no application to the challenge for cause issue. It is a due process case.

Defendant's contention here is the trial judge's denial of his challenges for cause to jurors Thompson, Butler and McRainey, violated our statute, N.C. Gen. Stat. § 15A-1212, because each of these jurors had formed an opinion as to defendant's guilt. The statute provides:

> A challenge for cause to an individual juror may be made by any party on the ground that the juror:
>
> . . . .
>
> (6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party

> to elicit whether the opinion formed is favorable or adverse to the defendant.

The statute does not permit denial of a challenge for cause of a juror who has once formed an opinion on the ground that the juror says at trial that he or she can lay it aside. The statute is clear, unambiguous, and not susceptible to interpretation on this point. It says, without equivocation, that a juror who has either "formed or expressed an opinion as to the guilt or innocence of the defendant" is subject to a challenge for cause. When the court finds no error in the denial of challenges for cause if the jurors can lay aside their opinions, it usurps the legislative function by rewriting the statute. Jurors Thompson, Butler and McRainey each admitted that they had formed an opinion about defendant's guilt. Defendant's challenge for cause to these jurors should have been allowed.

Defendant then challenged each of these jurors peremptorily. He exhausted the peremptory challenges available to him. He renewed his challenges for cause after he had peremptorily challenged the three jurors in question and the renewed challenges were denied. The improper denials, therefore, of defendant's challenges for cause of these three jurors warrants a new trial. N.C. Gen. Stat. § 15A-1214(h) & (i).

Evidence of defendant's guilt is strong. Despite what this Court may believe about his guilt, it has an obligation to afford him a fair trial before an impartial jury. Specifically, we are obligated as regards his trial, to protect him, if we can, from the clamor of an irate newspaper bent on seeing him convicted. The Court fails to meet these obligations when, under the circumstances here, it finds no error in the denial of defendant's change of venue motion and his challenges for cause of those jurors who before his trial had formed an opinion about his guilt.

Justice FRYE dissenting.

For the reasons stated in *State v. Jerrett*, No. 228A82 (filed 27 September 1983), and in the dissenting opinion herein by Justice Exum, I dissent from that part of the majority opinion which holds that the trial court did not commit prejudicial error in denying defendant's motion for a change of venue or special venire. I vote to give defendant a new trial.

STATE OF NORTH CAROLINA v. BOBBY LEWIS BLACKWELDER

No. 231A83

(Filed 27 September 1983)

1. **Criminal Law § 138— second degree murder—heinous, atrocious, or cruel aggravating factor**

The evidence showed that a second degree murder was excessively brutal and that the victim suffered unnecessary physical pain prior to death so as to support the trial judge's finding as an aggravating factor that the murder was especially heinous, atrocious, or cruel where the evidence showed that deceased suffered a shotgun wound to his back and another to his head, the second shot having literally blown the victim's brains from his skull; the first serious wound inflicted was the shotgun wound to the victim's back; although such a wound could have been fatal, it would have not caused instantaneous death, and a person of the size, weight, age and physical condition of the victim could have lived a maximum of several hours after receiving such a wound; the victim's body was discovered in the kitchen of defendant's trailer; in addition to the blood and brains scattered in the vicinity of the body, there were bloodstains found on the front porch or deck of the trailer, in the bathroom and in the hallway leading to the bathroom, indicating that the victim was wounded and bleeding and thus suffered for some time prior to the fatal shot; and the fatal shot was fired with the muzzle of the shotgun placed no more than an inch from the victim's head. G.S. 15A-1340.4(a)(1)f.

2. **Criminal Law § 138— murder case—use of deadly weapon as aggravating factor**

When the facts in a murder case justify an instruction on the inference arising as a matter of law from the use of a deadly weapon and it is in fact given, or when it could have been given had defendant not entered a plea of guilty, evidence of the use of that weapon may not be used as an aggravating factor at sentencing. G.S. 15A-1340.4(a)(1)i.

3. **Criminal Law § 138— second degree murder—seriousness of crime as aggravating factor**

In imposing a sentence for second degree murder, the trial judge erred in finding as an aggravating factor that "the presumptive sentence of fifteen years does not do justification to the seriousness of this crime," since factors such as deterrence or the seriousness of a crime were presumably considered in determining the presumptive sentence for the offense, and since the "seriousness" of a crime may be measured only in terms of specific statutory or nonstatutory aggravating or mitigating factors relating to the character or conduct of the offender, or focusing on the victim.

4. **Criminal Law § 138— person of good character mitigating factor—insufficiency of proof**

Defendant failed to prove by a preponderance of the evidence the mitigating factor that he has been a person of good character or has had a good reputation in the community in which he lives, G.S. 15A-1340.4(a)(2)m,

where his evidence showed only that he was never seen in a fight or carrying a weapon; that he paid his rent; that he borrowed money and repaid it; and that as an alcoholic he was nonviolent when drunk.

5. **Criminal Law § 138— military service as mitigating factor**

Should the evidence at defendant's resentencing establish that defendant was honorably discharged from the United States Armed Services, that factor must be found by the court in mitigation. G.S. 15A-1340.4(a)(2).

BEFORE *Freeman, J.*, at the 10 January 1983 Criminal Session of Superior Court, ROWAN County, defendant was convicted of second degree murder. Pursuant to G.S. § 7A-27(a), he appeals from a judgment sentencing him to life imprisonment. Argued 12 September 1983.

The case arises out of the 28 September 1982 shooting death of Michael Trent Tew. The body was discovered inside defendant's mobile home. When law enforcement authorities arrived at the scene of the crime, defendant was on his front porch mopping up what appeared to be blood. Inside the trailer, the officers found Tew's body and observed what appeared to be a shotgun wound to his back and another to his head, the second shot having literally blown the victim's brains from his skull. Physical evidence discovered as a result of a crime scene search, including a shotgun, shotgun shells, plastic waddings, and blood samples, connected the defendant with the murder. George Basinger, a taxi driver in Kannapolis, testified at trial that he picked up the defendant and the victim at the Driftwood Lounge on 28 September and at 6:15 p.m. dropped the two men at defendant's trailer. At the request of Mr. Tew, Basinger arranged for a second cab driver, Edward Hill, to return to defendant's trailer at 6:30 p.m. Hill testified that upon his arrival he was informed by defendant that Tew had gone. Hill was told to "just go on up the hill and don't even look back. Just keep on going." Hill later picked defendant up at the Driftwood Lounge and drove him to the Saturday Night Lounge.

Willard Howard, who alerted law enforcement authorities that the murder had occurred, testified that he met defendant at the Saturday Night Lounge at approximately 7:15 p.m. on 28 September. He accompanied defendant to defendant's trailer. Defendant had indicated to Howard that he had shot someone twice, that he had never seen anything bleed that much before,

and that the body was in the trailer. Howard left the trailer immediately after viewing what loooked like "bloody water" and a "chunk of meat" (the victim's brains) on the floor and what looked like a body covered up with sheets on one side of the kitchen.

Defendant's assignments of error pertain only to the sentencing phase of his trial. He challenges the trial court's reliance on two statutory aggravating factors: that the offense was especially heinous, atrocious, or cruel, G.S. § 15A-1340.4(a)(1)f, and that defendant was armed with or used a deadly weapon at the time of the crime, G.S. § 15A-1340.4(a)(1)i. Defendant further challenges the trial court's reliance on a non-statutory aggravating factor: "That the presumptive sentence of 15 years does not do justification to the seriousness of this crime." In addition, defendant assigns as error the trial court's failure to find in mitigation that defendant has been a person of good character or has had a good reputation in the community in which he lives, and as an additional mitigating factor defendant's service in the army. Finally defendant challenges the trial court's discretionary weighing process which resulted in a life sentence in excess of the presumptive term of fifteen years. Facts necessary to a determination of these issues will be discussed where pertinent. For the reasons set forth below, we hold that defendant is entitled to a new sentencing hearing.

Rufus L. Edmisten, Attorney General, by Guy A. Hamlin, Assistant Attorney General, for the State.

Kenneth L. Eagle, Attorney for Defendant-Appellant.

MEYER, Justice.

[1] Defendant first contends that the trial court erred in finding as a factor in aggravation that the offense was especially heinous, atrocious, or cruel. G.S. § 15A-1340.4(a)(1)f. We have addressed the applicability of this factor in the context of a manslaughter offense in *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). In that case we looked, for definitional purposes only, to those capital cases where a similar factor had been applied under G.S. § 15A-2000(e)(9). We considered whether death was immediate; whether there was unusual infliction of suffering upon the victim; whether there was evidence of excessive brutality beyond that normally present in any killing; or whether the facts as a whole

portrayed the commission of a crime which was conscienceless, pitiless or unnecessarily tortuous to the victim. We held that evidence which indicated that a baby had been beaten to death, struck against a bedpost with such force that it shattered his body cast and crushed his skull, was sufficient to support a finding that the voluntary manslaughter offense was especially heinous, atrocious, or cruel. We noted that the baby's injuries were multiple and death was not immediate.

The Court of Appeals has since applied this factor in *State v. Medlin*, 62 N.C. App. 251, 302 S.E. 2d 483 (1983), and *State v. Hammonds*, 61 N.C. App. 615, 301 S.E. 2d 457 (1983) (assault with a deadly weapon with intent to kill inflicting serious injury); in *State v. Massey*, 62 N.C. App. 66, 302 S.E. 2d 262 (1983) (attempted burglary); in *State v. Abee*, 60 N.C. App. 99, 298 S.E. 2d 184 (1982), *mod. and aff'd.*, 308 N.C. 379, 302 S.E. 2d 230 (1983) (multiple sex offenses); and in *State v. Sandlin*, 61 N.C. App. 421, 300 S.E. 2d 893, *cert. den.* 308 N.C. 679 (1983) (second degree murder by strangulation). In *Medlin* and *Massey* the Court of Appeals found insufficient evidence of "excessive brutality" to support a finding that the crimes were especially heinous, atrocious, or cruel,[1] while in *Hammonds* the court found no evidence of this factor apart from evidence necessary to prove elements of the offense, *i.e.* use of deadly weapon and serious injury. In *Abee* and *Sandlin*, the Court of Appeals upheld a finding that the crimes were especially heinous, atrocious, or cruel, without discussion.

While it is instructive to turn to our capital cases for a *definition* of an especially heinous, atrocious, or cruel offense, we decline to measure the facts of those capital cases against the

1. While the Court of Appeals in *Medlin* applied the correct standard, *i.e.* whether the offense was excessively brutal beyond that normally present in any assault with a deadly weapon with intent to kill inflicting serious injury, the court ignored, to defendant's favor, that the victim was shot five times. Where proof of one act constituting an offense is sufficient to sustain a defendant's conviction, multiple acts of the same offense are relevant to the question of sentencing, including whether the offense charged was especially heinous, atrocious, or cruel. *See State v. Abee*, 308 N.C. 379, 302 S.E. 2d 230 (1983). Also relevant to the question of sentencing and properly considered under G.S. § 15A-1340.4(a)(1) is the impact of the crime on the victim. Where the physical or emotional injury is *in excess* of that normally present in the offense, multiple injuries would be an important consideration *either* as an additional factor in aggravation *or* as proof that the offense was especially heinous, atrocious, or cruel.

facts of cases decided under G.S. § 15A-1340.4(a)(1)f. Rather, the focus should be on whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*

Defendant contends that the facts of the case sub judice do not support a finding that this murder was excessively brutal, or involved an unusual degree of suffering. We disagree.

An examination of the victim's body revealed two shotgun wounds, one on the left back area and the other through the top of the head, the head wound resulting in severe disfigurement. There were many small bruises on the front of both thighs, between one-sixteenth and one-eighth of an inch, circular and randomly distributed. There were also several similar bruised areas on the right forearm, but these had small cut marks one-eighth of an inch long and deep in each one. The autopsy report also noted a laceration below the victim's kneecap, possibly caused by a fall prior to death. We agree that evidence of bruises and cuts, if inflicted prior to death by the defendant, would support a conclusion that there was physical and psychological pain or torture not normally present in a murder; however, the record here is silent on how or when the victim sustained these wounds. Without regard to the evidence of these cuts and bruises, the record supports a conclusion that the murder was excessively brutal and that the victim, whose death was not immediate, suffered unnecessary physical pain prior to death. In fact, photographs taken of the crime scene bespeak of a ghoulish, bloody nightmare.

The examining pathologist determined that the first serious wound inflicted was the shotgun wound to the victim's back. His opinion was based on the amount of bleeding into the soft tissues of the armpit—bleeding that would be less likely to occur after death when the heart had stopped. The pathologist further testified that the wound could have been fatal, but would not cause instantaneous death and that a person of the size, weight, age and physical condition of the victim could have lived a maximum of several hours after receiving such a wound. The victim's body was discovered in the kitchen. In addition to the blood and brains scattered in the vicinity of the body as a direct result of a close-range shotgun blast to the head, there were bloodstains found on the front porch or deck of the trailer, in the bathroom, and in the

hallway leading to the bathroom. The clear indication is that the victim was wounded and bleeding and thus suffered for some time prior to the fatal shot. Also, we do not consider it inappropriate in any case to measure the brutality of the crime by the extent of the physical mutilation of the body of the deceased or surviving victim. In the present case there was evidence that the muzzle of the shotgun was placed no more than an inch from the head. The result was an excessively brutal murder:

> The head wound was on the very top of the head in the middle and there was an entrance hole which measured about an inch in diameter. Around the hole there were tears in the skin going off in all directions and there was some soot material on the skin surface of the back side of the hole. There was severe fracturing of the skull and most of the brain was absent. The brain could have been blown out of the skull through the large tear in the front of the face. This tear was down the right side of the front of the face and basically split the top of the face in half. The tear was from the top of the head down through the right eye and down the cheek next to the nose, not quite reaching the mouth. There were several other tears coming off that in the front of the face. The bones of the skull were shattered in many places and the entire skull cavity could be opened as wide as the head would go.

The trial judge properly found as an aggravating factor that the murder was especially heinous, atrocious, or cruel.

[2] Defendant next contends that the trial court erred in finding, as an aggravating factor, that defendant was armed with or used a deadly weapon at the time of the crime. G.S. § 15A-1340.4(a)(1)i. In support of his contention defendant relies on the language of G.S. § 15A-1340.4(a)(1) which states, in pertinent part, that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ." Thus, argues defendant, because evidence of the use of a deadly weapon was necessary to prove the malice element of the second degree murder offense, the same evidence could not be used to prove this factor in aggravation. The argument has merit.

In this case, as in virtually every case involving murder effected by the use of a deadly weapon, the trial judge instructed on the inference of malice raised by the use of a deadly weapon:

> Second degree murder is the unlawful killing of a human being with malice.
>
> Now the State of North Carolina has offered evidence which tended to show that on or about the 28th day of September, 1982, the Defendant went in a cab with the deceased, Michael Trent Tew, to the trailer owned by the Defendant and that while there, the Defendant took a shotgun which he owned and shot Mr. Tew once in the back and then in the top of the head with the shotgun, and that Mr. Tew died as a result of one or both of these gunshot wounds.
>
> The Defendant elected not to offer evidence, but relied on the insufficiency or the weakness of the State's case.
>
> Now I charge that for you to find the Defendant guilty of second degree murder, the State must prove two things beyond a reasonable doubt. First, that the Defendant intentionally and with malice shot Michael Trent Tew with a deadly weapon.
>
> Intent is a mental attitude which is seldom provable by direct evidence. It must ordinarily be proven by circumstances from which it may be inferred. You arrive at the intent of a person by such reasonable deduction from circumstances proven as a reasonably prudent person would ordinarily draw therefrom.
>
> Malice means not only hatred, ill-will or spite as it is ordinarily understood. To be sure, that is malice. But it also means that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in his death and without just cause, excuse, or justification.
>
> *A shotgun is a deadly weapon.*
>
> The second thing the State must prove to you beyond a reasonable doubt is that the shooting was a proximate cause of Michael Tew's death. A proximate cause is a real cause, a cause without which Michael Tew's death would not have oc-

curred. *If the State proves beyond a reasonable doubt that the Defendant intentionally killed Michael Trent Tew with a deadly weapon or intentionally inflicted a wound upon Michael Trent Tew with a deadly weapon that proximately caused his death, the law implies first that the killing was unlawful and secondly that it was done with malice.*

(Emphasis added.)

Without launching into a full discourse on the history or the impact of the "inference of malice" instruction, *see State v. Reynolds*, 307 N.C. 184, 297 S.E. 2d 532 (1982), we are satisfied that when the facts justify the giving of this instruction, and it is in fact given, juries rely upon the use of the weapon for proof of malice. When the facts justify the giving of the instruction of the inference of malice arising as a matter of law from the use of a deadly weapon and it is in fact given, or when it could have been given had defendant not entered a plea of guilty, evidence of the use of a deadly weapon is deemed necessary to prove the element of malice for purposes of precluding its use as an aggravating factor at sentencing. We hold that when, as in the case sub judice, the facts justify an instruction on the inference of malice arising as a matter of law from the use of a deadly weapon, evidence of the use of that deadly weapon may not be used as an aggravating factor at sentencing.

We adopt this "bright-line" rule to avoid hairsplitting factual disputes necessitated by having to second-guess jury decisions as to the existence of malice.[2] Short of requiring every jury to specify upon what facts and circumstances it relied in determining the existence of malice, it is simply not possible to conclude,

2. For example, in *State v. Keaton*, 61 N.C. App. 279, 283-84, 300 S.E. 2d 471, 473 (1983), the defendant fired three shots at the victim, two of which hit him. The Court of Appeals held that "[a]s there were no facts and circumstances indicating that Hawks' death was unusually gruesome, other than the fact that he died from gunshot wounds, the necessary element of malice *must have been inferred* by the jury from the evidence that defendant intentionally shot Hawks with a gun." (Emphasis added.) *Accord, State v. Gaynor*, 61 N.C. App. 128, 300 S.E. 2d 260 (1983). Yet in *State v. Hough*, 61 N.C. App. 132, 135, 300 S.E. 2d 409, 411 (1983), the Court of Appeals wrote that "[t]he trial judge could properly infer the presence of malice from the circumstances and acts of the defendant" in that "[t]he number of shots [four] and manner of the shooting give rise to an inference of malice." Thus, concluded the court, "[d]efendant's use of the deadly weapon in this case was not necessary to prove the element of malice."

with any degree of certainty, that a jury instructed on the inference of malice would not have considered the use of a deadly weapon as evidence necessary to prove the element of malice.[3] We hold that defendant is entitled to a new sentencing hearing for error in considering this factor in aggravation of his sentence.

[3] As an additional aggravating factor, the trial judge found that "the presumptive sentence of 15 years does not do justification to the seriousness of this crime." Under the authority of *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983), we hold that this was error, and repeat that factors such as deterrence or the seriousness of a crime were presumably considered in determining the presumptive sentence for the offense. While these factors may legitimately serve as a basis for imposing an active sentence, neither may be considered as *an additional* aggravating or mitigating factor. Rather, the "seriousness" of a crime may be measured in terms of *specific* statutory or nonstatutory aggravating or mitigating factors relating to the character or conduct of the offender, or focusing on the victim.[4] This the trial judge did in finding that the offense was especially heinous, atrocious, or cruel. In fact, upon considering evidence of the excessive brutality of the crime, including the mutilation of the body and the physical suffering of the victim, the trial judge was precluded from using these same items of evidence in finding an additional factor of "seriousness." G.S. § 15A-1340.4(a)(1).

[4] Defendant's fourth assignment of error focuses on the trial court's failure to find a statutory mitigating factor: that defendant has been a person of good character or has had a good reputation in the community in which he lives. G.S. § 15A-1340.4 (a)(2)m. Defendant contends that the trial court ignored uncon-

3. The fact that a defendant *pleads* guilty to second degree murder, as noted above, does not affect our decision on this issue. Where malice can be inferred from a murder perpetrated by the use of a deadly weapon, irrespective of whether defendant is convicted of or pleads to the charge, use of the deadly weapon will be deemed evidence necessary to prove the element of malice.

4. The offense may be aggravated because the defendant committed the offense while on pretrial release (the character of the defendant); because the offense was committed to avoid arrest (the conduct of the defendant); or because the offense was committed against a public official or because the victim was very young, old, or infirm (the position held by or the nature of the victim). G.S. § 15A-1340.4 (a)(1).

tradicted evidence that he was never seen in a fight or carrying a weapon; that he paid his rent; that he borrowed money and repaid it; that as an alcoholic he was argumentative and verbally abusive when drunk, but nonviolent.

We have recently stated that "[w]hen evidence in support of a particular mitigating or aggravating factor is uncontradicted, substantial, and there is no reason to doubt its credibility, to permit the sentencing judge simply to ignore it would eviscerate the Fair Sentencing Act." *State v. Jones*, 309 N.C. 214, 218, 306 S.E. 2d 451, 454 (1983). We cannot agree, however, that in the present case the trial judge *ignored* defendant's evidence. Rather, the testimony, taken in its entirety, simply failed to prove by a preponderance of the evidence the existence of this factor—that defendant has been a person of good character or has had a good reputation in the community. The failure here is on the part of the defendant in attempting to substitute the quantity of the evidence for the quality of the evidence. The fact that numerous witnesses testified that defendant paid his bills and was nonviolent when drunk does not, under any reasonable interpretation of general "good character" or "good reputation in the community in which he lives," establish the existence of this factor. To repeat —uncontradicted, quantitatively substantial, and credible evidence may simply fail to establish, by a preponderance of the evidence, any given factor in aggravation or mitigation. While evidence may not be ignored, it can be properly rejected if it fails to prove, as a matter of law, the existence of the mitigating factor.

[5] Defendant further argues that the trial court erred in failing to find his service in the army as a nonstatutory mitigating factor. We note that military service has now been appropriately included under G.S. § 15A-1340.4(a)(2) as a statutory mitigating factor. 1983 Session Law, Chapter 606, effective 1 October 1983. Should the evidence at resentencing establish that defendant was honorably discharged from the United States Armed Services, that factor must be found in mitigation. The weight to be attributed to that factor, as to any factor found in aggravation or mitigation, remains within the trial judge's sound discretion. *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658, *disc. rev. den.*, 306 N.C. 745 (1982). *See State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689; *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983).

As his final assignment of error, defendant challenges the discretionary weighing process that resulted in a sentence of life imprisonment for second degree murder. As the case must be remanded for resentencing in view of error found in two aggravating factors, we again emphasize that:

> The fair sentencing act did not remove, nor did it intend to remove, all discretion from the sentencing judge. Judges still have discretion to increase or reduce sentences from the presumptive term upon findings of aggravation or mitigating factors, the weighing of which is a matter within their sound discretion. Thus, upon a finding by the preponderance of the evidence that aggravating factors outweigh mitigating factors, the question of whether to increase the sentence above the presumptive term, and if so, to what extent, remains within the trial judge's discretion.
>
> The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. Although the court is required to consider all statutory factors to some degree, it may very properly emphasize one factor more than another in a particular case. N.C. Gen. Stat. 15A-1340.4(a). The balance struck by the trial judge will not be disturbed if there is support in the record for his determination.

State v. Davis, 58 N.C. App. at 333-34, 293 S.E. 2d at 661 (citations omitted). *Accord, State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689; *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673.

The case is remanded to the Superior Court, Rowan County, for resentencing.

Remanded for resentencing.

STATE OF NORTH CAROLINA v. MACK LEO THOMPSON

No. 150PA83

(Filed 27 September 1983)

Criminal Law § 138— Fair Sentencing Act—aggravating factors—prior convictions

Pursuant to G.S. 15A-1340.4(e), the initial burden of raising the issue of indigency and lack of assistance of counsel on a prior conviction is on the defendant. If the defendant elects to challenge the admissibility of evidence of his prior convictions, he must do so by a method which informs the court of the specific reason for his objection; *i.e.*, that he was indigent and unrepresented by counsel at the time of the prior conviction or convictions. The defendant may challenge the evidence of prior convictions prior to trial by motion to suppress or he may challenge the evidence in the first instance at the time of the offer of proof by the State. The challenge may be in the form of objection, motion to strike, motion to suppress or other acceptable means.

BEFORE *Llewellyn, J.*, at the 7 April 1982 Session of Superior Court, LENOIR County, defendant was convicted of felonious breaking or entering and felonious larceny and sentenced to prison terms in excess of the presumptive. Defendant appealed. In a decision reported at 60 N.C. App. 679, 300 S.E. 2d 29 (1983), the Court of Appeals reversed and remanded the cases for resentencing. We granted the State's petition for discretionary review on 3 May 1983. Argued 12 September 1983.

Stated briefly, evidence at trial tended to show that on 2 December 1981 a burglar alarm sounded in a building housing equipment, motors and compressors. In response to the alarm, law enforcement officers arrived at the scene where they discovered a large hole torn in the tin covering the back of the building. Defendant and another man were found inside the building.

Defendant raised three assignments of error before the Court of Appeals all of which were addressed to the trial court's reliance on certain aggravating factors during sentencing. We agree with the holding of the Court of Appeals that defendant is entitled to a new sentencing hearing for error in considering in aggravation G.S. § 15A-1340.4(a)(1)c (that the offense was committed for hire or pecuniary gain) and G.S. § 15A-1340.4(a)(1)m (that the offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss).

We do not agree, however, with the holding below that the trial court erred in finding that the defendant had been convicted of offenses punishable by more than sixty days' confinement. G.S. § 15A-1340.4(a)(1)o.

Rufus L. Edmisten, Attorney General, by William N. Farrell, Associate Attorney General, for the State.

Nora B. Henry, Assistant Appellate Defender, Office of the Appellate Defender, Attorney for defendant-appellee.

MEYER, Justice.

With respect to the State's contention that the trial judge properly considered in aggravation that the offense was committed for pecuniary gain, we find no evidence in this record that the defendant was hired or paid to commit the offense—evidence which we have recently held to be necessary to support a finding of this factor. *See State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983). Nor do we agree that there is sufficient evidence on this record to support a finding of an attempted taking of property of great monetary value. The defendant apparently intended to take copper from the compressor wires. There was no evidence as to how much copper was available, its quality or its value. We add, however, that had the evidence been such to establish an attempted taking of property of great monetary value, the trial judge would not have been precluded from finding this factor in aggravation simply because defendant had been charged with larceny. The *additional* evidence necessary to prove a taking or attempted taking of property of *great* monetary value is not evidence necessary to prove an element of felonious larceny.[1]

1. We emphasize again that many of the statutory factors listed under G.S. § 15A-1340.4(a)(1) contemplate a duplication in proof without violating the proscription that "evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." In *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), we held that it was not error to consider in a felonious child abuse case that the two year old victim was very young. We pointed out in *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983), that where proof of one injury is sufficient to sustain a conviction, multiple or excessively brutal injuries are relevant to the question of sentencing. In *State v. Abee*, 308 N.C. 379, 302 S.E. 2d 230 (1983), we held that where defendants pled guilty to only one act of fellatio, repeated acts of fellatio were properly considered as aggravating factors under G.S. § 15A-1340.4(a)(1).

By far the most significant issue raised by the State in this appeal involves the decision of the Court of Appeals respecting G.S. § 15A-1340.4(a)(1)o, which provides:

> o. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement. Such convictions include those occurring in North Carolina courts and courts of other states, the District of Columbia, and the United States, provided that any crime for which the defendant was convicted in a jurisdiction other than North Carolina would have been a crime if committed in this State. Such prior convictions do not include any crime that is joinable, under G.S. Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced.

G.S. § 15A-1340.4(e) provides:

> e. 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. No prior conviction which occurred while the defendant was indigent may be considered in sentencing unless the defendant was represented by counsel or waived counsel with respect to that prior conviction. A defendant may make a motion to suppress evidence of a prior conviction pursuant to Article 53 of this Chapter. If the motion is made for the first time during the sentencing stage of the criminal action, either the State or the defendant is entitled to a continuance of the sentencing hearing.

On appeal to that court, defendant assigned as error the trial court's "finding that the defendant had been convicted of offenses punishable by more than sixty days' confinement when the State failed to introduce a certified copy of the defendant's record." After noting that the evidence of the prior convictions consisted of the defendant's own statements on cross-examination and a statement by the prosecuting attorney, the Court of Appeals

held that the methods of proof enumerated in G.S. § 15A-1340.4(e) are permissive, not mandatory. The Court of Appeals then added:

> Nevertheless, we do not believe there was sufficient proof of the prior convictions to constitute an aggravating factor. The method of proof of prior convictions is set forth in G.S. 15A-1340.4(e). That subsection also provides: 'No prior conviction which occurred while the defendant was indigent may be considered in sentencing unless the defendant was represented by counsel or waived counsel with respect to that prior conviction.' There is no evidence in the record as to the indigency of the defendant or his representation by counsel at the time of the prior convictions. The court could not have found by a preponderance of the evidence that the defendant was not indigent or that he had counsel or had waived it at the time of his prior convictions. We believe this is a feature of the aggravating factor of prior convictions that has to be proved. We do not believe the burden should be on the defendant to prove he was indigent and did not have counsel or waive counsel. The statute provides for a presumptive sentence unless the aggravating factors outweigh the mitigating factors. The burden should be on the State to prove the aggravating factors if the presumptive sentence is not to be imposed.

60 N.C. App. at 684-85, 299 S.E. 2d at 32-33.

We agree with that portion of the Court of Appeals' opinion holding that the language of G.S. § 15A-1340.4(e) is permissive rather than mandatory respecting methods of proof. It provides that prior convictions "may" be proved by stipulation or by original certified copy of the court record, not that they *must* be. The statute does not preclude other methods of proof. *See State v. Brooks*, 61 N.C. App. 572, 301 S.E. 2d 421 (1983); *State v. Teague*, 60 N.C. App. 755, 300 S.E. 2d 7 (1983); *State v. Massey*, 59 N.C. App. 704, 298 S.E. 2d 63 (1983). *Accord State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308 (1983); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981) (reaching the same result under G.S. § 15A-2000(e)(3)). We hold that a defendant's own statements under oath constitute an acceptable alternate method of proof of a prior conviction. We also agree with the Court of Appeals that the prosecuting attorney's statement concerning a prior convic-

tion of larceny in Jones County constituted insufficient evidence to support a finding of that prior conviction—if, in fact, the trial judge so found.[2]

We do not agree with that portion of the decision of the Court of Appeals placing the burden on the State to initially raise and prove nonindigency and representation by counsel or waiver of counsel in order to support a finding that the defendant had a prior conviction or convictions. We hold that portion of the Court of Appeals' decision to be error requiring reversal.

We are cognizant of the fact that, with the exception of *State v. Massey*, 59 N.C. App. 704, 298 S.E. 2d 63, which suggests otherwise, the Court of Appeals has consistently found error in the trial court's failure to make a finding concerning whether defendant was indigent at the prior proceeding, and if so, whether he was represented by counsel, upon the ground that the burden is on the State to present evidence to support such a finding. *See State v. Callicutt*, 62 N.C. App. 296, 302 S.E. 2d 460 (1983); *State v. Massey*, 62 N.C. App. 66, 302 S.E. 2d 262 (1983); *State v. Green*, 62 N.C. App. 1, 301 S.E. 2d 920 (1983); *State v. Locklear*, 61 N.C. App. 594, 301 S.E. 2d 437, *disc. rev. denied*, 308 N.C. 679 (1983); *State v. Farmer*, 60 N.C. App. 779, 299 S.E. 2d 842 (1983).

The contentions of the parties are best summarized in *State v. Green*, 62 N.C. App. 1, 301 S.E. 2d 920. In that case Judge Whichard, writing for the majority, stated in a footnote that although the decision respecting the allocation of the burden of proof in this situation is more appropriately for the Legislature,[3] in the absence of a clear statement, the burden should be on the defendant. Judge Whichard first reasoned that nonindigency or representation by counsel were not intended to be "elements" of the aggravating factor of a prior conviction, placing the burden on

2. It would be helpful for purposes of appellate review for trial judges to note the conviction or convictions specifically relied upon under G.S. § 15A-1340.4(a)(1)o, particularly where the method of proof or the issue of representation by counsel is raised at the sentencing hearing.

3. The Legislature has, in fact, spoken to the issue. *See*, G.S. § 15A-980, An Act to Set Forth the Procedure to Suppress a Prior Conviction Obtained in Violation of the Right to Counsel, 1983 Session Laws, Chapter 513 (effective 1 October 1983). *See also* G.S. § 15A-1340.4(e), amended to delete from the fourth sentence the words "pursuant to Article 53 of this Chapter" and to substitute "pursuant to G.S. 15A-980." 1983 Session Laws, Chapter 513 (effective 1 October 1983).

the State to prove the absence of indigency or the presence of counsel as it would the other elements of any criminal offense. Rather, reasoned Judge Whichard, the Legislature

> intended merely to provide defendants with a means to resist a finding of prior convictions as an aggravating factor in appropriate cases.
>
> Twenty years after *Gideon*, cases in which a defendant was convicted while indigent and unrepresented should be the exception rather than the rule. A defendant generally will know, without research, whether this occurred. In my view it is not the preferable policy to put the State to the burden of producing records, at times from multiple counties or even multiple jurisdictions, to establish something which only rarely will enable a defendant to resist a finding of the prior convictions as an aggravating factor, and which, when it will, is generally within the defendant's knowledge without the necessity of research, possibly in a multiplicity of geographical areas.

62 N.C. App. at 6, 301 S.E. 2d at 923.

Not only is it preferable policy to require a defendant to object to or move to suppress the admission of evidence of a prior conviction in the sentencing stage of a criminal trial, such a requirement is consistent with our general procedural rules;[4] consistent with the language of G.S. § 15A-1340.4(e) that *a defendant* may make a motion to suppress; and not inconsistent with any constitutional right a defendant may have to prevent the use of a conviction obtained in violation of *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799 (1963), to enhance punishment for another offense. *United States v. Tucker*, 404 U.S. 443, 30 L.Ed. 2d 592 (1972). A constitutional right may be waived, as can a substantive right or a procedural right. *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980). Where a defendant stands silent and, without objection or motion, allows the introduction of evidence of a prior conviction, he deprives the trial division of the opportunity to pass on the constitutional question and is properly precluded from raising the issue on appeal. We find the language in *McDowell* particularly appropriate on this issue. In *McDowell* defendant con-

4. *See e.g.* G.S. § 15A-971 *et seq.* referred to in G.S. § 15A-1340.4(e).

tended that he was denied his statutory right to make an opening statement. We answered as follows:

> The record before us in the present case is completely silent with respect to any mention by either the trial court or defense counsel concerning an opening statement. It is well established that a defendant may waive the benefit of statutory or constitutional provisions by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970). It follows that in order for an appellant to assert a constitutional or statutory right on appeal, the right must have been asserted and the issue raised before the trial court. *State v. Parks*, 290 N.C. 748, 228 S.E. 2d 248 (1976). In addition, it must affirmatively appear on the record that the issue was passed upon by the trial court. *City of Durham v. Manson*, 285 N.C. 741, 208 S.E. 2d 662 (1974); *State v. Braswell*, 283 N.C. 332, 196 S.E. 2d 185 (1973). By his failure to request the opportunity to make an opening statement, defendant engaged in conduct inconsistent with a purpose to insist upon the exercise of a statutory right. Therefore, his conduct at trial amounts to a waiver of this procedural right.

Id. at 291, 271 S.E. 2d at 294.

As Judge Braswell aptly stated in his dissenting opinion in *Green*, "[t]he record is 'silent' only because the defendant voluntarily chose for it to be 'silent.' " 62 N.C. App. at 10, 301 S.E. 2d at 925.

We therefore hold that pursuant to G.S. § 15A-1340.4(e), the initial burden of raising the issue of indigency and lack of assistance of counsel on a prior conviction is on the defendant. If the defendant elects to challenge the admissibility of evidence of his prior convictions, he must do so by a method which informs the court of the specific reason for his objection; *i.e.* that he was indigent and unrepresented by counsel at the time of the prior conviction or convictions. A mere objection to the evidence alone will not be sufficient. The defendant may challenge the evidence of prior convictions prior to trial by motion to suppress or he may challenge the evidence in the first instance at the time of the offer of proof by the State. The challenge may be in the form of objection, motion to strike, motion to suppress or other acceptable

means. The onus is on the defendant to inform the court that he is prepared on voir dire to offer proof that he was indigent and unrepresented by counsel at the time of the prior convictions.

If defendant challenges the evidence by motion to suppress, the proceedings on the motion are governed by Article 53 of Chapter 15A of the General Statutes. When the challenge is made otherwise than by a motion to suppress, the defendant has the burden of going forward with the evidence of his indigency and lack of representation, or waiver thereof, on his prior convictions. If the defendant establishes a prima facie showing, the burden shifts to the State to prove by a preponderance of the evidence that the challenged evidence is admissible. *See State v. Cheek*, 307 N.C. 552, 299 S.E. 2d 633 (1983); *State v. Breeden*, 306 N.C. 533, 293 S.E. 2d 788 (1982).

For error in findings on two aggravating factors, defendant is entitled to a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689. The case is remanded to the Court of Appeals for further remand to the Superior Court, Lenoir County, for resentencing.

Modified and affirmed.

STATE OF NORTH CAROLINA v. PHILIP JAMES LOCKLEAR

No. 114PA83

(Filed 27 September 1983)

1. **Criminal Law § 99.7— admonitions to witness about perjury—invasion of province of jury—denial of fair trial**

In a prosecution for feloniously discharging a firearm into an occupied dwelling, the trial court's admonitions to the prosecuting witness to answer truthfully questions asked her by the prosecutor and warning her of the consequences of perjury invaded the province of the jury, probably caused the witness to change her testimony, and deprived defendant of a fair trial before an impartial judge.

2. **Weapons and Firearms § 3— discharging firearm into dwelling—sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for feloniously discharging a firearm into an occupied dwelling.

Justice MITCHELL dissenting.

ON discretionary review of the decision of the Court of Appeals, 60 N.C. App. 524, 299 S.E. 2d 470 (1983), finding no error in the judgment entered by *Morgan, J.*, at the 25 January 1982 Criminal Session of Superior Court, ROBESON County. Heard in the Supreme Court 14 September 1983.

Defendant was tried upon a proper bill of indictment charging him with feloniously discharging a firearm into the dwelling house of Mary Hunt Campbell. He was found guilty, sentenced to imprisonment for eight years, and thereupon appealed to the Court of Appeals. That court found no error in the trial, and we granted discretionary review pursuant to N.C.G.S. 7A-31(a).

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

Adam Stein, Appellate Defender, by Lorinzo L. Joyner, Assistant Appellate Defender, for the defendant.

MARTIN, Justice.

[1] We find prejudicial error with respect to defendant's first assignment of error and, therefore, reverse the decision of the Court of Appeals. In this assignment defendant argues that he was deprived of due process of law by the actions of the trial court regarding the state's principal witness.

The state's evidence tended to show that defendant and the state's witness Mary Hunt Campbell were friends and that they occasionally lived together in Ms. Campbell's mobile home. On the night in question they had an argument, and Ms. Campbell called the Fairmont police because defendant threatened her. Later in the night she heard "something" hitting her house. She again called the police. She went to the window and saw defendant's car parked down the road and defendant standing in the road with something in his hands. The officers testified that they saw defendant in his car on the highway after the first call. They advised him that he should go home. After the second call one officer in the vicinity of the Campbell home saw defendant in his car coming from the direction of the trailer park. The next day Ms. Campbell pointed out to an officer the spot where she saw defendant, and the officer found sixteen .22-caliber shell casings in the road. An examination of the house disclosed that some bullets had penetrated the wall and windows.

Defendant and his witnesses testified that although he had been at the trailer park about dark, he had left and did not return that night. One witness said he heard shots and looked out the window at Ms. Campbell's home but did not see defendant in his car.

Ms. Campbell in her testimony was very hesitant and appeared to be trying to help defendant. This brings us to the actions by the trial court about which defendant now complains. The trial court sent the jury out of the courtroom, and the following took place:

> THE COURT: Let the record reflect the following occurs in the absence of the Jury. Miss Campbell, I'm going to ask you to sit up close to the microphone, that you take your hand away from your mouth and that you put your hands in your lap, please, and speak up and answer the questions that are asked of you. I a, you're in the process of leading a witness. My observation is that the witness is being a, recalcitrant and hesitant and because of that I'm going to allow you to explore this matter in the absence of the Jury at this time, so we'll have an idea of about what's going to be coming.
>
> . . . .
>
> Q. And what did you call the police station for?
>
> A. (Pause—no answer.)
>
> Q. What did you call the police station for, Miss Campbell?
>
> A. (No answer.)
>
> Q. Did you call the police station because you were having trouble with Phillip?
>
> A. (No answer.)
>
> MR. WEBSTER: If it pleases the Court, I ask the witness be instructed to answer the question.
>
> THE COURT: Miss Campbell, you have been placed under oath and it's your obligation to a, answer the questions as they are asked of you, and to answer them truthfully.
>
> . . . .

Q. Who came there to your trailer?

A. I can't remember.

. . . .

THE COURT: You need to speak up, Ma'm. Remember I asked you to take your hand down from your mouth. Slip up to that microphone and speak into it, about three or four inches away, well, the electric is not on now. Speak up so we can all hear you.

. . . .

THE COURT: Let me interrupt you just a second. Miss Campbell, sometimes folks feel like that a, when there's difficulties between people who know each other that they can come into court as on assault on a female charge and say, "I don't want to testify." I would remind you that this is a proceeding in which a criminal charge has been made, and it is no longer your opportunity to say whether or not this matter will be prosecuted. You are directed to answer the questions the District Attorney asks you. You can be punished by contempt if you do not answer those questions. Do you understand that?

A. Yes, sir.

THE COURT: I am now directing that you answer the questions, the proper questions, any proper questions that are put to you by the Attorneys in this case, do you understand that?

A. Yes, sir.

. . . .

Q. Whose car was it, if you know?

MR. BRITT: Objection.

THE COURT: Objection is over-ruled.

A. (Pause.) I couldn't hardly tell, it was dark.

. . . .

Q. Who did you tell him got out of the car?

A. (Pause) It was dark, I couldn't tell who it was.

Q. Who did you tell Chief Pittman got out of the car?

A. Phillip.

. . . .

THE COURT: Mark "yes" in probable cause, (looking at file.) Just a second, I need to . . . Miss Campbell, not only are you required to answer the questions here; not only those questions asked out of the presence of the Jury but also those questions asked you in front of the Jury. Your failure to answer those questions truthfully, can subject you for an indictment charge for perjury for telling a, an untruth under oath. I want you to understand, completely, that you must answer the questions that are asked of you, and you must answer those questions in a truthful fashion. You must tell the truth when you answer them. I do not know what your relationship is with the defendant, but my impression is that you and he have known each other for some period of time and that you are in the process of not telling the truth because . . . hesitating . . . because there is some hesitation because he is sitting here. Whether or not it's your fault for what happened, or didn't happen, you are directed to tell the truth and to answer the questions. I am directing you to do that. Is that clear?

A. Yes, sir.

THE COURT: You can be put in jail for thirty days for not answering and fined five hundred dollars. Is that clear?

A. Yes, sir.

THE COURT: If you fail to tell the truth, the District Attorney could indict you for perjury, an offense which is punishable possibly up to ten years. Is that clear?

A. Yes, sir.

THE COURT: I am directing you to answer all proper questions put to you by the attorneys in this case. Do you understand that?

A. Yes, sir.

THE COURT: Do you understand that this case is not up to you, one way or the other?

A. Yes, sir.

THE COURT: It's not up to you take it up, or to continue with it. That is out of your hands now, do you understand that?

A. Yes, sir.

THE COURT: I direct that when you answer, you answer in a way that people hear. That you answer so that the court reporter can take it down, the gentleman who is sitting in front of you, and so, so that all the persons on the Jury can hear it. Is that clear?

A. Yes, sir.

Later, after some testimony by Ms. Campbell before the jury, the following took place in the absence of the jury:

THE COURT: Miss Campbell, in order for this trial to proceed, everyone must be able to hear. I have directed you to speak up and you continue to fail to speak up. Those of us who are responsible for the trial of this case and the Jury must hear. I must make notes about it; the court-reporter must take down every word that you say, and all thirteen Jurors must be able to hear. I'm a patient man but my patience is running out. Is that clear to you?

A. Yes, sir.

THE COURT: You are to answer the questions and you are to answer them in a way that everyone can hear. That microphone is there for the purpose of aiding you in doing that. I instruct you to answer the questions when they are asked of you, directly into the microphone so that everyone can hear. Are you prepared to do that?

A. Yes, sir.

THE COURT: The next time we have to do that . . . this, you're going to be in the custody of the Sheriff. Call the Jurors back in.

The jury returned, and Ms. Campbell continued her testimony:

Q. Miss Campbell, whose car was it that you saw there in the trailer park at that time?

A. Phillip's.

Q. And that's Phillip Locklear?

A. Yes, sir.

Q. And you saw it stop, didn't you?

. . . .

A. (Pause.) Yes, sir.

Q. And you saw Phillip get out of it, didn't you?

. . . .

A. Yes, sir.

Q. And you saw Phillip point the rifle at your house, didn't you?

. . . .

A. I couldn't tell what he had.

Q. And a, you could tell he had something, couldn't you?

A. Yes, sir.

Q. And at that point, something began hitting against your house again, didn't it?

A. Yes, sir.

Q. And Phillip was on the same side of the trailer where the bullets were striking, wasn't he?

A. Yes, sir.

The foregoing does not constitute all of the problems the trial judge had with this witness. Truly, her testimony and behavior on the witness stand would have sorely tried the patience of Job. However, the trial judge must not let himself be goaded into such responses as took place in this case.

With respect to this assignment of error, we reaffirm the principles stated by this Court through Chief Justice Sharp in *State v. Rhodes*, 290 N.C. 16, 224 S.E. 2d 631 (1976):

> The presiding judge is given large discretionary power as to the conduct of a trial. Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within his discretion. . . . Thus a trial judge may, if the necessity exists because of some statement or action of the witness, excuse the jurors and, *in a judicious manner*, caution the witness to testify truthfully, pointing out to him generally the consequences of perjury. . . .
>
> Any intimation by the judge in the presence of the jury, however, that a witness had committed perjury would, of course, be a violation of G.S. 1-180 and constitute reversible error. . . . Moreover, whether the reference to perjury be made in or out of the presence of the jury, "error may be found in any remark of the judge, in either a civil or criminal trial, which is calculated to deprive the litigants or their counsel of the right to a full and free submission of their evidence upon the true issues involved to the unrestricted and uninfluenced deliberation of a jury (or court in a proper case)." . . . Therefore, judicial warnings and admonitions to a witness with reference to perjury are not to be issued lightly or impulsively. Unless given discriminatively and in a careful manner they can upset the delicate balance of the scales which a judge must hold evenhandedly. Potential error is inherent in such warnings, and in a criminal case they create special hazards.
>
> First among these is that the judge will invade the province of the jury, which is to assess the credibility of the witnesses and determine the facts from the evidence adduced. . . . It is most unlikely that a judge would ever warn a witness of the consequences of perjury unless he had determined in his own mind that the witness had testified falsely. Therefore, if, while acting upon an assumption which only the jury can establish as a fact, he makes declarations which alter the course of the trial, he risks committing prejudicial

error. For this reason, *inter alia*, the judge has no duty to caution a witness to testify truthfully. "Once a witness swears to give truthful answers, there is no requirement to 'warn him not to commit perjury or, conversely to direct him to tell the truth.' It would render the sanctity of the oath quite meaningless to require admonition to adhere to it." . . .

A second hazard is that the judge's righteous indignation engendered by his "finding of fact" that the witness has testified untruthfully may cause the judge, expressly or impliedly, to threaten the witness with prosecution for perjury, thereby causing him to change his testimony to fit the judge's interpretation of the facts or to refuse to testify at all. Either choice could be an infringement of the defendant's Sixth Amendment rights to confront a witness for the prosecution for the purpose of cross-examination or to present his own witnesses to establish a defense. Both rights are fundamental elements of due process of law, and a violation of either could hamper the free presentation of legitimate testimony. The following statement from Annot., 127 A.L.R. 1385, 1390, is pertinent: "Any statement by a trial court to a witness which is so severe as to put him or other witnesses present in fear of the consequences of testifying freely constitutes reversible error."

. . . .

A third hazard is that the judge's admonition to the witness with reference to perjury may intimidate or discourage the defendant's attorney from eliciting essential testimony from the witness. This is particularly true when the judge anticipates a line of defense and indicates his opinion that the testimony necessary to establish it can only be supplied by perjury; *a fortiori*, if the judge's warnings and admonitions to the witness are extended to the attorney, coercion can occur. A law license does not necessarily insulate one from intimidation. In short, even a seasoned trial attorney may trim his sails to meet the prevailing judicial wind. If a defendant's attorney is intimidated by a trial judge's unwarranted or unduly harsh attack on a witness or the attorney himself, then the defendant's constitutional right to effective representation guaranteed by the Sixth Amendment is impinged.

. . . .

A fourth and final interest of a criminal defendant that may be affected by a trial judge's manner of warning a witness is the defendant's due process right to trial before an impartial tribunal. "A fair jury in jury cases and an impartial judge in all cases are prime requisites of due process." It is a maxim that " '[e]very litigant, including the state in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge.' " . . . The right to an impartial judge embraces a defendant's right to present and conduct his *own* defense unhampered by the judge's idea of what that defense should be or how it should proceed. . . .

Because of the inherent hazards and many potential errors in the innumerable factual situations in which they may occur, a slide-rule definition of "reversible error" to measure a trial judge's comments to a witness with reference to perjury has not been formulated.

Id. at 23-24, 26-28, 224 S.E. 2d at 635-38 (citations omitted).

Applying these considerations to the present case, we hold that the trial judge's actions invaded the province of the jury, probably caused the witness to change her testimony, and may have deprived defendant of a fair trial before an impartial judge. We note that after the last warning by the trial judge, the witness testified that it was defendant's car outside her house and that defendant was the person she saw outside her house at the time she heard the objects strike her home. It can be fairly inferred that this testimony resulted from the admonitions of the judge to Ms. Campbell. For this error, defendant is entitled to a new trial. *Id. See Webb v. Texas*, 409 U.S. 95, 34 L.Ed. 2d 330 (1972).

[2] Defendant also argues that the evidence was insufficient to carry the state's case to the jury. We disagree. Ms. Campbell's testimony as finally given, together with that of the officers, made it a case for the twelve. Nothing said herein should be construed as an expression of opinion as to the credibility of any witness and particularly Ms. Campbell. That is for the jurors who observe the witnesses and weigh their testimony.

New trial.

Justice MITCHELL dissenting.

I dissent for the reasons fully stated by Judge Whichard in his opinion for the Court of Appeals in this case. 60 N.C. App. 524, 299 S.E. 2d 470 (1983).

STATE OF NORTH CAROLINA v. STANFORD ANTHONY SHANE

No. 455A82

(Filed 27 September 1983)

1. **Constitutional Law § 48— effective assistance of counsel—former representation by codefendant's counsel—former partnership between attorneys for defendant and codefendant**

Defendant was not denied the effective assistance of counsel at his second trial because the attorney for a codefendant, who entered a plea of guilty and testified against defendant at the second trial, had represented defendant at a bond reduction hearing and had formerly been in partnership with the attorney who represented defendant at his first trial where defendant showed no actual prejudice from the codefendant's attorney's former representation of him or from the attorney's former association with defendant's attorney at his first trial, and where defendant did not raise any objection at trial to the codefendant's counsel.

2. **Constitutional Law § 48— effective assistance of counsel—failure to call witness**

A defendant is not denied the effective assistance of counsel by the failure of his counsel to call a witness when the decision not to call the witness is shown by the record to be defendant's own.

3. **Constitutional Law § 80; Criminal Law § 138.1— cruel and unusual punishment—life imprisonment for sexual offense—more lenient sentence to codefendant**

Imposition of a sentence of life imprisonment for a first degree sexual offense did not constitute cruel and unusual punishment because the sexual acts occurred between a defendant who spent several years in public service and a person he claims sold sexual favors. Nor did defendant's sentence of life imprisonment for first degree sexual offense and his consecutive sentence of twenty years for attempted first degree sexual offense constitute cruel and unusual punishment because defendant is black and his codefendant, a white man, received only two consecutive ten-year sentences where the codefendant entered a plea bargain with the State in which he agreed to plead guilty only to attempted second degree sexual offenses.

BEFORE *Judge Robert H. Hobgood*, at the April 5, 1982 Criminal Session of Superior Court, CUMBERLAND County. The defendant was found guilty of first degree sexual offense and attempted first degree sexual offense. He was sentenced to the mandatory life sentence for the sexual offense and a twenty-year sentence for the attempted sexual offense to begin at the expiration of the life sentence. The defendant's motion to bypass the Court of Appeals on the twenty-year sentence was allowed April 27, 1983. He appealed the life sentence directly to this Court as a matter of right.

Rufus L. Edmisten, Attorney General, by Jane P. Gray, Assistant Attorney General, for the State.

Rudolph Lion Zalowitz, pro hac vice, and Everette Noland, for the defendant-appellant.

MITCHELL, Justice.

The defendant through several assignments of error brings two main issues before this Court on appeal. He first contends that a conflict of interest, which he claims arose out of the representation by the attorney for his codefendant, was a per se denial of his constitutional right to effective assistance of counsel. Additionally, he claims he was denied effective assistance of counsel because his own attorney at trial did not call witnesses who were able and willing to testify in his behalf.

Secondly, the defendant contends that his sentence, a life sentence for first degree sexual offense and twenty years for attempted first degree sexual offense, violated the Eighth Amendment ban on imposing cruel and unusual punishment. We find no error.

I.

The facts surrounding the crimes for which the defendant Shane was charged and convicted are not relevant to the issues before us, but a summary of that evidence can be found in this Court's decision concerning the first trial of this matter. *State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982). In that decision this Court reversed on unrelated grounds the sexual offenses convictions. We remanded for a new trial on those charges and ordered

new sentencing hearings on robbery convictions for this defendant and his codefendant, Dean Williams.

The defendants Shane and Williams were tried jointly in the first trial for offenses allegedly committed on February 10, 1982 by both men. Following their arrest, Attorney Jack E. Carter represented defendant Shane in his motion to reduce bail. During the first trial Carter, then of the law firm of Barrington, Witcover, Carter & Armstrong, represented defendant Williams. Shane's attorney was Carl A. Barrington, Jr., a member of the same law firm.

In the first trial both defendants denied that they had had weapons and that they had committed the offenses charged. In the course of that trial, upon request by the State, the court questioned each defendant about whether he objected to being represented by partners in the same law firm. Each defendant replied that he had no objection.

Between the first and second trials, Carter left the law firm in which Barrington was a partner, but Carter continued to represent the defendant Williams. A different lawyer, Willie A. Swann, represented the defendant Shane in the second trial. At the outset of the second trial both defendants joined in a motion arguing against consolidation of the trials. Upon the court's denial of that motion, the defendant Williams entered into a plea bargain with the State. He pleaded guilty to charges of attempted sexual offenses, and the State agreed to dismiss the other charges against him in exchange for his testimony in the trial of Shane.

Williams testified at Shane's trial that he and Shane, at Shane's suggestion, took weapons to the Tahiti Health Club, that they bound the manager of the club and that they forced two female employees to engage in sexual activity with them. Shane was convicted of first degree sexual offense and attempted first degree sexual offense. A mandatory life sentence was imposed for the sexual offense. After finding two aggravating and one mitigating factor in Shane's sentencing hearing, the trial court imposed a sentence of twenty years for attempted sexual offense, which sentence was to begin at the expiration of the life term.

II.

[1] The defendant urges a reversal of his conviction based on error he claims the trial court committed in permitting Attorney Carter to represent Williams in the second trial. He contends that representation of Williams by Carter constituted direct conflicts of interest arising from both Carter's former representation of the defendant Shane at the bond reduction hearing and Carter's former partnership with Shane's attorney in the first trial, Carl Barrington.

The defendant Shane contends that since Attorney Carter represented him at a bond reduction hearing and in the second trial represented Williams, who testified against Shane, Carter had a direct conflict of interest. Shane contends that he revealed confidences at the time of his arrest to Carter. Shane maintains that when Carter represented a codefendant at trial who was "directly opposed" to Shane, he violated those confidences and denied Shane effective assistance of counsel.

The defendant Shane also argues that Carter's association with Carl Barrington in the law firm of Barrington, Jones, Witcover, Carter & Armstrong, P.A. caused a direct conflict. Shane contends that, just as Barrington could not have represented Williams in the second trial because Williams' interests were adverse to Shane's, Carter, Barrington's partner, was also prohibited from the representation of Williams. The defendant Shane contends that the fact that Carter left the law firm between the first and second trials did not remove the conflict.

Because we find that Attorney Carter's conduct was not sufficiently prejudicial to the defendant to entitle him to a new trial, it is not necessary to decide whether Carter violated the rules of ethics set forth by the North Carolina State Bar. It is sufficient to note that attorneys are encouraged to follow closely the dictates of the *North Carolina Code of Professional Responsibility.* Canon 9 of that code states that attorneys are to avoid even the appearance of impropriety. *North Carolina Code of Professional Responsibility,* Canon 9 (1981). The code also prohibits a lawyer from continuing in employment if the "exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client." DR5-105(B). Further, "[i]f a lawyer is required to decline employ-

ment or to withdraw from employment under DR5-105, no partner or associate of his or his firm may accept or continue such employment." DR5-105(D).

The constitutional right of a defendant to be represented by counsel in a criminal prosecution includes not only the right to obtain counsel, but also the right to have a reasonable opportunity in the light of all the circumstances to investigate, prepare and present his defense. *State v. Phillip*, 261 N.C. 263, 134 S.E. 2d 386 (1964), *cert. denied*, 377 U.S. 1003 (1964). The general rule is that assistance of counsel must be "within the range of competence demanded of attorneys in criminal cases" in order to be effective. *State v. Vickers*, 306 N.C. 90, 291 S.E. 2d 599 (1982). Those seeking to show a denial of effective assistance of counsel must meet a stringent standard of proof, as to require less would encourage convicted defendants to raise frivolous claims causing unwarranted trials of counsel. *State v. Milano*, 297 N.C. 485, 256 S.E. 2d 154 (1979).

The question whether Attorney Carter's representation of Williams entitles the defendant Shane to a new trial in the face of Carter's former representation of the defendant and Williams' testimony for the State, is governed by this Court's decision in *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979), *cert. denied*, 446 U.S. 929 (1980). In that case an assistant public defender had originally represented both the defendant Jolly and his codefendant at trial. During the trial, however, the court found an apparent conflict between the defendants and precluded the attorney from representing both. After the appointment of new counsel, Jolly was cross-examined on the stand by his former attorney. Furthermore, the attorney argued to the jury that Jolly, his former client, and not Jolly's codefendant had committed the crime.

We refused to grant a new trial in *Nelson*, finding that Jolly failed to show actual prejudice resulting from the apparent conflict of the former attorney. We stated:

> Actual prejudice in this context means more than a defendant's having been damaged at trial by actions of his former lawyer. The actions complained of must have grown out of the former attorney-client relation. The record should show that the attorney took advantage of the former relation in

> some way at the subsequent trial or that the former relation put the attorney in a better position to inflict the damage than he otherwise would have been. *See generally, United States v. Carroll*, 510 F. 2d 507 (2d Cir. 1975), *cert. denied*, 426 U.S. 923; *United States v. Press*, 336 F. 2d 1003 (2d Cir. 1964), *cert. denied*, 379 U.S. 965 (1965); *People v. Suiter*, 82 Mich. App. 214, 266 N.W. 2d 762 (1978). That there was a former attorney-client relation is *not*, alone, enough.

Id. at 592, 260 S.E. 2d at 643 (1979). The court decided in *Nelson* that the cross examination and argument to the jury by that defendant's former attorney in no way indicated that the attorney used information obtained during his representation of the defendant.

Similarly, the defendant in the case before us has shown no actual prejudice traceable to Carter's former representation of him. Unlike the situation in *Nelson*, in this case after Williams struck a plea bargain Attorney Carter took no part in the conduct of the trial. There was no evidence that he "took advantage of the former relation in some way at the subsequent trial or that the former relation put the attorney in a better position to inflict the damage than he otherwise would have been." *State v. Nelson*, 298 N.C. at 592, 260 S.E. 2d at 643 (1979). The fact that Carter represented Shane in a prior bond reduction hearing two years prior to the trial is not sufficient to show actual prejudice to the defendant Shane. Nor has the defendant shown that Carter's former association with Barrington, the defendant's lawyer in his first trial, in any way caused the defendant actual prejudice in his second trial.

Furthermore, Shane did not raise any objection to the representation of Williams by Attorney Carter at trial. Although the issue was alluded to in the first trial, no objection was raised there. The defendant failed to raise the issue at the second trial as well even though at one point he claimed, through a motion for appropriate relief, that his representation at the first trial was ineffective for reasons other than a conflict of interest.

The defendant's acquiescence to Attorney Carter's representation of Williams at trial weighs heavily upon him on appeal. As we noted in *Nelson*, objection at trial would not only show that the defendant did not acquiesce in the representation, it would

also establish a foundation for a contention of prejudice on appeal with evidence produced by means of a properly conducted *voir dire*. *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629.

III.

[2] The defendant next contends that he was denied effective assistance of counsel because his attorney at the second trial, Willie Swann, did not call witnesses who were present and able to testify for him, such as an FBI officer. The defendant claims that the failure to call this available witness might well have been enough to reestablish his character.

The defendant has not identified the witness or witnesses who were present and able to testify on his behalf. Nor has he offered evidence of what their testimony would have been if they had been called.

The assignment apparently refers to an FBI agent who was present in court, but who the defendant and his attorney apparently agreed not to call. The record reveals the following exchange:

> COURT: Mr. Swann, is your witness now present?
>
> MR. SWANN: He is, your Honor. He said he had to make a further call before he's allowed to testify in a local matter. He will be making that call right now. I've got the subpoena ready for him. I need to talk to the defendant, however, first before I issue those.
>
> COURT: All right, sir. Let the record reflect the Court has now been in recess for 50 minutes. (Mr. Swann conferred with Mr. Shane at counsel table.)
>
> MR. SWANN: Your Honor, if it please the Court, in talking with the defendant and after talking with the witness, the defendant chooses not to call him at this time as a character witness and, therefore, the defendant has some motions that he would like to—.

The defendant is not denied effective assistance of counsel by the failure of his counsel to call a witness when the decision not to call the witness is shown by the record to be defendant's own. *See State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981). This assignment is without merit.

It is appropriate to note here that we have recently called attention to *Jones v. Barnes*, --- U.S. ---, 103 S.Ct. 3308, 77 L.Ed. 2d 987 (1983), in which the Court held that defense counsel assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant. *State v. Jackson*, 309 N.C. 26, 30 n. 1, 305 S.E. 2d 703 (1983). As the Supreme Court of the United States stated, "[a] brief that raises every colorable issue runs the risk of burying good arguments—those that, in the words of the great advocate John W. Davis, 'go for the jugular.' Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895, 897 (1940)—in a verbal mound made up of strong and weak contentions." (Citation omitted.) *Jones v. Barnes*, --- U.S. at ---, 103 S.Ct. at 3313, 77 L.Ed. 2d at 994.

IV.

[3] In his final assignment of error the defendant claims that life imprisonment for a nonviolent crime is cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States, applicable to the states through the Fourteenth Amendment. In support of his argument the defendant in his brief maintains that the sexual acts charged occurred between a person he claims sold sexual favors and himself, a man who spent several years in public service. The defendant further claims that the fact that he is black and received life imprisonment and a twenty-year sentence and the codefendant, Williams, is white and received two consecutive ten-year sentences is additional evidence of a disproportionate and excessive sentence.

The sentences imposed upon the defendant were within the statutory limits. It is within the province of the General Assembly and not the judiciary to determine the extent of punishment which may be imposed on those convicted of crime. *State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296, *cert. denied*, 409 U.S. 1047 (1972).

The defendant was convicted of first degree sexual offense and attempted first degree sexual offense. The statutes classify a first degree sexual offense as a Class B felony, G.S. 14-27.4(b). An attempted first degree sexual offense is defined as a Class F felony. G.S. 14-27.6.

The mandatory sentence under the statute for a Class B felony is life imprisonment. G.S. 14-1.1(a)(2). For a Class F felony, the presumptive sentence is six years. G.S. 15A-1340.4(f)(4). The defendant's sentence for the attempted first degree sexual offense, twenty years, is the maximum sentence available for a Class F felony. G.S. 14-1.1. As is required by the Fair Sentencing Act in G.S. 15A-1340.4(b), the trial judge made a finding that the aggravating factors outweighed the mitigating factor when he imposed greater than the presumptive sentence.

The defendant's suggestion that his sentence was cruel and unusual punishment because his codefendant, a white man, received only two consecutive ten-year sentences is without merit. The defendant's argument ignores the fact that his codefendant Williams entered a plea bargain with the State in which he agreed to plead guilty only to attempted second degree sexual offenses. We do not find the defendant's sentence in this case to be cruel or unusual punishment.

No error.

STATE OF NORTH CAROLINA v. LARRY JUNIOUS BOOKER

No. 36A83

(Filed 27 September 1983)

Criminal Law § 75— voluntariness of confession—findings supported by evidence

In a prosecution for first degree murder, the trial court correctly concluded that defendant's confession was made freely and voluntarily and was admissible against him where the evidence tended to show the period of custodial interrogation was not unduly lengthy; defendant did not suffer from deprivation of any necessary or requested human comforts; at no time did defendant request that the interrogation be suspended or that he be permitted to speak with an attorney; he was permitted to use the telephone and to converse with his mother; and at no time did the interrogating officers deprive or abuse defendant.

DEFENDANT was tried and convicted of first degree murder and armed robbery by a jury in ALAMANCE Superior Court, the *Honorable D. M. McLelland*, judge presiding. The trial judge arrested judgment in the armed robbery case and entered judgment

in the first degree murder case, sentencing defendant to life imprisonment upon the jury's recommendation. Defendant appealed to this Court, which found no error, save the insufficiency of the trial judge's findings regarding the voluntariness of defendant's confession. *State v. Booker*, 306 N.C. 302, 293 S.E. 2d 78 (1982). We remanded with appropriate instructions.

On remand, a hearing was held before the Honorable Wiley F. Bowen on 16 August 1982 in Alamance Superior Court. At the conclusion of that hearing, the judge made findings of fact and conclusions of law regarding the voluntariness of defendant's confession, finding that it was freely and voluntarily made. From these findings, defendant appeals.

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

Gregory Davis for defendant appellant.

EXUM, Justice.

The sole issue presented in this appeal is whether the trial court erred in concluding that defendant's confession was made freely and voluntarily. There is no *Miranda* issue. Defendant contends that the totality of the circumstances surrounding his custodial interrogation created a coercive atmosphere that rendered his confession involuntary. After a full review and consideration of the evidence presented at the hearing below, we conclude that the trial court's findings are amply supported by competent evidence. In light of these findings, we conclude that the totality of circumstances did not render defendant's confession involuntary. We affirm the trial court.

A full statement of the facts is set out in our earlier opinion. *See State v. Booker*, 306 N.C. 302, 293 S.E. 2d 78. We summarize them briefly. Defendant was taken into custody on 21 July 1980 under suspicion for an armed robbery and murder which occurred at a Robo car wash in Burlington, North Carolina. At the time of his arrest, defendant was nineteen years old, a high school graduate, and a private first class in the United States Army. He remained in custody for a period of about five and one-half hours, during which time he was interrogated for approximately two and one-half hours. Near the end of this period of interrogation, defendant confessed to the crimes.

On the first appeal there was uncontroverted evidence that: (1) interrogating officers told defendant he "would feel better if he got it off his chest"; (2) before confessing, defendant overheard discussions among the officers that certain ballistics tests performed on the murder weapon incriminated defendant; and (3) defendant was in custody five and one-half hours, during which time he was interrogated for approximately two and one-half hours. This Court concluded that these events, even if true, would not, taken singly or collectively, render defendant's confession inadmissible. The Court said, "We are not convinced that any one or the totality of defendant's contentions regarding the uncontroverted evidence . . . amount to such violation of defendant's due process rights as would render defendant's confession inadmissible." *Id.* at 311, 293 S.E. 2d at 83.

The Court was concerned on the first appeal with additional evidence offered by defendant at the suppression hearing which was controverted by the state's evidence. The conflict was not resolved by the trial court. The Court said, "There remains the question of whether the totality of the evidence, including both the uncontroverted evidence and the evidence in conflict, amounted to such coercion, actual or psychological, as would render defendant's confession involuntary." *Id.* We thus remanded the case and ordered the trial court to conduct a new hearing on the question of the voluntariness of defendant's confession.

At the new hearing the state offered testimony of two police officers who interrogated defendant. According to them defendant voluntarily accompanied the officers to police headquarters. He initially denied any involvement in the incident. When he denied having any money in his possession, Detective Dan W. Ingle asked to see his wallet. Defendant gave the wallet to Ingle, saying, "The money is in the billfold." Detective Ingle found $58 in the wallet. Between Detective Ingle's discovery of the money and defendant's inculpatory statement, defendant requested and was permitted to use the telephone. His mother came to the police station and was allowed to speak with defendant in the presence of police officers. During this time, the other interrogating officer, Detective Lieutenant Jerry D. Garner, received a telephone call from the State Bureau of Investigation dealing with a ballistics report. Garner repeated aloud the test results which indicated

that shell casings found at the scene of the crime had been fired from a Titan automatic pistol found at the residence of defendant's mother. Garner observed defendant react to having overheard this conversation by lowering his head and beginning to cry. Garner asked defendant if defendant now wanted to speak with him, and defendant stated that he did. During the conversation which ensued, defendant confessed to the crimes under investigation. The confession proceeded without interruption and was recorded in its entirety on a small tape recorder pursuant to standard police procedures. At no time did defendant request a break in his statement. Neither officer directed or suggested that defendant answer any question in any particular manner.

Defendant offered four witnesses, including himself, who controverted much of the officers' testimony. Defendant's mother testified that the officers yelled at defendant in a cruel voice, that the officers permitted her to talk with her son but prohibited them from discussing the case, and that defendant appeared unusually nervous and was crying. Angela Norwood, defendant's girlfriend, testified that she was permitted to see defendant after he gave the confession. She stated that when she asked defendant if he committed the crimes, he answered yes, but whispered to her that "they were making him say he did it." Elsie Mae Haith, a family friend, testified that she accompanied defendant's mother to the police station. While waiting for her, she conversed with Officer Garner. Garner told her that "if he had to do it over again, I don't think he would do it." While it is unclear from her testimony to whom the statement refers, she indicated on cross-examination that Garner was referring to a statement made by defendant. Finally, defendant testified regarding the incidents leading to his confession. He stated that the interrogating officers threatened him with the gas chamber if he did not confess, offered to intercede with the district attorney if he would cooperate, coached him during his recorded confession, and verbally coerced him to confess.

After considering all of the evidence presented at the hearing, the trial court made lengthy findings of fact and conclusions of law. Finding that no credible evidence supported the version advanced by defendant, the trial court found the following facts: Defendant was interrogated by only two police officers; requested and was allowed to use the telephone; availed himself of the

restroom facilities in the police station; refused the officers' offer of food and drink; was permitted to talk with his mother; at no time requested that the interrogation cease or that he be permitted to speak with an attorney; and was not abused, either physically or verbally. Finally, the trial court found the officers neither threatened defendant with a death sentence in the gas chamber nor offered to intercede with the district attorney on his behalf.

Our task in this appeal is a limited one. Factual determinations of the trial court supported by competent evidence, are conclusive on appeal. *State v. Easterling*, 300 N.C. 594, 602, 268 S.E. 2d 800, 806 (1980). On conflicting testimony determinations of witnesses' credibility is the province of the trial court. *State v. Biggs*, 289 N.C. 522, 530, 223 S.E. 2d 371, 376 (1976). A thorough review of the evidence presented at the hearing before Judge Bowen reveals that competent evidence exists which supports his factual determinations. Although conflicts exist in the evidence, their resolution is for the trial court. *State v. Rook*, 304 N.C. 201, 212-14, 283 S.E. 2d 732, 740-42 (1981), *cert. denied*, 455 U.S. 1038 (1982); *State v. McRae*, 276 N.C. 308, 314, 172 S.E. 2d 37, 41 (1970). That court has resolved the conflicts against defendant.

In light of the trial court's findings, we conclude that the totality of the circumstances surrounding defendant's confession does not give rise to such coercion, physical or psychological, that would render defendant's confession involuntary. *See generally, State v. Morgan*, 299 N.C. 191, 261 S.E. 2d 827, *cert. denied*, 446 U.S. 986 (1980). The period of custodial interrogation was not unduly lengthy. Defendant did not suffer from deprivations of any necessary or requested human comforts. At no time did defendant request that the interrogation be suspended or that he be permitted to speak with an attorney. He was permitted to use the telephone and to converse with his mother. At no time did the interrogating officers deprive or abuse defendant. Therefore, the trial court correctly concluded that defendant's confession was made freely and voluntarily and was admissible against him. Its ruling and its order of commitment on defendant's conviction and sentences are

Affirmed.

STATE OF NORTH CAROLINA v. EDELL WILLIS

No. 163PA83

(Filed 27 September 1983)

1. **Criminal Law § 80— nicknames on pieces of paper—identification of persons by officer**

In a prosecution for felonious possession of heroin, the trial court properly permitted an officer to testify that he recognized certain initials, abbreviations and names appearing on pieces of paper found in defendant's wallet as being the nicknames or "street names" of specified persons whom he had investigated for various narcotics violations since the officer was merely testifying concerning his personal knowledge.

2. **Criminal Law § 34.6— evidence of other narcotics violations—admissibility to show intent and guilty knowledge**

In a prosecution for felonious possession of heroin, pieces of paper found in defendant's wallet containing the names of persons with numbers written beside the names, testimony by officers that the names on the papers were the "street names" for various persons who had been investigated or arrested for narcotics violations, and large amounts of cash seized from defendant were admissible to show the intent of defendant in possessing the heroin and his guilty knowledge of the type of substance he possessed, notwithstanding such evidence also tended to show other narcotics violations by defendant.

ON defendant's petition for discretionary review, pursuant to G.S. 7A-31, of the decision of the Court of Appeals (*Judge Braswell*, with *Chief Judge Vaughn* and *Judge Wells* concurring) reported at 61 N.C. App. 23, 300 S.E. 2d 420 (1983), finding no error in the judgment of conviction entered by *Battle, J.*, at the 22 February 1982 Criminal Session of Superior Court, WAKE County.

Defendant was charged in an indictment, proper in form, with feloniously possessing four to fourteen grams of the controlled substance heroin in violation of G.S. 90-95(h)(4). The trial court entered judgment and sentenced the defendant to not less than eight nor more than ten years, and a fine of $50,000.00.

The facts disclose that the defendant was searched subsequent to his arrest and in searching defendant's wallet, the officers found four pieces of paper which contained certain writings. These papers were seized and offered into evidence before the jury at the trial. In connection therewith, Officer O'Shields was permitted to testify over objection that he recognized the abbreviations and initials appearing on the pieces of paper as being

the names or aliases of persons who had either been arrested for, or convicted of, various violations of the Controlled Substances Act.

The State's evidence further tended to show that two officers on patrol saw the defendant, who was riding on the passenger side of the front seat of a Cadillac, open the door and throw something under the car before it sped away. One of the officers, Sergeant Peoples, testified that after apprehending defendant he returned to the scene to retrieve the package thrown from the car and found it in the street about four feet from the curb with nothing else near it. A laboratory analysis of the contents of the package revealed it to be 13.4 grams of white powder containing thirty percent pure heroin.

Defendant did not testify in his own behalf but offered the testimony of one witness who said she was in a position to see what occurred, and did not see a car door open and a hand throw something from the car.

A complete statement of the facts is set forth in the Court of Appeals' opinion, reported at 61 N.C. App. 23, 300 S.E. 2d 420 (1983).

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

J. Frank Huskins, Hafer, Purrington & Hall, by Kyle S. Hall; Loflin & Loflin, by Thomas F. Loflin, III, for the defendant.

COPELAND, Justice.

The facts disclose that one of the pieces of paper taken from the defendant had the following on it:

MISS D — 500

Young J.J. — 900-500

Johnnie — 750

B. Ray 900-300-550

Peach — 675

Drake 675-60

S. Man — 225

Another had:

Sam man — 725

Greensboro — 450

Peach

S. Man 450

Another had:

Peach 8-3

Vern 3

S. 2

Sam man 725

Ray 900-1000

Good

In addition there was a note with names and telephone numbers. This note included the following:

Sam Perry H. 832-0924

S. 833-9146

Mrs. D. 832-9146

On *voir dire*, concerning the admissibility of these documents, Officer O'Shields testified that the names with numbers beside them are the amounts of packaged heroin or the amounts the named people owed Edell Willis for their heroin. The officer also testified that from his own experience in narcotics investigation including talking to informants and the people themselves, he recognized most of the names written on the papers as being the "street names" for certain people he had investigated. Specifically, O'Shields stated:

> With regard to the names here and my interpretation that they mean particular people comes from informants and with me talking with these people themselves telling me their names, their street names. I have not taken these items to these people on here and asked them if this is heroin and if

> they got it from Edell Willis. I assume from my information on the street that Miss D is Dee Jones. I have called that telephone number and talked with Miss D and Dee Jones at that address when she used to live on Angier Avenue. . . . Basically I look at the paper writings in front of me and pretty much based on the information that I have gathered over the years as a narcotics officer, place an interpretation on these items as to who they are and what it means.

Thereupon, the judge ordered that the officers could testify before the jury as to the names with which they were personally familiar and explain how they knew those persons, including whether those persons had been arrested for or convicted of possession of heroin.

It was then that Officer O'Shields testified before the jury that he knew various of the names on the paper to mean certain named individuals. He also testified concerning their drug arrests and convictions.

The defendant offered evidence through Janet Graves that she observed the scene and that Willis did not open the door or throw anything under the Cadillac, and that defendant Willis said nothing. This witness said that she recognized the officers' automobile as a police vehicle. She also said she saw some people walk down the street after the Cadillac and the police car left the area. Sergeant Peoples testified that he saw no one on the street when he and Officer O'Shields first stopped nor when he came back approximately five minutes later to retrieve the package of heroin.

[1] Defendant argues and contends that the trial court was in error in allowing Officer O'Shields to testify concerning the meaning of initials, names and telephone numbers on a paper seized from the defendant's wallet.

In this connection the defendant argues that the Court of Appeals erred in finding that Officer O'Shields was an expert witness as to his testimony about the pieces of paper found on the defendant and that Officer O'Shields should not have been allowed to identify the names of the people whose "street names" were listed on the papers taken from Willis' wallet. The State claims that the Court of Appeals correctly upheld Officer O'Shields' testimony concerning people he knew personally.

The defendant argues that the Court of Appeals improperly held, "that it was permissible for O'Shields to render his opinion about the meaning of the letters, words, numbers and cryptic abbreviations that appeared on the paper." We conclude that Officer O'Shields did not testify as an expert witness, though the State contended that O'Shields clearly is an expert in drug and especially heroin investigation and was properly allowed to testify before the jury as he did on *voir dire* concerning the meaning of the figures on the papers. O'Shields testified concerning his personal knowledge. He knew these people by their nicknames on the paper. He had further verified his knowledge by the telephone numbers listed next to several of the names. Also, he had arrested most of the people he identified.

Officer O'Shields simply identified the persons he personally knew from their nicknames on the papers. The officer's knowledge and expertise as a drug investigator was certainly relevant to show *how* he knew these people. He was not qualified as an expert in nicknames. He testified from his own first-hand knowledge. Counsel for the defendant could have tested his knowledge at trial by cross examination, if there was any doubt about the identifications. It is significant that there was no cross examination.

Judge Battle properly allowed Officer O'Shields to identify the names he knew. On this basis, this assignment of error is overruled.

Next it is argued that the trial court incorrectly permitted the State to show the defendant's association with others in the trafficking of controlled substances where such association showed guilty knowledge of the type of substance the defendant possessed.

[2] Defendant argues that the Court of Appeals erred in upholding the trial court's permitting into evidence the paper writings, large amounts of cash, and the officers' testimony concerning their knowledge of the people listed on the papers into evidence. The defendant claims that this violated the rule that other offenses are inadmissible on the issue of guilt if their only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged. 1

Stansbury, N.C. Evidence § 91 (Brandis rev. 1973); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

The rule in *McClain* establishes that evidence of other crimes is inadmissible if its *only* relevance is to show the character of the accused. The exceptions to this rule of inadmissibility, also set out in *McClain*, are as well established as the rule itself. Two of these exceptions read as follows:

> 2. 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. . . .
>
> 3. Where guilty knowledge 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 guilty knowledge, even though the evidence reveals the commission of another offense by the accused. . . . 240 N.C. at 175.

The evidence admitted showed that Edell Willis had engaged in other violations of the Controlled Substances Act. This evidence was relevant to show the intent of the defendant in possessing the substance and his guilty knowledge of the type of substance he possessed. *State v. Humphrey*, 283 N.C. 570, 196 S.E. 2d 516, *cert. denied*, 414 U.S. 1042 (1973); *State v. Jenerett*, 281 N.C. 81, 187 S.E. 2d 735 (1972); *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Russell*, 56 N.C. App. 374, 289 S.E. 2d 42 (1982).

In order to show possession of an illegal substance, the State must show the defendant had both the power and intent to control the substance's disposition or use. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). So, in the matter that we have before us, the pieces of paper and the money seized were certainly admissible to show Willis' ability and intent to control the heroin's disposition as well as his knowledge of the contents of the substance.

The Court of Appeals, in its opinion, cited the case of *State v. Richardson*, 36 N.C. App. 373, 243 S.E. 2d 918 (1978). In that case it is stated as follows:

> In drug cases, evidence of other drug violations is relevant and admissible if it tends to show . . . disposition to deal in illicit drugs. . . . 36 N.C. App. at 375, 243 S.E. 2d at 919.

The State in its brief concedes that the above quotation from *Richardson* appears to be in direct contradiction with *McClain*. In fact, the Court of Appeals in *State v. Bean*, 55 N.C. App. 247, 284 S.E. 2d 760 (1981) declared that the language in *Richardson* is dictum and disapproved it. We likewise disapprove of the above-quoted language from *Richardson*. The admission of evidence in the matter now before the Court of other drug transactions was proper under the holding of *McClain* to show intent and guilty knowledge. The fact that the Court of Appeals cited *Richardson* as its authority for the admission of the evidence in this present case in no way implies that the only value of the evidence was to show Willis' predisposition to deal in drugs. The Court of Appeals specifically identified the purpose of showing guilty knowledge when approving the trial court's ruling.

The defendant argues that this evidence of other drug transactions and the prosecution's arguments concerning the evidence constituted evidence of bad character. Nevertheless, such evidence is appropriate despite what it might show about the defendant's character. *McClain*, 240 N.C. at 175.

The opinion of the Court of Appeals is modified and affirmed.

Modified and affirmed.

STATE OF NORTH CAROLINA v. MILES WILSON GREENE, JR.

No. 649PA82

(Filed 27 September 1983)

ON discretionary review, pursuant to G.S. 7A-31, from a decision of the Court of Appeals, 59 N.C. App. 360, 296 S.E. 2d 802 (1982), dismissing defendant's appeal for failure to comply with Rule 9(c)(1) and Rule 28(b)(4) of the Rules of Appellate Procedure.

Defendant was tried during the 9 November 1981 Criminal Session of Superior Court, SURRY County, before *Judge Julius A. Rousseau.* A jury found defendant guilty of felonious breaking or entering and felonious larceny. *Judge Rousseau* consolidated the convictions for sentencing and imposed a maximum term of ten years imprisonment and a minimum term of eight years.

The Court of Appeals dismissed defendant's appeal and we granted defendant's petition for discretionary review on 5 April 1983.

Rufus L. Edmisten, Attorney General, by Elizabeth C. Bunting, Assistant Attorney General, and Thomas J. Ziko, Associate Attorney, for the State.

Adam Stein, Appellate Defender, by Malcolm R. Hunter, Jr., Assistant Appellate Defender, and James H. Gold, Assistant Appellate Defender, for defendant.

PER CURIAM.

On the authority of this Court's recent decisions in *State v. Edmonds*, 308 N.C. 362, 302 S.E. 2d 223 (1983) and *State v. Nickerson*, 308 N.C. 376, 302 S.E. 2d 221 (1983), the decision of the Court of Appeals is reversed. This cause is remanded to the Court of Appeals with directions to reinstate the appeal and to consider the merits of the case.

Reversed and remanded.

STATE OF NORTH CAROLINA v. GRACE SINGLETON JOHNSON

No. 497A82

(Filed 27 September 1983)

DEFENDANT appealed her conviction of second degree murder and sentence of life imprisonment at the 19 April 1982 Criminal Session of the Superior Court of HENDERSON County, *Kirby, J.* presiding.

Robert A. Hassell, Thomas C. Manning and Barbara A. Smith, for defendant-appellant.

Rufus L. Edmisten, Attorney General, by Assistant Attorney General Wilson Hayman, for the State-appellee.

PER CURIAM.

While her appeal to this Court was pending, defendant filed a motion for appropriate relief pursuant to G.S. 15A-1415(b)(6) and 15A-1418 on the grounds that defendant had obtained newly-discovered evidence which has a direct and material bearing on the guilt or innocence of defendant. Having reviewed this motion for appropriate relief, we hold that the defendant must receive a new trial on the grounds of newly-discovered evidence.

New trial.

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

CAMPBELL v. CAMPBELL

No. 413P83.

Case below: 63 N.C. App. 113.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 September 1983.

CHURCH v. FIRST UNION NAT'L BANK

No. 426P83.

Case below: 63 N.C. App. 359.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 27 September 1983. Motion by defendant to dismiss appeal for lack of merit allowed 27 September 1983.

DEPENDABLE INS. CO. v. MIDDLESEX CONSTR.

No. 436P83.

Case below: 63 N.C. App. 390.

Petition by defendants for discretionary review under G.S. 7A-31 denied 19 September 1983.

DOLPHIN CO. OF ORIENTAL, INC. v. THOMPSON

No. 297P83.

Case below: 62 N.C. App. 144.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 September 1983.

FOUR SEASONS HOMEOWNERS ASSOC., INC. v. JORDAN

No. 440P83.

Case below: 62 N.C. App. 328.

Petition by defendants for writ of certiorari to North Carolina Court of Appeals denied 27 September 1983.

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

HOMEOWNERS ASSOC. v. SELLERS and
HOMEOWNERS ASSOC. v. SIMPSON

No. 439P83.

Case below: 62 N.C. App. 205.

Petition by defendants for writ of certiorari to North Carolina Court of Appeals denied 27 September 1983.

HORNBY v. PENN NAT'L MUT. CASUALTY INS. CO.

No. 357P83.

Case below: 62 N.C. App. 419.

Petitions by defendant and plaintiffs for discretionary review under G.S. 7A-31 denied 27 September 1983.

IN RE BOYTE

No. 372P83.

Case below: 62 N.C. App. 682.

Petition by Dicksons for discretionary review under G.S. 7A-31 denied 27 September 1983. Notice of appeal dismissed 27 September 1983.

JENNEWEIN v. CITY COUNCIL OF WILMINGTON

No. 293P83.

Case below: 62 N.C. App. 89.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 27 September 1983.

MEDFORD v. DAVIS

No. 315P83.

Case below: 62 N.C. App. 308.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 September 1983.

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

PORTER v. MATTHEWS ENTERPRISES

No. 404P83.

Case below: 63 N.C. App. 140.

Petition by defendants for discretionary review under G.S. 7A-31 denied 27 September 1983.

RAINTREE HOMEOWNERS ASSOC. v. RAINTREE CORP.

No. 387P83.

Case below: 62 N.C. App. 668.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 27 September 1983.

SANDERS v. YANCEY TRUCKING CO.

No. 383P83.

Case below: 62 N.C. App. 602.

Petition by defendants for discretionary review under G.S. 7A-31 denied 27 September 1983.

SHUTT v. BUTNER

No. 380P83.

Case below: 62 N.C. App. 701.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 September 1983.

STATE v. BATTLE

No. 185P83.

Case below: 61 N.C. App. 87.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 September 1983.

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

STATE v. CRUMP

No. 292P83.

Case below: 62 N.C. App. 144.

Petition by Attorney General for writ of certiorari to North Carolina Court of Appeals allowed 27 September 1983 and the cause is remanded to the Court of Appeals for reconsideration in light of our decision today in the case of *State v. Thompson*, No. 150PA83.

STATE v. ESTEP

No. 244P83.

Case below: 61 N.C. App. 495.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 September 1983.

STATE v. GONZALEZ

No. 325PA83.

Case below: 62 N.C. App. 146.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 27 September 1983. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question denied 27 September 1983.

STATE v. JACOBS

No. 245P83.

Case below: 61 N.C. App. 610.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 September 1983.

STATE v. KEATON

No. 216P83.

Case below: 61 N.C. App. 279.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 27 September 1983.

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

STATE v. SELLERS

No. 360P83.

Case below: 63 N.C. App. 199.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 September 1983. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 27 September 1983.

STATE v. STEELE

No. 302P83.

Case below: 62 N.C. App. 145.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 September 1983. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 27 September 1983.

STATE v. TEW

No. 291P83.

Case below: 62 N.C. App. 190.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 27 September 1983.

STATE v. THOMPSON

No. 305PA83.

Case below: 62 N.C. App. 38.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 27 September 1983. Notice of appeal dismissed 27 September 1983.

WOLFE v. CITY OF ASHEVILLE

No. 420P83.

Case below: 63 N.C. App. 568.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 27 September 1983.

STATE OF NORTH CAROLINA v. JOHN ERIC MARTIN AKA JOHN ERIC MARTIN, JR. AND CHARLES ALVIN BROWN

No. 56A83

(Filed 3 November 1983)

1. **Criminal Law § 34.8— evidence of other crimes—offer to establish plan or design or intent properly admitted**

The trial court properly admitted into evidence testimony concerning defendants' abandoned attempt to rob merchants at Eastland Mall in Charlotte where the testimony showed that upon deciding that there were circumstances at Eastland Mall unfavorable to the successful execution of the planned crime, the plan was abandoned, and within minutes the same parties were engaged in a plan which resulted in the armed robbery of a Handy Pantry store and the felony murder of an officer. The evidence elicited by the defendants concerning their hesitancy to engage in the charged crimes emphasized the relevancy of the challenged evidence which tended to show intent and the existence of a plan and design among defendants and their confederates to obtain money by means of a robbery.

2. **Conspiracy § 5.1— criminal conspiracy—admissibility of statements of co-conspirators**

The trial court properly permitted testimony of two co-conspirators concerning conversations which tended to establish the conspiracy to commit the crime of armed robbery. In North Carolina the testimony of a co-conspirator is competent to establish the conspiracy, and a conspirator's unsupported testimony is sufficient to sustain a verdict although the jury should receive and act upon such testimony with caution.

3. **Criminal Law § 79— statements of co-conspirator—not expression of opinion—shorthand statements of fact**

Testimony by a co-conspirator that defendants went across the street "to wait on us," did not constitute an expression of opinion by a lay witness, rather the witness was merely reiterating his prior admissible testimony as to what defendants had told him. The witness's response as to why defendants were going to wait was not an expression of opinion as to their intent; rather, it was simply a recitation of the sequence of events as seen and heard by the witness. The inference drawn by the witness flowed naturally and logically from the facts and circumstances about which he testified.

4. **Criminal Law § 86.10— prior statement of witness—corroboration**

The trial judge properly admitted a witness's prior written statement into evidence where the statement corroborated his in-court testimony.

5. **Criminal Law § 42.4— evidence relating to weapons properly admitted**

The trial judge properly allowed a witness to testify that he saw two pistols in the possession of one defendant and an accomplice on the day following the armed robbery. The answer of the witness was responsive and could not reasonably be interpreted as implying who might be the owner of the weapons.

6. Criminal Law § 79— acts of co-conspirators—not intended as declarations—admissible into evidence

The trial judge did not err in permitting evidence of the sale of the murder weapon and the slain officer's pistol by co-conspirators on the day following the commission of the charged crime since the evidence involved *acts* obviously not intended as declarations, and since the evidence was relevant to show guilty knowledge and an attempt to suppress evidence.

7. Conspiracy § 6; Homicide § 25.1; Robbery § 4.5— conspiracy to commit armed robbery—felony murder—sufficiency of evidence

The trial judge properly denied defendants' motions to dismiss the charges of armed robbery, first degree murder, and conspiracy where the evidence tended to show that six men formed a plan to rob the Handy Pantry store; defendants Brown and Martin agreed to wait across the street in an automobile for the individuals who agreed to commit the actual robbery; defendants Martin and Brown circled the block in the automobile while the robbery was in progress and fled the scene only after hearing shots and observing police cars coming to the scene; that although there was some hesitancy on the part of Martin and Brown about taking part in the robbery, after it was agreed that others would enter the store, they remained outside the store either parked or circling the block while the others entered the store and committed the crimes of armed robbery and first-degree murder; that when Brown and Martin fled the scene they went to another conspirator's apartment; that Martin told the other conspirator's wife, "We went to make a lick, and me and Charlie Brown was at some store. We were supposed to be circling."; that Martin further stated that upon hearing shots and seeing police cars, they left the scene; that the other conspirator later came to his apartment, and he told Martin that he should not have left them; and that both Martin and Brown shared in the proceeds of the robbery.

8. Criminal Law § 26.5; Homicide § 4.2— felony murder—additional punishment for armed robbery improper

The commission of the crime of armed robbery was the basis for the conviction of defendants for first degree murder; therefore, no additional punishment may be imposed for the convictions of armed robbery as independent criminal offenses.

APPEAL by defendants from *Kirby, Judge*, at 20 September 1982 Schedule "D" Criminal Session of MECKLENBURG County Superior Court.

Defendants Martin and Brown were charged in separate indictments with first-degree murder of Police Officer Edmond Cannon, conspiracy to commit armed robbery and armed robbery. Each defendant entered a plea of not guilty to each charge and upon motion by the State all cases were consolidated for trial.

The State offered evidence tending to show that on the night of 23 November 1981, Mark Anthony Owens, Ameen Kareem Abdullah, Charles Alvin Brown, John Eric Martin, Jr., Antonio Randolph, and Richard Washington were at Martin's home where they had a conversation concerning going to Eastland Mall in Charlotte, North Carolina, to steal bank deposit bags from merchants after the mall closed. Pursuant to their conversation, the six men drove to the mall in separate cars, but their plan to steal the deposit bags was abandoned because they observed a plainclothes detective in the mall. Upon leaving the mall, they observed a Handy Pantry store located at the intersection of Kilborne and Eastway Drives.

The two cars pulled behind the store, and a conversation ensued as to whether they should rob the store. There was evidence that defendants Brown and Martin indicated that they did not want to carry out the planned robbery. However, Abdullah, Owens, and Randolph entered the convenience store to commit the armed robbery. Abdullah was armed with a small dark pistol. Neither Owens nor Randolph was armed. The Thunderbird automobile, driven by Washington, was positioned on the street behind the Handy Pantry. There was conflicting evidence as to whether the station wagon occupied by Brown and Martin was positioned across the street from the Handy Pantry or whether Brown and Martin were circling the block. There was also testimony tending to show that the men in each automobile were to act as lookouts and getaway drivers.

At approximately 10:00 o'clock p.m., Abdullah entered the store first. He pulled his pistol on Wendy Jenkins, the store clerk, and placed her in the cooler at the back of the store. Owens and Randolph entered the store and at Abdullah's direction removed the money from the cash register. At this point, Officer Edmond Cannon of the Charlotte Police Department pulled his marked police car in front of the Handy Pantry. Cannon was in uniform and had a silver service revolver in his holster.

Cannon entered the store and observed Abdullah, Owens, and Randolph. He asked where the store clerk was. Abdullah told Cannon that she was getting something for him at the back of the store. Abdullah tried to leave. Cannon pushed Abdullah back and told him not to leave. At this point, the store clerk pushed the cooler door open and called for help.

Abdullah pulled his pistol and shot Cannon. After the first shot was fired, Officer Cannon, who had not drawn his pistol, stumbled out the door and fell on the ground. Abdullah continued to fire. There was medical testimony which indicated that two bullets struck Cannon in the arm. One passed through his arm and grazed his chest. Three bullets penetrated Cannon's back, and one of these bullets pierced his heart causing his death.

Abdullah, Owens, and Randolph fled. They ran to Washington's car and sped away from the scene. In the car, Abdullah showed Owens Officer Cannon's service revolver which he had taken from Cannon as he lay on the pavement.

Martin and Brown fled when they heard the shots and observed police cars. They immediately went to the home of Tonya Abdullah, wife of Ameen Kareem Abdullah. At approximately 10:30 o'clock p.m. Martin and Brown arrived. Tonya Abdullah testified:

> . . . I was on the couch and it was in the middle of the late show when I heard a knock on the door. John Martin and Charlie Brown were knocking on the door. When I got up to open the door, John Martin was in front, Charlie Brown was in the back. They came in fast, I remember that because they almost pushed me the way they came in. When John first came in, I asked him where was Kareem, and he said, "Oh, s---, everything's f----- up." Then John Martin and Charlie Brown were trying to talk at the same time. I asked John what had happened and he said, "We went to make a lick and me and Charlie Brown was at some store, we were supposed to be circling. We were circling around the store and we heard some bullets. Shots. So we came back, and as we were coming, we seen police cars going toward the store." Charlie Brown told John Martin in my presence that was no reason to leave them and John responded asking Charlie Brown if he didn't see all the police cars and that the place was soon going to be swarming with police. I do not remember anything else that was said between the two of them that night. They stayed at my house about one or two hours. About thirty minutes after John Martin and Charlie Brown arrived, my husband and Skillet (Mark Owens) and Wheaty (Antonio Randolph) came in. John Martin and Charlie Brown were still

there. When I opened the door, Kareem went over to grab John and told him he shouldn't have left them. John did not say anything to Kareem. Charlie Brown was there when this happened and said, "Man, I told him he shouldn't have left."

Vermerial Bennett, Tonya Abdullah's sister, was present when Martin and Brown arrived and testified that:

> On November 23rd of last year, I saw John Martin and Charlie Brown in the later evening hours at my house with my sister, Tonya Abdullah. They were knocking at the door and I went to the door and opened it and they came in talking. John Martin said, "We went to make a lick," and my sister asked where was Abdullah. John said, "We had to leave him because the police came." And Charlie Brown said, "Man, I told you we shouldn't have left them." I also remember John Martin said, "Man, all those cops," and that is why they left. John Martin and Charlie Brown were at the house about fifteen minutes that night and they left. They came back later and Abdullah was with them. Martin, Brown, my sister and me, Skillet, Wheaty and Abdullah were in the house when Abdullah said, "Man, why did you leave us? We could have got caught." I do not remember anyone saying anything back to Abdullah. I do not remember anything else that either Charlie Brown or John Martin said that night.

Later that night, the six men met at John Martin's house where they split the proceeds of the robbery. Each man received about $16.00 from the proceeds of the robbery.

The following day, Owens, Martin, and Abdullah went to Chester, South Carolina, where the murder weapon and Officer Cannon's service revolver were sold to Clarence Buchanan for $70.00 in cash and some marijuana.

Defendants offered no evidence.

The jury returned verdicts of guilty as charged on all counts. The trial judge entered judgment imposing upon each defendant a sentence of life imprisonment upon the verdict of guilty of first-degree murder, a sentence of imprisonment for one year upon the verdict of guilty of conspiracy to commit armed robbery, and a sentence of imprisonment for fourteen years on the verdict of

guilty of armed robbery. Each defendant appealed to this Court as a matter of right on the murder convictions, and on 31 May 1983, we allowed their respective motions to bypass the Court of Appeals on the armed robbery and conspiracy convictions.

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

Marshall H. Karro for defendant appellant John Eric Martin, Jr.

Richard H. Tomberlin for defendant appellant Charles Alvin Brown.

BRANCH, Chief Justice.

[1] Defendants contend that the trial judge erred by admitting into evidence testimony concerning their abandoned attempt to rob merchants at Eastland Mall in Charlotte, North Carolina.

It is well settled in North Carolina that the State cannot offer evidence of other crimes committed by an accused where the only relevancy of such evidence is its tendency to show the defendant's disposition to commit a crime of the nature of the one for which he is on trial. *Accord, State v. Williams*, 304 N.C. 394, 284 S.E. 2d 437 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907 (1980); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). However, there are numerous exceptions to this rule which include evidence tending to show intent or the existence of a plan or design to commit the offense charged. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979); *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978). Evidence offered for the purpose of showing intent or the existence of a plan or design should be carefully scrutinized before it is admitted to insure that it is really relevant to the establishment of plan or design or intent rather than merely to show propensity to commit the offense charged. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510; *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364; 1 Brandis on North Carolina Evidence, § 92 (2d Rev. Ed. 1982).

Here the evidence discloses that the defendants entered into a plan with other persons to commit a robbery in Eastland Mall. Upon deciding that there were circumstances at Eastland Mall unfavorable to the successful execution of the planned crime, this

plan was abandoned. Within minutes the same parties were engaged in a plan which resulted in the armed robbery of the Handy Pantry store and the felony murder of Officer Cannon. The evidence elicited by the defendants concerning their hesitancy to engage in the charged crimes emphasizes the relevancy of the challenged evidence which tends to show intent and the existence of a plan and design among defendants and their confederates to obtain money by means of a robbery.

This assignment of error is overruled.

[2] Defendants next assign as error the rulings of the trial judge permitting co-conspirators Randolph and Owens to testify as to conversations among the six men on 23 November 1981, which conversations tended to establish the conspiracy to commit the crime of armed robbery.

It is defendants' position that without additional extrinsic evidence the State cannot prove the existence of a criminal conspiracy by the in-court testimony of other co-conspirators. We disagree.

It is well established in North Carolina that the testimony of a co-conspirator is competent to establish the conspiracy. *State v. Carey*, 285 N.C. 497, 206 S.E. 2d 213 (1974); *State v. Miley*, 291 N.C. 431, 230 S.E. 2d 537 (1976). Further, a conspirator's unsupported testimony is sufficient to sustain a verdict although the jury should receive and act upon such testimony with caution. *State v. Carey*, 285 N.C. 497, 206 S.E. 2d 213; *State v. Tilley*, 239 N.C. 245, 79 S.E. 2d 473 (1954).

Here the State offered the co-conspirators Owens and Randolph as witnesses. Obviously, such testimony does not involve the use of acts and declarations of one conspirator against another. To the contrary, it is direct, sworn, in-court testimony of one conspirator against another. This evidence was competent and admissible on the question of defendants' guilt or innocence of the charged crimes.

[3] Defendants next contend that the trial judge erred in permitting the witness Owens to testify concerning the roles of defendants Martin and Brown in the robbery of the Handy Pantry store and the murder of Officer Cannon. Defendants argue that the

challenged testimony constituted an inadmissible opinion of the witness as to the intent of defendants.

The testimony which defendants contend was erroneously admitted appears in the record as follows:

Q. If you know, where did Martin and Brown go when you went to rob the Store and why?

MR. TOMBERLIN: Objection.

MR. KARRO: Objection.

COURT: Overruled.

DEFENDANTS' MARTIN AND BROWN EXCEPTION NUMBER NINETEEN (19).

A. Across the street to wait on us.

MR. TOMBERLIN: Motion to strike.

MR. KARRO: Motion to strike.

Q. To do what?

A. To wait on us.

MR. TOMBERLIN: Motion to strike.

COURT: Motion to strike denied.

DEFENDANTS' BROWN AND MARTIN EXCEPTION NUMBER TWENTY (20).

Q. Why were they going to wait on you?

A. Well, from what I understand—

MR. KARRO: Objection.

MR. TOMBERLIN: Objection.

COURT: Sustained as to what he understood.

Q. Why were they going to wait on you?

MR. TOMBERLIN: Objection.

MR. KARRO: Objection.

COURT: Overruled.

DEFENDANTS' BROWN AND MARTIN EXCEPTION NUMBER TWENTY-ONE (21).

A. So that some of us could get in the station wagon and leave.

Prior to the admission of the questioned evidence, Owens had testified as follows:

A. The cars were beside one another behind the Handy Pantry. Both cars had the windows rolled down on the passenger's side and on the driver's side. The station wagon had the driver's side rolled down, the station wagon had the passenger's side rolled down, and we were discussing the matter from the two cars there. Three of us were in one car and three of us were in the other car.

Q. All right, describe what the conversation was.

MR. TOMBERLIN: Objection.

THE COURT: Overruled.

A. Whether or not to go into the Handy Pantry Store and rob it.

DEFENDANT'S BROWN EXCEPTION NUMBER SIX (6).

A. I remember Richard saying that he really didn't want to go in; but Abdullah said it's too late now. We have come too far so we might as well go ahead with it. Well John and Charlie, they really weren't too particular about going in but since Abdullah persuaded us to go along with him so. . . .

MR. KARRO: Objection to us, move to strike.

Q. When you say us, who are you referring to?

A. Antonio, Richard, myself, John Martin, Charlie Brown and Abdullah.

THE COURT: (Overruled). Mr. Tomberlin's same objection.

DEFENDANTS' MARTIN AND BROWN EXCEPTION NUMBER SEVEN (7).

Charlie, John and Richard, there was a conflict on whether or not they were going in or not. They said they didn't want to

go in but Abdullah said that it was too late. Abdullah said it was too late to turn back and Charlie Brown and John Martin said they would wait across the street for us when we came out of the store. Abdullah told me and Antonio to come into the store with him and then Richard was to park the car in the neighborhood behind the store, park the car and wait for us to come out.

We briefly review the cases upon which defendant relies to support his position.

In *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980), a trial judge overruled defendant's objection to testimony that a weapon "looked to me like it was probably the caliber of a .38." This Court found no error in the trial judge's ruling and, in pertinent part, stated:

> Opinion evidence is inadmissible whenever the witness can relate the facts so that the jury will have an adequate understanding of them, and the jury is as well qualified as the witness to draw inferences and conclusions from the facts. *See generally* 1 Stansbury's North Carolina Evidence § 124 (Brandis Rev. 1973). However, it is well settled that opinion evidence is always admissible when the facts on which the opinion or conclusion is based cannot be so described that the jury will understand them sufficiently to be able to draw their own inferences. *E.g., State v. Watson*, 287 N.C. 147, 214 S.E. 2d 85 (1975); *see also* 1 Stansbury's North Carolina Evidence § 125 (Brandis Rev. 1973). Implicit in the rule is the recognition that the limitations of the language may make it difficult or impractical for a witness to describe the facts in detail. *Tyndall v. Harvey C. Hines, Co.*, 226 N.C. 620, 39 S.E. 2d 828 (1946); *State v. Dills*, 204 N.C. 33, 167 S.E. 459 (1933).

The defendant in *State v. Harrelson*, 54 N.C. App. 349, 283 S.E. 2d 168 (1981), sought to offer his opinion as to whether "George was on defendant's 'side' or Owens' 'side' " at the time a shooting occurred. The trial judge sustained the State's objection and excluded the testimony. The Court of Appeals found no error on the basis that the question required defendant, a lay witness, "to draw a conclusion as to what George . . . was thinking." *Id.*

Defendant in his brief relies upon the following quote from *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976): "It is true that ordinarily a witness may not give his opinion of another person's intention." *Id.* at 661, 224 S.E. 2d at 563.

In *Brower*, this Court held that it was not error for the trial judge to permit a witness to testify that defendant Brower "went over with [a codefendant] to assist him." In so holding, we stated:

> Defendant Brower next argues under this assignment that the trial court erred in allowing the State's witness Wade Burris to testify over objection that after the shorter of the two robbers, identified as Brower, forced Mr. Burris and Mrs. Hall to lie on the floor and after he took Mr. Burris's pocketbook, the shorter man "went over with the taller man [identified as defendant Johnson] *to assist him.*" (Emphasis added by the court.) Defendant contends the witness was thus erroneously permitted to draw inferences concerning defendant's intention. We find no merit in this argument. It is true that ordinarily a witness may not give his opinion of another person's intention. 1 Stansbury North Carolina Evidence § 129. (Brandis rev. 1973), and cases cited therein. Nevertheless, the witness Burris was not expressing his opinion that Brower intended to assist defendant Johnson. Rather, the statement was simply a narration of the sequence of events during the commission of the crime. It was a shorthand statement of fact. (Citations omitted.)

Id. at 661-62, 224 S.E. 2d at 563.

Defendants' reliance on *Harrelson*, *Smith* and *Brower* lends little support to their contentions.

As to *Harrelson*, we are of the opinion that the excluded evidence should have been admitted pursuant to the shorthand statement of fact rule. *Smith* and *Brower*, in effect, restate that rule. Further, we conclude that *Brower* not only contains a correct statement of the law, but strongly tends to support the State's position.

In instant case, the witness Owens had engaged in conversations with the other conspirators, including defendants Brown and Martin, concerning a plan to rob the Handy Pantry store. The challenged testimony did not constitute an expression of opinion

by a lay witness. To the extent that Owens testified that defendants went across the street "to wait on us," he was merely reiterating his prior admissible testimony as to what defendants Martin and Brown had told him. Owens' response as to *why* defendants were going to wait was not an expression of opinion as to their intent; rather, it was simply a recitation of the sequence of events as seen and heard by Owens. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551. The inference drawn by the witness flowed naturally and logically from the facts and circumstances about which he testified. 1 *Brandis on North Carolina Evidence* § 125 (2d Rev. Ed. 1982).

This assignment of error is overruled.

[4] Defendants assign as error the ruling of the trial judge permitting the State to introduce into evidence a prior written statement made by the witness Owens.

The statement was admitted by the trial judge with instruction that this evidence was offered for the purpose of corroboration, "if you, the jury, you being the triers of the facts, finds that prior statement does in fact corroborate his testimony at this trial and for no other purpose."

Defendants additionally argue that the statement was an attempt by the prosecutor to impeach his own witness.

It has long been recognized in North Carolina that prior consistent statements made by a witness are admissible for corroborative purposes when the witness is impeached in any manner. 1 Brandis on North Carolina Evidence, supra, § 50; *State v. Medley*, 295 N.C. 75, 243 S.E. 2d 374 (1978); *State v. Bennett*, 226 N.C. 82, 36 S.E. 2d 708 (1946). The wide latitude which this jurisdiction grants to the admission of this type of evidence is set forth in recent decisions which state the rule that prior consistent statements are admissible even when the witness has not been impeached. *State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979); *State v. Best*, 280 N.C. 413, 186 S.E. 2d 1 (1972). Nevertheless, it remains the law in this State that the prior statements of a witness must in fact corroborate the testimony of the witness. If the previous statements are generally consistent with the witness' testimony, slight variations will not render the statements inadmissible, but such variations only affect the credibility of the statement. *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977).

It is true that the State may not impeach its own witness by introducing his prior *contradictory* statements under the guise of corroboration. *State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963).

We, therefore, are brought to the question of whether the prior statement in instant case was in fact corroborative or whether the prior statement so substantially varied from the witness' in-court testimony that it was contradictory and impeaching. Defendants focus their argument on that portion of the prior written statement which reads: "Sometime in November of 1981, me, Ameen Kareem Abdullah, Richard Washington, John Martin, Charles Brown, and a guy named Wheaty all went on Eastway Drive to do a robbery." Defendants argue that the witness Owens' in-court testimony was to the effect that upon leaving Eastland Mall, the place they first intended to rob, the parties were headed home. There was no mention of robbing the Handy Pantry until the cars pulled along side one another behind the Handy Pantry.

In our opinion, the fact that the in-court testimony tended to show that the conspiracy to rob the Handy Pantry occurred after the parties arrived on Eastway Drive, and the prior written statement tended to show that the plan was formulated before they came to Eastway Drive, does not amount to a substantial variance. *Where* the conspiracy to rob was formulated is of little moment.

We have carefully compared Owens' in-court testimony with his prior written statement and we are of the opinion that the prior statement does corroborate his in-court testimony.

We hold that the trial judge properly admitted the witness Owens' prior written statement into evidence.

[5] Defendant Martin contends that the trial judge erred in overruling his objection and denying his motion to strike the testimony of witness Owens to the effect that he saw two pistols in the possession of Martin and Abdullah on the day following the armed robbery of the Handy Pantry store.

The questioned testimony appears in the record as follows:

Q. Where did you see the two pistols marked as State's Exhibit Number One and State's Exhibit Number Two?

MR. TOMBERLIN: Objection.

COURT: Overruled.

DEFENDANT BROWN'S EXCEPTION NUMBER NINE (9).

A. They were in the possession of Abdullah and John Martin.

MR. KARRO: Objection, move to strike.

COURT: Overruled. Motion to strike denied.

DEFENDANT MARTIN'S EXCEPTION NUMBER TEN (10).

Defendant argues that defendant's answer was a nonresponsive conclusive statement as to who *owned* the weapons. We disagree. Suffice it to say that we are of the opinion that the answer was responsive and cannot reasonably be interpreted as implying who might be the owner of the weapons. In fact, the witness had previously indicated in his testimony that one of the pistols belonged to Abdullah and the other to the deceased police officer. His answer merely related what he had observed.

[6] By his assignment of error No. 7, defendant Brown contends that the trial judge erred by overruling his objection to evidence relative to the sale of the murder weapon and Officer Cannon's pistol on the day after the armed robbery of the Handy Pantry store. He argues that these acts of other conspirators were not made during the course of and in furtherance of the conspiracy to commit the armed robbery, and therefore this testimony was not admissible as to him.

It is true that for many years it has been the general rule in North Carolina that when the State establishes a *prima facie* case of conspiracy, the acts and declarations of each party to the conspiracy in furtherance of its purposes is admissible against other conspirators when made or done after the conspiracy was formed and before it terminated. Declarations or acts made or done prior to the formulation of the conspiracy or after its termination, according to the long-standing rule, were admissible only against the one who committed the acts or made the declarations. *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907 (1977); *State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39 (1969). However, in *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977), we recognized a distinction between *declarations* and *acts*

and clarified the latter rule as it applied to acts not intended as declarations.

In *Tilley*, defendants Tilley, Smith and Jordan were charged with first-degree murder and conspiracy to commit a felonious assault with firearms. Among the challenged evidence was testimony that Smith, one of the co-conspirators, was seen carrying and brandishing a pistol during the day and evening of the murder. Defendants Tilley and Jordan objected to this testimony on the ground that these acts transpired before the conspiracy was formed. Defendants Tilley and Jordan also objected to testimony of the witness Julia Pruitt to the effect that she threw the murder weapon away in a pasture behind her trailer.

In sustaining the trial judge's rulings admitting this evidence, we stated, *inter alia*:

> On the facts of the present case it is appropriate to examine the rules which apply to acts or declarations of a conspirator committed or said outside the pendency of the conspiracy.
>
> It does not necessarily follow that these acts or declarations are always inadmissible. *Acts* done by a co-conspirator before or after the conspiracy, which were not intended as declarations, are not hearsay and thus are competent evidence, assuming their relevance. *Anderson v. United States*, 417 U.S. 211, 41 L.Ed. 2d 20, 94 S.Ct. 2253 (1974); *Lutwak v. United States*, 344 U.S. 604, 97 L.Ed. 593, 73 S.Ct. 481 (1953). Any statements in our cases that may have indicated that acts by co-conspirators outside the pendency of a conspiracy are inadmissible, are not applicable to acts not intended as a means of expression.
>
> * * * *
>
> Smith's act in carrying a pistol was not intended as a declaration. Hence it matters not whether the prosecution had established a *prima facie* case for the existence of the conspiracy at all times that Smith was seen with the gun. This evidence was within the personal knowledge of the testifying witnesses and was not hearsay. Defendants' exceptions 14-18 are overruled.
>
> Similarly, Julia Pruitt's testimony that she later threw this gun away in the pasture behind her trailer was admissi-

ble. Of her own knowledge, she explained how she gained possession of Smith's pistol, disposed of it and later led law enforcement officers to it. *State v. Bovender*, 233 N.C. 683, 65 S.E. 2d 323 (1951). Her evidence was probative and not hearsay. The fact that she threw the pistol away after termination of the conspiracy and that she did so out of the presence of the defendants is irrelevant. Defendants' exceptions 47-49 and 52-53 are overruled.

Id. at 140, 232 S.E. 2d at 439-40.

Here, the questioned evidence involved *acts* obviously not intended as declarations. The evidence was relevant to show guilty knowledge and an attempt to suppress evidence. Under the rule announced in *State v. Tilley*, the challenged evidence was admissible.

We, therefore, hold that the trial judge did not err in permitting evidence of the sale of the murder weapons and Officer Cannon's pistol on the day following the commission of the charged crimes.

[7] Defendants Martin and Brown assign as error the denial of their respective motions to dismiss the charges of armed robbery and first-degree murder at the conclusion of the State's evidence.

It is well settled in this jurisdiction that when a conspiracy is formed to commit an armed robbery and any one of the conspirators commits a murder in the perpetration or attempted perpetration of the armed robbery, all conspirators actually or constructively present, aiding and abetting the actual perpetrators of the crime of armed robbery are guilty of murder in the first degree. *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Carey*, 285 N.C. 497, 206 S.E. 2d 213 (1974). Where one has entered into the perpetration of a felony and has aided or encouraged its commission, he cannot escape criminal liability by withdrawing from the scene. *State v. Spears*, 268 N.C. 303, 150 S.E. 2d 499 (1966).

A motion to dismiss in a criminal case requires the court to consider the evidence in the light most favorable to the State, take it to be true, and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Goines*, 273

N.C. 509, 160 S.E. 2d 469 (1968); *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967).

There was evidence in instant case tending to show that after the parties to the conspiracy formed the plan to rob the Handy Pantry store, defendants Brown and Martin agreed to wait across the street in an automobile for the individuals who agreed to commit the actual robbery. There was also evidence that defendants Martin and Brown circled the block in the automobile while the robbery was in progress and fled the scene only after hearing shots and observing police cars coming to the scene. The evidence shows that there was some hesitancy on the part of Brown and Martin about taking part in the robbery, but after it was agreed that others would enter the store, they remained outside the store, either parked or circling the block, while Abdullah, Owens and Randolph entered the store and committed the crimes of armed robbery and first-degree murder. Further, when Brown and Martin fled the scene, they went to Abdullah's apartment. There Martin told Abdullah's wife, "We went to make a lick, and me and Charlie Brown was at some store. We were supposed to be circling." He further stated that upon hearing shots and seeing police cars, they left the scene. When Abdullah later came to his apartment, he told Martin that he should not have left them. Both Martin and Brown shared in the proceeds of the robbery.

We are of the opinion, and so hold, that there was ample evidence, when taken in the light most favorable to the State, for the trial judge to find that defendants Brown and Martin were actually or constructively present at the crime scene with intent to aid in the commission of the crime of armed robbery and that they had communicated their intent to render assistance to the actual perpetrators of the crime.

We find no error in the trial judge's ruling denying the respective motions of Brown and Martin to dismiss the charges of armed robbery and murder.

Finally, defendants Brown and Martin assign as error the trial judge's denial of their respective motions to dismiss the charge of conspiracy at the close of the State's evidence. This assignment of error is based on each defendant's contention that there was no competent evidence of a conspiracy. We have hereinabove considered and answered this contention adversely to de-

fendants' position. Therefore this assignment of error is without merit.

[8] Our careful examination of defendants' assignments of error and the entire record discloses no error requiring that the verdicts returned or the judgments imposed in the cases charging first-degree murder and conspiracy to commit armed robbery against each defendant be disturbed. We note, however, that each defendant was convicted of first-degree murder under the felony murder rule and separate judgments were pronounced upon the verdicts of guilty in the first-degree murder charges, the conspiracy charges, and the armed robbery charges. The commission of the crime of armed robbery was the basis for the conviction of defendant Brown for first-degree murder in case number 82CRS5472; and for the conviction of defendant Martin of first-degree murder in case number 82CRS5470. Therefore no additional punishment may be imposed for the convictions of armed robbery as independent criminal offenses. *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973); *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972). The separate judgment imposing a prison sentence upon defendant Martin on the verdict of guilty of armed robbery in case number 82CRS5469 and the separate judgment imposing a prison sentence upon defendant Brown on the verdict of guilty of armed robbery in case number 82CRS5475 are arrested.

In case number 82CRS5470, charging James Eric Martin, Jr., with first-degree murder—no error.

In case number 82CRS5468, charging James Eric Martin, Jr., with conspiracy to commit armed robbery—no error.

In case number 82CRS5469, charging James Eric Martin, Jr., with armed robbery—judgment arrested.

In case number 82CRS5472, charging Charles Alvin Brown with first-degree murder—no error.

In case number 82CRS5473, charging Charles Alvin Brown with conspiracy to commit armed robbery—no error.

In case number 82CRS5475, charging Charles Alvin Brown with armed robbery—judgment arrested.

MARY LEE HEATH AND SON, KENNETH LEE HEATH v. T. J. TURNER AND WIFE, EVELYN TURNER; GRAHAM TURNER AND WIFE, FRANCES TURNER; LLOYD KENNEDY AND WIFE, LOIS KENNEDY

No. 561A82

(Filed 3 November 1983)

1. Quieting Title § 2.2— burden of proof

In an action to quiet title, the burden of proof is on the plaintiff to establish his title, and he may do so by traditional methods or by reliance on the Real Property Marketable Title Act.

2. Deeds § 11.3— quitclaim deed—interest conveyed

A quitclaim deed conveys only the interest of the grantor, whatever it is, no more and no less.

3. Adverse Possession § 10— adverse possession against remainderman

Defendants could not possess the property in question adversely to a remainderman or his grantees during the lifetime of the life tenant, since the statute of limitations conferring title by adverse possession does not begin to run against one who has no present right of possession to the property.

4. Quieting Title § 2.2; Trespass to Try Title § 2— Real Property Marketable Title Act—effect of possession

The fact that defendants were in possession of the lands in question serves as a defense against a competing marketable record title but does not, under the Real Property Marketable Title Act, establish title in defendants. Therefore, whatever rights the defendants have because they are in possession of the lands are not taken away by a competing marketable record title, but the mere fact of possession by the defendants does not alone establish their ownership of the lands and only protects what ownership the defendants already have on the date that marketability is to be determined.

5. Quieting Title § 2.2; Trespass to Try Title § 4— Real Property Marketable Title Act—effect of possession

Where defendants had acquired title to an 8/11 undivided interest in the lands in question by adverse possession when an action to quiet title was commenced, their possession of the lands at the time of commencement of the lawsuit protects, as against a competing marketable title, both their "interest" and "estate" in the lands, that is, the 8/11 undivided interest and their "right" to possession of the property, but possession does not give defendants any title which they did not already have. G.S. 47B-3(3).

6. Quieting Title § 2.2; Trespass to Try Title § 2— Real Property Marketable Title Act—beginning of 30-year period defined

In exception (10) under G.S. 47B-3 which preserves from extinction rights, estates, interests, claims or charges created subsequent to the beginning of the 30-year period for establishing marketable record title, the "beginning of such 30-year period" is the date of the title transaction purporting to create

the interest relied upon as the basis for the marketability of title and which was the most recent title transaction as of a date 30 years prior to the time when marketability is to be determined.

7. **Quieting Title § 2.2; Trespass to Try Title § 2— Real Property Marketable Title Act—competing title created by transaction recorded after beginning of 30-year period**

Even though a party establishes a marketable record title to the property in question, under G.S. 47B-3(10) it cannot extinguish a competing independent title if that competing title is created by a title transaction recorded after the beginning date for the establishment of the marketable record title. Therefore, defendants who claimed a record title to the lands in question under a deed recorded in 1932 would have a marketable record title within the meaning of the Real Property Marketable Title Act 30 years later in 1962, but their marketable record title would not affect or extinguish the title of plaintiffs to a 3/11 interest in the lands acquired by and through deeds to them and their predecessors recorded in 1943, 1955 and 1974.

APPEAL by plaintiffs from a decision of the Court of Appeals, 58 N.C. App. 708, 294 S.E. 2d 392 (1982), reversing a judgment of *Cowper, Judge*, entered at the 12 January 1981 Special Session of the Superior Court, DUPLIN County.

Fred W. Harrison, Attorney for plaintiff-appellants.

Russell J. Lanier, Jr., Attorney for defendant-appellees (Kennedys).

Vance B. Gavin, Attorney for defendant-appellees (Turners).

FRYE, Justice.

This action involves the title to real property. The plaintiffs in this action alleged that they owned Lots 2 through 7 in the division of the Margaret Hall land, that the defendants were trespassing on their land, and that the defendants' claims constituted a cloud on the plaintiffs' title. The defendants filed answers denying the plaintiffs' title, asserting title in themselves alternatively by record title, adverse possession for twenty years, and adverse possession for seven years under color of title. Amended answers were filed alleging that the defendants and their predecessors in title had been vested with an estate in the lands therein described for thirty or more years with nothing appearing of record purporting to divest their interests, that no notice had been filed by the plaintiffs as by law prescribed and that the defendants are entitled to be declared the owners of a

marketable record title in the property. The case was tried by the court without a jury.

Margaret Hall died intestate in Duplin County, North Carolina, on 1 December 1916 owning a tract of land containing 50 acres, more or less. She was survived by her husband, Thomas Hall,[1] and by eleven children. Subsequently, five of the children each received properly executed and recorded division deeds to one lot, thus effecting a division as to Lots 1, 8, 9, 10 and 11 of the Margaret Hall lands. No division deeds were recorded for Lots 2, 3, 4, 5, 6 or 7 to any of the other six children. Nevertheless, three of the remaining six children executed deeds purporting to convey all of Lots 2, 6 and 7 to B. F. Hobgood, Sr., husband of one of the children, Lillie Hall Hobgood. These deeds were duly recorded. Also, by duly recorded deeds, two of the remaining three children each conveyed their 1/11 undivided interest in the remaining Margaret Hall lands to their sister, Lillie Hall Hobgood. Lillie Hall Hobgood never conveyed her interests in the lands of Margaret Hall, except as contained in the division deeds to Lots 1, 8, 9, 10 and 11.

Lillie Hall Hobgood died intestate on 4 July 1929, survived by her husband, B. F. Hobgood, Sr. and one child, B. F. Hobgood, Jr.

B. F. Hobgood, Sr., by deed recorded on 4 November 1932, purported to convey to J. A. Thigpen Lots 2, 3, 4, 5, 6 and 7 of the Margaret Hall lands. This warranty deed, regular in form, purported to convey a fee simple estate in the lands therein conveyed. By subsequent title transactions, including deeds recorded in 1942 and 1945, the property was conveyed to the defendants.

B. F. Hobgood, Jr., by quitclaim deed recorded 8 December 1943, conveyed to A. L. Mercer all of his right, title and interest in Lots 2, 3, 4, 5, 6 and 7 of the Margaret Hall lands. A. L. Mercer, by quitclaim deed recorded in 1955, conveyed his interest in the property to Ella Rose Mercer and Grady Mercer, Jr., who then conveyed their interest by quitclaim deed recorded in 1974 to the plaintiffs.

1. Under existing law at that time, a surviving husband was not an heir as to real property. At most, her surviving husband acquired a curtesy estate which expired at the time of his death on 31 March 1930.

B. F. Hobgood, Sr. died on 20 August 1976. This action was commenced on 15 August 1978. The plaintiffs, as successor-grantees, base their claim to title on the deed from B. F. Hobgood, Jr. to A. L. Mercer in 1943. The defendants, successor-grantees under the deed from B. F. Hobgood, Sr. to J. A. Thigpen in 1932, claim title under the Real Property Marketable Title Act, G.S. §§ 47B-1 through 47B-9, and by adverse possession. The case was heard by Judge Albert W. Cowper at the 12 January 1981 Special Session of the Duplin County Superior Court, without a jury. Judge Cowper made extensive findings of fact, concluding as follows:

> 1. That the defects, if any, in the Deed from Lamb H. Hall to Lillie Hall Hobgood (recorded in the Duplin County Registry in Book 190 at Page 81) were cured by G.S. 47-49.
>
> 2. That the defendants in the proportion of their several interests are the owners of Lots 2, 6 and 7 hereinabove referred to and delineated on the map of Martin L. Barrow, Jr. (Plaintiffs' Exhibit No. 1) by reason of the defendants' actual, open, hostile and notorious possession of the same under known and visible lines and boundaries for more than thirty years and by color of title for more than seven years and prima facie by reason of the Title Marketability Act of North Carolina, as is hereinabove set out.
>
> 3. (That the Plaintiffs are the owners of a 3/11 undivided interest in the lands designated as Lots 3, 4 and 5 on Plaintiffs' Exhibit No. 1) and have failed to show title to any other lands.
>
> 4. That the defendants in the proportion of their several interests and their predecessors in title are the owners of an 8/11 undivided interest in the lots designated as 3, 4, and 5 on the map of Martin L. Barrow, Jr. (Plaintiffs[']) Exhibit No. 1) by reason of their actual, open, hostile and notorious possession of the same under known and visible lines and boundaries for more than thirty years and by color of title for more than seven years and prima facie by reason of the Title Marketability Act of North Carolina, as is above more specifically set out.
>
> 5. That the defendants . . . through their predecessors in title . . . acquired the curtesy interest of B. F. Hobgood,

Sr. and were in lawful possession. That the said B. F. Hobgood, Sr. took a curtesy interest in his wife's lands upon her death on July 4, 1929; and the said curtesy interest expired on the date of his death on August 20, 1976. That the Statutes of Limitations (whether seven years, twenty years or thirty years) began to run on the date of August 20, 1976; and said Statutes are no bar to plaintiffs' action.

Judge Cowper then entered judgment in favor of the plaintiffs, Mary Lee Heath and son, Kenneth Lee Heath, declaring them to be the owners of a 3/11 undivided interest in Lots 3, 4 and 5 and that the remaining 8/11 undivided interests in said lots were owned by the defendants, together with the entire interest in Lots 2, 6 and 7.

Both plaintiffs and defendants appealed to the Court of Appeals where a divided panel reversed and remanded, holding that under the Real Property Marketable Title Act the defendants were the owners of the entire interests in all of the lots. From that decision, plaintiffs appealed to this Court as a matter of right pursuant to G.S. § 7A-30(2).

The essential question in this case is whether the plaintiffs, successor-grantees from a remainderman, can recover the property in question from the defendants who have been in possession of the property for over thirty years. Stated differently, the question is whether the defendants, in possession under a deed conveying a life estate but purporting to convey a fee, actually acquired a fee simple estate in the land thus destroying the vested remainder of the plaintiffs during the lifetime of the life tenant.

The Court of Appeals held that the defendants' title must prevail because the defendants were in possession of the property and because the plaintiffs' vested remainder was divested by G.S. § 47B-2(c) which provides that a "marketable record title" shall be clear of "all rights . . . the existence of which depends upon any . . . title transaction . . . that occurred prior to such 30-year period." For the reasons indicated herein, we reverse the Court of Appeals and affirm the holding of the trial court that the plaintiffs own a 3/11 interest in Lots 3, 4 and 5 with all other interests being owned by the defendants.

The plaintiffs do not contest the trial court's finding, upheld by the Court of Appeals, that the defendants are the owners in fee of the entire interest in Lots 2, 6 and 7 of the Margaret Hall lands. Plaintiffs do contend, however, that the trial court erred in limiting their interest in Lots 3, 4 and 5 to a 3/11 undivided interest. The defendants contend that the trial court erred in concluding that the plaintiffs held any interest in Lots 3, 4 and 5. We now consider the plaintiffs' claim of title to Lots 3, 4 and 5.

[1] Before examining the plaintiffs' claim, however, we note that this is an action to quiet title which is controlled by Section 41-10 of the General Statutes of North Carolina. This is a remedial statute and is to be liberally construed to advance the remedy and permit the courts to bring the parties to an issue. *Trust Co. v. Miller*, 243 N.C. 1, 5, 89 S.E. 2d 765, 768-69 (1955). The beneficial purpose of this section is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion. *Christman v. Hilliard*, 167 N.C. 4, 8, 82 S.E. 949, 951 (1914). In an action to quiet title, the burden of proof is on the plaintiff to establish his title. *Walker v. Story*, 253 N.C. 59, 60, 116 S.E. 2d 147, 148 (1960). He may do so by traditional methods or by reliance on the Real Property Marketable Title Act.

The Real Property Marketable Title Act was enacted by the General Assembly of North Carolina in an effort to expedite the alienation and marketability of real property. Note, *North Carolina Marketable Title Act—Section 47B-2(D)—Proof of Title —Relief at Last for the Plaintiff Insituting Land Actions*, 10 W.F.L. Rev. 312 (1974). Section 47B-2 of the act provides as follows:

> (a) Any person having the legal capacity to own real property in this State, who, alone or together with his predecessors in title, shall have been vested with any estate in real property of record for 30 years or more, shall have a *marketable record title* to such estate in real property.
>
> . . . .
>
> (d) In every action for the recovery of real property, to quiet title, or to recover damages for trespass, the establish-

> ment of a marketable record title in any person pursuant to this statute shall be *prima facie evidence that such person owns title* to the real property described in his record chain of title.

(Emphases added.)

Other relevant sections of the Real Property Marketable Title Act will be referred to later in this opinion.

The leading case in North Carolina setting out the traditional methods of proving title is *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889). As stated therein:

> This *prima facie* showing of title may be made by either of several methods. [Citations omitted.]
>
> 1. He may offer a connected chain of title or a grant direct from the State to himself.
>
> 2. Without exhibiting any grant from the State, he may show open, notorious, continuous, adverse and unequivocal possession of the land in controversy, under color of title in himself and those under whom he claims, for twenty-one years before the action was brought. [Citations omitted.]
>
> 3. He may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title in himself and those under whom he claims, for seven years before the action was brought. [Citations omitted.]
>
> 4. He may show, as against the State, possession under known and visible boundaries for thirty years, or as against individuals for twenty years before the action was brought. [Citations omitted.]
>
> 5. He can provide title by estoppel, as by showing that the defendant was his tenant, or derived his title through his tenant, when the action was brought. [Citations omitted.]
>
> 6. He may connect the defendant with a common source of title and show in himself a better title from that source. [Citations omitted.]

Mobley, 104 N.C. at 115, 10 S.E. at 142-43.

We note that the plaintiffs, in the case before us, did not base their claim to title on the Real Property Marketable Title Act. Rather, they relied on a traditional method of proving title, by connecting themselves, through a series of title transactions, to a common source (Margaret Hall), and then showing a better title in themselves from that source. By this method the plaintiffs were able to establish title in themselves to a 3/11 undivided interest in Lots 3, 4 and 5 but they were unable to establish title by this method to any greater interest in Lots 3, 4 and 5 or to *any* interest in Lots 2, 6 and 7.

The trial court made the following findings of fact to which there was no exception:

> That Lillie Hall Hobgood has no prior record title to any interest in the lands designated on said plat as Lots 3, 4 and 5 except:
>
> a. By virtue of a Deed recorded in Book 190 at Page 81 of the Duplin County Registry. Dated July 10, 1917. From Lamb H. Hall to Lillie Hall for a 1/11 interest in the Margaret Hall Lands.
>
> b. Deed from James W. Stanley and wife, Sarah Stanley, to Lillie S. Hall. Dated December 10, 1917. Filed January 20, 1919. Recorded in Book 200 at Page 196 of the Duplin County Registry. A 1/11 interest.
>
> That the aforesaid Lillie Hall Hobgood (wife of B. F. Hobgood, Sr.; mother of B. F. Hobgood, Jr., and daughter of Margaret Hall) inherited a 1/11 interest in the lands of Margaret Hall, who died intestate. Lillie Hall Hobgood thereby owned a total of 3/11 undivided interest in said lands.

[2] The plaintiffs acquired their title through successive grantees of B. F. Hobgood, Jr., who could only convey to the plaintiffs' predecessors the interest acquired by descent from his mother, Lillie Hall Hobgood, who died intestate in 1929. The trial court found that Lillie Hall Hobgood owned a 3/11 undivided interest in Lots 3, 4 and 5. Since the plaintiffs claim title through and by a quitclaim deed from B. F. Hobgood, Jr. conveying all of his right, title and interest in the property, it must necessarily follow that the interest conveyed could not exceed the interest of Hobgood, Jr.'s mother, that is, a 3/11 undivided interest in the lots in

question. A quitclaim deed conveys only the interest of the grantor, whatever it is, no more and no less. *Hayes v. Ricard*, 245 N.C. 687, 691, 97 S.E. 2d 105, 108 (1952). We also note that each of the deeds in the plaintiffs' chain subsequent to the B. F. Hobgood, Jr. deed is also a quitclaim deed, again conveying all of the grantors' right, title and interest in the property. We find no error, therefore, in the trial court's ruling that the plaintiffs are the owners of only a 3/11 undivided interest in Lots 3, 4 and 5.

[3] We turn now to the defendants' claims that they are entitled to all of the interests in Lots 3, 4 and 5. The defendants claim title to the property in question by virtue of the Real Property Marketable Title Act. G.S. §§ 47B-1 through 47B-9. They could not acquire title to the 3/11 undivided interest of B. F. Hobgood, Jr. in those lots by adverse possession, either under the twenty-year statutes of limitations, G.S. §§ 1-39 and 1-40, or by adverse possession under color of title for seven years, G.S. § 1-38, since it is clear that they could not possess the property adversely to the remainderman or his grantees during the lifetime of B. F. Hobgood, Sr., the life tenant. This is so under the well established rule that the statute of limitations conferring title by adverse possession does not begin to run against one who has no present right of possession to the land involved. *See generally* P. Hedrick, *Webster's Real Estate Law in North Carolina*, § 302 (rev. ed. 1981).

In enacting the Real Property Marketable Title Act, the General Assembly stated its purpose as follows:

> It is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished.

G.S. § 47B-1 (Cum. Supp. 1981).

As it relates to the 3/11 undivided interest in Lots 3, 4 and 5 of the Margaret Hall lands, it appears, as the majority of the panel of the Court of Appeals noted, that both the plaintiffs and the defendants have record titles of more than thirty years' dura-

tion which could be examined without finding an exception, the defendants' title commencing in 1932 and the plaintiffs' title commencing in 1943.[2] Because the defendants had been in possession of the property for over thirty years, and because the panel treated the plaintiffs' reliance on Hobgood, Jr.'s inheritance from his mother as predating the defendants' 1932 deed, the Court of Appeals held that the 3/11 interest of the plaintiffs was divested by virtue of G.S. § 47B-2(c). This was error. This section makes marketable record title, by its terms, *subject to the matters stated in G.S. § 47B-3*, which provides in pertinent part as follows:

> § 47B-3. Exceptions.
>
> Such marketable record title shall not affect or extinguish the following rights:
>
> . . . .
>
> (3) Rights, estates, interests, claims or charges of any person who is in present, actual and open possession of the real property so long as such person is in such possession.
>
> . . . .
>
> (10) Rights, estates, interests, claims or charges created subsequent to the beginning of such 30-year period.

Following the language of the statute, the marketable record title (*prima facie* evidence of ownership) of the plaintiffs does not affect or extinguish the rights, estates, interests, claims or charges of the defendants who are admittedly in present, actual and open possession of the property. G.S. § 47B-3(3). The market-

2. We may assume, without deciding, that both the plaintiffs and the defendants have "marketable record title," that is, "the public records disclose a title transaction affecting the title to the real property which has been of record for not less than 30 years purporting to create such estate" in the person from whom, by one or more title transactions, such estate has passed "with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed." G.S. § 47B-2(a) and (b). Pursuant to G.S. § 47B-2(d), the establishment of the "marketable record title" in this lawsuit would be "prima facie evidence that such person owns title to the real property described in his record chain of title." On its face then, the record would show marketable record title to the 3/11 undivided interest in Lots 3, 4 and 5 in both the plaintiffs and the defendants, *prima facie* evidence that both parties own the property.

able record title (*prima facie* evidence of ownership) of the defendants does not affect or extinguish the rights, estates, interests, claims or charges (of the plaintiffs or anyone else) created subsequent to the beginning of such 30-year period. G.S. § 47B-3(10). The exceptions listed under G.S. § 47B-3 do not serve as a sword to establish title in the party claiming a marketable title under the Act but instead serve as a shield to protect from extinguishment the rights therein excepted. Nor does the enumeration of the exceptions determine the priority of one exception over the other.

[4] Applying this provision to the instant case, the fact that the defendants were in possession of the lands in question serves as a defense against a competing marketable record title but does not, under the Marketable Title Act, establish title in the defendants. Stated differently, whatever rights the defendants have because they are in possession of the property are not taken away by a competing marketable record title but the mere fact of possession by the defendants does not alone establish their ownership of the land. It (possession) only protects whatever ownership the defendants already have on the date that marketability is to be determined.

[5] When this action was filed on 15 August 1978, the defendants had acquired title to an 8/11 undivided interest in Lots 3, 4 and 5 by adverse possession. Since the defendants owned an undivided interest in Lots 3, 4 and 5, their possession of the property on the date that marketability is to be determined (15 August 1978), protects their rights as owners of the 8/11 undivided interest. Thus, even if the plaintiffs had a marketable record title on that date under the Real Property Marketable Title Act, it could not affect or extinguish the defendants' title previously acquired by adverse possession because that title is an interest protected by G.S. § 47B-3(3). Possession by the defendants on the crucial date would not give the defendants title as to the plaintiffs' 3/11 undivided interest in the property, but their right to possession of the property as cotenants, prior to partition or sale, would be protected. This is true under the general rule that each cotenant has the right to enter upon the land and to enjoy it jointly with the other cotenants. *See generally* P. Hedrick, *Webster's Real Estate Law in North Carolina* § 115 (rev. ed. 1981). Thus, the defendants' possession of the property at the time of commencement of the

lawsuit protects, as against a competing marketable title, both their "interest" or "estate" in the property, that is, the 8/11 undivided interest and their "right" to possession of the property but does not give them any title which they did not already have.

[6] We return to exception (10) under G.S. § 47B-3 which preserves from extinction rights, estates, interests, claims or charges created subsequent to the beginning of such 30-year period. The "beginning of such 30-year period" is the date of the title transaction purporting to create the interest claimed by the defendants upon which they rely as the basis for the marketability of their title and which was the most recent title transaction as of a date thirty years prior to the time when marketability is to be determined. *See* Basye, *Clearing Land Titles*, § 174, p. 381 (2d ed. 1970). If it be assumed that defendants jointly claim their record title from B. F. Hobgood, Sr.'s warranty deed recorded 4 November 1932, this date would constitute the "beginning of such 30-year period" for the purpose of establishing the marketable record title of defendants. Plaintiffs' claim is based on the deed from B. F. Hobgood, Jr. to A. L. Mercer which was recorded on 8 December 1943, conveying all of his right, title and interest in the property.[3] Did this deed create in the grantee, Mercer, any rights, estates, interests or claims subsequent to the beginning of such 30-year period within the meaning of G.S. § 47B-3(10)? Clearly, the vested remainder is a right, estate, interest *and* claim. It is also clear that the deed created the vested remainder in the grantee subsequent to 4 November 1932. Accordingly, the B. F. Hobgood, Jr. deed, recorded 11 years after the B. F. Hobgood, Sr. deed, created in Mercer a vested remainder in fee subject to Hobgood, Sr.'s curtesy rights. This vested remainder, "created subsequent to the beginning of such 30-year period," by the clear language of G.S. § 47B-3, was not affected or extinguished by the marketable record title of defendants.

Since the plaintiffs' interest created by the B. F. Hobgood, Jr. deed is only to a 3/11 undivided interest, the defendants' marketable record title to the remaining 8/11 undivided interest in the lands in question is not affected.

3. On that date Hobgood, Jr. owned a vested remainder in a 3/11 undivided interest in Lots 3, 4 and 5.

Section 47B-3(10) of the North Carolina Real Property Marketable Title Act is similar, though not identical to section 2(d) of the Model Marketable Title Act.[4] The Model Act provides in pertinent part as follows:

> . . . .
>
> Section 2. *Matters to Which Marketable Title is Subject.* Such marketable record title shall be subject to:
>
> . . . .
>
> (d) Any interest arising out of a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title of record is started; *provided*, however, that such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of Section 3 hereof.
>
> . . . .
>
> Section 3. *Interests Extinguished by Marketable Title.* Subject to the matters stated in Section 2 hereof, such marketable record title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims or charges whatsoever, the existence of which depends upon any act, transaction, event or omission that occurred prior to the effective date of the root of title
> . . . .

Basye, *Clearing Land Titles*, § 174 (2d ed. 1970).

In the comment to section 2(d) of the Model Act,[5] the following example appears:

> Clause (d) deals with the question: What is the effect of instruments being recorded during the forty-year [30-year

4. For full text, and analysis of the Model Marketable Title Act, see Basye, *Clearing Land Titles* § 174 (2d ed. 1970).

5. Neither section 2(d) of the Model Act or § 47B-3(10) of the North Carolina Real Property Marketable Title Act were included in the Proposed Marketable Title Act for the State of North Carolina. *See* Webster, *The Quest for Clear Land Titles—Making Land Title Searches Shorter and Surer in North Carolina via Marketable Title Legislation*, 44 N.C.L. Rev. 89, 103-126 (1965).

> NC] period after the effective date of the root of title, which are a part of or constitute an independent chain of title? Suppose a deed conveying land from A to B in fee simple is recorded in 1912. A second deed conveying the same land from B to C in fee simple is recorded in 1925. In 1915, a deed conveying the same land from X to Y in fee simple is recorded. In 1955, Y may be said to have a marketable record title under the statute, since 40 years has elapsed after the effective date of his root of title, 1915. And the 1925 conveyance from B to C cannot be said to purport to divest Y, since it is an entirely independent chain of title. Nevertheless, by the terms of this clause, Y takes subject to the interest of C arising from the deed recorded in 1925. It will be noted, therefore, that the recording of C's deed in 1925 operated in much the same way as if he had filed a notice, and prevented Y from wiping out C's title in 1955 . . . .

Simes and Taylor, *Improvement of Conveyancing by Legislation*, 13-14 (1960).

[7] Subsection (10) of G.S. § 47B-3 operates in much the same manner as in the example cited in the comment to section 2(d) of the Model Act. Even though a party establishes a marketable record title to the property in question, it cannot extinguish a competing independent title if that competing title is created by a title transaction recorded after the beginning date for the establishment of the marketable record title. Applying the rule to the instant case, the defendants, if claiming a record title under a deed recorded in 1932, would have a marketable record title within the meaning of the Real Property Marketable Title Act, 30 years later in 1962. However, their marketable record title would be subject to (would not affect or extinguish) the title (the rights, estates, etc.) of the plaintiffs acquired (created) by and through the deeds to them and their predecessors recorded in 1943, 1955 and 1974.

Although the majority opinion in the Court of Appeals noted that the defendants had a record title commencing with the deed from B. F. Hobgood, Sr. to J. A. Thigpen in 1932, we note that in their amended answers and in their offer of proof at trial, the defendants claimed marketable record title only from deeds recorded in 1942 and 1945. The 1942 deed would ripen into

marketable record title in 1972, but the marketable record title would not affect or extinguish rights or interests of the plaintiffs created by the deeds to them and their predecessors recorded in 1943, 1955 and 1974. The 1945 deed would, of course, ripen into marketable record title in 1975, but this marketable record title would not extinguish rights of the plaintiffs acquired under the deeds to them and their predecessors recorded in 1955 and 1974. Thus, whether the defendants use the 1932 deed or the 1942 or 1945 deeds as their root of title, the result is the same. Their marketable record title cannot "affect or extinguish . . . [r]ights, estates, interests, claims or charges created subsequent to the beginning of such 30-year period." G.S. § 47B-3(10). The defendants' marketable record title in fee simple is *prima facie* evidence of ownership of the property, but this *prima facie* case is rebutted to the extent of the plaintiffs' interests acquired by the subsequently recorded deeds.

The plaintiffs' interest acquired by the subsequently recorded deeds was a 3/11 undivided interest in Lots 3, 4 and 5. Since this is the only interest that is preserved from extinguishment by G.S. § 47B-3, the defendants' title remains good as to the remaining 8/11 interest in the property.

As stated earlier herein, the defendants could not acquire this 3/11 interest from the plaintiffs by adverse possession during the life of B. F. Hobgood, Sr., and not enough time had elapsed between the date of Hobgood, Sr.'s death in 1976 and the filing of the lawsuit in 1978 for the defendants to acquire title by adverse possession. Thus, defendants have failed to establish title in themselves to the 3/11 interest in Lots 3, 4 and 5, either under the Real Property Marketable Title Act or under any of the traditional methods of proving title in this State. Accordingly, title to the 3/11 interest in Lots 3, 4 and 5 remains in the plaintiffs.

The plaintiffs argue persuasively that the defendants' marketable record title should not be able to divest the interest of a remainderman prior to the time that the remainderman is entitled to possession. However, we find it unnecessary to reach that question in this case[6] since the only interest the plaintiffs

6. The court below noted that no constitutional question was raised in the Superior Court or in that court as to the Real Property Marketable Title Act as ap-

have is a 3/11 undivided interest in the property and this interest is preserved from extinction under § 47B-3(10) of the Real Property Marketable Title Act by virtue of the subsequently recorded deeds in the plaintiffs' chain of title. The learned trial judge who weighed the evidence presented by the parties found that the plaintiffs had not established title to any other property. Thus, the plaintiffs' claim to the remaining 8/11 interest in Lots 3, 4 and 5 fails for lack of proof on their part rather than by any divestment on the part of the defendants under the Marketable Title Act.

This was a very complicated title lawsuit, hotly contested by competing members of the various families involved. The action was ably tried by Judge Cowper, by consent, without a jury. It is our view that he has considered carefully all of the competing claims of the parties and has correctly applied the law to the facts of the case.

The decision of the Court of Appeals is reversed and this cause is remanded to the Court of Appeals for remand to the Superior Court, Duplin County, for reinstatement of the judgment of Judge Cowper.

Reversed and remanded.

CEBUS WATSON v. JUANITA JACKSON WHITE AND LEROY WHITE

No. 53A83

(Filed 3 November 1983)

1. **Automobiles and Other Vehicles § 89.4— last clear chance—failure to instruct proper**

In a tort action in which plaintiff alleged defendant negligently hit him while he was crossing the street and defendant alleged that plaintiff was contributorily negligent, the trial court properly failed to instruct on the doctrine of last clear chance, and the Court of Appeals erred in focusing on whether the defendant should have seen plaintiff's perilous condition in time to avoid striking him without taking into account whether defendant had, within her then

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plied to this case and that the due process question was not considered by the court.

existing ability, the time and means to avoid harming the plaintiff. The evidence tended to show that as defendant approached a grocery store which plaintiff was crossing the street to reach, she was traveling at a speed of approximately 40 miles per hour; defendant could not have discovered plaintiff's perilous position until she drove out of a curve, a distance of 75 feet from the store; that assuming defendant discovered plaintiff's perilous position immediately upon exiting the curve, the maximum amount of time that defendant had to avoid the injury was approximately 1.28 seconds; and on these facts, while defendant might have had the last *possible* chance to avoid the injury, she did not have the last *clear* chance.

2. **Trial § 11— jury argument—references to ability of defendants to pay—failure to show prejudice**

In a tort action, defense counsel's remark: "Can you imagine what a low jury verdict would do to that family?" was clearly improper, calculated to appeal to the sympathy of the jury, and the trial court erred as a matter of law in failing to sustain plaintiff's objection to the remark. Plaintiff, however, failed to show prejudice inasmuch as the jury did not reach the issue of damages.

3. **Pleadings § 37; Rules of Civil Procedure §§ 8.2, 15; Trial § 38.1— request for instructions concerning evidential admissions—no error**

The trial judge did not err in refusing to submit plaintiff's proposed instructions to the jury concerning the effect of defendant's admissions in the pleadings where (1) defendant failed to deny certain allegations found in plaintiff's complaint in her answer, pursuant to G.S. 1A-1, Rule 8(d), (2) defendant moved to amend her answer to deny the allegations following closing arguments, (3) the trial court allowed the amendment pursuant to G.S. 1A-1, Rule 15(c), (4) after the amendments, the admissions were evidentiary admissions, (5) plaintiff failed to introduce the specific evidentiary admissions into evidence, and (6) it is apparent from the record that the defendants were given no opportunity to explain to the jury their failure to deny, by way of inadvertence, mistake of counsel, or otherwise, the allegations of the complaint.

Justice EXUM dissenting.

Justice FRYE dissenting.

DEFENDANTS appeal from a decision of the Court of Appeals reported at 60 N.C. App. 106, 298 S.E. 2d 174 (1982), one judge dissenting, granting plaintiff a new trial. The case was heard before *Hobgood (Robert B.), J.*, at the 13 April 1981 Session of Superior Court, WAKE County, as a civil action to recover damages for personal injuries allegedly caused by defendant Juanita Jackson White's negligence in striking the plaintiff, a pedestrian, with defendant Leroy White's automobile. Plaintiff appealed from a jury verdict finding defendant negligent and plaintiff contributorily negligent. The trial judge denied plaintiff's

request to submit the issue of last clear chance. Heard in the Supreme Court 8 September 1983.

At trial plaintiff, Cebus Watson, testified that on 12 October 1979 he left for work at approximately 5:30 a.m. His car ran out of gas on Rock Quarry Road. A man driving a truck gave him a ride to the Community Grocery store on Rock Quarry Road. The truck stopped across from the store, and plaintiff alighted from the passenger side of the truck, walked to the rear and emerged from behind the truck to cross the road to the store. Plaintiff was struck by defendants' vehicle after he had crossed the road and reached the shoulder of the pavement on the opposite side. Although plaintiff looked both ways before crossing, he did not see defendants' vehicle prior to being struck.

James Earl Hill, the driver of the truck, testified that he picked up the plaintiff on Rock Quarry Road and that as he approached the Community Grocery store, the plaintiff requested that Hill stop. Plaintiff indicated that he would ride to work with a co-worker whose car he had seen parked in front of the store. Hill was driving a 1972 pickup truck with a camper shell on the back. He testified that all four tires of the truck were on the hard surface of the paved road when he stopped as there was no shoulder. He stated: "When I stopped there was no vehicle coming behind me or in front of me. Before I could stop, and he got out, the lady came up over the hill and when the light shined on Cebus Watson coming behind my truck I saw just a vanish and at that time he vanished just like that." Both Mr. Hill and another witness, William Goodwin, testified that Mr. Watson was near the side of the road when he was hit.

Defendant Juanita White testified that she approached the Community Grocery store on Rock Quarry Road on 12 October between 6:10 and 6:15 a.m. It was still dark and she had her headlights on. She was traveling approximately 40 m.p.h. She saw Hill's truck stopped in the oncoming lane opposite the store and thought the driver had stopped "to make a left hand turn going to the store." Although at an earlier deposition defendant testified that she did not see the plaintiff prior to impact and did not know she had hit the plaintiff until she "heard it," at trial she testified that she saw a blur, "maybe a ghost like figure" crossing the road. Defendant stated that she remained in her lane of travel.

She did not blow her horn or apply her brakes prior to impact, nor did she turn or swerve or take any kind of evasive action. The right front fender of defendants' vehicle was damaged as a result of the accident.

Defendant Juanita White's testimony established further that upon traveling east just prior to reaching the Community Grocery store on Rock Quarry Road, there is a curve. The store is on the right "just as you are getting out of the curve." There was nothing to obscure her visibility from the time she left the curve until she reached the store.

Hilda Stancil, the co-worker whose car plaintiff had seen parked in front of the store, testified that the distance between the end of the curve and the store is approximately 75 feet. She testified that after 6:00 a.m. when the lights from the gas pump in front of the store are turned on, the area in front of the store is well-lit.

The three issues which are brought forward to this Court for determination and which are pertinent to the final disposition of this case were resolved by the Court of Appeals as follows:

1. The Court of Appeals, with one judge dissenting, held that the trial court erred in failing to instruct on and to submit the issue of last clear chance to the jury. On this issue we reverse the Court of Appeals.

2. The Court of Appeals held that arguments made by defendants' counsel to the jury concerning the effect that even a low jury verdict would have on defendants' "little family" constituted prejudicial error. We agree that the trial judge erred in overruling plaintiff's objections to the remarks and in failing to instruct the jury to disregard them. We do not agree however that the remarks, and thus the trial court's failure to strike them and give the cautionary instruction, constituted prejudicial error. We therefore reverse the Court of Appeals on this issue.

3. The Court of Appeals held that the trial court erred in failing to instruct the jury on the effect of defendants' admissions in their pleadings. The admissions were subsequently denied by amendment pursuant to Rule 15(c) of the Rules of Civil Procedure. Although competent as evidential admissions, plaintiff failed to

place this evidence before the jury at trial. Therefore we reverse the Court of Appeals on this issue.

Moore, Ragsdale, Liggett, Ray & Foley, P.A., by Jane Flowers Finch, attorney for defendant-appellants.

Blanchard, Tucker, Twiggs, Denson & Earls, P.A., by Douglas B. Abrams, attorney for plaintiff-appellee.

MEYER, Justice.

[1] Defendants contend that, on the facts in the record before us, the Court of Appeals erred in holding that plaintiff was entitled to an instruction on the issue of last clear chance.[1] Defendants argue that the source of the error lies in a misstatement of the law of last clear chance. The Court of Appeals enunciated the law as follows:

> The elements of the doctrine of last clear chance are the following: (1) plaintiff, by his own negligence, placed himself in a position of peril (or a position of peril to which he was inadvertent); (2) defendant saw, or by the exercise of reasonable care should have seen, and understood the perilous position of plaintiff; (3) defendant should have seen or discovered plaintiff's perilous condition in time to have avoided injuring him; (4) notwithstanding such notice, defendant failed or refused to use every reasonable means at his command to avoid the impending injury; and (5) plaintiff was injured as a result of defendant's failure or refusal to avoid the impending injury. *Wray v. Hughes*, 44 N.C. App. 678, 262 S.E. 2d 307, *review denied*, 300 N.C. 203, 269 S.E. 2d 628 (1980).

60 N.C. App. at 109, 298 S.E. 2d at 176 (emphasis added). It is to the underlined portion of this statement of the law that defendants particularly object.

The opinion below also cited as authority the Restatement of Torts, Second, as follows:

1. In making our determination, we are bound by the record. We caution that evidence of the specific facts so necessary to a determination of the applicability of the doctrine of last clear chance did not appear to be fully developed at trial.

§ 479. Last Clear Chance: Helpless Plaintiff. A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm,

(a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and

(b) the defendant is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm, when he

(i) knows of the plaintiff's situation and realizes or has reason to realize the peril involved in it or

(ii) *would discover the situation and thus have reason to realize the peril, if he were to exercise the vigilance which it is then his duty to the plaintiff to exercise.* (Emphasis added.)

60 N.C. App. at 111, 298 S.E. 2d at 177.

The Court of Appeals, applying the above-quoted law to the facts, then held that the trial court erred in failing to submit the issue of last clear chance to the jury, stating that:

> The evidence in this case tended to show that the road in front of the grocery store was well lit, defendant could have had an unobstructed view of plaintiff as he crossed the road in defendant's lane, plaintiff was hit when he was either at the edge of the road or on the shoulder, and defendant's right front fender was damaged in the collision. This evidence would permit the jury to find that if defendant had kept a proper lookout she could have avoided the accident by swerving slightly to her left. Indeed, this is most likely the basis upon which the jury found defendant negligent. Having found both plaintiff and defendant negligent, the jury should have then been allowed to consider whether defendant should have seen plaintiff's perilous condition in time to avoid striking him, and whether defendant used every reasonable means at her command to avoid the impending injury.

Id. at 111-12, 298 S.E. 2d at 177-78.

We agree with defendants that the Court of Appeals erred, at least to the extent that it relied solely on the language from *Wray v. Hughes*, 44 N.C. App. 678, 682, 262 S.E. 2d 307, 310, *disc.*

rev. denied, 300 N.C. 203, 269 S.E. 2d 628 (1980), that defendant "should have so seen or discovered plaintiff's perilous condition in time to have avoided injuring him." The test as applied by the Court of Appeals, in focusing on whether the defendant *should have seen plaintiff's perilous condition in time to avoid striking him*, failed to take into account whether defendant had, within her then existing ability, *the time and means* to avoid harming the plaintiff.

In *Exum v. Boyles*, 272 N.C. 567, 576, 158 S.E. 2d 845, 853 (1968), we stated with respect to the doctrine of last clear chance that

> there must be proof that after the plaintiff had, by his own negligence, gotten into a position of helpless peril (or into a position of peril to which he was inadvertent), the defendant discovered the plaintiff's helpless peril (or inadvertence), or, being under a duty to do so, should have, and, thereafter, the defendant, *having the means and the time to avoid the injury*, negligently failed to do so.

(Emphasis added.)

In *Clodfelter v. Carroll*, 261 N.C. 630, 634-35, 135 S.E. 2d 636, 639 (1964), we stated that an injured pedestrian found to be contributorily negligent must establish four elements in order to invoke the doctrine of last clear chance against the driver of the motor vehicle which struck and injured him. These are:

> (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) *that the motorist had the time and means to avoid injury* to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) *that the motorist negligently failed to use the available time and means to avoid injury* to the endangered pedestrian, and for that reason struck and injured him.

(Emphasis added.)

We now determine whether the plaintiff in the present case has established the four elements enumerated in *Clodfelter* and applied in *Exum*, and therefore is entitled to an instruction on last clear chance. First, it is reasonable to conclude that the plaintiff could not have, by the exercise of reasonable care, extricated himself from the position of peril into which he had negligently placed himself. Plaintiff apparently did not see defendants' oncoming vehicle; he determined that he could cross the highway in safety; and as a result, he placed himself in a position of peril. Unlike the facts in *Clodfelter v. Carroll*, 261 N.C. 630, 135 S.E. 2d 636, plaintiff never saw defendants' vehicle and therefore could not reasonably have been expected to act to avoid injury. Thus the first element of the *Clodfelter* test is satisfied.

Secondly, as we noted in *Exum v. Boyles*, 272 N.C. at 576, 158 S.E. 2d at 852, the doctrine of last clear chance imposes liability upon a defendant who did not actually know of the plaintiff's peril, as the facts here tend to disclose, "if, but only if, the defendant owed a duty to the plaintiff to maintain a lookout and would have discovered his situation had such a lookout been maintained." In *Exum* we added that "a motorist upon the highway does owe a duty to all other persons using the highway, including its shoulders, to maintain a lookout in the direction in which the motorist is traveling." 272 N.C. at 576, 158 S.E. 2d at 852-53. Finally, in *Exum*, we termed as "inaccurate" those decisions which appeared to hold that the " 'original negligence' of a defendant cannot be relied upon to bring into play the last clear chance doctrine since this 'original negligence' is cancelled or nullified by the plaintiff's contributory negligence." 272 N.C. at 576, 158 S.E. 2d at 853.

With these principles in mind, it is reasonable to conclude that defendant owed a duty to the plaintiff to maintain a proper lookout; that defendant was originally negligent in failing to keep a proper lookout; and that although not knowing of plaintiff's peril, defendant, by the exercise of reasonable care, could have discovered plaintiff's perilous position. The second element of the *Clodfelter* test is thus satisfied.

We hold, however, as a matter of law, that plaintiff has failed to establish the third element necessary to invoke the doctrine of last clear chance; that is, that defendant had the time and the

means to avoid the injury to the plaintiff by the exercise of reasonable care after she discovered or should have discovered plaintiff's perilous position.

In the case *sub judice* the defendant had neither the time nor the means to avoid the injury: As defendant approached the Community Grocery store, she was traveling at a speed of approximately 40 m.p.h., well within the authorized speed limit. She could not have discovered plaintiff's perilous position until she drove out of the curve, a distance of some 75 feet from the store. There is some factual dispute as to whether plaintiff began crossing the highway before or after defendants' vehicle emerged from the curve. In any event, assuming defendant discovered plaintiff's perilous position immediately upon exiting the curve, the *maximum* amount of time that defendant had to avoid the injury was approximately 1.28 seconds—the time it took defendant to travel the full 75 feet at a speed of 40 m.p.h. In *Mathis v. Marlow*, 261 N.C. 636, 639, 135 S.E. 2d 633, 635 (1964), we stated that the doctrine of last clear chance is invoked "only in the event it is made to appear that there was an appreciable interval of time between the plaintiff's negligence and his injury during which the defendant, by the exercise of ordinary care, could or should have avoided the effect of plaintiff's prior negligence." Where there is no evidence that a person exercising a proper lookout would have been able, in the exercise of reasonable care, to avoid the collision, the doctrine of last clear chance does not apply. On the facts before us, while defendant might have had the last *possible* chance to avoid the injury, she did not have the last *clear* chance. *Battle v. Chavis*, 266 N.C. 778, 147 S.E. 2d 387 (1966); *Mathis v. Marlow*, 261 N.C. 636, 135 S.E. 2d 633. The trial court properly failed to instruct on and to submit the issue of last clear chance to the jury.

[2] Defendants next contend that the Court of Appeals erred in holding that counsel's references to the ability of defendants to pay even a small verdict, made during closing argument to the jury, constituted prejudicial error. The objected to portion of the argument is as follows:

> Can you imagine what a low jury verdict would do to that family.
>
> MR. ABRAMS: Objection to what a verdict would do.

COURT: Overruled. Argument of contention.

MR. RAGSDALE: Can you imagine what a jury verdict, a low jury verdict, a little one, five thousand dollars, would do to that little family.

The remarks are clearly improper, calculated to appeal to the sympathy of the jury. "In a court of justice neither the wealth of one party nor the poverty of the other should be permitted to affect the administration of the law. *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333 (1955); *Yost v. Hall*, 233 N.C. 463, 64 S.E. 2d 554 (1951)." *Scallon v. Hooper*, 58 N.C. App. 551, 556, 293 S.E. 2d 843, 845-46, *cert. denied*, 306 N.C. 744, 295 S.E. 2d 480 (1982). While it is true that in jury trials "the whole case as well as of law as of fact may be argued to the jury," and counsel's freedom of argument should not be impaired without good reason, argument is not without limitation. G.S. § 84-14. *Wilcox v. Motors Co. and Wilson v. Motors Co.*, 269 N.C. 473, 153 S.E. 2d 76 (1967); *Jenkins v. Hines Co.*, 264 N.C. 83, 141 S.E. 2d 1 (1965). Thus, "[w]hen the remarks of counsel are not warranted by either the evidence or the law, or are calculated to mislead or prejudice the jury, it is the duty of the judge to interfere." *In re Will of Farr*, 277 N.C. 86, 93, 175 S.E. 2d 578 (1970). Under these circumstances the trial court has a duty, upon objection, to censure the remarks and, if the impropriety is gross, it is proper for the trial judge, even in the absence of objection, to correct the abuse *ex mero motu*. *See State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). We hold that the trial court erred as a matter of law in failing to sustain plaintiff's objection to the remarks of defendants' counsel, which remarks had no basis in law or fact, but rather injected extraneous considerations concerning defendants' financial situation so far as their capacity to respond to damages was concerned.

Plaintiff, however, has failed to show prejudice inasmuch as the jury did not reach the issue of damages. In this respect the Court of Appeals erred. We reject plaintiff's argument that counsel's remarks influenced the jury on their finding of liability; that is, the jury chose to find plaintiff contributorily negligent in order to insure that defendants would not be liable for damages.

Under this assignment of error, plaintiff further argues that the defendants improperly appealed to religious prejudice in their

closing argument. This question was not addressed by the Court of Appeals and we find no reference to the contention in defendants' brief to this Court. Before us, then, we have plaintiff's statement in his brief that "[c]ounsel for defendant argued that the defendant, Juanita White, should not be held negligent because after the collision the 'first thing she did was say a prayer.' " The record, however, does not indicate the context in which defense counsel's argument was made, but merely provides:

> COURT: Overruled. Argument of contention.
>
> MR. RAGSDALE: First thing she did was say a prayer.
>
> MR. ABRAMS: Objection.
>
> COURT: Overruled.
>
> MR. RAGSDALE: Now they object to prayer.

The record does not disclose whether the defendant, Juanita White, testified that after the collision she said a prayer; that is, whether defense counsel's statement was based on evidence at trial. Plaintiff, however, does not object to the argument on this basis. Furthermore, there is nothing in the record to indicate that inquiry was made into the religious beliefs of any party or witness at trial, or that the statement reflected any religious preference. Under these circumstances, we can only determine that defense counsel's remark was irrelevant. The conduct of a trial, including proper supervision over the argument of counsel, is a matter largely within the discretion of the trial judge. *Hamilton v. Henry*, 239 N.C. 664, 80 S.E. 2d 485 (1954); *Rupert v. Rupert*, 15 N.C. App. 730, 190 S.E. 2d 693, *disc. rev. denied*, 282 N.C. 153, 191 S.E. 2d 759 (1972). We hold that it was within the trial court's discretion to overrule plaintiff's objection.

[3] Finally defendants contend that the Court of Appeals erroneously concluded that the trial judge erred in failing to instruct the jury on the effect of the defendants' admissions in the pleadings.

In their answer, the defendants, through what they now argue to us as inadvertence, failed to deny paragraph 12(c)-(e) of plaintiff's complaint which alleged that:

> 12. The defendant, Juanita J. White, operated the said vehicle carelessly and negligently in that she:

c. Failed to reduce speed when such was necessary to avoid colliding with the plaintiff, Cebus Watson, and when such was necessary to avoid injury to the plaintiff Cebus Watson, in violation of North Carolina General Statute Section 140(m);

d. Drove at a speed and in a manner so that she was unable to stop within the radius of her headlights in violation of the duty to use due care and keep a proper lookout;

e. Drove the car off the highway, striking the plaintiff, Cebus Watson, and causing the plaintiff severe and permanent bodily injuries.

Following closing arguments, defendants moved to amend their answer to deny these allegations. The trial court allowed the amendment pursuant to G.S. § 1A-1, Rule 15(c), stating that the amendment related back to the original date of the filing of the answer, "[a]nd the denial of the allegations in Paragraphs 12(a) through (e) of the plaintiff's Complaint has full force and effect as of the date of the Answer." Plaintiff then submitted the following proposed jury instruction which the trial court declined to give:

The admissions of a party in an amended complaint are evidence of something that the Defendants once said, even if the complaint is amended, and although it is not conclusive evidence, it is some evidence of what the parties once said through their attorney.

In finding error in the trial court's refusal to give the proposed jury instruction, the Court of Appeals relied on 2 Brandis on North Carolina Evidence § 177 (1982), quoting as follows:

[There are] two classes of pleadings: (1) the final pleadings defining the issues and on which the case goes to trial, and (2) other pleadings in the same or another case which do not serve to define the issues in the case being litigated. An admission in a pleading of the first class is a *judicial* admission, conclusively establishing the fact for the purposes of that case and eliminating it entirely from the issues to be tried. . . .

Pleadings of the second class, while not defining issues in the case being litigated, nevertheless reflect something

> which a party has once said . . . and qualify as *evidential* admissions. This class includes: pleadings . . . in the same case which, though once serving to define issues, have been withdrawn, amended to strike out admissions, or otherwise superseded. . . . (Emphasis in original.)

60 N.C. App. at 113, 298 S.E. 2d at 178-179.

The Court of Appeals then stated:

> Before defendant amended her answer the admitted allegations were judicial admissions which conclusively established those facts. These admissions did not need to be introduced into evidence. After the amendment, the admissions were evidentiary admissions. Since defendant's admissions were relevant, the trial judge erred in refusing to submit plaintiff's proposed instructions to the jury.

60 N.C. App. at 114, 298 S.E. 2d at 179.

In granting defendants' motion to amend their answer, the trial judge acted within his discretion. *Service Co. v. Sales Co.*, 264 N.C. 79, 140 S.E. 2d 763 (1965). Thus, as the Court of Appeals properly noted, the amendment to defendants' answer denying the allegations in paragraph 12(c)-(e) had the effect of removing the admitted allegations from the class of judicial admissions into the class of evidential admissions.

Without considering the confusing nature of plaintiff's proposed jury instruction in that the alleged admissions were not made in an *amended complaint*, but rather in an *amended answer*, the proposed instruction appears to have been submitted on the assumption that the admissions were, in fact, evidential admissions. Plaintiff therefore relies upon the authority of *Willis v. Telegraph Co.*, 150 N.C. 318, 64 S.E. 11 (1909), to argue that the trial court erred in failing to give the proposed instruction. In *Willis* we stated: "The fact that the defendant afterwards filed an amended answer and denied that it was the owner of the Beaufort and Newport line does not affect the competency of the evidence, but merely detracts from its weight or its sufficiency to prove the fact now in issue." *Id.* at 324, 64 S.E. at 14.

While *Willis* stands for the proposition that allegations in a complaint not initially denied by answer may constitute evidential

admissions,[2] that case further points out that to take advantage of evidential admissions, the opponent must introduce them into evidence. The evidence, however, is not conclusive on the issue of the specific act of defendants' negligence. *Willis v. Telegraph*, 150 N.C. 318, 64 S.E. 11; *Cummings v. Hoffman*, 113 N.C. 267, 18 S.E. 170 (1893). "It might be shown that [the admission] was made under a misapprehension, or by mistake or inadvertence." 113 N.C. at 269, 18 S.E. at 171. The plaintiff in *Willis* offered into evidence both the complaint and the original answer. In fact, in quoting Section 177 of Brandis, the Court of Appeals failed to include the following relevant language: "[t]o take advantage of [evidential] admissions . . ., the opponent must introduce them in evidence; and, when introduced, they are not conclusive, but may be controverted or explained on the ground of inadvertence or mistake of counsel or otherwise." In holding that plaintiff was entitled to his proposed jury instruction, the Court of Appeals did not consider whether plaintiff had introduced the complaint and original answer into evidence. The record, however, indicates that prior to resting his case, plaintiff offered into evidence "all the admissions of record, the pleadings or any other admissions and the stipulations and the pre-trial order that had not already been admitted." It is also apparent from the record that the defendants were given no opportunity to explain to the jury their failure to deny, by way of inadvertence, mistake of counsel, or otherwise, the allegations of paragraph 12(c)-(e) of the complaint. Furthermore, Professor Brandis suggests that:

> Even if the judge finds that there is a presumption or evidence sufficient to justify a finding that an attorney had authority to make an evidential admission, and thus receives it, the client may still testify that he did not authorize or ap-

2. Plaintiff's reliance on *Willis* will not support the giving of the proposed instruction absent a showing that the question was before the jury at trial. However, the case does negate defendants' position that under G.S. § 1A-1, Rule 15(c), plaintiff would never be entitled to a jury instruction on evidential admissions under these circumstances. It appears that in refusing to submit the proposed instruction, the trial judge adopted defendants' position that because the amendment related back to the date of the filing of the original answer and had "the full force and effect as of the date of the Answer," there were no prior admissions. We point out that our holding today, contrary to defendants' belief, is not inconsistent with G.S. § 1A-1, Rule 15(c). The effect of that rule in the circumstances presented by the case *sub judice* is, as we have stated, to transform what was in the first instance a judicial admission under G.S. § 1A-1, Rule 8(d) into an evidential admission.

prove it and that he denies its truth. The jury should then be instructed that if the admission is found to be unauthorized it should be disregarded, even if made.

2 Brandis on North Carolina Evidence § 177, n. 77.

On the facts in the record before us, we hold that the trial judge did not err in refusing the requested instruction. The introduction of "all the admissions of record" did not place this evidence before the jury at trial in the sense of drawing the jury's attention to the specific allegations of the complaint and the specific answers thereto.

The decision of the Court of Appeals is reversed and the case is remanded to that court for reinstatement of the judgment of the trial court.

Reversed and remanded.

Justice EXUM dissents on the jury argument question and votes for a new trial for the reasons stated in the Court of Appeals opinion on this question.

Justice FRYE dissents because of the failure of the trial court to submit the issue of last clear chance to the jury.

STATE OF NORTH CAROLINA v. STANLEY MARVIN LANG

No. 205A83

(Filed 3 November 1983)

1. Criminal Law § 76.5— admissibility of confession—voir dire hearing—necessity for findings

If there is no conflict in the evidence on voir dire or only immaterial conflicts, it is not error to admit a confession without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. However, when there is a material conflict in the evidence on voir dire, the judge must make findings of fact resolving any such material conflict.

2. Criminal Law § 75.4— custodial interrogation after right to counsel invoked—admissibility of incriminating statements

In cases in which the defendant was subjected to custodial interrogation in the absence of counsel after invoking his right to have counsel present during interrogation, defendant's incriminating in-custody statement is admissible only if it is found that (1) defendant initiated the further communication with the police which resulted in his incriminating statement and (2) defendant validly waived his right to counsel and to silence under the totality of the circumstances, including the circumstance that defendant reopened the dialogue with the police.

3. Criminal Law § 76.6— admissibility of confession—insufficiency of findings of fact

Where the evidence on voir dire showed that defendant was subjected to custodial interrogation in the absence of counsel after having invoked his right to have counsel present during interrogation, the trial court erred in ruling that defendant's confession was admissible without making specific findings of fact as to who initiated the contact between defendant and the law officers which resulted in his confession after defendant had invoked his right to have counsel present during custodial interrogation. Furthermore, the trial court erred in failing to make findings of fact resolving material conflicts in the voir dire testimony as to whether the investigating officers offered to release or not arrest a relative of defendant if defendant confessed or made threats against a relative if defendant refused to confess, and as to whether an officer slapped defendant on the head during custodial interrogation.

4. Homicide § 24.1— use of hands or feet causing death—inference of malice—erroneous instructions

The trial court in a murder prosecution erred in giving the jury instructions which permitted the jury to infer malice if it found only that defendant either kicked deceased or struck her with his hand and thereby proximately caused her death, since the fact that a defendant struck a person with his hand or kicked a person and proximately caused that person's death would not support either a presumption of malice as a matter of law or an inference of malice as a matter of fact unless the defendant was then using his hands or feet as deadly weapons.

5. Homicide § 5— second degree murder—intent to kill

While an intent to kill is not a necessary element of murder in the second degree, that crime does not exist in the absence of some intentional act sufficient to show malice and which proximately causes death.

6. Homicide § 14— intentional use of deadly weapon—presumptions

An intentional assault upon another with a deadly weapon which proximately causes death gives rise to two presumptions: (1) that the killing was unlawful and (2) that it was done with malice, and, nothing else appearing, the person who perpetrated such assault would be guilty of murder in the second degree.

7. Homicide § 14— attack with hands or feet alone—presumption of malice

Whether an attack made with hands or feet alone which proximately causes death gives rise to either a presumption of malice as a matter of law or to an inference of malice as a matter of fact will depend upon the facts of the particular case. For example, if an assault were committed upon an infant of tender years or upon a person suffering an apparent disability which would make the assault likely to endanger life, the jury could, upon proper instructions by the trial court, find that the defendant's hands or feet were used as deadly weapons, and, nothing else appearing, the trial court could properly instruct the jury that, should they find the defendant used his hands or feet as deadly weapons and intentionally inflicted a wound upon the deceased proximately causing his death, the law presumes that the killing was unlawful and done with malice.

8. Homicide § 24.1— intoxicated victim—use of hands or feet as cause of death—heat of passion—instructions on presumptions of malice and unlawfulness

Where defendant's confession in a murder case tended to show that decedent was a woman laboring under the disability of intoxication induced by alcohol and marijuana, that she was attacked by defendant and his companion who were both adult males, that both defendant and his companion kicked decedent with their feet and hit her with their hands, that the companion hit her with a baseball bat, that defendant kicked her in the stomach, hit her in the face and, using a knife given him by the companion, cut her on the back, and that the two men then threw her body into a ditch, and where there was also evidence which would support but not compel a finding that the killing was in the heat of passion suddenly aroused in that it tended to show that defendant was "rolling a joint" when a fight arose between decedent and the companion, defendant "got hit" and then kicked decedent, struck her with his hands and cut her on her back, and defendant was bitten on the arm at some point, the trial court should have instructed the jury (1) that if it found beyond a reasonable doubt that defendant intentionally assaulted the deceased with his hands, fists, or feet, *which were then used as deadly weapons*, the jury might infer first, that the killing was unlawful, and second, that it was done with malice, but the jury was not compelled to do so, and (2) that the jury could consider these facts along with all other facts and circumstances arising from the evidence in determining whether the killing in fact was unlawful and done with malice.

9. Homicide § 24— instruction on inference of malice from total disregard for human life

The evidence in this murder prosecution was sufficient to support a finding by the jury that defendant's acts indicated a total disregard for human life, and the State was thus entitled to an instruction that, if the jury found that the acts of defendant indicated a total disregard for human life and were intentionally done and proximately caused the death of the deceased, then the jury might infer that the killing was unlawful and that it was done with malice, but would not be compelled to do so. The jury should also have been instructed that it might consider this along with all other facts and circumstances arising

from the evidence in determining whether the killing was in fact unlawful and done with malice.

APPEAL of right from *Bruce, Judge*, presiding at the November 15, 1982, Criminal Session of Superior Court, CURRITUCK County. Heard in the Supreme Court September 14, 1983.

The defendant was charged in a bill of indictment, proper in form, with the murder in the first degree of Frances Mae Pack and entered a plea of not guilty. The jury returned a special verdict finding that North Carolina had jurisdiction as well as a verdict finding the defendant guilty of murder in the second degree. The trial court entered judgment sentencing the defendant to imprisonment for life. 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 M. R. Rich, Jr., Deputy Attorney General, and William B. Ray, Assistant Attorney General, for the State.

C. Everett Thompson and John G. Trimpi, for the defendant-appellant.

MITCHELL, Justice.

In this appeal the defendant's dispositive assignments of error relate to the admission into evidence of his confession and to instructions by the trial court to the jury concerning the conditions under which the jury could infer malice. We find merit in these assignments and hold that the defendant must be allowed a new trial. Other errors assigned by the defendant are not likely to arise at a new trial and are neither reached nor discussed herein. Therefore, a complete recitation of the evidence presented at trial is unnecessary.

The State's evidence tended to show that the defendant, Stanley Marvin Lang, was observed in a restaurant and bar known as "Feldo's" in the Ocean View Section of Norfolk, Virginia early on the morning of April 20, 1982. He was in the company of Robert Linwood Taylor and Frances Mae Pack. The three of them had been drinking. Having had some conversation about smoking a marijuana cigarette, they left Feldo's shortly after 1:00 a.m. on April 20.

At approximately 5:45 a.m. on April 20, the nude body of Frances Mae Pack was found lying in a ditch on the side of Beachwood Shores Road about eight miles from the Virginia-North Carolina State Line, in or near Moyock, North Carolina. The body of Frances Mae Pack bore numerous external injuries including a large incised cut across the front of the neck about seven inches long and one-half inch in depth and numerous small incised cuts to the cheek and neck. A series of wounds produced by a blunt object were visible. The body also bore a series of wounds with a patterned surface which could have been produced by the tread of a tire, certain footwear or any firm object with a rigid corrugated pattern. There were also numerous cuts to the back, buttocks and arms of the body produced by a sharp instrument. Additionally, there were defensive cuts to the hands caused by a sharp instrument, together with numerous scratches and abrasions. Examination of the body also revealed wounds to the anal canal consistent with sodomy.

Frances Mae Pack died from a wound resulting from a blunt instrument impact on the right side of her head behind the ear causing a skull fracture and internal bleeding with aspiration of blood. The mortal wound was received approximately one-half hour prior to death.

The defendant and Taylor arrived at the defendant's home in Norfolk, Virginia during the early morning hours of April 20 and were seen there washing blood from their hands. The defendant then assisted Taylor in washing blood out of Taylor's van. A rag found in the defendant's yard later that day contained blood and hair consistent with the blood and hair of the deceased.

The defendant was interviewed by police officers at approximately 11:26 p.m. on April 22, 1982. At that time he gave a statement which tended to be exculpatory. Taylor was interviewed at approximately 12:25 a.m. on April 23, 1982 and denied any wrongdoing. He was again interviewed at approximately 1:30 p.m. on April 23 and gave an inculpatory statement which implicated the defendant. The defendant was again interviewed on two occasions on April 23. The defendant gave a statement in the nature of a confession during the second interview.

Other evidence introduced during the trial and pertinent to the defendant's appeal is reviewed later in this opinion where appropriate.

The defendant first assigns as error the admission into evidence of statements made by him to police officers while he was in custody. Prior to trial the defendant made a motion to suppress all statements made by him to law enforcement officers concerning this case. A hearing on the defendant's motion was held before Judge Herbert O. Phillips, III at the November 8, 1982, Session of Criminal Superior Court, Camden County, with the consent of the defendant and the State. The State and the defendant presented strongly conflicting evidence at the hearing. At the conclusion of the hearing, Judge Phillips made findings of fact and reached conclusions to the effect that the defendant freely, knowingly, intelligently and voluntarily made his inculpatory statement to the law enforcement officers. We are of the opinion that the findings of fact failed to resolve the conflicts arising from the evidence concerning certain controlling events and that this failure was prejudicial error.

The evidence for the State during the *voir dire* hearing on the defendant's motion to suppress tended to show that the defendant was first interviewed by law enforcement officers at approximately 11:26 p.m. on April 22, 1982. He was advised of his constitutional rights and, after waiving them, gave an exculpatory statement.

The defendant called Lawrence W. Hill, a narcotics investigator with the Norfolk Police Department by telephone and met with him between 7:00 p.m. and 8:00 p.m. on April 22. The defendant told Hill that he was a suspect in the murder and asked Hill to check into the matter. The defendant and his wife were acquainted with Hill because the defendant had been an informant for Hill for approximately two years after Hill had arrested the defendant on narcotics charges.

The defendant went to the office of an attorney in Virginia on the afternoon of April 23. The attorney called the Norfolk Police Department and learned that a warrant was being issued for the defendant's arrest. The attorney accompanied the defendant to the police station where he was arrested. At that time the defendant's attorney advised the police that the defendant did not

wish to make any statement or talk to them without his attorney present.

The State's evidence also tended to show that Agent O. L. Wise of the North Carolina State Bureau of Investigation and Detective Tom Pollard of the Norfolk Police Department interviewed the defendant at approximately 6:25 p.m. on April 23. At that time the defendant was advised of his rights and informed the officers that he did not wish to talk to them or answer any questions without his lawyer present. All questioning of the defendant by Wise and Pollard was immediately terminated at that time.

At approximately 8:00 p.m. on April 23, Detective Hill had a discussion with the defendant who was in custody. Hill informed the defendant that he was not going to advise him of his rights, since he did not want to talk to the defendant about the matter under investigation. Hill told the defendant that he had read a statement by Taylor implicating the defendant and that he knew that the defendant had not made a statement. He then told the defendant that he wanted him to know that "all who's going to be looking out for you is you yourself." The defendant responded that he was not worried since he had not killed the girl but had only beaten her up. Hill and the defendant shook hands and Hill left.

After talking with his partner, Detective Hill concealed a radio transmitter on his person and went to the defendant's home to attempt to determine whether the defendant's wife had been involved in the murder. This was done without the knowledge of the officers investigating the murder. While Hill was in the home, the defendant called his wife. After learning from his wife that Hill was there, the defendant asked to speak to Hill and informed him that he wanted him to "get somebody" for the defendant to talk to. Hill suggested that, if the defendant wanted to talk to anybody, Detective Pollard would be a good man to talk to. As a result of this conversation, Hill called the Norfolk Police Department seeking Detective Pollard who had already gone home for the evening. Hill asked the person he spoke to to contact Detective Pollard. Detective Pollard was contacted and returned to see the defendant.

S.B.I. Agent Wise was returning to North Carolina when he received a radio message to call the Norfolk Police Department. When he called he was informed that Detective Pollard had received a telephone call requesting that they both return to the Norfolk Police Department as the defendant wanted to talk to them. Agent Wise testified that the defendant "told me when I went back to the Norfolk Police Department that he wanted to talk to me and tell me what happened, and I wanted to hear it." Agent Wise and Detective Pollard read the defendant his rights from a standard form. The defendant indicated that he understood his rights and wished to waive them and answer questions without an attorney present. The waiver of rights form was signed by the defendant and witnessed by the officers at approximately 10:00 p.m. on April 23. The defendant then made an inculpatory statement which was reported and transcribed by a stenographer. The officers indicated that they did not strike or threaten the defendant.

The defendant's evidence conflicted sharply with that of the State in several respects. The defendant testified that when he telephoned his wife, he discovered that Hill was with her. He talked with Hill by telephone and said, "I ain't telling nothing." He also testified that Hill told him that his wife and her sister were accessories to the murder and were going to be picked up. Hill asked him if he "had any place for the kids to go—downtown at a youth center or something." The defendant then told Hill that he wanted to talk to his lawyer before he said anything. Hill told the defendant that his wife's life was in danger but that Hill was not going to let anything happen to her or the children. The defendant's wife told him "that she was going to get fifty years in the penitentiary."

The defendant testified that later that evening Wise and Pollard came to see him. He told them that the only reason he was making a statement "was because they just said that Dora was going to get fifty years in the penitentiary and I was scared for her." The officers told the defendant at that time that they were going to contact his lawyer. Detective Pollard told the defendant that the lawyer was on his way but he never arrived.

The defendant also testified that the officers stopped his statement and started it over two or three times "because it

wasn't what they wanted." He made an inculpatory statement because, "I had no other choice; otherwise, they were going to pick up my wife." He said that Detective Pollard slapped him on the head at one point in the interview.

After the hearing on the defendant's motion to suppress his statements, Judge Phillips made findings of fact, concluded that the defendant's inculpatory statement was voluntarily and understandingly made and entered an order denying the defendant's motion to suppress. Those findings were insufficient to support the conclusions and order.

[1] The general rule is that, at the close of a *voir dire* hearing to determine the admissibility of a defendant's confession, the presiding judge *should* make findings of fact to show the basis of his ruling. *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976). If there is no conflict in the evidence on *voir dire* or only *immaterial* conflicts, it is not error to admit a confession without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. *Id.* In the present case, however, there were material conflicts in the evidence before the judge at the conclusion of the *voir dire* hearing of the defendant's motion to suppress. When there is a *material* conflict in the evidence on *voir dire*, the judge *must* make findings of fact resolving any such material conflict. *Id.* The findings in the present case failed to resolve all material conflicts in the evidence.

Certain of the findings in the order denying suppression are more correctly described as recitations of testimony presented at the hearing. They do not resolve conflicts in the evidence but are merely statements of what a particular witness said. Although such recitations of testimony may properly be included in an order denying suppression, they cannot substitute for findings of fact resolving material conflicts.

For example, there was no specific finding as to who initiated the contact between the defendant and law enforcement officers after the defendant had invoked his right to have counsel present during custodial interrogation. The presiding judge found in this regard that:

> 22. It was Agent Wise's understanding at that time that Mr. Lang had called for him and Detective Tom Pollard to

come back to the Norfolk Police Department and talk with him, the defendant.

23. It was also Agent Wise's understanding that the defendant initiated the conversation.

Although these findings establish what Agent Wise understood, the presiding judge inadvertently failed to make a specific finding with regard to the contested material fact of who actually initiated the conversation with the defendant. This inadvertence was fatal.

In *Edwards v. Arizona*, 451 U.S. 477, *reh'g denied*, 452 U.S. 973 (1981), the Supreme Court of the United States held

> 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 available to him, *unless the accused himself initiates further communication*, exchanges, or conversations with the police.

451 U.S. 484-485 (emphasis added). The Supreme Court has more recently stated that this statement in *Edwards* established "in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was." *Oregon v. Bradshaw*, --- U.S. ---, ---, 103 S.Ct. 2830, 2834, 77 L.Ed. 2d 405, 411 (Plurality opinion) (1983). Thus, the holdings in *Edwards* and *Bradshaw* make it crucial that there be a finding of fact as to who initiated the communication between the defendant and the officers which resulted in his inculpatory statement while in custody and after he had invoked the right to have counsel present during interrogation.

[2, 3] Even if the communication leading to the confession was initiated by the defendant, however, the inquiry and need for findings of fact does not end. "[T]he burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the in-

terrogation." *Oregon v. Bradshaw*, --- U.S. at ---, 103 S.Ct. at 2834, 77 L.Ed. 2d at 412. This was made clear in the following footnote to the *Edwards* opinion:

> If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly one-sided, it is likely that the officers will say or do something that clearly would be "interrogation." In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, *whether* the purported waiver was knowing and intelligent and *found to be so* under the *totality of the circumstances, including* the necessary fact that the accused, not the police, reopened the dialogue with the authorities.

451 U.S. at 486 n. 9 (emphasis added). Therefore, in cases such as this in which the defendant was subjected to custodial interrogation in the absence of counsel after invoking his right to have counsel present during interrogation, the inquiry may not end with a finding that the defendant initiated the later dialogue between himself and the police. The judge presiding must go further and make findings and conclusions establishing whether the defendant validly waived the right to counsel and to silence under the totality of the circumstances, including the circumstance that the accused reopened the dialogue with the authorities. If the presiding judge finds that the accused did not initiate the further dialogue with the authorities, however, the prophylactic rule applies and the confession must be excluded without reaching a consideration of the totality of the circumstances. *Oregon v. Bradshaw*, --- U.S. ---, 103 S.Ct. 2830, 77 L.Ed. 2d 405 (1983).

The phrase "totality of the circumstances" as used in *Edwards* and *Bradshaw* clearly includes all circumstances material to a determination of whether the defendant engaged in a knowing, intelligent and valid waiver of the right to counsel and the right to silence, including the necessary fact that the accused reopened the dialogue with the authorities.

Should the defendant challenge the admissibility of the confession at a new trial, the judge hearing the motion will also be required to make findings resolving other material conflicts in the evidence. The defendant testified that he told Officer Hill by telephone that, "I ain't telling nothing." He testified that Hill then

told him that his wife and her sister were accessories to the murder and were going to be picked up and that Hill asked whether a youth center or some other place would be appropriate for placement of the defendant's children. Officer Hill testified that he never discussed such matters with the defendant.

The presiding judge found that Officer Hill made a statement to the defendant's wife that, "This is capital murder and the punishment for this is the death penalty. This ain't playing games. And just being an accessory to it is just like about 50 years in the penitentiary." The presiding judge also found that Hill at no time spoke directly to the defendant about the possibility that his wife could be charged as an accessory.

"A statement by investigating law enforcement officers that a suspect's relatives will be released from custody or not be arrested if the suspect confesses may, under the totality of the circumstances, render the suspect's resulting confession involuntary." *State v. Branch*, 306 N.C. 101, 107, 291 S.E. 2d 653, 658 (1982). It is generally held, however, that a mere desire of a defendant to protect a relative will not render his confession inadmissible where the desire to protect the relative and the hope of being able to do so was not suggested by the police but originated with the accused. *See generally*, Annot. 80 A.L.R. 2d 1428, §§ 6, 7 and 8 (1961). Of particular importance, for example, will be whether the investigating officers offered to release or not arrest a relative if the defendant confessed or made threats against the relative if the defendant refused to confess. *State v. Branch*, 306 N.C. at 108-09, 291 S.E. 2d at 659. Should the defendant seek to have his confession excluded at a new trial, material issues of fact concerning the alleged statements relative to his wife and sister-in-law must be made and appropriate conclusions reached.

The defendant testified that, at one point during the interview with the officers at which he confessed, Detective Pollard slapped him on the head. The officers testified that this did not occur. Appropriate findings must be made and conclusions reached on this contested material fact, should the defendant challenge the admissibility of his confession at a new trial.

The presiding judge's failure to find facts resolving certain material conflicts in the *voir dire* testimony was prejudicial error. Where there is such prejudicial error involving issues or matters

not fully determined by the lower court, an appellate court may remand the cause for appropriate proceedings without ordering a new trial. *State v. Booker*, 306 N.C. 302, 313, 293 S.E. 2d 78, 84 (1982). As we find other prejudicial error which will require a new trial of this case, however, all matters at issue will again be before the trial court and such remand is unnecessary.

[4] The defendant next assigns as error a portion of the trial judge's final instructions to the jury which he contends permitted the jury to infer the malice necessary to elevate the killing in question to murder in the second degree solely upon the jury's finding that the defendant kicked the deceased or struck her with his hand. In his final instructions to the jury, the trial judge defined "malice" and then instructed the jury as follows:

> If the state proves, beyond a reasonable doubt, or if it's admitted that the defendant intentionally kicked, cut or struck Frances May Pack, thereby proximately causing Miss Pack's death, you may infer first that the killing was unlawful and second, that it was done with malice. But, you are not compelled to do so. You may consider this along with other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.

This instruction was prejudicial error and a new trial is required.

The quoted portions of the instructions by the trial judge permitted the jury to infer malice if it found *only* that the defendant *either* kicked, cut *or* struck the deceased and thereby proximately caused her death. The State argues that the challenged portion of the trial judge's instructions did not invoke a presumption or inference of malice as a matter of law, but merely permitted the jury to infer malice as a matter of fact. The State is correct in its assertion, but we do not find it controlling. The fact that a defendant struck a person with his hand or kicked a person and proximately caused that person's death would not support either a presumption of malice as a matter of law or an inference of malice as a matter of fact unless the defendant was then using his hands or feet as deadly weapons.

[5, 6] While an intent to kill is not a necessary element of murder in the second degree, that crime does not exist in the absence of some intentional act sufficient to show malice and

which proximately causes death. *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). An intentional assault upon another with a deadly weapon which proximately causes death gives rise to two presumptions: (1) that the killing was unlawful and (2) that it was done with malice and, nothing else appearing, the person who perpetrated such assault would be guilty of murder in the second degree. *State v. Benton*, 299 N.C. 16, 260 S.E. 2d 917 (1980).

As Judge Parker speaking for the Court of Appeals has correctly pointed out:

> It is true that ordinarily if death ensues from an attack made with hands and feet only, on a person of mature years and full health and strength, the law would not imply malice required to make the homicide second-degree murder. This is so because, ordinarily, death would not be caused by use of such means. The inference would be quite different, however, if the same assault were committed upon an infant of tender years or upon a person infeebled by old age, sickness, or other apparent physical disability.

State v. Sallie, 13 N.C. App. 499, 510, 186 S.E. 2d 667, 674, *cert. denied*, 281 N.C. 316, 188 S.E. 2d 900 (1972). Justice (later Chief Justice) Ruffin speaking for this Court expressed a similar view by stating that:

> An instrument, too, may be deadly or not, according to the mode of using it, *or the subject on which it is used.* For example, in a fight between men, the fist or foot would not, generally, be regarded as endangering life or limb. But it is manifest, that a wilful blow with the fist of a strong man, on the head of an infant, or the stamping on its chest, producing death, would import malice *from the nature of the injury, likely to ensue.*

State v. West, 51 N.C. 505, 509 (1859) (emphasis added).

[7] Whether an attack made with hands or feet alone which proximately causes death gives rise to either a presumption of malice as a matter of law or to an inference of malice as a matter of fact will depend upon the facts of the particular case. For example, if an assault were committed upon an infant of tender years or upon a person suffering an apparent disability which would make the assault likely to endanger life, the jury could,

upon proper instructions by the trial court, find that the defendant's hands or feet were used as deadly weapons. Nothing else appearing, the trial court properly could instruct the jury that, should they find the defendant used his hands or feet as deadly weapons and intentionally inflicted a wound upon the deceased proximately causing his death, the law presumes that the killing was unlawful and done with malice. *See State v. West*, 51 N.C. 505 (1859); *State v. Sallie*, 13 N.C. App. 499, 186 S.E. 2d 667, *cert. denied*, 281 N.C. 316, 188 S.E. 2d 900 (1972) and cases cited therein. *See generally* Annot. 22 A.L.R. 2d 854 (1952).

If, after the mandatory presumptions arise, there is no evidence that the killing was in the heat of passion on sudden provocation or in self-defense, our law requires that the jury be instructed that the defendant must be convicted of murder in the second degree. But

> [i]f, on the other hand, there is evidence in the case of all the elements of heat of passion on sudden provocation the mandatory presumption of malice disappears but the logical inferences from the facts proved remain in the case to be weighed against this evidence. If upon considering all the evidence, including the inferences and the evidence of heat of passion, the jury is left with a reasonable doubt as to the existence of malice it must find the defendant not guilty of murder in the second degree and should then consider whether he is guilty of manslaughter.

State v. Hankerson, 288 N.C. 632, 651, 220 S.E. 2d 575, 589 (1975), *reversed on other grounds*, 432 U.S. 233 (1977).

[8] In the present case, the defendant's confession tended to show that the deceased was a woman laboring under the disability of intoxication induced by alcohol and marijuana. She was attacked by the defendant and Taylor, two adult males assisting each other. Both the defendant and Taylor kicked the deceased with their feet and hit her with their hands. Taylor beat her with a baseball bat. The defendant kicked her in the stomach, hit her in the face and, using a knife given him by Taylor, cut her on the back. The two men then threw her body into a ditch.

Under this evidence, *nothing else appearing*, the trial court properly could have instructed the jury that, if they found from

the evidence and beyond a reasonable doubt that the defendant intentionally assaulted the deceased with his hands, fists, or feet, *which were then used as deadly weapons*, and that her death was a proximate result of his acts, then the law presumes malice and the defendant must be convicted of murder in the second degree. Here, however, there was also evidence which would support but not compel a finding that the killing was in the heat of passion suddenly aroused. The defendant stated in his confession that he was "rolling a joint" when a fight arose between the deceased and Taylor. The defendant "got hit" and then kicked the deceased, struck her with his hands and cut her on her back. There was also evidence tending to show that the defendant was bitten on the arm at some point.

Since there was evidence of a killing in the heat of passion suddenly aroused, the mandatory presumptions of malice and unlawfulness disappear. Therefore, the trial court should have instructed the jury that if they found from the evidence and beyond a reasonable doubt that the defendant intentionally assaulted the deceased with his hands, fists, or feet, *which were then used as deadly weapons*, the jury might infer first, that the killing was unlawful, and second, that it was done with malice, but the jury was not compelled to do so. The jury then should have been instructed that they could consider these facts along with all other facts and circumstances arising from the evidence in determining whether the killing in fact was unlawful and done with malice.

We also note that the instructions given by the trial court did not tend to focus upon whether the cuts on the back of the deceased were administered with a weapon or upon whether any such weapon was a deadly weapon per se or used as a deadly weapon. At the time of any new trial of this case, the trial court will be required to go into these questions based upon the evidence presented and give such instructions as are required by the evidence.

[9] We further note that the evidence presented at trial would have justified an instruction concerning the permissible inference of malice which the jury might properly draw if it found that the defendant's acts indicated a total disregard for human life. This Court has said:

> [A]ny act evidencing "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person" is sufficient to supply the malice necessary for second degree murder. Such an act will be accompanied by a general intent to do the act itself but it need not be accompanied by a specific intent to accomplish any particular purpose or do any particular thing.

State v. Wilkerson, 295 N.C. at 581, 247 S.E. 2d at 917 (1978).

The evidence presented was sufficient to support a finding by the jury that the defendant's acts indicated a total disregard for human life. Based on this evidence, the State was entitled to an instruction that, if the jury found that the acts of the defendant indicate a total disregard for human life and were intentionally done and proximately caused the death of the deceased, then the jury might infer that the killing was unlawful and that it was done with malice, but would not be compelled to do so. *See State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). The jury then should also be instructed that it might consider this along with all other facts and circumstances arising from the evidence in determining whether the killing was in fact unlawful and done with malice.

For the reasons stated herein, we order that the defendant be granted a

New trial.

STATE OF NORTH CAROLINA v. MICHAEL S. BATES

No. 647A82

(Filed 3 November 1983)

1. Robbery § 4.7— armed robbery—insufficient evidence

Defendant's motion to dismiss the charge of robbery with a dangerous weapon should have been granted at the close of the evidence where the evidence tended to show that a brutal fight took place between defendant and decedent; blood of both defendant and the deceased was found on the items of

personal property, on the hood of an automobile, and on the ground; a crime scene technician testified that there were numerous scuff marks in the dirt surrounding the automobile and in other areas in the clearing of a field where the fight took place; personal property belonging to *defendant* was also scattered throughout the field as well as personal property belonging to decedent; defendant testified that he never saw decedent's possessions nor was he aware of how they came to be strewn around the area; and where, when defendant's explanatory testimony is considered along with the physical evidence presented by the State, the logical inference is that decedent lost items of personal property during the struggle with defendant, and there was simply no substantial evidence of a taking by defendant with the intent to permanently deprive decedent of the property.

2. **Homicide § 4— insufficient evidence to support commission of underlying felony—insufficient evidence to support felony murder**

Where defendant was found not guilty of premeditated and deliberated murder, and where he was convicted of felony murder, premised upon the commission of armed robbery, but where there was insufficient evidence to support the commission of the underlying felony, there was also insufficient evidence to support defendant's conviction of felony murder.

3. **Homicide § 18— evidence designed to show premeditation and deliberation—improperly admitted**

There was no open and visible connection between defendant's statements to a witness several months prior to decedent's death and the fact to be proved in the case which was that the murder of decedent was committed by defendant with premeditation and deliberation where the witness testified that he and defendant were discussing methods of fighting in the Army when defendant told the witness that if he were going to kill someone he would be inclined to use a handgun.

4. **Homicide § 23— failure to instruct on effect of circumstantial evidence—no error**

The trial court properly failed to instruct as to the effect of circumstantial evidence since there was both direct and circumstantial evidence of defendant's perpetration of the crime charged in that defendant admitted fighting with decedent at the crime scene and admitted stabbing him several times with a knife.

APPEAL by defendant from *Britt, Judge,* at the 26 July 1982 Criminal Session of CUMBERLAND County Superior Court.

Defendant was charged in indictments, proper in form, with first-degree murder and robbery with a firearm. He entered pleas of not guilty to each of the offenses charged.

The State offered evidence tending to show that at around 11:00 p.m. on 6 January 1982, defendant came to the residence of Mrs. Mary Godwin at 307 Kenleigh Road in Fayetteville, North

Carolina. Mrs. Godwin testified that defendant appeared to be severely injured and was pleading for help. She stated that defendant's clothing was covered with blood and dirt. A nurse at Cape Fear Valley Hospital, Mrs. Godwin attempted to render first aid assistance to defendant Bates and immediately called an ambulance and the Cumberland County Sheriff's Department.

Deputy John Dean responded to Mrs. Godwin's call. Deputy Everette Scearce arrived shortly thereafter and began to search the area around the Godwin residence. In a field approximately 300 feet from the house, Scearce discovered the body of Roy Lee Warren, Jr., lying beside an automobile. Warren's body was partially covering what appeared to be a lead pipe approximately 18 inches in length. Scearce testified that he remained in the field only a few moments before leaving to call an ambulance for Warren.

Conrad Rensch, a crime scene technician with the City/County Bureau of Investigation, testified that he received a call to come to Kenleigh Road at approximately 12:30 a.m. on 7 January. He immediately proceeded to the field and began his investigation of the crime scene. He observed that there were numerous scuff marks in the dirt surrounding the body and he detected spots of blood on the car.

Items of personal property belonging to both Bates and Warren were discovered in an area near the edge of the field. These items ranged in distance from approximately 73 feet to 116 feet from Warren's body and were generally located within 25 feet of each other. A watch, keys, wallet, checkbook and calculator were identified as the victim's possessions, while a gauze bandage, gold neck chain and jacket were determined to belong to defendant. Rensch noted that there were scuff marks near several of the items and that the ground was covered with blood in some places.

Rensch also testified that he found a .22 caliber revolver in a grassy area not far from the other items. Douglas Branch, a ballistics expert with the State Bureau of Investigation, stated that in his opinion a bullet recovered from the decedent's body was fired from the revolver discovered in the field. Rensch related that there was a large amount of blood near the gun. He did not see scuff marks in that area, but admitted that it was usually difficult to find them in the grass.

David Hedgecock is a forensic serologist employed by the S.B.I. Crime Laboratory. He testified that after performing laboratory tests upon blood samples removed from Bates and Warren, he determined that defendant's ABO grouping was type B and the deceased's ABO grouping was type O. Hedgecock stated that the blood removed from the car was type B and therefore consistent with defendant's blood type, but that the bloodstains found on the ground and on the various personal items strewn throughout the field were of both type O and B.

The State also presented testimony of Dr. Thomas Bennett, a forensic pathologist. He testified that during the post-mortem examination of the deceased, he located numerous small cuts and abrasions and 32 stab wounds. He further identified two gunshot wounds, one to Warren's right abdomen and another, a grazing wound to the left cheek. Dr. Bennett recovered one bullet from the body in the midline section.

Dr. Bennett testified that in his opinion the gunshot wounds were inflicted at close range, at least within four feet. He further gave his opinion that the gunshot wounds were probably inflicted before the stab wounds.

Defendant's evidence, which included his own testimony, tended to show that he and Warren were friends and former coworkers at the Food Town grocery. Defendant Bates testified that a few days prior to 6 January 1982, Warren asked him if he had a gun. Defendant replied that he did not have one, but that his mother did. Defendant asked Warren to meet him in the field on Kenleigh Road and there gave Warren his mother's .22 caliber revolver. Defendant acknowledged that Warren gave him $30.00 for the weapon, although he maintained that he did not ask for any money in exchange for the gun.

Defendant further testified that, on 6 January, he went to the Food Town where Warren worked and asked him to return the pistol because his mother had discovered that it was missing. Warren offered to bring the gun to defendant's home later that evening, but defendant told Warren he would rather meet at the same field on Kenleigh Road so his mother would not see them. Warren agreed and told defendant to watch for him around 7:00 p.m. Defendant stated that he lived near the field and watched for Warren's car from his bedroom window. Warren arrived at the

field at around 10:00 p.m. and defendant then walked out to meet him.

Defendant testified that he and the decedent had a disagreement over the gun because Warren refused to return it until defendant gave him $30.00. After Warren consistently refused to relinquish the weapon without payment, defendant said he would have to tell his mother where the gun was. As he rose and turned to get out of the car, defendant testified that Warren stabbed him in the back. Defendant remembered that he stumbled, but after regaining his balance he began to run in the direction of the nearest house. Because defendant had a cast on his leg from a football injury, he did not run to his own home because it was farther away and he was afraid he would not make it.

Defendant testified that Warren fired one or two gunshots and shouted something like, "If you don't stop running, I'll kill you." Defendant stated that he stopped running and Warren caught up with him in the general area where most of the items of personal property were later found. Defendant stated, however, that he did not recall seeing any of the decedent's possessions.

Defendant testified that Warren approached him and hit him across the forehead with the gun. Defendant fell to the ground, Warren jumped on him and they started to fight. Defendant related that at one point during the tussle, he tried to wrestle the gun from the decedent. He testified that the gun went off while he and Warren were fighting on the ground, although he was unaware that a bullet had struck the decedent.

Eventually, defendant was able to break free from Warren and he crawled back toward the car. Defendant testified that he was about to enter the car when Warren grabbed him from behind and pulled him to the ground. Defendant stated that when he opened the door to get into the car, a metal pipe rolled out from the floorboard and onto the ground.

Defendant remembered tussling with Warren beside the car and receiving a second stab wound to the chest. He testified that he pulled the knife from his chest and began to stab the decedent. At some point, Warren fell off of defendant and, shortly thereafter, defendant lost consciousness. He later wakened and made his way to the Godwin residence on Kenleigh Road.

The jury convicted defendant of felony murder and robbery with a firearm. Defendant was, however, specifically found not guilty of premeditated and deliberated murder. Defendant was sentenced to life imprisonment for the first-degree murder of Roy Lee Warren, Jr. Since the felony murder conviction was premised upon the commission of the armed robbery, the robbery conviction merged with the felony murder conviction and no sentence was imposed on the robbery charge.

Defendant appealed the life sentence directly to this Court as a matter of right pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by W. Dale Talbert, Assistant Attorney General, and David Roy Blackwell, Assistant Attorney General, for the State.

John G. Britt, Jr., Assistant Public Defender, and Richard B. Glazier, Assistant Public Defender, for defendant appellant.

BRANCH, Chief Justice.

[1] Defendant first contends the trial court erred in denying his motion to dismiss the armed robbery charge for insufficiency of the evidence.

On a motion to dismiss on the ground of insufficiency of the evidence, the question for the court is whether there is substantial evidence of each element of the crime charged and of the defendant's perpetration of such crime. *State v. Riddle,* 300 N.C. 744, 268 S.E. 2d 80 (1980). "The substantial evidence test requires that the evidence must be existing and real, not just seeming and imaginary." *State v. Irwin,* 304 N.C. 93, 97-98, 282 S.E. 2d 439, 443 (1981).

In evaluating the motion, the trial judge must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom. *State v. Thomas,* 296 N.C. 236, 250 S.E. 2d 204 (1978). When so considered, if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss should be allowed. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967).

To withstand defendant's motion to dismiss in instant case, the State was required to show substantial evidence of each of

the essential elements of the crime of robbery with a dangerous weapon. Under G.S. 14-87, an armed robbery is defined as the nonconsensual taking of the personal property of another in his presence or from his person 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 intending to permanently deprive the owner thereof. *State v. Davis*, 301 N.C. 394, 271 S.E. 2d 263 (1980); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

Specifically, defendant argues that the State has not shown by substantial evidence a taking of the victim's property with the intent to permanently deprive him of its use.

The State relies on the fact that the deceased's property was found some distance from his body to establish a taking by defendant. In support of this position, the State analogizes the facts of this case to those presented in *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980). In *King*, the State's evidence revealed that the victim, a taxi driver, usually wore a money pouch attached to his belt in which he placed the fares that he collected. On the day of the crime, the driver had collected $1.45 in fares. When his body was discovered, his belt had been cut and coins were found scattered around the body. The money pouch was located several hundred yards away.

The defendant argued that these facts were not sufficient to establish that he took anything of value from the deceased. This Court disagreed, holding that the defendant's motion to dismiss was properly denied. The Court found that these facts supported an inference that the defendant had possession and control of the money pouch and the coins and decided to discard them.

King is factually distinguishable from the instant case. In *King*, there was evidence that the victim's belt had been *cut*, thereby supporting an inference that the money pouch was forcibly taken. Here, there is no such clear physical evidence of a taking.

Furthermore, in *King* there was no evidence that the victim had ever been in the area where the pouch was found. Conversely, in this case the evidence clearly establishes that defendant and the deceased struggled violently in the grassy area where most of Warren's personal property was discovered.

Finally, defendant's uncontroverted testimony refutes a conclusion that he forcibly took these items of personal property from the victim with the intent to steal them.

We have consistently held that on a motion to dismiss, the court must consider the defendant's evidence which explains or clarifies that offered by the State. *State v. Blizzard*, 280 N.C. 11, 184 S.E. 2d 851 (1971); *State v. Bruton*, 264 N.C. 488, 142 S.E. 2d 169 (1965). The court must also consider the defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence. *State v. Bruton, supra.*

Defendant Bates' testimony in its entirety must be characterized as a clarification of the State's testimonial and physical evidence; it in no way contradicted the prosecution's case.

Defendant's testimony and the physical evidence reveal that a brutal fight took place between Bates and Warren. Blood of both defendant and the deceased was found on the items of personal property, on the hood of the automobile and on the ground. Conrad Rensch testified that there were numerous scuff marks in the dirt surrounding the automobile and in other areas in the clearing. It is also important to note that items of personal property belonging to *defendant* were also scattered throughout the field. Defendant testified that he never saw decedent's possessions nor was he aware of how they came to be strewn around the area.

When defendant's explanatory testimony is considered along with the physical evidence presented by the State, the logical inference is that the decedent lost these items of personal property during the struggle with defendant. There is simply no substantial evidence of a taking by defendant with the intent to permanently deprive Warren of the property. We therefore hold that defendant's motion to dismiss the charge of robbery with a dangerous weapon should have been granted.

[2] We further note that defendant was found not guilty of premeditated and deliberated murder. He was convicted of felony murder, premised upon the commission of armed robbery. Because there was insufficient evidence to support the commission of the underlying felony, there is also insufficient evidence to support defendant's conviction of felony murder.

Because the possibility of retrial exists as to lesser charges, we address the following issues raised by defendant.

[3] Defendant contends the trial court erred in admitting into evidence, over defendant's objection, testimony of Manuel Alvarez regarding a conversation he had with defendant several months prior to the date of the offense charged.

On rebuttal for the State, the witness Alvarez testified that he spoke with defendant in the fall of 1981 about methods of killing. Alvarez recalled telling defendant that if he were going to kill someone, he would use hand-to-hand combat. Defendant responded that he would be more inclined to use a handgun. Alvarez testified that he concluded the brief conversation by telling defendant that if he were to use a firearm, he would take the person to a secluded area to commit the killing. In response to questioning by defense counsel, Alvarez stated that this dialogue arose out of a conversation relating to fighting in the United States Army.

Defendant objects to the admission of this evidence on the ground that it has no logical or theoretical connection to the case at bar. The State, however, contends that defendant's statements to Alvarez were admissible to show premeditation and deliberation.

This Court has stated on numerous occasions that evidence is relevant and therefore admissible if it has any logical tendency to prove a fact in issue. *E.g., State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968). The following passage from *State v. Covington*, 290 N.C. 313, 335, 226 S.E. 2d 629, 645 (1976), quoting 1 Stansbury's North Carolina Evidence § 78, at 237 (Brandis rev. ed. 1973), is instructive:

> The standard of admissibility based on relevancy and materiality is of necessity so elastic, and the variety of possible fact situations so nearly infinite, that an exact rule cannot be formulated. In attempting to express the standard more precisely, the Court has emphasized the necessity of a *reasonable*, or *open and visible* connection, rather than one which is remote, latent, or conjectural, between the evidence presented and the fact to be proved by it, at the same time

> pointing out that the inference to be drawn need not be a *necessary* one.

(Emphasis in original.)

We perceive no *open and visible* connection between defendant's statements to Alvarez several months prior to Warren's death and the fact to be proved in instant case, that is, that the murder of Warren was committed by defendant with premeditation and deliberation. The remoteness of the connection between the conversation and the killing is not merely temporal. The State presented absolutely no evidence tending to logically connect this conversation with the death of Roy Lee Warren, Jr. The conversation did not include the name of the deceased, or of any individual. In fact, Alvarez testified that he and defendant were discussing methods of fighting in the army when this specific discussion arose. There is simply a dearth of evidence tending to show that in the fall of 1981, Michael Bates was planning the murder of Roy Lee Warren, Jr.

Since the State failed to provide any logically direct or circumstantial basis to connect this conversation with the crime charged, we must agree with defendant that the trial court erred in admitting this testimony.

Although we find error in the admission of the evidence, we conclude that the error was not prejudicial to defendant. Alvarez' testimony clearly related to the issue of premeditation and deliberation. The jury rejected this theory, however, finding defendant not guilty of first-degree murder on the basis of premeditation and deliberation. Defendant was convicted of felony murder and the testimony complained of does not relate to the elements of that offense. We therefore perceive no prejudice to defendant from the erroneous admission of this testimony.

[4] Finally, defendant contends the trial court erred in denying his special request for a jury instruction as to the effect of circumstantial evidence when no direct evidence is presented.

The instruction requested by defendant should be given only when there is no direct evidence. If either the State or the defendant elicits direct evidence bearing on any issue for the jury's determination, then such an instruction is not appropriate.

Defendant's contention that the trial judge erroneously failed to give the requested instruction must be rejected for the reason that there was both direct and circumstantial evidence of defendant's perpetration of the crime charged. Defendant admitted fighting with Warren at the crime scene and admitted stabbing him several times with a knife. This was direct evidence supporting the trial court's instructions on first-degree murder, second-degree murder and voluntary manslaughter.

Admittedly, the vast majority of the evidence against defendant was circumstantial. Nevertheless, some direct evidence bearing on the issues submitted to the jury was presented and the trial judge therefore properly instructed on the concept of circumstantial evidence when direct evidence is also presented. This assignment is overruled.

For the reasons above stated, the judgment entered upon defendant's convictions of felony murder and robbery with a dangerous weapon is

Reversed.

STATE OF NORTH CAROLINA v. RICHARD BENBOW

No. 136A83

(Filed 3 November 1983)

1. **Criminal Law § 138— pecuniary gain aggravating factor**

Where the record does not support a finding that the defendant was hired or paid to commit the offense, the trial judge erred in relying on the aggravating factor that the offense was committed for pecuniary gain.

2. **Criminal Law § 138— especially heinous, atrocious, or cruel aggravating factor**

The trial court properly found as an aggravating factor that a second degree murder was especially heinous, atrocious, or cruel where the evidence tended to show that the victim's skull was crushed and fractured in several places, the orb of one eye was driven into the brain, and the victim lingered and remained in a semiconscious state for over twelve hours.

3. **Criminal Law § 138— mitigating circumstances—mental condition reducing culpability—inability to see serious harm resulting from conduct—insufficient evidence**

Evidence that defendant would not understand that his role as a lookout in an armed robbery could result in his personal responsibility for the re-

sulting brutal murder of the robbery victim did not require the trial court to find as a mitigating factor under G.S. 15A-1340.4(a)(2)d that defendant was suffering from a mental condition sufficient to reduce his culpability for the crime. Nor did such evidence require the trial court to find as a mitigating factor under G.S. 15A-1340.4(a)(2)j that defendant could not reasonably have foreseen that his conduct could cause or threaten serious harm, since the test is not whether defendant subjectively believes or does not believe but whether he could reasonably foresee that his conduct would cause harm.

4. Criminal Law § 138— passive participant in offense as mitigating factor

In imposing a sentence for second degree murder of an armed robbery victim, the trial court should have considered whether defendant met his burden of proving by a preponderance of the evidence the mitigating factor that he was only a passive participant in the actual murder where there was evidence tending to show that, although defendant played an active role in the planning and execution of the robbery, he acted only as a lookout, was not present, and did not participate in the actual bludgeoning of the victim, since it is proper at sentencing to consider defendant's actual role in the offense as opposed to his legal liability for the acts of others.

5. Criminal Law § 138— sentencing hearing—evidence of good character

When the defendant in his sentencing hearing produces evidence of his good character in order to take advantage of that particular mitigating circumstance, G.S. 15A-1340.4(a)(2)m, character is "a direct issue in the case" and thus is not limited to the traditional methods of proof but may be proved by specific acts as well as by reputation and by the opinions of others.

6. Criminal Law § 138— good character or good reputation as mitigating factor—insufficient proof

Evidence that defendant was a young man who, apart from one incident with the law for which he appeared to have been making satisfactory amends, was generally well-behaved, considerate, respectful to family and friends, truthful, and good to his mother, and that he attended church regularly as a youth did not rise to the level which would entitle defendant to a finding in mitigation that he was a person of "good character" or that he had a "good reputation." Furthermore, because defendant's character witnesses were, for the most part, family members, their relationship with defendant was a factor in assessing the credibility of these witnesses, and it was therefore within the trial court's prerogative to accept or reject their testimony.

7. Criminal Law § 138— sentencing hearing—reliance on evidence from trials of others

At any sentencing hearing held pursuant to a plea of guilty, reliance on evidence from the trials of others connected with the same offense is improper absent a stipulation. Even with such a stipulation, reliance exclusively on such record evidence from other trials (in which the defendant being sentenced had no opportunity to examine the witnesses) as a basis for a finding of an aggravating circumstance may constitute prejudicial error, since the focus in such other trials is necessarily upon the culpability of others and not on the culpability of the defendant being sentenced. Thus, by proper stipulation and

in the interest of judicial economy, the sentencing judge may consider the evidence from such other trials, but only as incidental to his present determination of defendant's individual culpability as a factor in sentencing.

BEFORE *Stevens, J.*, at the 13 October 1982 Session of Superior Court, NEW HANOVER County, defendant was sentenced to life imprisonment upon his plea of second degree murder. He appeals pursuant to N.C. Rule of App. P. 4(d), as authorized by G.S. § 15A-1444(al) & (d) (Cum. Supp. 1981). Heard in the Supreme Court 6 October 1983.

Freddy Stokes, Lorenzo Thomas, James Murray and the defendant were indicted for the murder of Kauno A. Lehto. Judge Stevens presided at the trial of Freddy Stokes in May 1982, and at the trial of James Murray in September-October 1982. Prior to the trial of James Murray, the defendant agreed to testify for the State in return for acceptance of a plea to second degree murder. Lorenzo Thomas testified for the State at both trials. Following a total of eight weeks of trial testimony in the Stokes and Murray trials, Judge Stevens sentenced both Thomas and Benbow.

At a sentencing hearing held pursuant to G.S. § 15A-1340.1 through -1340.4 the following facts, inter alia, were stipulated by the defendant and the State as an accurate narration of the events leading up to the death of Kauno A. Lehto and defendant's subsequent plea to second degree murder:

> During the late evening of December 28, 1981, defendant RICHARD BENBOW and co-defendants LORENZO THOMAS, FREDDY STOKES, and JAMES MURRAY met in the playground area of the Houston-Moore housing project in the City of Wilmington and there agreed among themselves to go to the Wilmington Bonded Warehouse, located approximately three blocks away, to rob the owner, KAUNO A. LEHTO, age 70. FREDDY STOKES and JAMES MURRAY each carried a stick approximately 18" long and one to two inches in diameter. The four men walked to the Wilmington Bonded Warehouse at 13th and Kidder Streets just as darkness fell. Once at the warehouse, a concrete building office annex, which is entered by a 25 foot ramp leading from the ground to the office door, the defendants positioned themselves to wait for the owner to emerge. Defendants STOKES and MURRAY positioned themselves on either side of the doorway, defendant BENBOW

stood at the foot of the ramp, approximately 25 feet away, acting as a lookout. Co-defendant LORENZO THOMAS was across 13th Street, approximately 258 feet, also acting as a lookout.

KAUNO A. LEHTO, age 70 emerged from his business sometime between 6:05 P.M. and 6:15 P.M. on the night of December 28, 1981. He was carrying a briefcase and an armload of other papers. Night had fallen and rain and fog prevailed during the period of the 28th. LEHTO emerged from the door of the office building and was beaten repeatedly by MURRAY and STOKES with sticks. The beating occurred partway down the ramp, within 25 feet of defendant BENBOW. Co-defendants MURRAY and STOKES then robbed the semi-conscious LEHTO of his wallets, money amounting to approximately $250, briefcase and keys and then ran down the ramp to where defendant BENBOW was waiting.

Once at the foot of the ramp all three defendants—STOKES, MURRAY and BENBOW—entered the victim's car and drove off using the victim's stolen keys to operate the car, leaving co-defendant LORENZO THOMAS behind. BENBOW, MURRAY and STOKES then rode around Wilmington in the victim's car, later abandoning it one block from the Houston-Moore housing project where they all lived or stayed from time to time.

The victim, a man of 70 years of age, was left on the concrete ramp of the warehouse building from approximately 6:15 P.M. until about 8:15 when he was found semi-conscious by family friends who searched for him when he failed to come home after work.

LEHTO was taken to New Hanover Memorial Hospital by ambulance where he was admitted into Intensive Care. He lived in a semi-conscious state until 8:30 A.M. the following day, December 29, 1981.

The doctors who treated the victim stated that he died of multiple blunt trauma wounds and that the cause of death was massive cerebral injury. The skull was crushed and fractured in several places and the orb of one eye was driven into the brain. The victim lost massive amounts of blood due

to his injuries. The victim attempted to communicate with others around him but his words were unintelligible.

The case remained unsolved until the end of January 1982 when LORENZO THOMAS gave a voluntary statement implicating himself and co-defendants STOKES, MURRAY and BENBOW. Based on the information provided by THOMAS; BENBOW, MURRAY and STOKES were arrested and questioned. STOKES and BENBOW gave voluntary statements when confronted with THOMAS' statement.

Prior to trial, LORENZO THOMAS agreed to testify for the State without any plea bargain or plea agreement. Separate trials were ordered and on May 18, 1982, FREDDY LEE STOKES went on trial for First Degree Murder, Armed Robbery, and Felonious Larceny. LORENZO THOMAS testified against STOKES and the jury convicted STOKES of all charges and later sentenced him to death. The jury in that case found as an aggravating factor that the murder was especially henious (sic), atrocious and cruel.

Prior to the trial of JAMES H. MURRAY, RICHARD BENBOW agreed to testify for the State in return for guilty plea to Second Degree Murder and Armed Robbery with maximum exposure being life imprisonment, 50 years. Sentencing was to be left to the discretion of the trial judge. Defendant MURRAY was tried in September 1982 at which time LORENZO THOMAS and RICHARD BENBOW testified for the State. During his testimony, BENBOW admitted his part in the robbery-murder saying that he was 25 feet away from the door on the ramp as a lookout when the victim emerged and that STOKES and MURRAY beat the victim and robbed him, and that he, MURRAY and STOKES then entered the victim's car and drove away leaving co-defendant LORENZO THOMAS across the street. The car was later abandoned near the housing project where BENBOW, STOKES and THOMAS all lived or stayed. BENBOW testified that he met THOMAS, MURRAY and STOKES at the Houston-Moore project in the late afternoon hours of December 28, 1981. There they planned the robbery of KAUNO A. LEHTO at the Wilmington Bonded Warehouse. When he and the others went to the warehouse, their only purpose was to rob "the old man," meaning KAUNO A. LEHTO.

BENBOW testified that the defendant MURRAY and STOKES split the money with BENBOW refusing to take any. RICHARD BENBOW's testimony at trial differed from prior written statements he had given to police officers earlier in that he originally claimed to be across the street, some 258 feet away, not at the foot of the ramp, 25 feet away from the scene of beating, as he testified to at trial. BENBOW also claimed in his original statement that once he saw the beating administered to the victim, he turned away and ran home. At trial, he stated he remained at the foot of the ramp and entered the car with STOKES and MURRAY after the robbery was completed. Defendant BENBOW testified he had previously been convicted of two counts of misdemeanor Breaking or Entering and one count of Larceny and was at the time of the crime on probation for those offenses.

As to JAMES H. MURRAY, the jury returned a verdict of guilty to First Degree Murder, Armed Robbery and Felonious Larceny. The jury rendered a sentence recommendation to the Court of life imprisonment and made no finding as to whether or not the capital felony was especially henious (sic), atrocious, or cruel after considering it as an aggravating factor.

At the sentencing hearing, defendant's evidence in mitigation consisted of the testimony of defendant's probation officer, a clinical psychologist, one of the investigating officers of the murder, and numerous family members and friends who testified as character witnesses. Defendant testified on his own behalf. The State presented no rebuttal evidence as to the mitigating factors and relied on evidence and exhibits presented during the preceding trials of the two co-defendants to support the aggravating factors. In support of the imposition of a life sentence, the trial judge relied on the following aggravating factors:

3. The offense was committed for hire or pecuniary gain.

6. The offense was especially heinous, atrocious, or cruel.

15. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement.

In mitigation, the trial judge found that:

8. The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

12. 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.

14. The defendant is a minor and has reliable supervision available.

Defendant assigns as error the trial court's reliance on two of the three aggravating factors: that the offense was committed for pecuniary gain and that the crime was especially heinous, atrocious, or cruel. Defendant further assigns as error the trial court's failure to find certain factors in mitigation. For errors found, defendant is entitled to a new sentencing hearing.

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

Jay D. Hockenbury, Attorney for defendant-appellant.

MEYER, Justice.

[1] As the record does not support a finding that the defendant was hired or paid to commit the offense, the trial judge erred in relying on the aggravating factor that the offense was committed for pecuniary gain. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983); *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983). Defendant is therefore entitled to resentencing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

[2] Defendant next assigns as error the trial court's reliance on the aggravating factor that the offense was especially heinous, atrocious, or cruel. This Court has most recently articulated the standard by which this factor may be found in *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983). In *Blackwelder* we stated that "the focus should be on whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*" *Id.* at 414, 306 S.E. 2d at 786. We further stated that it was not "inappropriate in any case to measure the brutality of

the crime by the extent of the physical mutilation of the body of the deceased or surviving victim." *Id.* at 415, 306 S.E. 2d at 787. The evidence in this case supports a finding that the beating death of Kauno A. Lehto was especially heinous, atrocious, or cruel. The victim's skull was crushed and fractured in several places. The orb of one eye was driven into the brain. In spite of the continued blows to his head and the severity of the wounds, the victim lingered and remained in a semiconscious state for over twelve hours.

[3] Defendant next contends that the trial court erred in failing to find as a mitigating factor under G.S. § 15A-1340.4(a)(2)d that the defendant was suffering from a mental or physical condition that, while insufficient to constitute a defense, was sufficient to entitle him to the benefit of the mitigating circumstance that his culpability for the offense was substantially reduced. We do not agree. In support of his contention, defendant points to the uncontradicted testimony of Dr. Peter J. Boyle, a clinical psychologist, who indicated that defendant would not understand that as a lookout, he could be held legally responsible for the murder. In other words, argues defendant, while he "could anticipate the consequences of his own acts as a lookout in an armed robbery," he "would be unable, because of a borderline range of mental retardation and low general intellectual function, to comprehend what consequences the actions of [Stokes and Murray] would have on his life." We do not doubt defendant's inability at the time of the murder to comprehend the full legal implications of his decision to participate in the armed robbery of Kauno A. Lehto. Ignorance of the legal implications of an act, nothing else appearing, however, is not tantamount to a mental condition sufficient to reduce one's culpability. Similarly, defendant contends that the trial court erred in failing to find as a mitigating factor under G.S. § 15A-1340.4(a)(2)j that defendant could not reasonably have foreseen that his conduct could cause or threaten serious harm. Defendant maintains now, as he did when he was first apprehended, that he did not know he was involving himself in anything more than a simple robbery. Again, we do not doubt defendant's sincerity in stating that he failed to understand that his role as a lookout in an armed robbery could possibly result in his personal responsibility for the resulting brutal murder. The test, however, is not what the defendant subjectively does or

does not believe, but whether he could *reasonably* foresee that his conduct would cause harm. Serious bodily injury or death is an omnipresent danger in any armed robbery. The trial judge properly rejected these two factors in mitigation.

[4] Defendant next contends that the trial court erred in failing to find in mitigation that he was a passive participant or played a minor role in the commission of the offense. The evidence would not support a finding of this factor with respect to defendant's participation in the robbery. Defendant clearly played an active role in the planning and execution of the robbery. For sentencing purposes, however, the evidence could support a finding that defendant was a passive participant in the murder for which he was sentenced. Both the defendant and the State stipulated to the following facts: defendant acted as a lookout, he was not present, and he did not participate in the actual bludgeoning of the victim. Defendant's own evidence, as discussed above, indicated that he did not anticipate that a murder would be the result of the plan to rob Mr. Lehto. In fact, defendant testified that it wasn't until the next day that he learned that Mr. Lehto had been as seriously injured as he was. We emphasize that a defendant's liability for a crime, including whether he was the principal offender or an accessory, is determined at the guilt phase of a trial or, as in the case *sub judice*, by a plea. At sentencing the focus must be on the offender's *individual* culpability. It is therefore proper at sentencing to consider the defendant's actual role in the offense as opposed to his legal liability for the acts of others. On resentencing, the sentencing judge will consider whether defendant has met his burden of proving by a preponderance of the evidence that he was a passive participant in the actual murder. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983).

Finally, defendant assigns as error the trial court's failure to find as a mitigating factor under G.S. § 15A-1340.4(a)(2)n that he has been a person of good character or has a good reputation in the community in which he lives. Defendant's evidence in support of this mitigating factor consisted of the following: Defendant's probation officer testified that after some initial problems, the defendant was complying with the conditions of his probation. He was paying his fine and attending school. He was described by family and friends as being nonviolent. "He didn't fight back." He had completed the tenth grade in school, was well-mannered and

respectful, and regularly helped his mother with household chores. He had "a little job at the Housing Authority" to pay his court fine. He spent most of his time at home listening to his music and if he went out at night to visit one of his aunts, he would call his mother and let her know where he was. He was generally truthful and until he was seventeen, attended church regularly with his grandmother. He was, however, susceptible to peer pressure and although his family cautioned him about associating with the wrong people, he continued to see Freddy Stokes and Stokes' sister, Betty, even after Stokes had beaten him severely enough to require hospitalization.

[5] When the defendant in his sentencing hearing produces evidence of his good character in order to take advantage of that particular mitigating circumstance, G.S. § 15A-1340.4(a)(2)m (Cum. Supp. 1981), character is "a direct issue in the case" and thus not limited to the traditional methods of proof but may be proved by specific acts as well as by reputation and by the opinions of others. *State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302 (1983); 1 Brandis on North Carolina Evidence §§ 102, 113. In such circumstances good character, or the lack of it, is a direct issue in the case because it is one of the "factors that may diminish or increase the offender's culpability" and thus an important consideration to be taken into account in sentencing. G.S. § 15A-1340.3 (Cum. Supp. 1981). On the question of defendant's individual culpability, evidence of character is, without question, highly relevant and directly in issue.

We have also recently held that "[w]hen evidence in support of a particular mitigating or aggravating factor is uncontradicted, substantial, and there is no reason to doubt its credibility, to permit the sentencing judge simply to ignore it would eviscerate the Fair Sentencing Act." *State v. Jones*, 309 N.C. 214, 218, 306 S.E. 2d 451, 454 (1983); *see State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302; *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983). In *Blackwelder*, however, we noted that "uncontradicted, quantitatively substantial, and credible evidence may simply fail to establish, by a preponderance of the evidence, any given factor in aggravation or mitigation. While evidence may not be ignored, it can be properly rejected if it fails to prove, as a matter of law, the existence of the mitigating factor." *Id.* at 419, 306 S.E. 2d at 789.

For a definition of good character, we turn to another case in which character was a direct issue:

> Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents. In the words of Chief Justice Stacy in *In re Applicants for License, supra*, 191 N.C. at 238, 131 S.E. at 663:
>
> > '[Good moral character] is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong.'
>
> Character thus encompasses both a person's past behavior and the opinion of members of his community arising from it.

In re Rogers, 297 N.C. 48, 58, 253 S.E. 2d 912, 918 (1976).

[6] With these principles in mind, we turn to the evidence in the case *sub judice*. This evidence paints a picture of a young man who, apart from one incident with the law for which he appeared to have been making satisfactory amends, was generally well-behaved, considerate, and respectful to family and friends. Arguably this evidence might entitle defendant to a mitigating circumstance that he was generally truthful, was good to his mother, attended church regularly as a youth, etc. The evidence does not rise to the level which would entitle defendant to a finding in mitigation that he was a person of "good character" or that he had a "good reputation." Furthermore, because defendant's character witnesses were, for the most part, family members, their relationship with the defendant was a factor in assessing these witnesses' credibility. It was therefore within the trial court's prerogative to accept or reject their testimony. *See State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302.

[7] We note from the transcript that the district attorney placed before the sentencing judge two files apparently containing the evidence heard at the trials of Freddy Stokes and James Murray

over which Judge Stevens also presided. We must caution that for purposes of resentencing this defendant, and indeed at any sentencing hearing held pursuant to a plea of guilty, reliance on evidence from the trials of others connected with the same offense is improper absent a stipulation. Even with such a stipulation reliance exclusively on such record evidence from other trials (in which the defendant being sentenced had no opportunity to examine the witnesses) as a basis for a finding of an aggravating circumstance may constitute prejudicial error. In such other trials the focus is necessarily upon the culpability of others and not on the culpability of the defendant being sentenced. Thus, by proper stipulation and in the interests of judicial economy, the sentencing judge may consider the evidence from such other trials, but only as incidental to his present determination of defendant's individual culpability as a factor in sentencing. In so considering this evidence, trial judges must scrupulously avoid shifting the focus from the offender's *individual* culpability for the offense. *See* G.S. § 15A-1340.3; *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689.

The case is remanded to the Superior Court, New Hanover County, for resentencing.

Remanded for resentencing.

STATE OF NORTH CAROLINA v. GARY LEE WEBB

No. 629A82

(Filed 3 November 1983)

1. Robbery § 5.2— taking vehicle while "scared and confused"—not exculpatory—guilt of armed robbery—proper instructions to jury

In a prosecution for second degree murder and armed robbery, the trial court's summary of the evidence included statements favorable to defendant including statements that defendant took the car "while scared and confused" in order to escape the scene; however, even if defendant did use the car to escape the scene at a time when he was confused and scared, these facts would not exculpate him. All the evidence tended to show defendant never intended to return the car and that he took and disposed of it under circumstances rendering it unlikely that it would ever be recovered and with indifference to the rights of the owner.

2. Criminal Law § 138— sentencing hearing—aggravating circumstance that defendant on pretrial release in separate felony properly considered

In a prosecution for armed robbery and second degree murder, the trial court properly considered as an aggravating circumstance that defendant was on pretrial release in a separate felony case, and consideration of G.S. 15A-1340.4(a)(1)k did not violate defendant's right to constitutional due process.

BEFORE *Judge D. Marsh McLelland* presiding at the 7 June 1982 Criminal Session of DURHAM Superior Court, and a jury, defendant was found guilty of second degree murder and armed robbery. Judge McLelland ordered a life sentence on the second degree murder conviction to begin running at the expiration of the fourteen-year sentence he imposed on the armed robbery conviction. Defendant appeals the second degree murder conviction and sentence as a matter of right pursuant to N.C. Gen. Stat. § 7A-27(a) (1981). Defendant's motion to bypass the Court of Appeals for the armed robbery conviction was allowed on 19 November 1982.

Rufus L. Edmisten, Attorney General, by Reginald L. Watkins, Assistant Attorney General, for the State.

R. Hayes Hofler, III, and A. Neil Stroud for defendant appellant.

EXUM, Justice.

In this appeal defendant brings forward two assignments of error. Defendant asserts that during its instructions to the jury the trial court erred by failing to give him the benefit of certain evidence favorable to his defense. Defendant also maintains his constitutional right to due process was violated when the trial court considered, for purposes of sentencing, that the murder was committed while defendant was on pretrial release in an unrelated felony case. Neither argument affords defendant any relief.

The state's evidence tends to show that on the evening of 24 October 1981 Roland Black, a resident of Richmond, Virginia, was reported missing. Black had last been seen at the Fountainhead Adult Book Store on Foster Street in Durham around eight o'clock that evening. At that time Black was driving a brown Mercury Cougar automobile with Virginia license plates. Later that same night, Investigator George Green of the Durham Depart-

ment of Public Safety saw defendant driving a brown Mercury Cougar with Virginia license plates. The brown Mercury Cougar belonging to Roland Black was recovered on Thursday, 29 October 1981, along Cook Road in southern Durham County after someone living in the area had become suspicious and notified the police. The victim's car was clean inside, but muddy around the tires, and the window in the driver's door was missing.

During the evening of 28 October 1981 defendant approached Investigator Green, a friend, at his off-duty job and told him that he urgently needed to speak with him. Green advised defendant to return home and wait for his arrival the following morning. Around 9 a.m. on 29 October 1981 Investigator Green arrived at defendant's home with Investigator Taylor and immediately informed defendant of his rights from a "*Miranda* Card." Defendant directed the officers to the dead end of Cooper Street in Durham where the victim's body along with his clothing, wallet, credit cards and twenty dollars in case were recovered. Although defendant initially stated that he knew the location of the victim's body as the result of overhearing a conversation, he later gave the police a statement admitting that he shot the victim in an attempt to repel a sexual assault. The statement by defendant as presented at trial is as follows:

> On Saturday, October 23rd I was out and I went down to a place better known where queers hang out. It's a book store. I went in intentionally to read some books. I didn't know all of this was going to happen. I went to the bathroom, I went straight to the bathroom and used the bathroom. I saw a brown car outdoors with someone sitting in it, so I walked out the doors going out to mind my own—my business when this man called me and asked me to have a beer out of his cooler in the back seat. I took the beer and he asked me to go for a ride with him. I told him no, no, I don't think I would want to do that. After that I ended up getting in the car with the man. He left and on the way to our destination where he had planned to go he tried to molest me. I asked him not to do that again and to let me out of the car. For a while we struggled and I could not get out of the car. We ended up down by the school at a dead end road to where this incident took place. This is where a big fight came between me and the man in the front seat of the car. At this time I pulled a

thirty-eight and shot in the direction toward his legs trying to make him leave me alone. I still—he still grabbed me and pulled me to him. I pulled the trigger not aiming at any part of his body, just pulling the trigger and I shot him in the head.

At this time I didn't know what to do. I was scared. I know I had killed a man. I pulled him out of the car, dragged him into the woods, put a couch over top of him, got back into the car, went to the car wash, washed the car out and I left and rode the car around. I didn't know what to do. I was scared. At this time I kept the car all that night. I took the car to Cook Road Sunday and parked it by the lake with the intentions of burning it. When I got out I just had a funny feeling I had better leave that car alone. I got out of the car and I threw the keys away and threw the gun in the woods and walked back to the city limits of Durham.

At this time my girlfriend—my wife had seen these things on T.V. of what had happened and she asked me did I know anything about it. I told her I needed to go talk to a friend of mine who was a detective. I found him Wednesday night on his duty at Studio D's. I told him that I needed to talk to him tomorrow morning very badly. He told me to go home and just stay there and don't go nowhere until tomorrow and that he would come by at nine-thirty or ten o'clock, no later than ten. When he came I was at home fully dressed and ready to talk to him. He had another detective with him. At this time he came to my door and knocked on the door. I went with him to show him where the body was at the scene. I told him everything that had happened that night and I told him what was what and I didn't do it intentionally, it was an accident. At this time before I left I told him when I first saw him the first thing I said was it was an accident and he asked me—and asked me what was it I was saying, and I told him that I did it and was involved in it. Later I told him I was involved in it. I make this statement of my own free will and no threats or promises have been made and no pressure of any kind have been used against me.

Investigator Green also testified that defendant initially stated that he had gotten the victim's car from two acquaintances

who requested that he clean up the car and get rid of it. The police also discovered later that defendant had not thrown away the car keys and the gun as he stated in his confession. However, with defendant's help those items were recovered.

The state also produced the testimony of Dr. John Butts, Associate Chief Medical Examiner for the State of North Carolina. Dr. Butts testified Roland Black had been shot four times; the gunshot wounds caused his death.

Defendant did not present any evidence at trial.

[1] Initially defendant argues the trial court erred in the robbery case when it failed, in its jury instructions, to give defendant the benefit of certain facts favorable to his defense that he lacked the requisite felonious intent to steal the car. Defendant argues the trial court failed to comply with N.C. Gen. Stat. § 15A-1232 (1981):

> Jury instructions; explanation of law; opinion prohibited.—In instructing the jury, the judge must declare and explain the law arising on the evidence. He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence. He must not express an opinion whether a fact has been proved.

Defendant argues the trial court failed to mention, in its summary of the evidence, the evidence favorable to defendant and failed to explain the law arising on this favorable evidence. Defendant relies on *State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978); *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979), *cert. denied*, 454 U.S. 973 (1981); *State v. Ward*, 300 N.C. 150, 266 S.E. 2d 581 (1980); and *State v. Pryor*, 59 N.C. App. 1, 295 S.E. 2d 610 (1982).

In *Hewett*, we held that, although the trial judge was not required by the predecessor of section 15A-1232 to give contentions of either party, if he does give contentions of one party, "he must also give the pertinent contentions of the opposing party." 295 N.C. at 643, 247 S.E. 2d at 888. An instruction which fails "to give equal stress to the state and defendant in a criminal action is error. . . . Obviously equal stress is absent when the contentions of the state are fully stated and the contentions of the defendant are not stated at all. This requires a new trial." *Id.*

In *Sanders*, we held that section 15A-1232 was violated "when the court recapitulates fully the evidence of the State but fails to summarize, at all, evidence favorable to the defendant," even when defendant offers no evidence but the state's case contains evidence favorable to defendant. 298 N.C. at 517, 519, 259 S.E. 2d at 262. In *Sanders*, the trial court failed to mention in its summary certain evidence brought out on cross-examination of the state's witnesses which tended to exculpate defendant and some evidence brought out by the state itself which "tended to raise inferences favorable to defendant." *Id.* at 517, 259 S.E. 2d at 261.

In *Ward*, we held that failure of the trial court to refer, in its summary of the evidence, to that portion of defendant's testimony that he did not shoot at or near the deceased and an omission in the court's final mandate "combined to deprive defendant of the full benefit of his testimony" and entitled him to a new trial. 300 N.C. at 157, 266 S.E. 2d at 586.

In *Pryor* the Court of Appeals found prejudicial error in the trial court's failure to "make any reference to evidence favorable to the defendant . . . which tended to show defendant's lack of involvement in the robbery itself or its planning." 59 N.C. App. at 11, 295 S.E. 2d at 617. The evidence favorable to Pryor was offered by the state, defendant having offered no evidence. *Id.* at 12, 295 S.E. 2d at 617.

Defendant here first contends the trial court did not comply with these principles, failing to mention evidence favorable to him in its summary of the evidence. This "favorable" evidence, defendant contends, was in defendant's confession when he said he took the car because he was frightened, confused and "didn't know what to do." The trial court did accurately summarize defendant's confession, however, expressly referring to that part of the confession defendant says was favorable. The trial court's summary of the evidence included the following statements:

> [T]hat Black nevertheless grabbed him and pulled defendant toward him and defendant then pulled the trigger without aiming and shot Black in the head; that defendant knew he had killed Black, was scared, did not know what to do; that he pulled Black's body out of the car, drug it into the woods, put a couch over it, got back in the car, drove it to a car

> wash, washed it out, and rode around; that on Sunday he took the car to Cook Road intending to burn it and did not, instead he threw the keys away and the gun into the woods and walked back to town . . . .

All of the above statements were included in the court's summary of the state's evidence. While the court never summarized evidence for the defendant (presumably because defendant offered no evidence), it summarized fairly the state's evidence and included those portions favorable to defendant.

Defendant further urges that the trial court did not "segregate the material facts of the case, array the facts on both sides, and apply the pertinent principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence." *State v. Friddle*, 223 N.C. 258, 261, 25 S.E. 2d 751, 753 (1943), *quoted with approval* in *State v. Ward*, 300 N.C. at 155, 266 S.E. 2d at 584-85. Although in both *Friddle* and *Ward* defendants offered evidence tending to be exculpatory, the principle relied on in these cases would apply here, where all of the evidence was offered by the state, provided some of that evidence would be exculpatory.

In the instant case, however, the "favorable" evidence upon which defendant relies is not necessarily exculpatory, even if it is believed. Defendant argues that if the jury found defendant took the car "while scared and confused" in order to escape the scene, he would not be guilty of armed robbery and the trial court erred in failing to so instruct the jury. This is not the law.

In *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966), defendant's accomplice, Henry, broke into H. H. Adams Service Station. Adams awoke with his rifle in hand and took custody of Henry. Adams marched Henry to a place where defendant and Policeman R. W. Spikes were standing. Spikes had earlier accosted defendant under the wheel of a parked 1960 Chevrolet automobile with its motor running. Defendant had succeeded in disarming Spikes of his .38 caliber pistol and was holding Spikes at bay when Adams and Henry arrived. By threatening Adams with the .38 caliber pistol, defendant forced Adams to drop his rifle. Defendant picked up the rifle and he and Henry, taking the rifle and the pistol with them, drove off. Forty minutes later police found Henry standing by the wrecked automobile. Adams'

rifle was beside a telephone pole near where the car wrecked. Defendant was later arrested and directed officers to his home where he showed them Spikes' .38 caliber pistol which he had hidden in a trunk. Defendant was convicted of assaulting Spikes and of armed robbery of a rifle from Adams.

On appeal defendant argued that the trial judge erred by not submitting in the armed robbery case the lesser included offense of assault upon Adams on the ground that there was some evidence which would permit an inference that defendant took the rifle, not intending to steal it, but simply intending to disarm Adams in an act of self-defense. The Court said:

> In robbery, as in larceny, the taking of the property must be with the felonious intent *permanently* to deprive the owner of his property. [Citations omitted.] Thus, if one disarms another in self-defense with no intent to steal his weapon, he is not guilty of robbery. [Citation omitted.] If he takes another's property for the taker's immediate and temporary use with no intent permanently to deprive the owner of his property, he is not guilty of larceny [Citations omitted.]
>
> Defendant here clearly intended to appropriate the rifle to a use inconsistent with its owner's property rights. Assuming that defendant's immediate purpose was to deprive Adams of a weapon so Adams could not use it against him or prevent his escape, still this is not in the least inconsistent with an intent permanently to deprive Adams of his rifle. The narrow question here is whether the circumstances under which defendant took the rifle are susceptible to the inference that he had any intent other than that of permanently depriving Adams of the weapon.

Id. at 170, 150 S.E. 2d at 198. The Court answered the "narrow question" posed negatively. The Court reasoned as follows:

> Where the evidence does not permit the inference that defendant ever intended to return the property forcibly taken but requires the conclusion that defendant was totally indifferent as to whether the owner ever recovered the property, there is no justification for indulging the fiction that the taking was for a temporary purpose, without any *animus furandi* or *lucri causa*.

> In *State v. Smith*, 68 S.W. 2d 696 (Mo. Sup. Ct.), prisoners, after a jail break, took an automobile at revolver point in order to make good their escape. In affirming a conviction of armed robbery, the Court said, 'We think the taking of the automobile was done with the intention of depriving the owner permanently, even though they later abandoned it.'
>
> It would be unreasonable to assume that defendant, fleeing from arrest for the crime of felonious breaking and entering, had any expectation of returning the rifle he had taken in order to effect his escape. To do so by any certain means would be to invite detection and capture. For the purpose of decision here, we assume that defendant took the rifle 'for temporary use' and that after it had served his purpose of escape, he intended to abandon it at the first opportunity lest it lead to his detection. Such procedure, however, would leave Adams' recovery of his rifle to mere chance and thus constitute 'such reckless exposure to loss' that it is consistent only with an intent permanently to deprive the owner of his property. See 32 Am. Jur., Larceny § 37 (1941). In abandoning it, defendant put it beyond his power to return the rifle and showed total indifference as to whether Adams ever recovered his rifle. When, in order to serve a temporary purpose of his own, one takes property (1) with the specific intent wholly and permanently to deprive the owner of it, or (2) under circumstances which render it unlikely that the owner will ever recover his property and which disclose the taker's total indifference to his rights, one takes it with the intent to steal (*animus furandi*). A man's intentions can only be judged by his words and deeds; he must be taken to intend those consequences which are the natural and immediate results of his acts.

Id. at 172-73, 150 S.E. 2d at 200.

As in *Smith*, all the evidence here tends to show defendant never intended to return the car and that he took it and disposed of it under circumstances rendering it unlikely that it would ever be recovered and with indifference to the rights of the car's owner. Therefore, even if defendant did use the car to escape the scene at a time when he was confused and scared, these facts, under *Smith*, would not exculpate him.

The trial judge here clearly instructed the jury that, in order to find defendant guilty of robbery of the car, it must find beyond a reasonable doubt that defendant, among other things, took the car and carried it away "knowing that he was not entitled to take the property and intending at the time to deprive any person entitled to it permanently of its use . . . ." The court then told the jury immediately, "if, however, you do not so find the facts or have a reasonable doubt that such are the facts, your duty would be to return" a not guilty verdict. Under the facts and applicable legal principles this was a sufficient instruction on the issue of defendant's felonious intent.

[2] Defendant maintains the sentencing judge erred when he considered as an aggravating circumstance that defendant was on pretrial release in a separate felony case, "to wit: Breaking or Entering and Larceny in case #81CRS23007, Durham," when he committed the crime for which he was being sentenced. Defendant contends that consideration of such a circumstance violates his right to constitutional due process. We find no merit in this argument.

North Carolina General Statute § 15A-1340.4(a) provides in part:

> In imposing a prison term, the judge, under the procedures provided in G.S. 15A-1334(b), may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing, whether or not such aggravating or mitigating factors are set forth herein, but unless he imposes the term pursuant to a plea arrangement as to sentence under Article 58 of this Chapter, he *must* consider each of the following aggravating and mitigating factors:
>
> (1) Aggravating factors:
>
> . . . .
>
> k. The defendant committed the crime while on pretrial release on another felony charge.

N.C. Gen. Stat. § 15A-1340.4(a)(1)k (Cum. Supp. 1981) (emphasis added). Defendant has failed to support his contention that N.C.

Gen. Stat. § 15A-1340.4(a)(1)k is unconstitutional with any authority, and our research has revealed none. Although a defendant on pretrial release in an unrelated felony case has not been convicted of the felony and is presumed to be innocent of its commission, he is in a special status with regard to the criminal law. He has not simply been accused of another crime, he has been formally arrested, appeared before a magistrate, and had the conditions of his release pending trial for this crime formally determined. *See generally,* N.C. Gen. Stat. §§ 15A-501 to -511 & -531 to -547 (1978 & Cum. Supp. 1981). Whether or not one in this position is in fact guilty, it is to be expected that he would, while the question of his guilt is pending, be particularly cautious to avoid commission of another criminal offense. If he is not and is convicted of another offense, his status as a pretrial releasee in a pending case is a legitimate circumstance to be considered in imposing sentence. The legislature may constitutionally require that it be considered. One demonstrates disdain for the law by committing an offense while on release pending trial of an earlier charge, and this may indeed be considered an aggravating circumstance.

We find no error in defendant's conviction and sentence in either the murder case, No. 81CRS25821, or the armed robbery case, No. 81CRS29048.

No error.

STATE OF NORTH CAROLINA v. REGINALD STANLEY POLK

No. 152A83

(Filed 3 November 1983)

1. Conspiracy § 5.1— statements by co-conspirators—admissibility against defendant

The State's evidence was sufficient to make a *prima facie* showing of a conspiracy to commit sexual assaults so that statements made by two co-conspirators in furtherance of the conspiracy were admissible against defendant where it tended to show that defendant and the two co-conspirators were in a convenience store parking lot when they observed the victim enter the parking lot; shortly thereafter, one co-conspirator went to the victim's automobile and was quickly joined by the other co-conspirator; one co-conspirator entered the automobile, and after he left the victim discovered

that her keys were missing; the second co-conspirator knew that the keys had been taken and enticed the victim into going with him on the pretext of recovering the keys; as the second co-conspirator and the victim walked away from the parking lot, defendant appeared and followed them; and the second co-conspirator then forced the victim to go to the steps of a nearby church where all three men took part in sexual assaults upon the victim.

2. **Conspiracy § 5.2— declarations of co-conspirators—prima facie case of conspiracy—order of proof**

Because of the nature of a conspiracy, the State can seldom establish a *prima facie* case of conspiracy by extrinsic evidence before tendering the acts and declarations of the conspirators which link them to the crimes charged. Therefore, our courts often permit the State to offer the acts or declarations of a conspirator before the *prima facie* case of conspiracy is sufficiently established, but the prosecution must properly prove the existence of the *prima facie* case of conspiracy before the close of the State's evidence in order to have the benefit of these declarations and acts.

3. **Conspiracy § 5.2— declarations of co-conspirators—failure to show prima facie case of conspiracy**

If inadmissible statements of co-conspirators are admitted and it develops that a case of conspiracy has not been shown, then upon proper motion the trial judge may strike the evidence of declarations or acts of the co-conspirators or grant a defendant's motion for judgment as of nonsuit if there is insufficient evidence to take the case to the jury without the aid of such declarations or acts.

4. **Conspiracy § 5.2— declarations of co-conspirators—voir dire hearing**

If he so chooses, the trial judge may, at any point in the trial, conduct a voir dire hearing in order to determine whether the evidence makes out a *prima facie* case of conspiracy for purposes of admitting the acts and declarations of co-conspirators in furtherance thereof.

5. **Rape and Allied Offenses § 2— aider and abettor of sexual offense—first degree offense**

Under our first degree sexual offense statute, an aider and abettor of a sexual offense is guilty of a first degree sexual offense or nothing at all. G.S. 14-27.4(a).

6. **Rape and Allied Offenses § 2— first degree sexual offense—aider and abettor**

By its enactment of G.S. 14-27.4(a)(2)(c), the legislature chose to include in the more serious first degree categories those sexual offenses which involved aiders and abettors and to subject to a harsher penalty those who participated in gang assaults, regardless of the actual role of the participant.

7. **Criminal Law §§ 26.5, 138; Rape and Allied Offenses § 7— first degree sexual offense—aider and abettor—no multiple convictions or enhanced punishment by use of same element twice**

Defendant was not subjected to multiple convictions or to enhanced punishment by an improper use of the same element twice when he was con-

victed of a first degree sexual offense on the theory that he aided and abetted two co-conspirators in a first degree sexual offense since defendant's acts of aiding and abetting, though used to elevate the charges against the co-conspirators to first degree offenses in the first instance, were used against defendant only once, that is, to find him guilty of the crime of first degree sexual offense by reason of aiding and abetting.

APPEAL by defendant from judgment of *Hobgood, Judge*, entered at the 25 October 1982 Session of WAKE County Superior Court.

Defendant was charged in bills of indictment proper in form with first-degree rape, first-degree sexual offense, and conspiracy to commit rape. Defendant entered pleas of not guilty to each of the offenses charged.

The State offered evidence tending to show the following:

The prosecutrix, Joyce Stancil Williams, was a registered nurse who worked the night shift at Rex Hospital in Raleigh, North Carolina. She had made arrangements to be off work the evening of 13 June 1982. She left her apartment at approximately 12:45 a.m. on 14 June 1982 to visit a friend on Calloway Drive, located off Old Garner Road. Upon arriving at Old Garner Road, Ms. Williams entered a Fast Fare driveway and was driving through to determine if a club at the other end of the street was open. As she did so, a black male, later identified as Mike Peebles, approached her car on the passenger side and asked what her name was and where she was going. He also asked her if she wanted to get high. When she responded in the negative, he opened the door on the passenger side and entered her automobile. Ms. Williams also noticed another black male approaching the driver's side of her car. The second male was later identified as Laney Partin. Partin also asked Ms. Williams for her name, where she was going, and about "smoking some reefer and snorting cocaine." After responding that she did not use drugs, Ms. Williams stated that she had to go indicating that she wanted him to leave her car. At that point, both men went to the rear of her car and began talking. Peebles then returned to his car and drove up Garner Road toward Bailey Drive. Ms. Williams then noticed that her keys were missing. She asked Partin about them and he replied that "those guys" probably had her keys, and that he would take her to get them. Ms. Williams left her car and

walked with Partin across a Gulf station yard adjacent to the Fast Fare. She observed a phone booth, and she attempted to call the police. Partin took the receiver out of her hand, told her to shut up, and pulled her out of the phone booth. He seized her arm and pushed her up Bailey Drive. When Ms. Williams began crying and asked him to stop, he hit her in the jaw with his fist and knocked her down into a mud puddle. Partin then jerked her up and pulled her arms behind her back and held them. When Partin struck Ms. Williams, her pocketbook fell off of her shoulder and some of its contents spilled out.

At that point, Ms. Williams noticed another black male coming down Bailey Drive toward them from the direction of the Circle of Faith Church. The man, later identified as defendant, picked up the pocketbook. As Partin shoved and pushed Ms. Williams along the street, she heard defendant walking behind them. Partin took Ms. Williams to the rear steps of the Circle of Faith Church. Ms. Williams saw three males standing at the back of the church. Two of the men were later identified as Michael Peebles and defendant.

Partin told Ms. Williams to pull her pants down and upon her refusal, he and defendant unfastened her jeans. Partin pushed her down on the steps and took off her pants and her underpants. While Peebles and defendant stood by, Partin had intercourse with her by force. During this time, one of the other men was holding her legs up in the air. Defendant then pushed Partin off of Ms. Williams, telling Partin that "he won't going to do anything." Defendant then began having intercourse with Ms. Williams, while Peebles held her legs up in the air.

At this point, Partin said, "I want some head, bitch," and shoved his penis into her mouth. When Partin removed his penis, Peebles forced his penis into her mouth. During this time, defendant was still having vaginal intercourse with the prosecutrix. At some point, Partin left. After defendant finished, Peebles had vaginal intercourse with her. At that time, Ms. Williams recognized the sound of her car approaching. She said, "Here comes the police. Y'all better get up." Defendant and Peebles both got up and ran.

Before she had time to put on her clothes, Ms. Williams heard her car being driven through the mud and bushes. Laney

Partin jumped out of the car and ran over to her. Defendant handed her pants to her and told her to put them on. Partin jerked her up from the steps and told her to come on. Peebles and defendant left. Partin then shoved Ms. Williams into her car, and drove away from the church. As the result of Ms. Williams' inquiry about her purse, Partin drove down Bailey Drive and through several streets before slowing down beside a house where defendant was walking across the lawn. Defendant, pursuant to Partin's instructions, threw Ms. Williams' purse to Partin who then drove to a Best Western Hotel located on the outskirts of Raleigh. After trying unsuccessfully to get into several of the rooms, Partin took Ms. Williams with him to the lobby of the motel. She stood behind Partin and mouthed words to the clerk to the effect that she was being raped. When the clerk went to the back to check for a key, Partin leaned across the desk and obtained a key from the board. When the clerk returned, Ms. Williams mouthed the number of the key taken by Partin. Partin took Ms. Williams around to the side of the building where he was taken into custody by police officers.

Ms. Sally Lynn Davis, night auditor for the Best Western Motel, Detective L. K. Barbour and Officer D. S. Overman gave testimony which substantially corroborated a portion of Ms. Williams' testimony. The trial judge correctly instructed the jury that this evidence was for the purpose of corroboration only.

Detective Barbour also testified concerning a statement made to him by defendant. According to defendant's statement, he had gone with Mike Peebles and Laney Partin to the Fast Fare on Garner Road "to drink." While defendant was still seated in the car, Mike Peebles got out of the car to approach a young lady. Shortly thereafter, Laney Partin went over to talk with her. Then defendant and Peebles left and drove down Bailey Drive. Defendant stated that they soon stopped and he headed back on foot, at which time he saw Partin holding the young lady's arm. Defendant picked up her belongings and went to the church. Defendant admitted that all three of the men had intercourse with Ms. Williams.

Defendant presented no evidence.

The jury returned verdicts of guilty as to all three charges. The trial judge imposed consecutive life sentences on the convic-

tions of first-degree rape and first-degree sexual offense and a concurrent sentence of three years upon the conspiracy conviction.

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

Adam Stein, Appellate Defender, by Marc D. Towler, Assistant Appellate Defender, for defendant appellant.

BRANCH, Chief Justice.

[1] Defendant contends that the trial court erred in admitting into evidence certain statements made by Laney Partin and Michael Peebles. Defendant maintains that these statements were hearsay and did not fall within the exception applicable to statements made by co-conspirators because the State had not shown that a conspiracy existed at the time the statements were made.

The rule governing the admission of co-conspirators' statements is that once the State has made a *prima facie* showing of the existence of a conspiracy, "the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members." *State v. Conrad*, 275 N.C. 342, 348, 168 S.E. 2d 39, 43 (1969). Prior to considering the acts or declarations of one co-conspirator as evidence against another, there must be a showing that:

> (1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended.

Id.; State v. Tilley, 292 N.C. 132, 232 S.E. 2d 433 (1977).

Defendant contends that the State's evidence was insufficient to make a *prima facie* showing that a conspiracy existed at the time Partin's and Peebles' out-of-court statements were made. He argues that there is insufficient evidence that defendant had any involvement until he appeared to retrieve Ms. Williams' purse, and therefore, any statements made prior to that time were inadmissible. We disagree.

First, it is well settled that a conspiracy "may be, and generally is, established by a number of indefinite acts, each of

which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933). In order to make out a *prima facie* case, the State must produce "sufficient evidence to authorize, but not necessarily compel" the jury to find that a conspiracy existed. 2 Brandis on North Carolina Evidence § 201 (2d Rev. Ed. 1982).

A review of the above-stated facts leads us to conclude that there was ample evidence to permit, but not compel, the jury to find that a conspiracy to commit the sexual assaults against Ms. Williams was formed among defendant, Peebles and Partin. These three men were in the Fast Fare parking lot drinking when they observed Ms. Williams enter the parking lot. Shortly thereafter, Peebles went to her automobile and was quickly joined by Partin. Peebles entered the automobile and after he left, Ms. Williams discovered that her keys were missing. Partin knew that Peebles had taken the keys and Partin enticed the victim into going with him on the pretext of recovering the keys. As Partin and Ms. Williams walked away from the service station lot and up Bailey Drive, defendant appeared and followed them. Partin then forced the victim to go to the church steps where all three men took part in sexual assaults upon the victim.

These facts would permit a jury to reasonably infer that the three men had agreed to commit sexual assaults upon Ms. Williams, had agreed on the manner in which she would be carried to a secluded place and agreed upon the location of the place where the crimes were to be committed.

The trial court properly admitted into evidence the statements made by the co-conspirators. This assignment is overruled.

[2, 3] We note that, upon defendant's objection to the admission of this evidence, the trial court conducted a *voir dire* hearing and heard the proposed testimony. The court found facts and concluded that the State had established the existence of the conspiracy and that the challenged statements were admissible as statements of co-conspirators. Because of the nature of a conspiracy, the State can seldom establish a *prima facie* case of conspiracy by extrinsic evidence before tendering the acts and declarations of the conspirators which link them to the crimes

charged. Therefore, our courts often permit the State to offer the acts or declarations of a conspirator before the *prima facie* case of conspiracy is sufficiently established. Of course, the prosecution must properly prove the existence of the *prima facie* case of conspiracy before the close of the State's evidence in order to have the benefit of these declarations and acts. *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433; *State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39; *State v. Jackson*, 82 N.C. 565 (1880). If inadmissible statements are admitted and it develops that a case of conspiracy has not been shown, then upon proper motion the trial judge may strike the evidence of declarations or acts of the co-conspirators or grant a defendant's motion for judgment as of nonsuit if there is insufficient evidence to take the case to the jury without the aid of such declarations or acts. 16 Am. Jur. 2d, "Conspiracy," § 38 (1979); *State v. Thompson*, 273 Minn. 1, 139 N.W. 2d 490, *cert. denied*, 385 U.S. 817 (1966).

[4] If the trial judge finds that the *prima facie* case has been shown, the declarations and acts of the conspirators are admitted and the case is sent to the jury with proper instructions. Of course, if he so chooses, the trial judge may, at any point in the trial, conduct a *voir dire* hearing in order to determine whether the evidence makes out a *prima facie* case of conspiracy for purposes of admitting the acts and declarations of co-conspirators in furtherance thereof.

Defendant assigns as error the failure of the trial court to dismiss the charge of first-degree sexual offense. He argues that the evidence showed only that he aided and abetted in that offense.

The trial judge submitted the charge of first-degree sexual offense solely on the theory that defendant acted in concert with, or aided and abetted, Peebles and Partin in their commission of a first-degree sexual act.

G.S. 14-27.4(a) defines first-degree sexual offense and provides in pertinent part:

> § 14-27.4. First-degree sexual offense.
>
> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> * * * *

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

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

[5] It is well established that a person who is present and aids and abets another in the commission of a criminal offense is as guilty as the principal perpetrator of the crime. *State v. Keller*, 268 N.C. 522, 151 S.E. 2d 56 (1966). This Court has also held that, under our first-degree sexual offense statute, an aider and abettor of a sexual offense is guilty of a first-degree sexual offense or nothing at all. *State v. McKinnon*, 306 N.C. 288, 293 S.E. 2d 118 (1982); *State v. Barnette*, 304 N.C. 447, 284 S.E. 2d 298 (1981). Under the statutory scheme, a person who commits a sexual act "with another person by force and against the will of the other person," and who also is "aided and abetted by one or more persons" is guilty of a first-degree sexual offense. An aider and abettor is as guilty as the principal offender, and thus an aider and abettor of any sexual offense *ipso facto* becomes guilty of a first-degree offense. *Id.*

[6] It is evident that the Legislature, by its enactment of G.S. 14-27.4(a)(2)c., chose to include in the more serious first-degree categories those sexual offenses which involved aiders and abettors and to subject to a harsher penalty those who participated in gang assaults, regardless of the actual role of the participant. G.S. 14-27.4. *See* G.S. 14-27.2 (first-degree rape). In so doing, the Legislature acknowledged the increased severity of rapes and other sexual offenses committed by persons acting in concert.

A California court, addressing its statute on rapes committed by parties acting together in concert, observed that the purpose of the provision was "to provide increased punishment where there is a gang sexual assault and to insure that those who participate in such assaults, either by personally engaging in the

ultimate sexual act or by voluntarily helping others to accomplish it, receive the enhanced punishment." *People v. Calimee*, 49 Cal. App. 3d 337, 341, 122 Cal. Rptr. 658, 660 (1975). Another California court summed up the legislative purpose succinctly:

> Rape is never very funny and one-on-one rape is hardly a laughing matter. However, it is even more reprehensible when committed by two or more persons.

People v. Lopez, 116 Cal. App. 3d 882, 886, 172 Cal. Rptr. 374, 376 (1981).

[7] Even so, defendant argues that his offense, aiding and abetting, is being improperly twice used against him to elevate his punishment. In essence, he contends that his aiding and abetting first elevated the principal offense to one of first degree, and then was used again to make him a participant in that crime.

Defendant makes no double jeopardy claim but rather attempts to draw an analogy between his case and those death penalty and presumptive sentencing cases in which this Court has struck down aggravating factors which duplicate an element of the underlying offense. *E.g.*, *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. Cherry*, 298 N.C. 86, 257 S.E. 2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980).

It is true that we have consistently held that a factor which is an element of an underlying offense cannot also be used to aggravate, or elevate, the sentence imposed. In *State v. Cherry*, 298 N.C. at 113, 257 S.E. 2d at 567-68, addressing a felony murder sentencing issue, we said,

> Once the underlying felony has been used to obtain a conviction of first degree murder, it has become an element of that crime and may not thereafter be the basis for additional prosecution or sentence. Neither do we think the underlying felony should be submitted to the jury as an aggravating circumstance in the sentencing phase when it was the basis for, and an element of, a capital felony conviction.

Defendant also relies upon *People v. Haron*, 85 Ill. 2d 261, 422 N.E. 2d 627 (1981), for his contention that the State may not twice use his aiding and abetting against him. In *Haron*, the defendant was charged with both armed violence and aggravated battery.

The armed violence statute prohibited commission of any felony "while armed with a dangerous weapon." Ill. Rev. Stat. 1979, ch. 38, par. 33A-2. However, the charge of aggravated battery was itself a felony which had been elevated from simple battery due to the use of a dangerous weapon. The court held that the predicate felony had an underlying element which could not then also be used to charge and convict defendant of the separate offense. The court noted,

> Our review of the language of the statute and the authorities leads us to conclude that the General Assembly did not intend that the presence of a weapon serve to enhance an offense from misdemeanor to felony and also to serve as the basis for a charge of armed violence.

Id. at 278, 422 N.E. 2d at 634.

Defendant's reliance upon our sentencing cases as well as upon *Haron* is misplaced. Here we are not concerned with the aggravation or elevation of a sentence; nor are we concerned with conviction of two offenses based on an unfair duplication of one element. In this case, defendant has only been convicted of one crime, to wit, a first-degree sexual offense by reason of his aiding and abetting. While it is true that aiders and abettors are as guilty of the offense as are principals, *State v. Keller*, 268 N.C. 522, 151 S.E. 2d 56 (1966), it is likewise true that aiding and abetting has a separate and distinct identity. *See State v. Graven*, 52 Ohio St. 2d 112, 6 Ohio Op. 3d 334, 369 N.E. 2d 1205 (1977). In this case, the principal acts constituting the crime were actually committed by Partin and Peebles. Though his participation and assistance made him guilty as a principal, defendant nevertheless did not commit the actual acts constituting the first-degree sexual offense. Thus, while defendant's acts of assistance were properly used under the statute to elevate the charges against Peebles and Partin to first-degree offenses in the first instance, defendant's acts of aiding and abetting were used against him only once, that is, to find him guilty of the crime of first-degree sexual offense by reason of aiding and abetting. Simply stated, defendant was convicted of only one offense, first-degree sexual offense by reason of his aiding and abetting a first-degree sexual offense committed by two other persons. He has not been subjected to multiple convic-

tions or to enhanced punishment by an improper use of the same element twice. This assignment is overruled.

Defendant received a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. THOMAS ALBERT TAYLOR

No. 153A83

(Filed 3 November 1983)

1. **Criminal Law § 138— sentencing hearing—aggravating factor that defendant used deadly weapons—improper consideration**

In a prosecution for second degree murder, the trial court incorrectly considered as an aggravating factor that defendant was armed with or used a deadly weapon during the commission of the offense since, even though defendant pled guilty to both homicides, use of the deadly weapon was necessary to prove the element of malice. G.S. 15A-1340.4(a)(1)i.

2. **Criminal Law § 138— evidence used to prove act of violence different from evidence used to prove use of deadly weapon**

It is proper for a sentencing judge to use the existence of a deadly weapon to find both the aggravating factor that defendant was armed with or used a deadly weapon during the commission of the offense and to find the aggravating factor that a murder was committed during the course of conduct in which defendant engaged in an act of violence against another person. Evidence used to prove the act of violence against another differs from that used to prove the use of a deadly weapon in that the gravamen of the factor is not merely the use of a weapon, but that the weapon was used to commit an act of violence against someone other than the victim of the crime. G.S. 15A-1340.4(a)(1)i.

3. **Criminal Law § 138— failure to find mitigating factor of good character or reputation—no abuse of discretion**

The sentencing court did not err in failing to find as a mitigating factor that defendant possessed good character and reputation where none of defendant's character witnesses claimed familiarity with the community where defendant lived nor his reputation in that community; where the witnesses testified, in essence, that they had never observed defendant act violently or unlawfully and that around them he was well behaved; and where all witnesses were either longtime friends or social acquaintances of defendant. The testimony was not of such quality and definiteness as to be overwhelmingly persuasive on the question of defendant's good character or good reputation in the community where he lived, and because of this and because of the

character witnesses' relationships to defendant, the credibility of the testimony was not manifest.

4. Criminal Law § 138— limited mental capacity mitigating factor properly not found

The trial court properly failed to find as a mitigating factor that defendant had "limited mental capacity" at the time of the offense since defendant's evidence dealt solely with his chronic brain syndrome, a mental illness, and the trial court found that defendant suffered from a "mental condition." G.S. 15A-1340.4(a)(2)(d) and G.S. 15A-1340.4(a)(2)(e).

APPEAL by defendant from a judgment of *Judge Donald L. Smith*, entered at the 25 October 1982 Criminal Session of ANSON Superior Court imposing a life sentence. N.C. Gen. Stat. § 7A-30 (1981). Defendant's petition to bypass the Court of Appeals in a companion case in which Judge Smith imposed a sentence of fifteen years' imprisonment was allowed. *Id.* § 7A-31.

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

H. P. Taylor, Jr., for defendant appellant.

EXUM, Justice.

Defendant pled guilty to the second degree murder of his wife, Sara Bell Taylor, and his sister-in-law, Mary Lou Kiker. After a sentencing hearing, defendant received the presumptive term of fifteen years' imprisonment in the murder of his wife and a life sentence in the murder of Ms. Kiker. Defendant alleges numerous errors in the sentencing judge's findings in aggravation and mitigation.

The facts involved in this incident are essentially undisputed. We summarize briefly:

On 9 August 1982 at approximately 7 a.m., defendant met his estranged wife at a local diner. After discussing several items, including payment of automobile liability insurance, defendant's wife told him to bring the insurance notice to her along with money necessary to pay the premium. Later, defendant went to his sister-in-law's residence where his wife was living. He told his wife, who was outside the house at the time, that he could not find the premium notice. He then went to his house, picked up all of the mail, and returned to his wife. Without exiting his truck,

he handed his wife the mail. She threw it back through the window of the truck, saying that the insurance premium notice was not among those papers.

At that point, Taylor returned to his house, searched for and found the insurance premium notice, and proceeded back to see his wife. She came up to the truck as he approached Ms. Kiker's house. Defendant gave her the insurance premium notice. She told him that she needed money to pay the premium, and defendant got out of the truck to get the money for her from the rear compartment. At that point, she reached into the cab of the truck and picked up a pistol. Defendant looked up, saw her pointing the gun at him, and forcibly took it from her. As she began to scream and run toward the house, defendant fired the pistol. He followed his wife into Ms. Kiker's house. As defendant entered the house to look for his wife, he heard a noise behind him, turned, and fired his gun twice. These shots struck and eventually killed Ms. Kiker. His wife then ran through the house with both hands up, knocking defendant backwards. At that point, defendant shot again. His wife ran across the street to a neighbor's house, where she collapsed on the steps and died.

Defendant left and returned to his home nearby. Later that morning, the police located him there and took him into custody without incident. Defendant voluntarily confessed to both homicides.

In both cases Judge Smith found identical aggravating circumstances: defendant used a deadly weapon; each homicide was committed during a course of conduct in which defendant committed an act of violence against another person, *i.e.*, the murders, respectively, of Mary Kiker in the case in which Sara Taylor was the victim and of Sara Taylor in the case in which Mary Kiker was the victim; defendant tends "to react impulsively and violently and therefore needs restraining to protect the public." *See* N.C. Gen. Stat. § 15A-1340.4(a) & (1)(i) (1981 Cum. Supp.). In both cases Judge Smith found these identical mitigating circumstances: defendant had no prior criminal record; defendant suffered from "chronic brain syndrome," a mental condition "insufficient to constitute a defense but [which] significantly reduced his culpability for the offense"; and defendant voluntarily acknowledged his wrongdoing "at an early stage of the criminal process." *See id.*

§ 15A-1340.4(a)(2)(a), (d), & (11). In the case involving defendant's wife's murder, Judge Smith found an additional mitigating circumstance: "defendant acted under strong provocation, or the relationship between defendant and the victim was otherwise extenuating." *See id.* § 15A-1340.4(a)(2)(i).

In defendant's wife murder, Judge Smith concluded that the aggravating and mitigating factors were evenly balanced, neither outweighing the other; hence, he imposed the presumptive sentence. In defendant's sister-in-law's murder, Judge Smith concluded the aggravating factors outweighed the mitigating, and he imposed the maximum sentence permitted.

I.

[1] We first consider defendant's contention that the sentencing judge erred in finding in both cases, as an aggravating factor, that defendant was armed with or used a deadly weapon during the commission of the offense. N.C. Gen. Stat. § 15A-1340.4(a)(1)i. The legislature has prohibited the use of evidence necessary to prove elements of the offense in proving factors in aggravation. *Id.* § 15A-1340.4(a)(1). A *per se* rule exists in this state that, when the facts justify an inference of malice arising from the use of a deadly weapon, evidence concerning the use of that deadly weapon may not be used to support an aggravating factor at sentencing. *State v. Blackwelder,* No. 231A83, slip op. at 9-10 (filed 27 September 1983). In this case, malice can be inferred from both murders having been perpetrated by the use of a deadly weapon. Even though defendant pled guilty to both homicides, we deem use of the deadly weapon to be evidence necessary to prove the element of malice. *Id.* at 10 n. 3. Therefore, evidence of the weapon's use could not also support the deadly weapon aggravating factor. Defendant is entitled to a new sentencing hearing in both cases due to the error in finding the aggravating circumstance that he used a deadly weapon. *See State v. Ahearn,* 307 N.C. 584, 300 S.E. 2d 689 (1983).

II.

[2] Defendant further contends the sentencing court erred in using the same item of evidence to prove more than one aggravating factor. Specifically, defendant argues the sentencing judge improperly used the existence of a deadly weapon in find-

ing both the aggravating circumstance discussed above and the aggravating circumstance that each murder was committed during a course of conduct in which defendant engaged in an act of violence against another person. We disagree.

The legislature has prohibited not only the use of "evidence necessary to prove an element of the offense" to prove a factor in aggravation, but also the use of the "same item of evidence . . . to prove more than one factor in aggravation." N.C. Gen. Stat. § 15A-1340.4(a)(1). We hold here that finding the use of a deadly weapon as a factor aggravating the murders violated the first prohibition. Even if this finding had been properly made, the second prohibition would not, we conclude, render unavailable an additional aggravating factor that defendant used the weapon in a course of conduct involving violence against others. Although the deadly weapon is common to both factors, evidence tending to prove each factor must necessarily be different. Proof of the "deadly weapon" factor requires evidence that defendant simply "was armed with or used a deadly weapon at the time of the crime." *Id.* § 15A-1340.4(a)(1)(i). This factor relates to the use of a deadly weapon in the very crime for which defendant is being sentenced. If defendant also uses the deadly weapon to commit acts of violence against another person, this additional aggravating circumstance requires a different evidentiary underpinning. The gravamen of this factor is not merely the use of a weapon, but that the weapon was used to commit an act of violence against someone other than the victim of the crime. Evidence, therefore, used to prove the act of violence against another differs from that used to prove the use of a deadly weapon in the crime for which defendant is being sentenced, even if the same deadly weapon is involved in both acts.

III.

Defendant finally contends that the sentencing court erred in failing to find certain factors in mitigation: (1) his good character or reputation; (2) his limited mental capacity at the time the offense was committed; and (3) the existence of strong provocation in the murder of his sister-in-law. We examine each of these contentions separately.

[3] Defendant offered the testimony of four character witnesses: William Burris, Booker Sturdivant, Edgar Sturdivant, and Jesse

Willoughby. Each witness testified he had known defendant approximately five years. Burris testified:

> We are good friends and were good friends. . . . I have seen him in all types of conditions, drunk and sober, and in circumstances where he could have been violent. I have never seen him act violent. . . . [H]e is not violent . . . to my knowledge. He did not have a reputation for violence. And did not have a reputation for mistreating his wife. . . . I have known him to drink but he never mistreated anybody and never was any trouble as far as I know.

Booker Sturdivant testified:

> I hang around the pool room and I shot pool with him several times. I have never observed any violence on his part. . . . As far as I know he has always been a law-abiding citizen. I don't know his general character and reputation. I have never observed him doing anything unlawful or misbehaving in any way.

Edgar Strudivant testified:

> I have occasion to know him because he came up around the pool room and I shot pool with him. I never observed any acts of violence on the part of Mr. Taylor. He has always been a law-abiding citizen as far as I know and has behaved himself as far as I know he had a good character and reputation.

Jesse Willoughby testified:

> He came around the pool room. He was always well behaved when he was in the pool room. . . . As far as his general character and reputation all I know is he was just good around us. That's all I know.

One mitigating circumstance listed in the Fair Sentencing Act is that "defendant has been a person of good character or has had a good reputation in the community in which he lives." N.C. Gen. Stat. § 15A-1340.4(a)(2)m (1981 Cum. Supp.). Strictly, "[c]haracter and reputation are, of course, two different things." *State v. Davis*, 291 N.C. 1, 15, 229 S.E. 2d 285, 295 (1976). "Character is what a [person] *is*; reputation is what others *say* [the person] is." 1 Brandis on North Carolina Evidence § 102 (2d

rev. ed. 1982) (hereinafter Brandis). In cases where character is relied on as evidence of a person's probable conduct or credibility as a witness, it may be proved by other witnesses only by testimony as to reputation. *Davis*, 291 N.C. at 15-16, 229 S.E. 2d at 295 (conduct); *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373, 385 (1978) (credibility).

When, however, character is "a direct issue in the case," 1 Brandis § 102, "evidence is much more freely admitted than where character is only collaterally involved." 1 Brandis § 113. In such cases, character may be proved, not only by reputation, but also by the opinions of witnesses who have firsthand knowledge of it and by specific good or bad acts of the person whose character is in question. *In re Rogers*, 297 N.C. 48, 253 S.E. 2d 912 (1979) (opinion evidence admitted as well as specific acts); *State v. Hopper*, 186 N.C. 405, 119 S.E. 769 (1923) (husband testified to wife's virtue). *See generally*, 1 Brandis § 113.

Under N.C. Gen. Stat. § 15A-1340.4(a)(2)m, a defendant's character and his reputation in the community where he lives are direct issues in the case for purposes of sentencing. Evidence of both, therefore, should be liberally received, not only because they are directly in issue but also because we accord more liberality in the admissibility of evidence when it is being considered by a trial judge for purposes of sentencing than when by a jury for some other purpose. *See generally, State v. Perry*, 265 N.C. 517, 144 S.E. 2d 591 (1965); *State v. Pope*, 257 N.C. 326, 126 S.E. 2d 126 (1962).

The question before us is not, however, the admissibility of the evidence regarding defendant's character and reputation; the question is whether the evidence is such as to compel the trial judge to find as a mitigating factor that defendant was a person of good character or had a good reputation in the community in which he lives. We conclude it is not. We recently held in *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983), that a defendant at a sentencing hearing under the Fair Sentencing Act bears the burden of persuasion on mitigating factors. When he argues that his evidence is such as to compel the finding of a mitigating factor,

> his position is analogous to that of a party with the burden of persuasion seeking a directed verdict. He is asking the court

> to conclude that 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,' and that the credibility of the evidence 'is manifest as a matter of law.'

Id. at 219-20, 306 S.E. 2d at 455, *quoting North Carolina National Bank v. Burnette*, 297 N.C. 524, 536-37, 256 S.E. 2d 388, 395 (1979). We held in *Jones* that "in order to give proper effect to the Fair Sentencing Act, we must find the sentencing judge in error if he fails to find a statutory factor when evidence of its existence is both uncontradicted and manifestly credible." 309 N.C. at 220, 306 S.E. 2d at 456.

Although defendant's evidence of his good character and reputation is uncontradicted, it is not manifestly credible. Except for William Burris, the other three witnesses admitted that their knowledge of defendant's character and reputation was limited. All three testified that their knowledge arose from occasions when they shot pool with defendant and observed him "around the pool room." Booker Sturdivant conceded that he did not know defendant's general character and reputation. Both Edgar Sturdivant and Jesse Willoughby further qualified their statements with phrases such as "as far as I know" and "all I know is he was just good around us." William Burris conceded that he and defendant "are good friends and were good friends."

On defendant's reputation, none of his witnesses claimed familiarity with the community where defendant lived nor with his reputation in that community. They did not testify that his reputation in that community was good. Yet the mitigating factor defined by the statute is that defendant "has had a good reputation in the community *in which he lives.*" (Emphasis supplied.) On defendant's character, the witnesses testified, in essence, that they had never observed defendant act violently or unlawfully and that around them he was well behaved. Good character, though,

> is something more than an absence of bad character. . . . Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing if it is wrong.

In re Applicants for License, 191 N.C. 235, 238, 131 S.E. 661, 663 (1926). Finally, all witnesses were either longtime friends or so-

cial acquaintances of defendant. Although not necessarily detracting from their credibility, the relationship of the witnesses to defendant is a factor which the fact finder may consider in assessing the witnesses' credibility.

We do not purport to hold that the testimony would not have supported a finding by the trial court that defendant was a person of good character and good reputation in the community in which he lived. We simply have pointed to factors which on the face of it detract from its credibility. The testimony is simply not of such quality and definiteness as to be overwhelmingly persuasive on the question of defendant's good character or good reputation in the community where he lives. Because of this and because of the character witnesses' relationships to defendant, we conclude the credibility of this testimony is not manifest. Its credibility is, rather, for the trial court, who saw and observed the witnesses, to assess. It was within the trial court's prerogative to accept or reject this testimony.

[4] In support of his contention that he suffered from a limited mental capacity at the time of the offense, defendant offered the testimony of Dr. Edwin R. Harris, a clinical psychologist. Dr. Harris testified that defendant suffered from chronic brain syndrome. This condition could cause defendant to act sporadically and with some paranoia, making it difficult for him to perceive reality in a normal way. After hearing this testimony, the court found, as a factor in mitigation, that defendant suffered from a *mental condition* that was insufficient to constitute a defense but significantly reduced his culpability for the offense. *See* N.C. Gen. Stat. § 15A-1340.4(a)(2)(d). Defendant further contends that this testimony required the sentencing judge to find, as a further factor in mitigation, that defendant's "immaturity or his *limited mental capacity* at the time of commission of the offense significantly reduced his culpability for the offense." *Id.* § 15A-1340.4(a)(2)(e) (emphasis supplied). We disagree.

The two mitigating circumstances involved are different. The one which the sentencing judge found deals with a mental disease or illness, such as chronic brain syndrome, which in this case impaired defendant so as to reduce significantly his culpability. The other circumstance, which the sentencing judge did not find, concerns a defendant's "immaturity" or "limited mental capacity"

which likewise significantly reduces culpability. The phrase "limited mental capacity" is used in the sense of limited intelligence or low I.Q. Dr. Harris's testimony does not support defendant's contention that he suffered from low or limited intelligence. It dealt solely with his chronic brain syndrome, a mental illness. Accordingly, there was no evidence to support the "limited mental capacity" mitigating factor. The sentencing judge properly did not find it.

Finally, defendant contends that he acted under strong provocation from his sister-in-law. Evidence in support of this circumstance is so meager as to be almost nonexistent. The evidence of provocation or an extenuating relationship concerned defendant's wife. The sentencing judge properly found this mitigating factor in the death of defendant's wife. But in the other death, we cannot say as a matter of law that defendant carried his burden of persuasion. Therefore, the sentencing judge did not err in not finding in the death of defendant's sister-in-law that defendant acted under strong provocation.

Because of errors in the sentencing process which we have identified,[1] defendant is entitled to a new sentencing hearing. The case is remanded to the Superior Court of Anson County for a new sentencing hearing.

Remanded for a new sentencing hearing.

1. Since a new sentencing hearing will be required at which the court might sentence defendant differently than did Judge Smith, we need not address defendant's contention that Judge Smith erred in concluding under the circumstances here that defendant was significantly more culpable in his sister-in-law's murder than in the murder of his wife.

COITE P. BRADY, D/B/A BRADY BUILDING COMPANY v. EDWIN M. FULGHUM, JR. AND WIFE, PATRICIA M. FULGHUM

No. 286A83

(Filed 3 November 1983)

1. **Contracts § 6.1— unlicensed general contractor—doctrine of "substantial compliance" rejected**

The doctrine of "substantial compliance" with the general contractor's licensing statutes is rejected by the Supreme Court. G.S. 87-1; G.S. 87-13.

2. **Contracts § 6.1— unlicensed general contractor—inability to enforce construction contract**

A contract illegally entered into by an unlicensed general construction contractor in unenforceable by the contractor and cannot be validated by the contractor's subsequent procurement of a license. Neither may the contractor recover for extras, additions or changes made during construction commenced pursuant to the contract.

3. **Contracts § 6.1— enforcement of construction contract against unlicensed contractor**

Parties not regulated by the general contractor's licensing statutes may enforce a construction contract against an unlicensed contractor.

4. **Contracts § 6.1— expiration of construction contractor's license—recovery permitted**

If a licensed contractor's license expires, for whatever reason, during construction, he may recover for only the work performed while he was duly licensed. If the contractor renews his license during construction, he may recover for work performed before expiration and after renewal.

5. **Contracts § 6.1— construction contract—contractor unlicensed when contract entered—inability to enforce contract**

Plaintiff construction contractor was not entitled to recover under a contract to construct a house for defendants for $106,850.00 or for extras in construction allegedly requested by defendants where plaintiff was unlicensed at the time he negotiated and contracted with defendants to construct their house.

APPEAL by plaintiff from a decision by a divided panel of the Court of Appeals, 62 N.C. App. 99, 302 S.E. 2d 4 (1983), affirming summary judgment dismissing plaintiff's cause of action.

Raymer, Lewis, Eisele, Patterson & Ashburn by Douglas G. Eisele, for plaintiff appellant.

Aimee A. Toth and Edwin A. Pressly for defendant appellees.

EXUM, Justice.

Plaintiff brought this action for monies allegedly due under a contract for construction of a private dwelling. In affirming summary judgment for defendants, the Court of Appeals concluded that plaintiff, a general contractor, had not complied "substantially" with the statutory licensing requirements. *See* N.C. Gen. Stat. §§ 87-1 to 87-15.2 (1981). We agree with the result reached by the Court of Appeals, but we reject the substantial compliance doctrine which that court has developed in earlier licensing cases and which formed the basis of its analysis in this case.

I.

In February 1980, plaintiff agreed with defendants by written contract to construct their house for a price of approximately $106,850. Plaintiff began construction on or about 13 March 1980. Neither during the negotiation of this contract nor when he began performance was plaintiff licensed as a general contractor as required by North Carolina law. N.C. Gen. Stat. § 87-13 (1981) (making it a misdemeanor for one to undertake work as a general contractor without having first obtained a license). *See id.* § 87-1 (defining anyone who undertakes to bid upon or construct a building the cost of which is $30,000 or more as a general contractor). Plaintiff was awarded his builder's license on 22 October 1980, having passed the examination on his second attempt. At that time, he had completed two-thirds of the work on defendant's house. Defendants paid plaintiff $104,000. Plaintiff by this action seeks an additional $2,850 on the original contract and $28,926.41 for "additions and changes" requested by defendants during construction.

From an adverse decision on defendants' motion for summary judgment, plaintiff appealed. The North Carolina Court of Appeals affirmed. A majority of that court, after reviewing its cases which had developed the substantial compliance doctrine, concluded that plaintiff was not entitled to the benefit of the doctrine. Chief Judge Vaughn, dissenting, concluded that he was.

II.

The legislature has provided a mechanism for certification of general construction contractors. N.C. Gen. Stat. § 87-1 (1981). This process, anchored by the provision that a general contrac-

tor's failure to procure a license constitutes a misdemeanor, *id.* § 87-13, protects the public by insuring confidence and integrity within the construction industry. *Builders Supply v. Midyette*, 274 N.C. 264, 270, 162 S.E. 2d 507, 512-13 (1968). Although the statute does not expressly preclude an unlicensed contractor's suit against an owner for breach of contract, *Midyette* held the contractor may not recover on the contract or in *quantum meruit* when he has ignored the protective statute.

After *Midyette* the Court of Appeals determined several cases, including the one at bar, in terms of whether the contractor had "substantially" complied with the licensing statutes. In *Holland v. Walden*, 11 N.C. App. 281, 181 S.E. 2d 197, *disc. rev. denied*, 279 N.C. 349, 182 S.E. 2d 581 (1971), the general contractor was not licensed at the time the contract to build defendant's house was made nor when construction commenced some six weeks later. The contractor finally obtained a license two months after construction began and held a valid license during the remainder of the twenty-one month construction period. The Court of Appeals concluded that since the contractor held a license for 88 percent of the construction time, the contractor had "substantially complied" with the licensing statute; therefore defendants could not rely on the fact that the contractor was not licensed as a defense. *Id.* at 285, 181 S.E. 2d at 200.

In *Barrett, Robert and Woods, Inc. v. Armi*, 59 N.C. App. 134, 296 S.E. 2d 10, *disc. rev. denied*, 307 N.C. 269, 299 S.E. 2d 214 (1982), the contractor was duly licensed at the time the construction contract was executed. Three and a half months later the license expired and was not renewed until some eight months later. Approximately 90 percent of the work was done while the contractor was unlicensed. Nevertheless, the Court of Appeals concluded that the contractor had substantially complied with the licensing statute. *Id.* at 140, 296 S.E. 2d at 14. The Court of Appeals, rejecting the contractor's contention that mere possession of a valid license at the time of contracting always constitutes substantial compliance, said,

> We stated in our opinion in *Construction Co. v. Anderson* [5 N.C. App. 12, 168 S.E. 2d 18 (1969)] that the time of entering the contract is of great significance since that is the time when the owner must decide whether the contractor is suffi-

> ciently competent to perform the work. Nevertheless we decline to hold, and the facts of this case do not require that we decide, that mere possession of a valid license at the moment of contracting, regardless of what transpires thereafter with regard to the license, constitutes 'substantial compliance' with the licensing statute.
>
> Article I of chapter 87 clearly contemplates that a contractor should be licensed at the time of contracting and during the construction period.

Id. at 139, 296 S.E. 2d at 14. The Court of Appeals found substantial compliance in *Armi* essentially because the contractor was licensed "at the significant moment of contracting"; the contractor's license lapsed during construction "through inadvertence, not as a result of incompetence or disciplinary action by the licensing board; . . . [and] was renewed immediately upon . . . filing of a renewal application and fees"; and the contractor's financial condition and construction personnel "remained unchanged during the period plaintiff was not licensed."

[1] The Court of Appeals analyzed the instant case in terms of whether plaintiff substantially complied with the licensing requirement. A majority of the panel concluded that because he did not have a license at the time the contract was made and "was not licensed during at least 66 percent of the construction, which comprised the major portion of the work," plaintiff had not substantially complied with the licensing requirements of the statute. Chief Judge Vaughn dissented on the ground that under *Armi* substantial compliance existed. The division on the Court of Appeals in this case demonstrates that the doctrine of substantial compliance is sometimes difficult to apply. By generating skewed results, it leaves uncertain the rights of parties which tends to promote litigation. We now reject the doctrine and end its application in this state.

Generally, contracts entered into by unlicensed construction contractors, in violation of a statute passed for the protection of the public, are unenforceable by the contractor. *Olsen v. Reese*, 114 Utah 411, 416, 200 P. 2d 733, 736 (1948). A majority of the jurisdictions adhere to this interpretation. *See* Annot., 82 A.L.R. 2d 1429 (1962). Reading these statutes as being designed to protect the public from irresponsible contractors, *Meridian Corp. v.*

McGlynn/Garmaker Co., 567 P. 2d 1110 (Utah 1977), most state courts find "no legal remedy for that which is illegal itself." *D & L Harrod, Inc. v. United States Precast Corp.*, 322 So. 2d 630, 631 (Fla. Dist. Ct. App. 1975). General contractors have been precluded from maintaining actions if they must rely on their illegal act to justify their recovery. *Kaiser v. Thomson*, 55 N.M. 270, 274, 232 P. 2d 142, 144 (1951). The unenforceability of such contracts by the contractor stems directly from their conception in the contractor's illegal act.

The express language of the North Carolina licensing statute indicates that it is designed to insure competence within the construction industry. The statute requires

> an examination . . . of all applicants for license to ascertain the ability of the applicant to make a practical application of his knowledge of the profession of contracting, under the classification contained in the application, and to ascertain the qualifications of the applicant in reading plans and specifications, knowledge of estimating costs, construction, ethics and other similar matters pertaining to the contracting business and knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the state of North Carolina relating to contractors, construction and liens.

N.C. Gen. Stat. § 87-10. By requiring this examination, the legislature seeks to guarantee "skill, training and ability to accomplish such construction in a safe and workmanlike fashion." *Arnold Construction Company, Inc. v. Arizona Board of Regents*, 109 Ariz. 495, 498, 512 P. 2d 1229, 1232 (1973). In tandem, these requirements "protect members of the general public *without regard to the impact upon individual contractors.*" *Urbatec v. Yuma County*, 614 F. 2d 1216, 1218 (9th Cir.) (applying Arizona law), *cert. denied*, 449 U.S. 841 (1980) (emphasis added).

In examining the licensing statute in question, we recognize the distinction between legislation designed to produce revenue and to protect the public. In the former situation, the legislature exercises its taxing authority. In the latter, it exercises its police power. Accordingly, when a legislature invokes its police power to provide statutory protection to the public from fraud, incompetence, and irresponsibility, as ours has done with the con-

tractor licensing statutes, courts impose greater penalties on violators. 6A A. Corbin, Corbin on Contracts § 1512 (1962). Making contracts unenforceable by the violating contractor produces "a salutary effect in causing obedience to the licensing statute." *Id.* These public policy considerations militate against permitting unlicensed general construction contractors to enforce their contracts. Denying the contractor the right to enforce his contract effectuates the statutory purpose and legislative intent of providing the public with optimum protection. *Enlow and Son, Inc. v. Higgerson*, 201 Va. 780, 787, 113 S.E. 2d 855, 860 (1960).

[1] In recognition of the essential illegality of an unlicensed contractor's entering into a construction contract for which a license is required and in order to give full effect to the legislative intent to furnish protection to the public by strict licensing requirements, we reject the doctrine of substantial compliance, cognizant that harsh consequences may sometimes fall on those who do contracting work without a license. *Schlicht v. Curtin*, 117 Ariz. 30, 31-32, 570 P. 2d 801, 803 (Ariz. App. 1977).

We do recognize the minority rule, adhered to by our Court of Appeals, is not without some support. California applies the doctrine of substantial compliance in certain cases to avoid unnecessarily harsh results on unlicensed contractors who perform well. *Latipac, Inc. v. The Superior Court of Marin County*, 64 Cal. 2d 278, 281, 49 Cal. Rptr. 676, 679, 411 P. 2d 564, 567 (1966). *See Michigan Roofing and Sheet Metal, Inc. v. Dufty Road Properties*, 90 Mich. App. 732, 282 N.W. 2d 809 (1979) (adopting the California standard). *Accord Murphy v. Campbell Investment Co.*, 79 Wash. 2d 417, 486 P. 2d 1080 (1971). The leading California case, however, noted a critical factual element which is not present in the case at bar. "The key moment of time when the existence of the license becomes determinative is the time when the other party to the agreement must decide whether the contractor possesses the requisite responsibility and competence and whether he should, in the first instance, enter into the relationship." *Latipac*, 64 Cal. 2d at 282, 49 Cal. Rptr. at 680, 411 P. 2d at 568. Since in *Latipac* the contractor had a valid license at the moment the parties entered into the contractual arrangement, the purpose of the statute was fulfilled. Essentially, the person entering into a contract with the contractor could be assured of his responsibility

and competence because he was licensed when the contract was signed.

[2-4] We agree that the existence of a license at the time the contract is signed is determinative and attach "great weight to the significant moment of the entrance of the parties into the relationship." *Id.* Accordingly, we adopt the rule that a contract illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor. It cannot be validated by the contractor's subsequent procurement of a license. *See Enlow*, 201 Va. at 784, 113 S.E. 2d at 859. In this circumstance there can be no substantial compliance with the licensing statutes. Neither may the contractor recover for extras, additions or changes made during construction commenced pursuant to the contract. Such a contract is not, however, void. Others not regulated by the licensing statutes passed for their protection do not act illegally in becoming parties to such a contract. The policy underlying the licensing statutes would not be served by preventing enforcement by those for whose protection the statutes were passed. These parties may enforce the contract against the unlicensed contractor. *Midyette*, 274 N.C. at 270-71, 162 S.E. 2d at 511. Further, if a licensed contractor's license expires, for whatever reason, during construction, he may recover for only the work performed while he was duly licensed. If, in that situation, the contractor renews his license during construction, he may recover for work performed before expiration and after renewal. If, by virtue of these rules, harsh results fall upon unlicensed contractors who violate our statutes, the contractors themselves bear both the responsibility and the blame.

[5] Plaintiff was unlicensed at the time he negotiated and contracted with defendants to construct their house. He illegally entered into the contract; it is, therefore, unenforceable by him. His subsequent procurement of a valid license cannot validate or make legal that which was illegal in its inception. Accordingly, we modify the reasoning of the Court of Appeals and affirm its decision upholding the trial court's grant of defendants' motion for summary judgment.

Modified and affirmed.

STATE OF NORTH CAROLINA v. SCOTT J. GRAHAM

No. 201PA83

(Filed 3 November 1983)

1. **Criminal Law § 138— mitigating circumstance of acknowledgment of wrongdoing at early stage of criminal process—clarifying term "criminal process"**

For purposes of the mitigating circumstance listed under G.S. 15A-1340.4(a)(2)l, the "criminal process" begins upon either the issuance of a warrant or information, or upon return of a true bill of indictment or presentment, or upon arrest, whichever comes first. Therefore, where defendant confessed to the law enforcement officers who were transporting him to the patrol station immediately after his arrest, and further aided them in retrieving the stolen articles, defendant voluntarily acknowledged his wrongdoing in an early stage of the criminal process and was entitled to the benefit of the statutory mitigating circumstance listed in G.S. 15A-1340.4(a). The defendant's motive in acknowledging his guilt at an early stage does not go to the existence of the mitigating factor, but goes to the weight the trial judge must give that factor. G.S. 15A-1340.3.

2. **Criminal Law § 138— aggravating factor of prior criminal convictions—methods by which prior convictions may be shown**

The enumerated methods of proof of G.S. 15A-1340.4(e) dealing with the aggravating factor that defendant had a prior criminal conviction punishable by more than 60 days' imprisonment, are permissive rather than mandatory.

3. **Burglary and Unlawful Breakings § 8— breaking and entering—sentence—no abuse of discretion**

A trial judge did not abuse his discretion in sentencing defendant to a 20-year sentence for the breaking into four unoccupied vacation cottages over a two-day period. G.S. 14-54, G.S. 15A-1340.4(f), and G.S. 14-1.1(a)(8).

ON the State's failure to perfect its appeal of right from a judgment of the Court of Appeals, 61 N.C. App. 271, 300 S.E. 2d 716 (1983) (*Vaughn, C.J.* dissenting), the State filed its petition for writ of certiorari asking for review of the Court of Appeals' decision to vacate and remand the judgment of *Winberry, J.*, entered 25 January 1982 in Superior Court, DARE County. We allowed certiorari on 3 May 1983.

The charges against the defendant arose out of four break-ins of unoccupied vacation cottages that occurred on 30 and 31 October 1981. The police investigation included two interviews with the defendant. On both occasions, defendant denied any knowledge of the break-ins. However, after some of the stolen property was found at the defendant's brother-in-law's house, defendant

was read his Miranda rights and placed under arrest. While being transported to the police station, defendant confessed his guilt to all four break-ins and informed the police where more of the stolen items were located. According to Deputy Eck, defendant stated that he confessed because "it might help him."

The defendant pled guilty to four charges of felonious breaking and entering pursuant to an agreement with the district attorney that the State would not prosecute the defendant for second degree burglary in those cases.

In sentencing the defendant the trial judge, Winberry, J., found one aggravating factor—that the defendant had prior convictions punishable by more than sixty days' imprisonment. Deputy Eck had testified for the State, over the defendant's objection, as to what he had been told was the defendant's record. No certified copy of the defendant's criminal record was ever introduced into evidence.

The trial judge further determined that no mitigating factors listed in N.C. Gen. Stat. § 15A-1340.4(a) were proved by a preponderance of the evidence. Thereupon he concluded that the factors in aggravation outweighed the factors in mitigation and sentenced defendant to four consecutive five year sentences for the four break-ins. The Court of Appeals vacated the defendant's sentences and remanded to the trial court for proper sentencing, based upon their finding that the trial court failed to find a factor in mitigation which was clearly established by the evidence.

Rufus L. Edmisten, Attorney General, by Associate Attorney K. Michele Allison, for the State-appellant.

Adam Stein, Appellate Defender, and Assistant Appellate Defender James H. Gold, for defendant-appellee.

COPELAND, Justice.

[1] The State assigns as error the Court of Appeals' holding that the defendant's voluntary acknowledgment of his wrongdoing at an early stage of the criminal process entitled defendant to the benefit of that statutory mitigating circumstance and thus to a new sentencing hearing. We agree with the Court of Appeals' holding, but feel we must clarify the term "the criminal process" and its time of commencement.

The evidence clearly revealed that the defendant, when first questioned prior to his arrest, denied any involvement in the break-ins. But immediately after his arrest defendant confessed to the law enforcement officers who were transporting him to the patrol station, and further aided them in retrieving the stolen articles.

Under N.C. Gen. Stat. § 15A-1340.4(a), when the preponderance of the evidence shows factors in mitigation, the trial judge must consider those factors which relate to the purpose of sentencing. Specifically, § 15A-1340.4(a)(2)(l) lists as a mitigating factor that:

> Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.

As the Court of Appeals noted in its opinion, this statute provides a criminal defendant with two opportunities to mitigate his sentence; to-wit, either prior to arrest or at an early stage of the criminal process. That court further concluded that the fact that a defendant denied wrongdoing prior to his arrest should not preclude the trial judge from considering also whether the defendant voluntarily acknowledged wrongdoing "at an early stage of the criminal process." Therefore, the main issue in this case turns upon an interpretation of the term "the criminal process" and its time of commencement.

The State contends that "the criminal process" begins when the officials of the law initiate their investigation of a criminal act. In other words, the State argues that a criminal investigation, subsequent to the commission of a crime, is the first part in a series of actions or functions which produces the result of apprehension, prosecution and conviction of a criminal.

We note that the legal meaning of the term "process" varies according to the context, subject matter and spirit of the statute in which it occurs. We share the Court of Appeals' view that, for purposes of N.C. Gen. Stat. § 15A-1340.4(a)(2)l, "the legislature contemplated that 'the criminal process' involves formal legal proceedings and not merely investigation of crimes by law enforcement officers." We further construe that statute to mean that "the criminal process" begins upon either the issuance of a war-

rant or information, or upon the return of a true bill of indictment or presentment, or upon arrest, whichever comes first.

Webster's Third New International Dictionary defines "process," as used in the legal sense, as "a summons, mandate, or writ that serves as the means used to bring a defendant into court to answer in a judicial action or in a suit in litigation." When used as a verb, "process" means "to prosecute or proceed against by law." Both Ballentine's Law Dictionary, 3d ed. and Black's Law Dictionary, 5th ed. agree with the Webster's definition. They further add that "criminal process" is that "which issues to compel a person to answer for a crime or misdemeanor."

These definitions are consistent with the Legislature's use of the term in the Speedy Trial Act, where it is stated that the trial of a criminal defendant shall begin, "within 120 days from the date the defendant is . . . served with criminal process . . ." N.C. Gen. Stat. § 15A-701. There the Legislature has chosen to begin the time running upon *service* of criminal process rather than when the criminal process begins. We conclude that the Legislature intended that under § 15A-1340.4(a)(2)(l) criminal process begins with the issuance of a formal written charge against a defendant. We hold that if defendant's confession was made prior to the issuance of a warrant or information, or upon the return of a true bill of indictment or presentment, or prior to arrest, whichever comes first, he is entitled to a finding of this statutory, mitigating circumstance.

The State cites our case of *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), in support of its next contention that the defendant must show remorse for his actions in order for his acknowledgment of wrongdoing, whenever made, to be considered as a mitigating factor. A law enforcement officer, present during the defendant's confession, testified that the defendant told the officers of his guilt and revealed the location of the remaining stolen articles because, according to the defendant, "it might help him." The State contends that this statement plainly discloses not only defendant's lack of remorse for his crimes, but also his primary motive to lessen his liability; therefore, this acknowledgment of wrongdoing fails to qualify for consideration as a mitigating factor. We disagree. The defendant's motive in acknowledging his guilt at an early stage does not go to the ex-

istence of this mitigating factor, but goes to the weight the trial judge must give that factor.

Although a trial judge may be required, under the circumstances set forth above, to find in mitigation that a defendant voluntarily acknowledged wrongdoing in connection with the offense, the *weight* to be given to that factor remains within his sound discretion. *Id.; 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 (1982). In *Ahearn* we stated that the defendant's plea of guilty had "no bearing on the policy behind this factor in mitigation, i.e. that defendant *showed remorse for his actions.*" 307 N.C. at 608, 300 S.E. 2d at 704 (emphasis added). A confession may or may not be motivated by this same underlying policy.

On one end of the spectrum, a confession may be more than a simple admission of guilt, but rather an admission of culpability, responsibility, and remorse. As such, this factor becomes one of the most important and persuasive factors in mitigation of a defendant's sentence: embodied in the confession is the essence of the Fair Sentencing Act—a focus on the offender's individual culpability, his character and attitudes, and on the very real possibility of rehabilitation. On the other end of the spectrum the confession may be a simple admission of guilt, later challenged by motion to suppress as being the product of coercion, etc., or given for purposes of serving the defendant's own self-interests. Under these circumstances the factor, as we interpret it, becomes almost meaningless in terms of its mitigating value.

This policy that the defendant show remorse for his actions is consistent with the purposes of the Fair Sentencing Act. N.C. Gen. Stat. § 15A-1340.3. Whether the confession reflects remorse is a matter for the fact finder to determine. The Legislature anticipated the need for a trial judge's reasoning and discretion when confronted with a defendant's confession, since the possibility exists that a defendant may be motivated by a desire for lenient treatment rather than remorse for wrongdoing. *State v. Wood*, 61 N.C. App. 446, 452, 300 S.E. 2d 903, 907 (1983). On resentencing the sentencing judge will determine whether defendant's confession came "during an early stage of the criminal process." If he so finds, he will then consider the weight to be given to this mitigating factor.

The defendant claims that the sentencing judge's failure to find other enumerated mitigating factors entitled him to a new sentencing hearing. The defendant, in his brief to the Court of Appeals, argued that the trial court erred in failing to find that the following mitigating factors listed in N.C. Gen. Stat. § 15A-1340.4 were proven by a preponderance of the evidence:

> d. The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense.
>
> e. The defendant's immaturity or his limited mental capacity at the time of commission of the offense significantly reduced his culpability for the offense.
>
> f. The defendant has made substantial or full restitution to the victim.

Upon the evidence presented in the record before us, it is our opinion that the trial judge could properly find insufficient evidence to support these mitigating factors. The Fair Sentencing Act did not remove all discretion from our trial judges. It is necessary that trial judges be permitted great latitude in ascertaining the true existence of aggravating and mitigating circumstances. *Ahearn* at 596. We find no error as to the trial court's findings in mitigation, with regard to these factors contained in this issue.

[2] Defendant next contends that the trial court improperly found as an aggravating factor that he had prior criminal convictions punishable by more than sixty days' imprisonment, since the State failed to introduce a certified copy of his record.

The relevant statute, N.C. Gen. Stat. § 15A-1340.4(e), provides:

> e. 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. . . . A defendant may make a motion to suppress evidence of a prior conviction pursuant to Article 53 of this Chapter.

In the present case, instead of providing the court with an original or certified copy of the conviction record, the State had a deputy, who had been informed by the law enforcement authorities in North Carolina and New York, advise the court as to the defendant's conviction record. Defendant objected to this method of proof, stating that N.C. Gen. Stat. § 15A-1340.4(e) mandates proof of a prior conviction by *either* stipulation of the parties or by the original or certified copy of the court record of the prior conviction.

We disagree that these are the exclusive methods by which prior convictions may be shown. As we emphasized in *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983), this Court and the Court of Appeals have repeatedly held that the enumerated methods of proof of N.C. Gen. Stat. § 15A-1340.4(e) are permissive rather than mandatory. *See State v. Brooks*, 61 N.C. App. 572, 301 S.E. 2d 421 (1983); *State v. Massey*, 59 N.C. App. 704, 298 S.E. 2d 63 (1982). *Accord State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308 (1983) (reaching the same result under N.C. Gen. Stat. § 15A-2000(e)(3)). We recognize that the more appropriate way to show the "prior conviction" aggravating circumstance would be to offer authenticated court records, for such records establish a prima facie case. However, the legislature did not intend to bind the State and the trial court by precluding other means of proof. Clearly the conviction could have been proven by the deputy's testimony as to his own personal knowledge or by defendant's admission. While here the deputy's testimony was hearsay, the record indicates that the defendant took the stand and admitted the prior convictions. Not only do we find that the defendant's testimony before the court constituted an acceptable form of proof of his prior convictions, but his admissions also cured any defect caused by the hearing of the deputy's testimony.

[3] Defendant's final assignment of error questions the imposition of a twenty-year sentence for the breaking into four unoccupied vacation cottages over a two-day period. He argues that this sentence is unjustifiably disparate and constituted an abuse of discretion by the sentencing judge. We reject this contention.

Felonious breaking or entering is a Class H felony which carries a presumptive sentence of three years' imprisonment. N.C. Gen. Stat. §§ 14-54 and 15A-1340.4(f). The trial court, upon finding

the aggravating factors outweighed the mitigating, sentenced the defendant to five years for each of the four counts, which is well within the maximum sentence provided for this offense. N.C. Gen. Stat. § 14-1.1(a)(8).

The Fair Sentencing Act provides sentencing judges with the discretion to impose a sentence greater or lesser than the presumptive term, based upon their finding of factors in aggravation or mitigation. The weighing of these is a matter within their sound discretion. If there is sufficient evidence to support these findings and no evidence of abuse of discretion, then this Court will not disturb the trial judge's decision. *Melton*, 307 N.C. 370; *Davis*, 58 N.C. App. at 330.

The decision of the Court of Appeals is affirmed except as herein modified and the case is remanded to the Court of Appeals for further remand to the Superior Court, Dare County, for resentencing in accordance with this opinion.

Modified and affirmed.

STATE OF NORTH CAROLINA v. MICHAEL LEROY WORKMAN AND GODOSAKAHI ANTONIO WILKINS

No. 4A83

(Filed 3 November 1983)

1. **Rape and Allied Offenses § 5— first degree sexual offense—acts against victim's will—sufficiency of evidence**

In a prosecution for a first degree sexual offense, the State's evidence was sufficient to permit the jury to find that the acts complained of were "by force and against the will of the other person" where there was plenary evidence tending to show that defendants threatened the victim with both a pencil and a razor; that defendants one at a time forced the victim back to a jail cell and held him while forcing him to commit fellatio; and that the victim was afraid not to comply with defendants' orders and he was afraid for his life.

2. **Rape and Allied Offenses § 5— first degree sexual offense—use of deadly weapon—sufficiency of evidence**

The State's evidence in a prosecution for first degree sexual offense was sufficient to be submitted to the jury on the issue of whether a pencil and a

safety razor used by defendant prison inmates constituted dangerous or deadly weapons or were articles which the victim reasonably believed to be dangerous or deadly weapons where it tended to show that one defendant threatened to kill the victim with the pencil and threatened to stab him in the eye and heart with it; that the victim was afraid such defendant would kill him with the pencil; that the second defendant held the razor up to the victim's neck and threatened him; and that, although safety razors distributed to inmates could do little more than "nick" a person, parts of the razor could become a deadly weapon if the razor were torn apart.

APPEAL by defendants from *DeRamus, Judge*, at the 13 September 1982 Session of FORSYTH County Superior Court.

Both defendants were charged in indictments, proper in form, with the commission of first-degree sexual offense against Joseph Frank Flippin. Each of the defendants entered a plea of not guilty. The cases were consolidated for trial.

The State offered evidence which tended to show that on 12 May 1982, while they were imprisoned in the Forsyth County jail, Joseph Flippin, James Cameron, and defendants were removed at about 8:40 a.m. from their individual cells and taken to a shower area. According to the testimony of both Flippin and Cameron, after the four men had showered, defendant Workman threatened to kill Flippin with a pencil and forced him to perform fellatio. Subsequently, defendant Wilkins threatened to cut Mr. Flippin's ear off with a safety razor and also forced him to perform fellatio.

The guards returned to the shower cell at approximately 11:20 a.m. to take the men back to their individual cells. Sergeant Thomas Spillman, a deputy sheriff employed at the jail, testified that, on the way back to the cell, Flippin told him about the attacks. After asking Cameron about it, Spillman informed his captain who in turn asked Spillman to call for a detective. The investigation was then turned over to Officer F. G. Crater who interviewed Flippin and Cameron shortly following the incident.

Crater's testimony substantially corroborated the testimony of the other State's witnesses regarding what transpired in the shower cell.

Defendants presented no evidence. As to each defendant, the jury returned a verdict of guilty as charged. The trial judge imposed on each defendant a mandatory life sentence and defendants appeal as a matter of right.

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

Adam Stein, Appellate Defender, by Malcolm Ray Hunter, Assistant Appellate Defender, for defendant appellants Workman and Wilkins.

BRANCH, Chief Justice.

Defendants assign as error the trial court's denial of their motions to dismiss the charge of first-degree sexual offense on the ground that there was insufficient evidence of the essential elements of the offense to permit the jury to find defendants guilty. Specifically, defendants contend that the State failed to prove two essential elements: (1) that the sex act was without the consent of the alleged victim; and (2) that defendants displayed or employed a deadly weapon.

The crime of first-degree sexual offense is defined in G.S. 14-27.4, which provides in pertinent part:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> * * * *
>
> (2) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon;
>
> * * * *

[1] In support of their contention that the State did not show that the act complained of was against the will of the victim, defendants maintain that Mr. Flippin actually encouraged them to engage in the sexual acts. Defendants argue that Mr. Flippin made certain provocative advances towards them prior to the acts, and also that the victim made no attempts to flee or to defend himself against the attacks. Defendants point specifically to the following testimony elicited from Mr. Flippin on cross-examination.

Q. Were you, at any time that morning, did you sort of feel on any of those gentlemen there?

A. Huh?

Q. Sort of put your hand on them or anything?

A. Yeah, like that.

Q. Were you sort of putting your hands on their legs and stuff like that?

A. Yeah, yeah.

However, there was also evidence that Flippin was a highly nervous individual who had less than a second grade education. Sergeant Spillman and Officer Crater both testified that Mr. Flippin had a tendency to touch people when he talked to them, and that it was just his way of showing friendship. Furthermore, James Cameron, the fourth man in the shower cell and an eyewitness, testified as follows:

Q. Did you notice that Mr. Wilkins was naked?

A. I did notice.

Q. But you didn't see Mr. Flippin watching him?

A. No.

Q. Did you ever see Mr. Flippin touch him?

A. I saw him touch him once on the leg like he said and he told him not to do it no damn more and he hit him upside the head and Joe didn't bother him no more.

Finally, Mr. Flippin specifically denied that his touching was intended as a sexual advance. His testimony was as follows:

Q. Did you say anything when you touched him on the leg?

A. Yeah, he said something to me. He said don't you do that no more, he said I'll smack you and he hit me like that, smacked me. I said I was just trying to be nice to you.

Q. You were just going to be nice when you touched him on the leg?

A. Yes.

* * * *

Q. When you touched him, did he pull out a razor or did he just slap you?

A. Slapped me, I think.

Q. Did you touch him again?

A. No.

Q. Did you touch Mr. Workman?

A. No.

Q. Did you touch Mr. Cameron?

A. No.

Q. You just touched the one with no clothes on, didn't you?

A. Yeah.

Q. Why did you pick him?

A. I just wanted to touch him on the leg.

Q. You just felt friendly toward him?

A. Yeah.

Defendants also quote a portion of Flippin's testimony in which he states he did not try to resist his attackers and he just "let it happen." However, there is plenary evidence in the record that defendants threatened the victim with both a pencil and a razor; that defendants one at a time forced him back to a cell and held him while forcing him to commit fellatio; and that the victim was afraid not to comply with defendants' orders and he was afraid for his life.

The test of the sufficiency of the evidence in a criminal case is whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense of that charged. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971); *State v. Mason*, 279 N.C. 435, 183 S.E. 2d 661 (1971).

> 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).

In the instant case, taking the evidence in the light most favorable to the State, there was ample evidence from which a jury might find that the offenses committed were "by force and against the will of the other person." Any contradictions and discrepancies were for the jury and the trial judge correctly submitted the case to them for resolution.

[2] Defendants also contend that the State failed to prove that they employed or displayed "a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon."

Defendant Workman maintains that he was convicted on the theory that he used a pencil to threaten Flippin. He argues, however, that no pencil was ever found at the scene of the incident; nor was one ever recovered from a defendant. Furthermore, the victim was never actually hurt by the pencil. In summary, defendant Workman maintains that the evidence was insufficient to support a jury finding that a pencil was a dangerous or deadly weapon, or that Flippin reasonably believed it to be.

There was also evidence that the safety razor, as it was distributed to the inmates, was not particularly dangerous. Sergeant Spillman testified that the blade was locked into the razor and that the only damage the razor could do was to "nick" a person. Wilkins argues, like Workman, that the evidence was not sufficient to submit to the jury the question of whether the razor was dangerous or deadly, or whether Flippin reasonably believed it to be so.

We have consistently held that a deadly weapon does not have to be one that kills, and in *State v. Sturdivant*, 304 N.C. 293, 283 S.E. 2d 719 (1981), we made the following observation:

> No item, no matter how small or commonplace, can be safely disregarded for its capacity to cause serious bodily injury or death when it is wielded with the requisite evil intent and force. *See, e.g., State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978) (Pepsi-Cola bottle); *State v. Strickland*, 290 N.C.

169, 225 S.E. 2d 531 (1976) (plastic bag); *State v. Perry*, 226 N.C. 530, 39 S.E. 2d 460 (1946) (brick); *State v. Heffner*, 199 N.C. 778, 155 S.E. 879 (1930) (blackjack); *State v. Smith*, 187 N.C. 469, 121 S.E. 737 (1924) (baseball bat); *State v. Beal*, 170 N.C. 764, 87 S.E. 416 (1915) (rock); *State v. Craton*, 28 N.C. 164 (1845) (pine stub); *State v. Whitaker*, 29 N.C. App. 602, 225 S.E. 2d 129 (1976) (broom handle, nail clippers).

Id. at 301, 283 S.E. 2d at 725 n. 2. We have likewise held that where there is a question as to a weapon's deadly or dangerous nature, it is properly submitted to the jury. *State v. Watkins*, 200 N.C. 692, 158 S.E. 393 (1931).

In the instant case, the victim testified several times that defendant Workman threatened to stab him with the pencil, threatened to kill him, and threatened to stab him in the eye and in the heart with it. He also testified that he was afraid Workman would kill him with the pencil. Mr. Cameron testified that "Mr. Workman took the pencil and put it in Joe's chest and said if you don't suck my thing, I'm going to take this pencil and stab you." Cameron also stated that Workman threatened to stab Flippin in his left eye and that "Joe said I am scared." Finally, although Sergeant Spillman testified that no pencil had been found, and that the cell had been locked in order to protect any evidence that might be there, Officer Crater testified that when he arrived on the scene to investigate, the shower cell had been unlocked and cleaned and the mattress had been removed.

Likewise, Flippin testified that Wilkins held the razor up to his neck and threatened him. James Cameron testified that defendant Wilkins "took the razor into the cell and he brought it back out and he laid it on the bars and he held it to Joe's—I think it was his left ear—and he said if you don't give me a blow job, I'll cut your ear off and Joe said please don't." Finally, while Sergeant Spillman stated that the safety razors routinely distributed to inmates could do little more than "nick" a person, he also testified that if the razor were "torn apart and damaged, parts of it could become a deadly weapon."

With the well-settled rule regarding the test of the sufficiency of the evidence in mind, and considering the evidence in the light most favorable to the State, as we must, we hold that the evidence in this case was sufficient to submit to the jury

the questions of whether the pencil and the razor constituted dangerous or deadly weapons or were articles which Mr. Flippin "reasonably believed to be . . . dangerous or deadly . . . ." *See State v. Johnson*, 304 N.C. 680, 285 S.E. 2d 792 (1982) (sufficient evidence for jury to find ballpoint pen was a dangerous or deadly weapon). Any discrepancies and inconsistencies in the evidence, and matters of credibility, are to be resolved by the jury. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

There was sufficient evidence of each element of the offenses charged to permit the jury to convict defendants, and the trial court properly submitted the case to the jury. Defendants' assignments are overruled.

No error.

STATE OF NORTH CAROLINA v. LANCE KOBERLEIN

No. 103PA83

(Filed 3 November 1983)

1. **Criminal Law § 91— speedy trial—dismissal due to unavailability of prosecuting witness—time runs from new charges**

When a charge is dismissed pursuant to G.S. 15A-612 as a result of a finding of no probable cause, the computation of the time for the purpose of applying the Speedy Trial Act commences with the last of the listed items (arrested, served with criminal process, waived an indictment, or was indicted) relating to the new charge rather than the original charge. Moreover, there is no practical distinction between dismissal based upon the State's failure to proceed with a probable cause hearing because of the unavailability of a prosecuting witness and dismissal based upon a finding of no probable cause, and the time within which the State was required to bring defendant to trial under the terms of the Speedy Trial Act began to run from the occurrence of the last of the listed events relating to the new charges and not the original charges. G.S. 15A-612(b).

2. **Criminal Law § 91— speedy trial—last relevant event as post-indictment arrest**

Where charges against defendant were dismissed once and then brought again, the last relevant event with regard to speedy trial purposes was when defendant was arrested after the return of the second indictment. G.S. 15A-701(a1).

ON discretionary review of the decision of the North Carolina Court of Appeals. 60 N.C. App. 356, 299 S.E. 2d 444 (1983). Heard in the Supreme Court September 13, 1983.

The defendant was charged in bills of indictment, proper in form, with the felonies of common law robbery and assault with a deadly weapon with intent to kill resulting in serious bodily injury. He was tried before Judge Small and a jury at the December 7, 1981 Criminal Session of Superior Court, Currituck County. The defendant entered pleas of not guilty and was found by the jury to be guilty as charged in both indictments. The trial court sentenced the defendant to an active term of imprisonment for each crime. The Court of Appeals reversed and remanded the case to the Superior Court. The Supreme Court allowed the State's Petition for Discretionary Review on April 5, 1983.

Rufus L. Edmisten, Attorney General, by Michael Rivers Morgan, Assistant Attorney General, for the State-appellant.

Twiford and Derrick, by Russell E. Twiford and Gary M. Underhill, Jr., for the defendant-appellee.

MITCHELL, Justice.

The basic question for review by this Court is whether the defendant was brought to trial within the time limits established by the Speedy Trial Act, G.S. 15A-701 *et seq.* We answer this question in the affirmative, reverse the opinion of the Court of Appeals which held to the contrary and remand this case to the Court of Appeals for its consideration of the merits of the remaining issues raised by the defendant in his appeal to that Court.

The issue which this Court finds dispositive makes a recitation of the evidence presented at trial unnecessary. Warrants were issued for the arrest of the defendant Lance Koberlein on September 9, 1980 charging him with common law robbery and assault with a deadly weapon with intent to kill. These warrants were executed by the arrest of the defendant on February 24, 1981. A probable cause hearing was set for March 18, 1981. On that date the District Court allowed the State's motion to continue the probable cause hearing to allow the State the opportunity to subpoena and secure a necessary witness, Joseph Curname, alleged to be the victim of the crimes for which the defendant

was charged. The charges against the defendant were dismissed by the District Court on March 25, 1981 due to the failure of the prosecuting witness to appear at the probable cause hearing.

The defendant was indicted on March 30, 1981 for the same offenses, and an order for his arrest was issued pursuant to G.S. 15A-305. The defendant was arrested on September 23, 1981. He was brought to trial on December 7, 1981. Thus, the defendant's trial began 285 days after his initial arrest, 250 days after his indictment and 74 days after his post-indictment arrest.

[1] The defendant contends that under G.S. 15A-701(a1)(3) the State was required to bring him to trial within 120 days from the date he was arrested and served with criminal process on the original charges against him. Under G.S. 15A-701(a1)(3) the trial of a defendant charged with a criminal offense must be commenced as follows:

> 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 the 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;

Although perhaps not artfully drafted, subsection (3) quoted above strongly implies by its own terms that, when a charge is dismissed pursuant to G.S. 15A-612 as a result of a finding of no probable cause, "the computation of time for the purpose of applying the Speedy Trial Act commences with the last of the listed items ('arrested, served with criminal process, waived an indictment, or was indicted') relating to the new charge rather than the original charge." *State v. Boltinhouse*, 49 N.C. App. 665 at 667, 272 S.E. 2d 148 at 150 (1980). We so hold, as to do otherwise would defeat the clearly expressed intent of the legislature that no finding made by a judge in a probable cause hearing will preclude the State from instituting a subsequent prosecution for the same offense. G.S. 15A-612(b).

Additionally, we agree with that portion of the opinion of the Court of Appeals in the present case indicating that, for purposes

of computing the time requirements imposed by the Speedy Trial Act, there is no practical distinction between dismissal based upon the State's failure to proceed with a probable cause hearing because of the unavailability of a prosecuting witness and dismissal based upon a finding of no probable cause. 60 N.C. App. at 359, 299 S.E. 2d at 446. Therefore, we hold that the time within which the State was required to bring this defendant to trial under the terms of the Speedy Trial Act began to run from the occurrence of the last of the listed events relating to the new charges and not the original charges.

[2] The defendant next contends, and the Court of Appeals held, that the "last" occurring event relating to the new charges and causing the time limits of the Speedy Trial Act to begin to run was the return of the indictments against him on March 30, 1981 and not his post-indictment arrest on September 23, 1981. The State contends that the Court of Appeals erred in so holding and that the arrest of the defendant which in fact occurred after the indictment was returned began the running of the time period within which trial must be commenced.

Subsections (1) and (3) of G.S. 15A-701(a1) each require that a defendant's trial begin within the 120 days from the date that the defendant is arrested, served with criminal process, waives an indictment, or is indicted, "whichever occurs last." The Court of Appeals held that, upon facts such as those presented by the present case, "the 'arrest' referred to in subdivisions (1) and (3) of G.S. 15A-701(a1) must relate to the arrest upon a warrant prior to indictment." 60 N.C. App. at 361-62, 299 S.E. 2d at 447.

The Court of Appeals reasoned that a literal construction of the phrase "arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last" to include an arrest upon an indictment instituting new charges would allow the State to defeat the purpose of the Speedy Trial Act. The Court of Appeals expressed concern that the State could delay the applicability of the Act in a given case by the exercise of the State's unfettered discretion to delay in obtaining an order for arrest after indictment. As a result of this reasoning, the Court of Appeals held that the return of the true bill of indictment against the defendant on March 30, 1981 and not the later arrest was "the relevant last occurring event in the chain of criminal process in

this case." 60 N.C. App. at 362, 299 S.E. 2d at 447. We disagree and conclude that this part of the opinion of the Court of Appeals is erroneous.

We believe that the concern expressed by the Court of Appeals will not be well founded in the vast majority of cases. We perceive that only in exceptionally rare cases will the State have any reason or motivation whatsoever to wish to see a defendant indicted but unarrested and free to flee the jurisdiction at will. As a general rule, it would appear that the State will instead have every reason to seek a defendant's arrest upon a warrant as soon as its investigation reveals probable cause for a warrant.

In any event, we must assume that the legislature weighed and considered fully all such policy questions prior to the adoption of the Speedy Trial Act and all amendments thereto. After having weighed all appropriate policy considerations, the legislature clearly stated in both subsections (1) and (3) of G.S. 15A-701(a1) that it is the last occurring of the listed events which will trigger the running of the 120 day measuring period under the Speedy Trial Act. Where the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is apparent or clearly indicated by the context in which they are used. *Lafayette Transportation Service, Inc. v. County of Robeson*, 283 N.C. 494, 196 S.E. 2d 770 (1973). When enacting the statute under review here, we assume that the legislature intended the phrase "whichever occurs last" to have its ordinary meaning and to indicate that, of the triggering events listed in the statute, that event occurring *last in fact* will trigger the running of the 120 day period within which the defendant must be brought to trial. *See State v. Young*, 302 N.C. 385, 275 S.E. 2d 429 (1981); *State v. Charles*, 53 N.C. App. 567, 281 S.E. 2d 438 (1981).

Where, as here, the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning as adopted by the legislature. *In Re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978). In such cases courts are without power to interpolate or superimpose provisions or limitations not contained in the statute. *Id.* Therefore, we hold that the relevant event listed in subsections (1) and (3) of G.S. 15A-701(a1) which occurred last and

triggered the running of the 120 day period of the Speedy Trial Act was the post-indictment arrest of the defendant on the new charges on September 23, 1981 and not the returning of the bill of indictment on March 30, 1981.

Only 74 days passed between the defendant's post-indictment arrest and his trial. This 74 day period was well within the 120 day requirement of the Speedy Trial Act. The opinion of the Court of Appeals holding that the defendant was not brought to trial within the 120 days allowed by the Act and reversing the trial court and remanding for a determination under G.S. 15A-703 of whether dismissal should be with or without prejudice is reversed. The case is remanded to the Court of Appeals for its consideration and determination of the remaining issues raised by the defendant in the Court of Appeals but not reached or decided there.

Reversed and remanded.

STATE OF NORTH CAROLINA v. RAYDELL GRIMES

No. 137A83

(Filed 3 November 1983)

1. **Criminal Law § 66.3— identification procedures—due process**

Identification procedures which are so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification violate a defendant's right to due process.

2. **Criminal Law § 66.3— pretrial identification—test to determine suggestiveness**

The test in determining the suggestiveness of a pretrial identification is whether the totality of circumstances reveals a pretrial procedure so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice.

3. **Criminal Law § 66.3— pretrial identification procedure—likelihood of irreparable misidentification**

Even if a pretrial procedure is suggestive, that suggestiveness rises to an impermissible level 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.

4. **Criminal Law § 66.9— pretrial photographic identification procedure—no impermissible suggestiveness**

A pretrial photographic identification procedure was not so impermissibly suggestive or conducive to misidentification as to violate defendant's right to due process where a lineup of ten photographs of black males was exhibited to the victim of a burglary and attempted rape; upon being shown the photographic lineup, the victim without hesitation picked the photograph of the defendant; the order of the same set of photographs was rearranged several times and shown to the victim, and each time the victim selected the picture of the defendant; the victim testified that after the crime occurred in her home, her assailant told her he wanted to talk, she turned on a night light, and she and her assailant had a face-to-face conversation from five to ten minutes; when the assailant left the victim's house, she went to unlock the door to let him out and at that time turned on a light to see her way to the door; the victim testified that her assailant wore no mask or face covering and that she had seen him on the streets of the town before the night she was attacked; only five days elapsed from the time of the attack until the time of the photographic identification; and the victim testified that her selection of defendant's photograph was not the result of any suggestion by another person.

5. **Criminal Law § 66.9— pretrial photographic identification procedure—facial hair of lineup participants**

The evidence did not support defendant's contention that defendant's picture in a photographic lineup was the only one of a man with both a mustache and a beard. Even if the picture of defendant had been the only one depicting a male with both a mustache and a beard, due process did not require that all participants in the lineup be identical but only required that the lineup be a fair one and that the officers conducting it do nothing to induce the witness to select one participant rather than another.

6. **Criminal Law § 66.1— pretrial photographic identification—absence of glasses—opportunity for observation**

A pretrial lineup identification was not impermissibly suggestive because the victim on the night of the crime saw her assailant without her glasses and in the light of a night light where the victim testified that her distance vision was fine, that she needed glasses only for close work such as for needlework or reading, and that the light was sufficient to recognize the man as someone she had seen in town before.

BEFORE *Judge R. Michael Bruce*, at the October 13, 1982 Criminal Session of Superior Court, BEAUFORT County. The defendant was convicted of first degree burglary and attempted second degree rape and sentenced to life imprisonment. The defendant appealed to the Supreme Court as a matter of right.

Rufus L. Edmisten, Attorney General, by Fred R. Gamin, Assistant Attorney General, for the State.

Moore & Moore, by Regina A. Moore, for the defendant-appellant.

MITCHELL, Justice.

The defendant brings forward one question for this Court's review on appeal. He contends the trial court erred in denying his motion to suppress evidence of the victim's pretrial photographic identification of him. He claims that identification was tainted, suggestive and conducive to irreparable mistaken identification in violation of the defendant's right to due process under the Fourteenth Amendment to the Constitution of the United States. We find no error.

The facts surrounding the offenses for which the defendant was convicted need not be stated in great detail. The State's evidence tended to show that around 11:00 p.m. on May 14, 1982 in Aurora, North Carolina, the victim, Mrs. Penelope Mitchell, awoke to sounds of her dog barking. She heard a crashing sound coming from the kitchen of her house, and when she went to discover its source, she saw a man coming into her house through a window. The man threw something over the victim's head and forced her into her bedroom where he attempted to have sexual intercourse with her. Afterwards the victim asked the assailant to leave her house, but he told her he wanted to talk. Mitchell testified that she put on a bathrobe, turned on a night light and had a face-to-face conversation with him which lasted five to ten minutes. During that conversation the intruder told the victim his name. She testified that she thought he had said his name was "Ray Don" or "Raybon" or "Rayboy Grimes." Mitchell testified that she recognized the assailant's face as someone she had seen in town, but that she had not known his name. Mitchell testified that, after the conversation, the man asked if she wanted him to replace the window screen he had removed. She replied that she did and then let him out through the back door.

Five days after the incident the victim reported the crime to the police at which time she described her assailant as a young black male with a muscular build, a medium-sized afro hairstyle, and a light beard and mustache. She also described the clothing

and jewelry he wore. Based on her description, Euel Atkinson, Chief of Police of Aurora, compiled a lineup of ten photographs of black males. Upon being shown the lineup, the victim without hesitation picked the photograph of the defendant, remarking, "That's the man." Chief Atkinson testified that he rearranged the order of the same set of photographs several times and showed the newly arranged lineups to the victim. Each time the victim selected the picture of the defendant. The defendant put on no evidence at trial.

The defendant claims through his sole assignment of error that the evidence of the photographic identifications was improperly admitted because, of the ten photographs in the lineups, none of the pictures except that of the defendant fit the exact description given by the victim. Specifically, the defendant says that none of the pictures except the one of him depicted a black male with a beard, mustache and afro. The defendant further claims that the victim observed the intruder without her glasses and only by the light of a night light. The conduct of the identification procedure was therefore impermissibly suggestive, according to the defendant. Furthermore, the defendant claims the use of the same set of pictures in three showings tended to "plant" the defendant's face in the mind of the victim.

[1, 2] Identification procedures which are so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification violate a defendant's right to due process. *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983); *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982). This Court has said that to determine the suggestiveness of pretrial identification, the test is whether the totality of circumstances reveals a pretrial procedure so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice. *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982).

[3] We have held that even if the pretrial procedure is suggestive, that suggestiveness rises to an impermissible level 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. *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983).

[4] After a review of the above factors as they apply in this case, we find no error in the trial court's conclusion that the pretrial identification procedure was not so impermissibly suggestive or conducive to misidentification as to violate the defendant's right to due process. Mitchell testified that after the crime occurred in her home, her assailant told her he wanted to talk. She said she turned on a night light, and that she and the man had a face-to-face conversation for from five to ten minutes. When he left the house, she said she went to unlock the door to let him out. At that time, too, she turned on a light to see her way to the door. She testified that her assailant wore no mask or face covering. She also testified that she had seen her assailant on the streets of Aurora before the night she was attacked.

[5] The defendant specifically contends that his photograph was the only photograph in the photographic lineups which depicted a young man with a beard, mustache and afro hairdo. Since the defendant has not caused the photographic lineup to be before this Court on appeal, we must rely on an examination of the testimony in the record to evaluate his claim. The testimony indicates that Chief Atkinson requested photographs of black males with facial hair to compile the lineup. Chief Atkinson testified that there were five or six pictures of men with mustaches and three with goatees, and that the defendant's was not the only picture of a man with both a mustache and beard. Even if the picture of the defendant had been the only one depicting a male with both a mustache and beard, we note that due process does not require that all participants in a lineup be identical; all that is required is that the lineup be a fair one and that the officers conducting it do nothing to induce the witness to select one participant rather than another. *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976).

The defendant contends that showing his picture to Mitchell in three lineups tended to plant the defendant's face in her mind.

We note that all of the other photographs were also included in each of the three lineups, and that the risk of planting the defendant's face in the victim's memory was no greater than the risk of planting any of the other photographed faces. We also note that even in the first lineup and before any possible "planting," Mitchell chose the defendant's picture without hesitation as the picture of her assailant.

[6] The defendant also argues that the victim on the night of the crime saw her assailant without her glasses and in the light of a night light. Although Mitchell testified that she was not wearing glasses at the time of the attack, she also stated that her distance vision was fine, and that she needed glasses only for close work such as for needlework or reading. She also testified that the light was sufficient to recognize the man as someone she had seen before in Aurora.

[4] There was evidence that the description the victim gave the police was a detailed one that matched the photograph of the defendant she picked out. Chief Atkinson testified that the victim showed no hesitancy in picking out the photograph of the defendant in any of the three lineups. The evidence shows that only five days elapsed from the time of the attack until the time Mitchell picked out the photographs of the defendant. Finally, Mitchell testified that her selection of the defendant's photograph was not the result of any suggestion by another person. This evidence is ample support for the trial court's findings of facts and conclusion of law to the effect that the pretrial identification procedure was not suggestive or conducive to misidentification.

We hold that the trial court committed no error in admitting the evidence of the victim's pretrial identification of the defendant as her assailant.

No error.

STATE OF NORTH CAROLINA v. BARRY LEE LINKER

No. 156PA83

(Filed 3 November 1983)

Indictment and Warrant § 17.5— fatal variance between indictment and proof

In a prosecution for attempting to obtain property by false pretenses pursuant to G.S. 14-100(a), there was fatal variance between the allegations in the indictment and the proof at trial where the indictments alleged that defendant "represented himself as Barry W. Linker," and the record clearly reflected that the State failed to prove that defendant represented himself as Barry W. Linker.

ON discretionary review of the Court of Appeals' unpublished decision finding no error in defendant's convictions for obtaining property by false pretenses in the Superior Court for MECKLENBURG County.

Rufus L. Edmisten, Attorney General, by Fred R. Gamin, Assistant Attorney General, for the State.

David P. Hefferon, Assistant Public Defender, and Purser and Hefferon by Thomas J. Hefferon for defendant appellant.

EXUM, Justice.

Defendant, Barry Lee Linker, was charged in two proper indictments with obtaining and attempting to obtain property by false pretenses from the Wachovia Bank and Trust Company. *See* N.C. Gen. Stat. § 14-100(a) (1981) (making it an offense to obtain property "by means of any kind of false pretense whatsoever . . ."). At the close of the state's evidence, defendant moved that the indictment be dismissed due to a variance between the acts charged in the indictment and those proved at trial. The essence of defendant's position hinged on the absence of any misrepresentation by him as to his identity when he cashed various counter checks at the bank's branch offices. The critical issue becomes the variance between the misrepresentations alleged in the indictment and those proved at trial. Contrary to the conclusion of the Court of Appeals, we believe the variance here to be fatal; and we reverse.

In testing the state's proof of the offense, we turn first to the language of the indictments. The indictment concerning the 8 October 1981 incident states, in pertinent part,

> Barry Lee Linker did unlawfully, wilfully and feloniously and knowingly and designedly with the intent to cheat and defraud obtain United States currency from Wachovia Bank and Trust Company without making proper compensation or bona fide arrangements for compensation. This property was obtained by means of defendant Barry L. Linker, who had no valid account with Wachovia Bank and Trust Company, representing himself as Barry W. Linker who did have a valid account and cashed a check for $190.00.

The indictment concerning the 22 October 1981 incident states, in pertinent part,

> Barry Lee Linker did unlawfully, wilfully and feloniously and knowingly and designedly with the intent to cheat and defraud attempted [sic] to obtain United States currency from Wachovia Bank and Trust Company without making proper compensation or bona fide arrangements for compensation. In attempting to obtain the property, the defendant Barry L. Linker, who had no valid account with Wachovia Bank and Trust Company, represented himself as Barry W. Linker who did have a valid account and attempted to cash a check for $120.00.

Thus, both indictments specify the false pretense, *i.e.*, misrepresentation of his identity, under which defendant obtained or attempted to obtain property from the banks.

The crux of each indictment was defendant's "representing himself as Barry W. Linker." Although defendant offered his own testimony to show why he used a bank account number other than his own (*i.e.*, that of Barry W. Linker) to obtain money from the bank,[1] we find it necessary to consider only the state's

1. Defendant testified at length. Summarizing briefly, we note that he claims to have made numerous deposits to his account in 1979 through 1981 which were never credited to him. His "personal banker" (whom he could not identify) allegedly checked the computer records and found the deposits had been recorded in a Salisbury, North Carolina account carrying the name, "Barry W. Linker." According to defendant, she, apparently believing the Salisbury account was actually

evidence in determining whether the misrepresentation, if any, proved at trial varied fatally from that alleged in the indictment. The essential facts established by the state's evidence, set out below, are not in dispute.

On 8 October 1981 defendant went to the Wachovia branch at Eastland Mall in Charlotte, North Carolina. He told Linda Morgan, a secretary, that he did not have any checks or his account number and asked her to write out a counter check for him. After taking defendant's driver's license (which identified him as Barry L. Linker), she checked the computer records for an account number. She noted that the middle initial on the driver's license was "L", while the computer entry for the account showed "W". When she questioned him about the differing middle initials, defendant told her the initial on the account was wrong. She wrote the counter check for him in the amount of $190, which he signed without using a middle initial. Linda Morgan stated on cross-examination that defendant at no time represented to her that he was Barry W. Linker.

On 22 October 1981 defendant went to Wachovia's Sugar Creek branch. He asked Grace Galloway, a secretary, to complete a counter check for him, giving her the account number for Barry W. Linker's account, which he had obtained from Linda Morgan. When she asked for identification, he told her to call Morgan at the Eastland branch. Meanwhile, Jack Johnson, the branch operations manager, came over and assumed the transaction. He remembered a bank alert dealing with defendant. Johnson, who knew defendant, examined defendant's driver's license (which identified him as Barry L. Linker) and stalled him until police arrived. Both Galloway and Johnson testified on cross-examination that defendant never represented to them that he was Barry W. Linker.

The gist of obtaining property by false pretense is the false representation of a subsisting fact intended to and which does

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defendant's account, gave him the Salisbury account number and told him to use it until he got new checks with his new account number. Defendant said he lived with his parents, and ordinarily, "my mother writes my checks because I am not too smart in spelling, I sign the checks." We find it unnecessary to consider or assess defendant's testimony as we analyze the variance between indictment and evidence based upon the state's case alone.

deceive one from whom property is obtained. *State v. Cronin*, 299 N.C. 229, 242, 262 S.E. 2d 277, 286 (1980). The state must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged. *See State v. Yancey*, 228 N.C. 313, 317-18, 45 S.E. 2d 348, 351 (1947); *State v. Carlson*, 171 N.C. 818, 89 S.E. 30 (1916). If the state's evidence fails to establish that defendant made this misrepresentation but tends to show some other misrepresentation was made,[2] then the state's proof varies fatally from the indictments. *See State v. Keziah*, 258 N.C. 52, 54, 55, 127 S.E. 2d 784, 786 (1962) (fatal variance in trial for perjury where indictment charged defendant with testifying that he sold liquor to Johnson and Erwin but evidence showed defendant testified only that he bought no liquor "in that house"); *State v. Nunley*, 224 N.C. 96, 97, 29 S.E. 2d 17, 17 (1944) (indictment alleging larceny of a specific amount of money and papers varied fatally from proof of larceny of two suitcases). In that situation, a defendant's motion to dismiss should be allowed with leave to the state to secure another indictment, if so advised. *State v. Hicks*, 233 N.C. 31, 34, 62 S.E. 2d 497, 499 (1950). This rule protects criminal defendants from vague and nonspecific charges and provides them notice so that if they have a defense to the charge as laid, they may properly and adequately prepare it without facing at trial a charge different from that alleged in the indictment.

The indictments explicate the alleged misrepresentation in clear and unequivocal terms: Defendant "represented himself as Barry W. Linker." The record clearly reflects that the state failed to prove that defendant represented himself as Barry W. Linker. Without exception, each of the state's witnesses testified that defendant never represented himself as Barry W. Linker. Instead, he gave each bank employee his driver's license which established that he was, in fact, Barry L. Linker. Simply put, defendant never made the misrepresentation charged in both indictments.

The Court of Appeals, in affirming defendant's conviction, concluded that the evidence supported "the permissible inference that defendant implicitly represented himself to be Barry W.

2. The state's evidence might arguably allow an inference that defendant misrepresented his account number or gave a wrong account number to Galloway or that he misrepresented to both Galloway and Linda Morgan that he had a Wachovia account when he did not. Neither indictment alleges either type of misrepresentation however.

Linker, when in fact he was not . . . ." We cannot agree with that conclusion in light of the state's own evidence. Defendant positively identified himself with his driver's license to each bank official. He neither told anyone nor did anything to imply that he was Barry W. Linker. Given defendant's constant, positive, and verifiable identification of himself as Barry L. Linker, the evidence simply fails to support an inference that he impliedly misrepresented himself as alleged in the indictment.

Because the state's proof varied fatally from the allegations in the indictment, the trial court erred in failing to grant defendant's motion to dismiss. Accordingly, the decision of the Court of Appeals is reversed and the case is remanded with instructions to dismiss the indictments, with leave to the state to obtain other indictments, if it is so advised.

Reversed and remanded.

JOHN WESLEY SETTLE, MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, MARK E. SULLIVAN v. KENNETH WAYNE BEASLEY

No. 67PA83

(Filed 3 November 1983)

Bastards § 10; Judgments § 36.2— paternity action—no estoppel by prior judgment in county's action

The minor plaintiff in an action to establish paternity and obtain support was not collaterally estopped by a judgment finding that defendant was not plaintiff's father entered in an action to establish paternity brought in the mother's name by the Child Support Enforcement Agency of Johnston County since (1) the real party in interest in the prior action was the county; (2) the minor plaintiff was not in privity with the county in the prior action because (a) the interests of the minor plaintiff in having his paternity adjudicated were not identical with the county's interest in the prior action in that the county's interest was solely economic, and interests of the minor plaintiff affected by the paternity adjudication are his rights to support, inheritance and custody, his mental health, outlook, attitude and personality, and his family medical history, and (b) the present action is governed by rules of evidence substantially different from those applicable to the prior action in that G.S. 8-50.1 now allows blood grouping tests to prove paternity as well as to preclude it, and G.S. 8-57.2 has been amended to allow both plaintiff's mother and presumed father to testify as to plaintiff's paternity; and (3) fairness requires that plain-

tiff be given a full and fair opportunity to relitigate the issue of paternity. G.S. 49-14; G.S. 110-130; G.S. 110-135; G.S. 110-138.

Justice MEYER concurring.

ON discretionary review of the decision of the Court of Appeals, 59 N.C. App. 735, 298 S.E. 2d 62 (1982), affirming summary judgment entered in favor of the defendant on 27 July 1981 by *Parker, J.*, in District Court, WAKE County. Heard in the Supreme Court 12 September 1983.

This is an action brought by plaintiff, through his duly appointed guardian ad litem, seeking support from defendant. Plaintiff alleges, and defendant denies, that defendant is his father. After a hearing on motions by plaintiff and defendant for summary judgment, the trial court granted defendant's motion for summary judgment. Upon appeal, the Court of Appeals affirmed. For the reasons herein set forth, we reverse.

Sullivan & Pearson, P.A., by Mark E. Sullivan, for plaintiff appellant.

Canaday & Canaday, P.A., by C. C. Canaday, Jr. and Claude C. Canaday III, for defendant appellee.

MARTIN, Justice.

The central question in this appeal is whether plaintiff is barred by collateral estoppel from pursuing this action. The materials before the court at the summary judgment hearing disclosed that a prior action had been brought against defendant in Johnston County about 20 December 1977, pursuant to N.C.G.S. 49-14, to establish the paternity of John Wesley Settle. This action was brought in the name of plaintiff's mother, Frances Settle, by the Child Support Enforcement Agency of Johnston County and its attorney, W. A. Holland, Jr. In that action, defendant denied he was the father of John Wesley Settle. The prior action was heard in January 1978, but for some inexplicable reason judgment was not entered until 30 April 1981. In that judgment, the court found as facts that plaintiff, Frances Settle, was married to Frank Settle at the time that the child was conceived and that she was also dating other men. The court concluded as a matter of law that defendant was not the father of the child. There was no appeal from this judgment.

Also before the court at the summary judgment hearing was the affidavit of Frances Settle stating that she only conferred briefly with attorney Holland before the prior trial. She further testified that at the time of the conception of the child she was separated from her husband and was only seeing defendant during that period. She was divorced one month after the birth. She had sexual intercourse with defendant every other weekend and did so during her period of conception without the use of contraceptives.

The trial court allowed defendant's motion for summary judgment on the theory that this plaintiff, John Wesley Settle, was in privity with Frances Settle, the plaintiff in the prior action, and estopped by that judgment from litigating the issue of paternity. The Court of Appeals affirmed this ruling. In this we find error.

The prior action was actually commenced by the Child Support Enforcement Agency of Johnston County. Frances Settle had been receiving public assistance on behalf of her child. This created a debt due the state by the responsible parents of the child. N.C. Gen. Stat. § 110-135 (Cum. Supp. 1981). The county has the authority and the duty to pursue an action against the responsible parent for the maintenance of the child and recovery of amounts paid by the county for support of the child. N.C. Gen. Stat. §§ 110-130, -138 (Cum. Supp. 1981). The county may bring the action in the name of the mother or in its own name. She is in either case required to cooperate with the county in the trial of the action.

In the prior action, no blood tests were made. Nor was the testimony of Frank Settle, husband of Frances, available on the contested issue.

The real party in interest in the prior action was the county, not Mrs. Settle. The acceptance of public assistance by Frances Settle assigned *her* right to child support to the county. N.C. Gen. Stat. § 110-128 (Cum. Supp. 1981); *Carrington v. Townes*, 53 N.C. App. 649, 281 S.E. 2d 765 (1981), *modified and remanded on other grounds*, 306 N.C. 333, 293 S.E. 2d 95 (1982), *cert. denied*, --- U.S. --- (1983). In determining the real party in interest, the courts will look beyond the nominal party whose name appears of record and consider the legal questions raised as they may affect the real party in interest. *Davenport v. Patrick*, 227 N.C. 686, 44 S.E.

2d 203 (1947). The 1977 action was for the economic benefit of the county. Mrs. Settle would continue to receive public assistance on behalf of her child so long as she cooperated with the county in its efforts to get support from the father of the child. N.C. Gen. Stat. § 110-131(a) (1978). Under no theory could John Wesley Settle be considered the real party in interest.

John Wesley Settle was not a party to the prior action. In order for the prior judgment to be binding upon him, he must be in privity with the plaintiff in the prior case. *King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973). This brings us to the issue of whether John Wesley Settle is in privity with the real party in interest in the prior action, Johnston County.

The purpose of collateral estoppel is to prevent repetitious lawsuits over matters which have been decided and which have remained substantially static, factually and legally. *Commissioner v. Sunnen*, 333 U.S. 591, 92 L.Ed. 898 (1948). In resolving the issue of privity, the following analysis is instructive:

> [A] privy, when applied to a judgment or decree, is 'one whose interest has been legally represented at the trial.' . . . A person in privity under the doctrine of estoppel by judgment is one whose interests are so identified in interest with a party that such party represents the same legal right. . . .
>
> There is no definition of the word "privity" which can be applied in all cases. . . .
>
> > "The ground of privity is property, not personal relation, and it relates to persons in their relation to property, and does not relate to any question, claim or right independent of property. . . . whether the privity be one of estate, contract, blood, or law, it has no personal basis as a mere matter of sentiment, but rests on some actual mutual or successive relationship to the same right of property.
> >
> > "Absolute identity of interest is essential to privity, and sometimes the word 'privity' merely means identity of interest, and is defined as meaning interest or mutuality of interest; and it is said that in legal literature 'privity' means partaking of, having a part or interest in or recognizance of any action, matter, or thing.

> ". . . However, the fact that persons are interested in the same question or in proving the same facts, or that one person is interested in the result of litigation involving the other does not make them privies.
>
> "In order to make a man a privy to an action he must have acquired an interest in the subject matter of the action either by inheritance, succession, or purchase from a party subsequently to the action, or he must hold property subordinately."
>
> When used with respect to estoppel by judgment, the term "privity" denotes mutual or successive relationship to the same rights of property. One is "privy," when the term is applied to a judgment or decree, whose interest has been *legally* represented at the trial. A party will not be concluded by a former judgment unless he could have used it as a protection, or as a foundation of a claim, had the judgment been the other way.

Masters v. Dunstan, 256 N.C. 520, 524-26, 124 S.E. 2d 574, 577-78 (1962) (citations omitted).

The meaning of "privity" for res judicata purposes may be elusive. It denotes a mutual or successive relationship to the same rights of property and does not ordinarily arise from the relationship of parent and child. Where there is no such concurrent relationship to the same right, as may exist between guardian and ward or trustee and beneficiary, privity does not exist to bar the child's subsequent suit.

Were John Wesley Settle's interests in having his paternity determined so identified with plaintiff's interest in the prior action that they were determinable in that action? We think not. The interest of Johnston County, the real party in interest in the prior suit, was solely economic. The county was only interested in requiring the responsible parent to support John Wesley Settle and to recoup the amounts that it had paid for such support. It mattered not to the county whether this goal was achieved by a judgment against this defendant or against Frank Settle.

John Wesley Settle, to the contrary, has more at stake in this present litigation. The paternity adjudication will dramatically affect his personal interests. His interests in an accurate deter-

mination of paternity are at least equal to those of defendant. John Wesley Settle's rights to support, inheritance, and custody are directly affected by the proceeding. N.C. Gen. Stat. § 29-19 (b)(1) (Cum. Supp. 1981); N.C. Gen. Stat. § 49-11 (1976); N.C. Gen. Stat. § 50-13.2 (Cum. Supp. 1981); *Jolly v. Queen*, 264 N.C. 711, 142 S.E. 2d 592 (1965); *Conley v. Johnson*, 24 N.C. App. 122, 210 S.E. 2d 88 (1974). Perhaps even more important is the mental health, outlook, attitude, and personality of John Wesley Settle as affected by the proceeding. It is also well established in medical practice that an accurate family medical history can be critical in the diagnosis and treatment of the illnesses and injuries of a child. In common parlance, John Wesley Settle needs to know who is his father.

The rationale in *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976), is apposite to this appeal. In *Tidwell*, defendant, the putative father, had been prosecuted criminally for nonsupport of an illegitimate child. He was convicted of this charge, which included a finding that he was the father of the child. In a subsequent civil suit by the mother of the child against defendant for support of the child, this Court held that the judgment in the prior criminal action did not estop defendant from denying paternity. The Court held that the state in the prior action and the plaintiff mother in the second case were not the same parties and were not in privity. The Court reasoned that the state was not a mere nominal party in the criminal action. Its interest was in the prevention of the child becoming a charge upon the state, an economic interest. The state, not the mother, had control of the litigation. The mother's interests were not identical to that of the state.

The facts in the present appeal are more compelling than those in *Tidwell*. In addition to the difference in the interests of the parties above set forth, John Wesley Settle was only a few months old at the time of the prior trial. He had no guardian appearing for him; he did not testify at the trial. John Wesley Settle had no control over the prior litigation. To the contrary, Ms. Tidwell swore out the warrant in the criminal action and appeared and testified at the trial. *Tidwell* has been followed in *Smith v. Burden*, 31 N.C. App. 145, 228 S.E. 2d 662 (1976), and *Hussey v. Cheek*, 31 N.C. App. 148, 228 S.E. 2d 519 (1976).

In the case of *Arsenault v. Carrier*, 390 A. 2d 1048 (Maine 1978), the Maine court faced this same issue. There the mother of a child born out of wedlock brought suit under the Uniform Act on Paternity, alleging that defendant was the father of the child. This suit was brought on behalf of the child. The defendant pleaded res judicata relying upon a prior bastardy action brought by the child's mother which was settled by the parties. The Maine court held that the subsequent suit was not barred as the child was neither a party nor privy to the bastardy action.

The legal commentaries support the result we reach today. In 1 Freeman on Judgments § 481 (1925), we find: "Neither is a bastard child bound by the adjudication of its paternity in a bastardy proceeding instituted by its mother against one alleged to be the father."

The issue is treated in the Restatement of the Law of Judgments:

> (2) A judgment in an action whose purpose is to determine or change a person's status is conclusive with respect to that status upon all other persons, with the following qualifications:
>
> (a) If a person has, under applicable law, an interest in such status such that he is entitled to contest its existence, the judgment is not conclusive upon him unless he was afforded an opportunity to be a party to the action;

Restatement (Second) of Judgments § 31 (1982). Of course, John Wesley Settle had no opportunity to be a party to the prior action against defendant.

Another factor to be considered in determining privity with respect to a plea of collateral estoppel is whether there has been a substantial change in the law between the first and second actions with respect to the question in issue. A substantial change in the law between the first and second actions is a cogent reason to support a finding of lack of privity. Restatement (Second) of Judgments § 28(2)(b) (1982); 46 Am. Jur. 2d *Judgments* § 444 (1969). John Wesley Settle's present cause of action is governed by rules of evidence substantially different from those applicable to the prior action. Since the determination of the prior action, N.C.G.S. 8-50.1(b) (1981) has been adopted to allow the use of blood

grouping tests to prove paternity as well as to preclude it. This is a powerful tool now available to plaintiff in this action. Also, N.C.G.S. 8-57.2 has been amended to allow both plaintiff's mother and presumed father, Frank Settle, to testify as to the paternity of plaintiff. This, likewise, is a substantial aid to plaintiff in this action which was not available at the prior trial.

Finally, where the interests of a person not a party or privy to the initial action will be adversely affected by that determination, fairness requires that he be given an opportunity to relitigate the issue. The impact of the first action upon John Wesley Settle is devastating. He is entitled to a full and fair opportunity to relitigate the issue of paternity.

For these reasons, under the facts of this case we hold that John Wesley Settle is not in privity with the plaintiff in the prior action and is not collaterally estopped by the prior judgment from pursuing the present action. The trial judge erred in entering summary judgment for the defendant.

The decision of the Court of Appeals is

Reversed.

Justice MEYER concurring.

I concur in the result but desire to add that the issue of whether an illegitimate child is bound by the adjudication of paternity in a criminal proceeding brought by its mother is not now before the Court and the reader should not assume that the quote from 1 Freeman on Judgments § 481 (1925) is any expression of this Court on this issue.

STATE OF NORTH CAROLINA v. FORREST GREEN

No. 269A83

(Filed 3 November 1983)

Criminal Law § 138— Fair Sentencing Act—aggravating factor—prior convictions—no objection by defendant to introduction of evidence

Where defendant did not object to the introduction of evidence of his prior conviction or convictions, nor did he allege that he was indigent and not

represented by counsel at the time of his prior conviction or convictions, the Court of Appeals erred in holding that the State's failure to show that, at the time of his prior conviction or convictions, the defendant was either not indigent or was represented by or waived counsel rendered the finding of this aggravating factor by the trial court erroneous. G.S. 15A-1340.4(a)(1)(a).

APPEAL of right by the State, pursuant to G.S. 7A-30(2), from a decision of a divided panel of the Court of Appeals, 62 N.C. App. 1, 301 S.E. 2d 920 (1983), finding no error in the guilt-innocence determination phase of the defendant's trial but vacating the sentence entered and remanding to the trial court for resentencing.

The defendant was tried for murder in the second degree and convicted of manslaughter. During the sentencing hearing the trial court found certain factors in aggravation and mitigation, found that the factors in aggravation outweighed those in mitigation and sentenced the defendant to imprisonment in excess of the presumptive term. The defendant appealed to the Court of Appeals which found no error in the guilt-innocence determination phase of the defendant's trial. The Court of Appeals held, however, that two of the factors in aggravation were improperly found to exist by the trial court. The Court of Appeals vacated the sentence and remanded to the trial court for a new sentencing hearing. Judge Braswell dissented, and the State appealed to the Supreme Court as a matter of right.

Rufus L. Edmisten, Attorney General, by Stephen F. Bryant, Assistant Attorney General, for the State-appellant.

Franklin B. Johnston, for the defendant-appellee.

PER CURIAM.

The trial court found as a factor in aggravation that the defendant had a prior conviction or convictions for criminal offenses punishable by more than sixty days' confinement. G.S. 15A-1340.4(a)(1)(o). The defendant did not object to the introduction of evidence of his prior conviction or convictions, nor did he allege that he was indigent and not represented by counsel at the time of his prior conviction or convictions. Nevertheless, the Court of Appeals held that the State's failure to show that, at the time of his prior conviction or convictions, the defendant ei-

ther was not indigent or was represented by or waived counsel rendered the finding of this aggravating factor by the trial court erroneous. This holding by the Court of Appeals was error. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983).

The Court of Appeals also held that the trial court erred in finding as a factor in aggravation that the defendant was armed with or used a deadly weapon at the time of the crime. G.S. 15A-1340.4(a)(1)(i). In its new brief filed in this Court, the State did not present or discuss any question concerning this holding by the Court of Appeals. Therefore, we leave undisturbed the holding of the Court of Appeals that this factor in aggravation was improperly found. Rule 28, North Carolina Rules of Appellate Procedure. If called upon during the resentencing hearing to determine whether this factor in aggravation is present, the trial court should review the evidence presented at that time in light of the recent decision of this Court in *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983).

When the trial court erroneously finds any aggravating factor to exist, the defendant is entitled to a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). As we have neither reviewed nor disturbed the holding of the Court of Appeals that the trial court erred in finding as a factor in aggravation that the defendant was armed with or used a deadly weapon at the time of the crime, the opinion of the Court of Appeals as modified herein must be affirmed.

Modified and affirmed.

STATE OF NORTH CAROLINA v. MICHAEL R. MASSEY

No. 299A83

(Filed 3 November 1983)

APPEAL by the state from a decision of a divided panel of the Court of Appeals, 62 N.C. App. 66, 302 S.E. 2d 262 (1983), which remanded for a new sentencing hearing. N.C. Gen. Stat. § 7A-30(2) (1981).

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General, and John F. Maddrey, Assistant Attorney General, for the state appellant.

Habegger & Johnson by Daniel S. Johnson, for defendant appellee.

PER CURIAM.

The sentencing court found, among others, the following factors in aggravation: The offense was especially heinous; defendant had a prior conviction; defendant was associated with a motorcycle gang; and defendant went to the scene armed with a shotgun intending to do revenge.

The Court of Appeals concluded there was error in each of these findings. Concerning the prior conviction circumstance, the Court of Appeals concluded it should not have been considered because there was no evidence that defendant was not indigent or was represented by counsel at the prior conviction. Because defendant did not make an issue of the validity of the prior conviction in the trial court, the Court of Appeals erred in so concluding for the reasons stated in *State v. Thompson*, No. 150PA83 (filed 27 September 1983). Otherwise the Court of Appeals should be affirmed. The decision of the Court of Appeals is therefore modified and affirmed accordingly.

Modified and affirmed.

STATE OF NORTH CAROLINA v. BUDDY FARRELL CALLICUTT

No. 322A83

(Filed 3 November 1983)

Criminal Law § 138— Fair Sentencing Act—aggravating factors—prior convictions

The State does not have the burden "to raise and prove nonindigency and representation by counsel or waiver of counsel in order to support a finding that the defendant had a prior conviction or convictions," and the Court of Appeals erred in finding that the State did have to so prove to support an aggravating factor that defendant had a prior conviction for a criminal offense punishable by more than 60 days' confinement.

State v. Callicutt

APPEAL by the State pursuant to N.C. Gen. Stat. § 7A-30(2) from the decision of the Court of Appeals (*Judges Eagles* and *Webb* concurring, *Chief Judge Vaughn* concurring in part and dissenting in part), reported in 62 N.C. App. 296, 302 S.E. 2d 460 (1983). The Court of Appeals found no error in defendant's trial with *Judge Beaty* presiding at the 22 June 1982 Session of MONTGOMERY Superior Court, but remanded for resentencing.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Daniel C. Oakley, for the State-appellant.

Charles H. Dorsett for defendant-appellee.

PER CURIAM.

The Court of Appeals determined that the trial court erred in the sentencing phase of the defendant's trial and remanded for resentencing. Following a hearing pursuant to the Fair Sentencing Act, the trial court found as one of the aggravating factors that the defendant had a prior conviction for a criminal offense punishable by more than sixty days confinement. The Court of Appeals held that this aggravating factor may not be considered until the State presents evidence as to whether the defendant was indigent at the time of this prior conviction and if so, whether he was represented by counsel.

This holding is erroneous in light of our decision in *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983). There we held that the State does not have the burden "to raise and prove nonindigency and representation by counsel or waiver of counsel in order to support a finding that the defendant had a prior conviction or convictions."

The decision of the Court of Appeals is reversed and the case is remanded to that court with instructions that it enter an order affirming the order of the trial court.

Reversed and remanded.

MARION DOZIER PUGH v. THOMAS DAVENPORT AND WIFE, EDITH DAVENPORT; THELMA DAVENPORT HASSELL AND HUSBAND, FENTRESS HASSELL; IDA D. MAITLAND AND HUSBAND, WILL MAITLAND; WILMA DAVENPORT SPENCER AND HUSBAND, JESSIE L. SPENCER; DALLAS DAVENPORT AND WIFE, MARGARET D. DAVENPORT; CLARA MAY DAVENPORT RHODES AND HUSBAND, T. EARL RHODES

No. 92PA83

(Filed 3 November 1983)

ON discretionary review pursuant to G.S. 7A-31 of a decision of the Court of Appeals filed 18 January 1983, modifying and affirming the judgment of *Smith, Judge*, entered 11 August 1981 in Superior Court, TYRRELL County.

Judge Smith declared plaintiff to be the owner of a marketable fee simple title to property pursuant to G.S. 47B-2. The Court of Appeals, without application or discussion of the Marketable Title Act, held for plaintiff on the theory that the remainder interest through which defendants claimed was defeated by application of the Rule in Shelley's Case.

We allowed defendant's petition for discretionary review on 5 April 1983.

No counsel for plaintiff appellee.

Charles W. Ogletree for defendant appellant.

PER CURIAM.

After reviewing the record and briefs, and hearing oral argument on the question presented, we conclude the petition for further review was improvidently granted. Our order allowing defendant's petition for discretionary review is vacated. The decision of the Court of Appeals modifying and affirming the judgment of Judge Smith remains undisturbed and in full force and effect.

Discretionary review improvidently granted.

JUANITA NASH v. CONRAD INDUSTRIES, INC. AND IOWA NATIONAL MUTUAL INSURANCE COMPANY

No. 379A83

(Filed 3 November 1983)

DEFENDANTS appeal as a matter of right pursuant to G.S. § 7A-30(2) from the decision of the Court of Appeals, 62 N.C. App. 612, --- S.E. 2d --- (1983), one judge dissenting, which affirmed in part and reversed in part the Opinion and Award of the Industrial Commission.

Snyder, Leonard, Biggers & Dodd, P.A., by Gary A. Dodd, for the plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Roy W. Davis, Jr. and Allan R. Tarleton, for defendant-appellant.

PER CURIAM.

The facts of this case are set out at length in the opinion of the Court of Appeals. The majority of the panel of the Court of Appeals reversed and remanded the Industrial Commission's Opinion and Award for further findings relating to whether the plaintiff was totally disabled for any employment between 8 June 1980 and 1 October 1981. We agree with the majority opinion. The Court of Appeals unanimously affirmed the Industrial Commission's Award with respect to plaintiff's permanent partial disability to her back and knees. We note that there is no indication in the record that the aggravation of the plaintiff's knee injury, which eventually led to permanent partial disability of plaintiff's knees, occurred prior to the initial hearing before the Hearing Commissioner. Nevertheless, as the Court of Appeals held, the Full Commission has the authority, pursuant to G.S. § 97-85, to reconsider evidence, take additional evidence, rehear the parties and, if appropriate, amend the award. Thus, it was proper for the Industrial Commission, in review of the Hearing Commissioner's Opinion and Award, to consider evidence relating to the disability of plaintiff's knees.

The decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. RALPH PATE

No. 263A83

(Filed 3 November 1983)

APPEAL by defendant pursuant to G.S. § 7A-30(2) from a decision of the Court of Appeals, one judge dissenting, filed 3 May 1983, finding no error in his conviction of second degree murder and the imposition of a sentence of imprisonment entered at the 26 April 1982 Session of Superior Court, UNION County. 62 N.C. App. 137, 302 S.E. 2d 286 (1983). Heard 5 October 1983.

Rufus L. Edmisten, Attorney General, by William F. Briley, Assistant Attorney General, for the State.

W. J. Chandler, Attorney for defendant-appellant.

PER CURIAM.

Defendant presents only one issue for review—whether the trial court erred in failing to instruct the jury on the issue of self-defense. We have carefully reviewed the opinion of the Court of Appeals, the record on appeal, and the briefs and authorities relating to defendant's contentions. We conclude that the result reached by the majority below, its reasoning, and the legal principles enunciated by it are correct.

The decision of the Court of Appeals is

Affirmed.

Ellenberger v. Ellenberger

TIMOTHY ELLENBERGER, PLAINTIFF	)	
v.	)	ORDER
CAROL ELLENBERGER, DEFENDANT	)	

No. 483P83

(Filed 4 November 1983)

THIS matter is before the Court upon plaintiff's petition for discretionary review under G.S. 7A-31, filed 29 September 1983. The petition is allowed for the sole purpose of entering the following Order:

> The total findings of fact made by the trial court are sufficient to sustain its order of 30 June 1982. Accordingly, so much of the decision of the Court of Appeals as relates to the lack of sufficient findings to support a substantial change of circumstances and which vacates that portion of the trial court's order entered 30 June 1982 awarding custody of Mark to the father, thus reinstating that portion of the original order awarding custody of Mark to the mother, is reversed. The decision of the Court of Appeals is otherwise affirmed, to the end that the order entered by Judge Robert T. Gash on 30 June 1982 may be reinstated. This cause is remanded to the Court of Appeals for further proceedings not inconsistent with this Order.

By order of the Court in Conference, this 3rd day of November, 1983.

FRYE, J.
For the Court

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

BELLEFONTE UNDERWRITERS INSUR. CO.
v. ALFA AVIATION

No. 237PA83.

Case below: 61 N.C. App. 544.

Petition by Smith for writ of certiorari to North Carolina Court of Appeals allowed 3 November 1983.

EDWARDS v. BROWN'S CABINETS

No. 495P83.

Case below: 63 N.C. App. 524.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 13 October 1983.

GARLAND v. CITY OF ASHEVILLE

No. 460P83.

Case below: 63 N.C. App. 490.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 3 November 1983.

HOCH v. YOUNG

No. 454P83.

Case below: 63 N.C. App. 480.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1983.

HOGAN v. HOGAN

No. 448P83.

Case below: 63 N.C. App. 565.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 November 1983.

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

HOLIDAY v. CUTCHIN

No. 430PA83.

Case below: 63 N.C. App. 369.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 3 November 1983.

IN RE ROGERS

No. 473P83.

Case below: 63 N.C. App. 705.

Petition by Rogers for discretionary review under G.S. 7A-31 denied 3 November 1983. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 November 1983.

ROSHELLI v. SPERRY

No. 453P83.

Case below: 63 N.C. App. 509.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 November 1983.

STATE v. EDWARDS

No. 476P83.

Case below: 63 N.C. App. 92.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 3 November 1983.

STATE v. GRANBERRY

No. 452P83.

Case below: 63 N.C. App. 566.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 November 1983.

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

STATE v. LEWIS

No. 391PA83.

Case below: 63 N.C. App. 98.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 3 November 1983.

STATE v. REID

No. 373P83.

Case below: 56 N.C. App. 257.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 3 November 1983.

WILSON BROTHERS v. MOBIL OIL

No. 428P83.

Case below: 63 N.C. App. 334.

Petitions by defendants and plaintiffs for discretionary review under G.S. 7A-31 denied 3 November 1983.

WRIGHT v. COMMERCIAL UNION INS. CO.

No. 463P83.

Case below: 63 N.C. App. 465.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 3 November 1983.

IN RE: INQUIRY CONCERNING A JUDGE, No. 76, CHARLES T. KIVETT, RESPONDENT

No. 417A83

(Filed 6 December 1983)

1. Appeal and Error § 10.1— motion to include materials in record on appeal—denial by Supreme Court

In this appeal of a judicial disciplinary proceeding, respondent judge's motion under Appellate Rule 37 to include as part of the record on appeal certain paperwritings previously furnished to the Judicial Standards Commission by respondent is denied by the Supreme Court where such materials were not considered by the Commission in arriving at its recommendation and are not necessary or helpful to the Supreme Court's decision.

2. Judges § 7— judicial disciplinary proceeding—effect of judge's resignation

The Supreme Court was not deprived of jurisdiction over a proceeding to remove a superior court judge by the judge's letter of resignation which was to take effect after the case was argued in the Supreme Court. Nor was the proceeding rendered moot by such resignation.

3. Judges § 7— judicial disciplinary proceeding—quantum of proof

The quantum of proof required to sustain findings by the Judicial Standards Commission is proof by clear and convincing evidence.

4. Judges § 7— judicial disciplinary proceeding—duty of Supreme Court

The Supreme Court is not bound by the recommendations of the Judicial Standards Commission but may consider all of the evidence and exercise its independent judgment as to whether it should censure, remand, or dismiss the proceedings against a respondent judge.

5. Judges § 7— conduct prejudicial to administration of justice—censure of superior court judge

A superior court judge is censured by the Supreme Court for conduct prejudicial to the administration of justice that brings the judicial office into disrepute on the basis of the following findings: (1) respondent established an unethical relationship with a bail bondsman and as a result thereof permitted the bondsman to communicate with him regarding pending criminal cases in which the bondsman had an interest or over which the respondent presided or both; (2) during lunch at a public restaurant, respondent made sexual advances toward a female probation officer against her will and over her protests by repeatedly placing his leg against her leg and then by placing his leg between her legs.

6. Judges § 7— willful misconduct in office—removal of superior court judge

The following conduct of a superior court judge constituted acts of willful misconduct in office which warranted his removal from office by the Supreme Court: (1) the judge telephoned the district attorney on behalf of a friend who had been charged with rape and attempted to discuss the pending rape charge

with the district attorney; (2) the judge signed an order eliminating "consent to search" and "house arrest" conditions of a probation judgment without notice to the district attorney, defendant's probation officer or to his original attorney and at a time when the judge was not assigned to hold court in the county; (3) the judge suggested to an assistant district attorney that he "help" a female defendant with respect to a driving under the influence charge, the assistant district attorney agreed to permit the defendant to plead guilty to the reduced charge of careless and reckless driving, and respondent presided over the defendant's trial, accepted her guilty plea and gave her a suspended sentence at a time when he recognized her as a woman with whom he had had sex within two years prior to the trial; and (4) the judge attempted to prohibit the convening of a grand jury which was to consider an indictment against him by telephoning another superior court judge and asking such judge to issue a restraining order to prevent the grand jury from convening.

7. Judges § 7— judicial disciplinary proceeding—compliance with notice requirements

The Judicial Standards Commission complied with the notice requirements of J.S.C. Rule 7 and due process where the notice sent to respondent judge fully informed him of the nature of the charges being investigated, specifically set forth eight events or transactions involved, and advised him of his right to submit materials to the Commission for consideration during the investigation.

8. Judges § 7— Judicial Standards Commission—investigative and judicial functions—due process

The combination of investigative and judicial functions within the Judicial Standards Commission did not violate respondent judge's due process rights.

9. Judges § 7— judicial disciplinary proceeding—character or credibility of respondent—absence of findings

The Judicial Standards Commission was not required to make findings concerning respondent judge's character or credibility.

10. Judges § 7— judicial disciplinary proceeding—no violation of ex post facto doctrine

A judicial disciplinary proceeding was not barred by the ex post facto doctrine because some of the conduct complained of occurred prior to the creation of the Judicial Standards Commission on 1 January 1973 since (1) all of the acts of respondent judge constituted grounds for removal at the time they were committed and the ex post facto doctrine did not prohibit the Commission from considering evidence of conduct by a judge which would constitute grounds for impeachment prior to 1 January 1973, and (2) the ex post facto doctrine applies only to criminal prosecutions, and judicial disciplinary proceedings are not criminal actions.

11. Judges § 7— judicial disciplinary proceeding—effect of reelection of judge

The reelection of a superior court judge after the conduct complained of did not bar a proceeding before the Judicial Standards Commission based on such conduct.

Justice EXUM did not participate in the consideration or decision of this proceeding.

THIS proceeding is before the Court upon the recommendation of the Judicial Standards Commission (Commission) that Charles T. Kivett (respondent), a judge of the General Court of Justice, Superior Court Division, Eighteenth Judicial District, be removed from office as provided in N.C.G.S. 7A-376. The recommendation was filed in the Supreme Court on 2 August 1983. Heard in the Supreme Court 10 November 1983.

On 4 October 1982, the Judicial Standards Commission, in accordance with its Rule 7 (J.S.C. Rule 7), 283 N.C. 763 (1973), notified respondent that it had ordered a preliminary investigation to determine whether formal proceedings under J.S.C. Rule 8 should be instituted against him. The notice informed respondent of the specific areas of misconduct to be investigated, that the investigation, reports, and any proceedings before the Commission would remain confidential pursuant to J.S.C. Rule 4 and N.C.G.S. 7A-377, and that respondent had the right to present for the Commission's consideration relevant matters as he might choose. Respondent from time to time during the investigative stage did present materials to the Commission for its consideration.

On 17 February 1983, respondent was served with a formal complaint and notice by the Commission. The notice informed respondent that formal proceedings should be instituted against him, that Howard E. Manning had been appointed Special Counsel for the formal proceedings, and that the charges were (a) willful misconduct in office and (b) conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Respondent was also informed that the alleged facts upon which the charges were based are specifically set out in the verified complaint attached to the notice and that respondent had the right to file a written verified answer within twenty days.

The complaint, in summary, alleged the following:

Count I. That between 24 January 1973 and 9 April 1973, respondent telephoned Herman W. "Butch" Zimmerman, Jr., Solicitor of the Twenty-Second Prosecutorial District, at the request of Gurney T. Johnson, for the purpose of using his position as a Superior Court Judge to influence Solicitor Zimmerman not

to prosecute Johnson on a charge of rape of one Cathy Elizabeth Lovette, alleged to have occurred on 24 January 1973.

Count II. That as a result of sexual relations with Miriam Eller, respondent granted lenient treatment of her son, Jimmy Crysel, who was before respondent on various traffic charges that occurred while Crysel was on probation.

Count III. While holding court in Surry County and during a lunch recess of that court, respondent had sexual relations with a female in the judge's chambers of the courthouse.

Count IV. That respondent allowed his judicial decisions to be influenced by the requests of G. T. Johnson because of the special relationship that had developed between respondent and Johnson. Over a period of several years, respondent established a relationship with Johnson in which Johnson procured females for respondent for the purpose of sexual activities, allowing respondent to use his lake cabin without expense, and resulted in Johnson gaining influence with respondent in respect to his judicial decisions. Specific instances of judicial acts influenced by Johnson are set forth.

Count V. Respondent requested an assistant district attorney to reduce a charge of DUI against Carol Bryson Pruitt in a case pending before respondent. Prior to this charge being brought against her, respondent had been sexually involved with Ms. Pruitt, and respondent interceded on her behalf for this reason. A plea to a lesser offense was entered before respondent.

Count VI. Respondent sexually assaulted a female probation officer by improperly touching her.

Count VII. This count was withdrawn.

Count VIII. On 17 December 1982, respondent telephoned Superior Court Judge Douglas Albright and solicited him to enter an order restraining the convening of the Guilford County Grand Jury. Respondent was fearful that a bill of indictment against him would be submitted to the grand jury.

Respondent filed an answer on 8 March 1983 denying the allegations of the complaint and setting up detailed explanations of his conduct with respect to each of the counts. He also alleged various defenses to the charges.

On 7 April 1983, a notice of formal hearing, to be held commencing 21 June 1983, was served upon respondent. Various discovery proceedings were carried out prior to the commencement of the formal hearing. At the hearing, respondent was present and represented by his counsel of record. Howard E. Manning appeared as Special Counsel for the Judicial Standards Commission. Evidence necessary for an understanding of the parties' contentions will be hereinafter set forth.

On 2 August 1983, after reciting the chronology of events and procedural findings prior to the formal hearing, the Commission in its order of recommendation made findings of fact and conclusions of law as follows:

> 9. At the hearing evidence was presented by Special Counsel for the Commission and by Counsel for the respondent, and having heard the evidence presented and having observed the demeanor and determined the credibility of the witnesses, the Commission found the following facts on clear and convincing evidence:
>
> (a) Between 24 January 1973, the date on which Gurney T. Johnson allegedly raped Kathy Elizabeth Lovette at his lake house in Alexander County, North Carolina, and 9 April 1973, the date on which H. W. "Butch" Zimmerman, Jr., District Attorney for the Twenty-Second Judicial District, presented a bill of indictment for rape in the case of *STATE OF NORTH CAROLINA v GURNEY T. JOHNSON*, Alexander County file number 73CR952, the respondent telephoned district attorney Zimmerman at home on behalf and for the benefit of Gurney T. Johnson, a friend of the respondent. During this telephone conversation, the respondent attempted to discuss the rape charge then pending against Johnson, knowing that Zimmerman would be responsible for prosecution of the case, but Zimmerman terminated the conversation soon after it began because he considered it improper.
>
> (b) Beginning in 1972 and continuing until January of 1982, the respondent established an unethical relationship with Gurney T. Johnson who was at the initiation and continued to be for a substantial portion of this relationship a bail bondsman serving Wilkes County and surrounding coun-

ties located in judicial districts wherein the respondent was regularly assigned to hold criminal sessions of court.

During the course of this relationship, Johnson made his lake house in Alexander County near Taylorsville, North Carolina, available to the respondent for use free of charge, and the respondent used it for illicit sexual activities on at least two occasions, one of which Johnson had knowledge. In addition, the respondent visited Johnson in his home, at his used car lot, at his bonding business office across from the courthouse in Wilkesboro, North Carolina, and as recently as 8 January 1982 at his farm office adjacent to his home; the respondent saw and spoke to Johnson at different courthouses where the respondent was holding court, ate meals with Johnson, and met Johnson in Winston-Salem, North Carolina, on at least two occasions.

As a result of this relationship, the respondent allowed Gurney T. Johnson to communicate with him regarding pending criminal cases in which Johnson had an interest or over which the respondent presided or both.

(c) Furthermore, during the 8 March 1976 Criminal Session of Alexander County Superior Court over which the respondent presided, the defendant in *STATE OF NORTH CAROLINA v VONTENIA ROBINETTE*, Alexander County file number 75CR1112, pleaded guilty to felonious sale of marijuana. The respondent accepted the defendant's plea and entered a probationary judgment against the defendant which included special conditions relating to the consent search of defendant's person, place, or vehicle by law enforcement or probation officers and to the house arrest of the defendant for six months. Prior to 28 April 1976, Gurney T. Johnson communicated with the respondent about changing this probationary judgment, and the respondent modified the probationary judgment on 28 April 1976 by ordering that the special conditions relating to consent search and house arrest be stricken from the judgment. Having already discussed the matter with Johnson, the respondent entered this order at the request of John Hall, attorney for defendant Robinette, made *ex parte* out of court, and the respondent entered this order without consulting or notifying H. W. "Butch" Zimmer-

man, Jr., District Attorney for the Twenty-Second Judicial District, or Sam Boyd, the defendant's supervising probation officer.

(d) On 17 December 1971 which was the last day of the last two-week criminal session of Forsyth County Superior Court over which the respondent presided from that date through 1 July 1972, the defendant in *STATE OF NORTH CAROLINA v CAROL BRYSON PRUITT*, Forsyth County file number 71CR35584, appeared before the respondent on appeal from her 22 November 1971 conviction in district court on charges of driving under the influence of intoxicating liquor and pleaded guilty to careless and reckless driving. Prior to 17 December 1971, the respondent had spoken to James C. Yeatts, the assistant district attorney who prosecuted the *PRUITT* case before the respondent, about the case, described the defendant as a friend or a friend of a friend, and asked Yeatts to look into the case and help with the case. As a result of the respondent's request and information he was able to learn about the case, assistant district attorney Yeatts determined he would agree to allow the defendant to plead guilty to the reduced charge of careless and reckless driving. The respondent presided over the defendant's trial, accepted her guilty plea, and gave her a suspended sentence. At the time the respondent sentenced Pruitt, he recognized her as a woman with whom he had had sex within two years prior to the trial and who had attempted to speak with him at a restaurant at lunch time about three weeks prior to the trial, but at no time did the respondent inform assistant district attorney Yeatts of his earlier sexual relationship with the defendant.

(e) During a noon recess of a session of Rowan County Superior Court over which the respondent was presiding in late 1969 or early 1970, the respondent went to lunch with Peggy King, a probation officer serving Rowan and seven other counties located in judicial districts in which the respondent was assigned to hold court. During lunch at a public restaurant, the respondent made sexual advances toward Peggy King without her consent and against her will by repeatedly placing his leg against her leg. Peggy King told him to stop, but he persisted and placed his leg around her

leg and between her legs whereupon she struck him in the shoulder with her fist.

(f) On Friday, 17 December 1982, the respondent telephoned W. Douglas Albright, Superior Court Judge for the Eighteenth Judicial District, at home. The respondent related to Judge Albright that he believed Michael Schlosser, then District Attorney for the Eighteenth Judicial District, was going to present a bill of indictment against the respondent before the grand jury of Guilford County to be convened on Monday, 20 December 1982, and the respondent solicited Judge Albright to enter a restraining order to prevent the grand jury from convening. Judge Albright expressed the belief that any action by him to restrain the grand jury from convening at the request of the respondent who would be the subject of such proceedings could be viewed as obstruction of justice, and he declined to issue such an order. When Judge Albright refused to enter the restraining order, the respondent abruptly terminated the conversation. Judge Albright promptly telephoned Franklin Freeman, Administrative Officer of the Courts, and notified him of the respondent's improper solicitation.

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 Commission.

CONCLUSIONS OF LAW

11. As to the facts set forth in paragraphs 9(b) and 9(e), the Commission concludes on the basis of clear and convincing evidence that the actions of the respondent constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute and his actions violate Canons 1 and 2 of the North Carolina Code of Judicial Conduct.

12. As to the facts set forth in paragraphs 9(a), (c), (d), and (f), the Commission concludes on the basis of clear and convincing evidence that the actions of the respondent 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, 3A(4), and 3C(1) of the North Carolina Code of Judicial Conduct.

RECOMMENDATION

13. The Commission recommends on the basis of findings of fact in paragraphs 9(a) through 9(f) and the conclusions of law relating thereto that the Supreme Court remove the respondent from judicial office.

By order of the Commission, this the 2nd day of August, 1983.

s/Gerald Arnold
Gerald Arnold
Chairman
Judicial Standards Commission

Thereafter, respondent timely requested a hearing before this Court on the Commission's recommendations.

Howard E. Manning, Special Counsel, for the Judicial Standards Commission.

Cahoon and Swisher, by Robert S. Cahoon; C. Richard Tate, Jr.; and Smith, Patterson, Follin, Curtis, James and Harkavy, by Norman B. Smith, for respondent.

MARTIN, Justice.

[1] At the outset, we are faced with respondent's motion to include as a part of the record on appeal certain paperwritings previously furnished to the Judicial Standards Commission by respondent. A copy of this material, entitled "Judge Charles T. Kivett, Investigative Information, Sections I-X," comprising two volumes, has been filed with this Court. This material was submitted to the Judicial Standards Commission, pursuant to JSC Rule 7(b), on 4 January 1983, except Section X, which was submitted 27 January 1983. Rule 7(b) allows a respondent to submit relevant matters to the Commission for its consideration in determining whether a formal complaint should be issued.

The material which respondent now seeks to have made a part of the record was not introduced as evidence in the formal hearing. It was not a part of the evidence upon which the Commission based its recommendation. However, the substance of some of this material was before the Commission through other

witnesses; e.g., evidence of alleged efforts by agents of the SBI to influence the testimony of Millie Dyonia Vernon through offers to help her regain her driver's license which had been suspended. Much of this material consists of affidavits by attorneys and court personnel as to respondent's good character and reputation as a judge. Approximately twenty-three affidavits are to this effect. Three affidavits are by attorneys who represented respondent during these proceedings. Affidavits by respondent, as well as an unsigned paper, purportedly a statement by respondent, were included, along with copies of court orders and judgments. Most, if not all, of the court orders and judgments were in evidence at the formal hearing.

There is nothing in the record suggesting that these persons could not have been available to testify at the hearing. At least one such person, attorney John E. Hall, was so present but was not called by respondent to testify. Some of the material is incompetent as evidence; e.g., the unsigned paper, purportedly a statement by respondent.

If these materials are allowed to become a part of the record at this late stage of the proceedings, fairness would require that evidence be allowed to rebut them. We do not find that the tendered materials are necessary or even helpful to our decision in this proceeding. The materials were not considered by the Commission in arriving at its recommendation. Certainly, respondent is not prejudiced by the absence of the materials. Respondent's motion, made pursuant to Rule 37 of the North Carolina Rules of Appellate Procedure, is addressed to our discretion. The motion is denied.

[2] At the call of this proceeding for oral argument, one of respondent's counsel informed the Court that respondent had, by letter dated 9 November 1983, submitted to Governor James B. Hunt, Jr., his resignation as a superior court judge. The resignation is to become effective 31 December 1983. Assuming that the resignation has been or will be accepted by the governor, it does not deprive this Court of its jurisdiction over this proceeding. *In re Peoples*, 296 N.C. 109, 250 S.E. 2d 890 (1978), *cert. denied*, 442 U.S. 929 (1979). "When a resignation specifies the time at which it will take effect, the resignation is not complete until that date arrives." *Id.* at 145, 250 S.E. 2d at 911. Nor is the case rendered moot by the resignation. *Id.*

We now consider whether the evidence before the Commission with reference to respondent's conduct supports the findings of fact and conclusions of law made by the Commission. After so doing, we must determine whether such conduct constitutes willful misconduct in office, conduct prejudicial to the administration of justice bringing the judicial office into disrepute, or both, and, if so, whether respondent should be removed from office or censured.

[3] First we address the sufficiency of the evidence to support the findings of fact. The quantum of proof required to sustain the findings of the Commission is by clear and convincing evidence. *In re Nowell*, 293 N.C. 235, 237 S.E. 2d 246 (1977).

Initially, we review the evidence offered to support *finding of fact 9(b)* (quoted above) because that evidence paints the background of the proceeding. This evidence showed in summary:

Gurney T. Johnson testified that he ran a used car business for over twenty years. Approximately eighteen years ago, Johnson entered the bail bonding business. He testified that he was engaged in that business until approximately 1979. He wrote bonds in Wilkes and surrounding counties. He was operating his bonding business when the respondent first met him. The respondent admitted that he was aware of that fact when they first met. The respondent testified that he held court in that district and in those counties.

Johnson testified that he made his lake house near Taylorsville available to the respondent free of charge. Likewise, Johnson testified that he made his bonding office apartment located in the rock house available to the respondent free of charge. Johnson further testified that he supplied the respondent with gifts at Christmas and Thanksgiving or a bottle of whiskey at a party and that he kept the lake house well stocked. Johnson testified that the first week of their relationship he and the respondent took some girls to the lake house. That pattern continued during the relationship. In fact, the respondent admitted using Johnson's lake house, on at least two occasions, as a location in which he engaged in illicit sexual relations. On one occasion this was with Ruth Byrd and on another occasion with Wanda Anderson. Respondent's testimony concerning these two

women at the lake house explicitly corroborated the testimony of G. T. Johnson who earlier testified about Byrd and Anderson as well as other women.

The respondent also admitted that he visited G. T. Johnson at his home, at his used car lot, at his bonding business office across from the courthouse, and as recently as 8 January 1982, at his farm. Johnson testified that the respondent visited him at his home, at his car lot, at his bonding business, and at his farm on 8 January. Robert Parker testified that he observed the respondent at Johnson's car lot on several occasions. Former trooper T. P. Reavis testified that he saw the respondent at Johnson's car lot on a couple of occasions and had a conversation on one occasion with the respondent concerning Miriam Eller. Furthermore, the respondent testified that he saw and spoke to Johnson at different courthouses where he was holding court, that he ate meals with Johnson and socialized with him, and that he met Johnson in Winston-Salem on at least two occasions. Johnson had testified that he met with the respondent, and went out looking for female companionship, in several counties other than Wilkes, including the cities of Charlotte and Winston-Salem. They visited the "Tiki," a topless bar in Winston-Salem.

From the first week of their relationship, Johnson procured women for respondent and that continued throughout. Johnson testified that "a lot of times I'd line them up and a lot of times we'd go to a bar or a dance." On many of those occasions, these rendezvous occurred at the lake house. Johnson described the activities that would often occur as cooking, having a few drinks, dancing, and sex. Johnson testified: "A few times we'd—maybe he'd take one to a bedroom and I'd take one to a bedroom."

The relationship was a close one between men from obviously different stations in life. As Johnson explained: "[E]verybody wanted to know what our relation was, me being a farmer and a country boy and into different things and he being a judge, why we were so close; and everybody knew there was something." Johnson explained why they were so close: "[W]e had something in common about women; we were both running around with women and we partied, and that was the truth about it."

Their relationship was so exceedingly close that the respondent would often relate to Johnson the details of his activities with

women. Johnson testified: "A lot of times we would comment, a lot of times . . . a lot of times he'd tell me that he had sex." The respondent related his activities with Wanda Anderson, as Johnson testified: "He just told me the way he had sex with her. He said she was an unusual person." The respondent related to Johnson his activities with Miriam Eller, the mother of Jimmy Crysel. Johnson testified: "Yes, sir, he told me he had sex with her that first time in my apartment up there . . . he's told me he had sex with her after that." The respondent had borrowed the key for the bonding office from Johnson, and he related his activity with Mrs. Eller to Johnson upon returning the key. Johnson testified that on one occasion the respondent related that he had engaged in sex with a lady juror in chambers in Dobson and that a chief deputy or deputy had guarded the door. He testified that the respondent named the deputy as the present Sheriff of Surry County, Bill Hall. The respondent denied having sex with either woman.

These frank admissions to G. T. Johnson by the respondent and their activities together, as noted above, demonstrate the close nature of the relationship that existed between these men. To give another example, Johnson testified that the respondent related an affair that he engaged in with Ruth Byrd. Johnson stated that the respondent told him he met Ruth Byrd in Ashe County where she worked in the Register of Deeds office and that she ultimately moved to Winston-Salem where the respondent continued to see her for a couple of years. He stated that the respondent had agreed to see her at least once a week. Johnson further testified that he saw Ruth Byrd at his lake house where she was staying with the respondent while he was holding court in Wilkes County. He related that the furnace in the house had run out of oil and that the respondent had asked him to attend to it. He further testified that the respondent informed him that after he and Ruth Byrd broke up, her brother was upset and the respondent informed him that he was going to change terms of court with another judge.

Respondent admitted having an affair with Ruth Byrd and engaging in sexual relations with Ruth Byrd at Johnson's lake house on at least one occasion. He further admitted on cross-examination that she moved to Winston-Salem and that for a while he saw her as frequently as once a week. Furthermore, he

testified that he was assigned to Ashe County during 1977 to hold court and that the relationship had terminated prior to that time. The discussion of sensitive personal matters of this sort were not one-sided. The respondent testified that Johnson took him to meet Wanda Byrd at her house. Johnson told the respondent that he had a second family with Wanda Byrd. Wanda Byrd was also present, by Wanda Anderson's testimony, at the lake house when Mrs. Anderson met the respondent.

The respondent allowed Gurney T. Johnson to communicate with him concerning pending criminal cases in which Johnson had an interest or over which the respondent presided or both. The first manifestation of this part of the relationship concerned a speeding ticket which the respondent received from a highway patrolman. Johnson testified that respondent came to court one morning after spending the night at Johnson's lake house and gave Johnson a copy of a speeding ticket written by Trooper Meeker. Johnson testified that he spoke with Solicitor Allie Hayes about it. Ultimately the charge was dismissed.

Johnson related that the respondent obtained the key for the bonding office apartment on one day and returned it to him the next day after stating that he used the rock building for sexual relations with Miriam Eller. Johnson testified that during that week he observed Mrs. Eller in court with her son, Jimmy Crysel, who was in court for a probation violation. During court, Johnson observed Mrs. Eller approach the bench and talk with the respondent. Thereafter, he observed the respondent in the company of Mrs. Eller and on one occasion he and the respondent went to her place of employment, Ithaca Hosiery, looking for her. On one occasion, Johnson testified that the respondent pointed out her house to him.

The court records contained in Commission Exhibit I indicate that in 1971 Crysel was arrested for drug violations. He was put on supervised probation in February of 1972 by Judge Gambill. On 15 June 1972, he was cited by his probation officer for a violation. That matter came on for hearing before the respondent on 8 August 1972, but was continued by respondent until 2 October 1972. On 2 October 1972, the matter came on for hearing before the respondent, who continued him on probation under the same conditions. On 24 October 1972, Crysel was arrested by a state

trooper after a chase in excess of one hundred miles per hour and for failing to stop for a siren. He was tried in district court, found guilty, and given a six-month active sentence on 30 November 1972. Thereafter, within a week, this case was written on the superior court calendar for disposition before the respondent, who placed the defendant on unsupervised probation. Commission Exhibit I-F showed that this term of court was respondent's last in Wilkes County and that he was not assigned to hold court in Wilkes County in 1973.

The respondent denied having sexual relations with, or even being acquainted with, Miriam Eller. Miriam Eller also denied sexual relations or any sort of relationship with the respondent.

The respondent, in his answer under oath, denied that Jimmy Crysel appeared before him on 2 October 1972 or that he ever continued Crysel on probation. The Commission heard the testimony of Rex B. Yates, Crysel's probation officer, who testified that he cited Crysel into court for violations before respondent. Yates recalled on the day it was heard that he presented his report to respondent and the court heard the report. He further testified that he recalled Mrs. Eller being in court that day and that he remembered her as a "very attractive lady." During a pause in the proceedings, Yates testified that the respondent called G. T. Johnson to the bench, and immediately thereafter the respondent instructed Yates to report back the following morning. Yates testified that the following morning Crysel was continued on probation by respondent with no new instructions, conditions, or reprimand.

Respondent allowed Johnson to improperly communicate with him regarding pending criminal cases over which the respondent presided. On several of these cases Johnson was paid by the defendant to use his influence in an attempt to receive a lighter sentence. In some cases, Johnson did not charge the defendant anything because of prior or longstanding friendship. An example of this latter category is the case of Gates Jordan.

Johnson testified that he had occasion to bump into Jordan when he was in court in Statesville. Jordan advised that he was charged with DUI and asked Johnson if he knew respondent, who was presiding. Jordan asked if Johnson would say a good word to the respondent, and Johnson stated that he would. Johnson said

he went in to see the respondent and advised him that Jordan was a real good friend and that he had a case pending. Johnson advised that Jordan's daughter was Judge Collier's secretary and if there was anything he could do to help him that he, Johnson, would appreciate it. The respondent said that he would do what he could. Commission Exhibit V shows that Jordan was charged with DUI 28 December 1975 and that the matter was heard in district court on 10 February 1976 where Jordan was found guilty and sentenced to six months suspended and to surrender his license for one year. The matter was heard before respondent on 27 May 1976, and the verdict was guilty and the sentence was four months suspended and surrender license. The case was appealed to the Court of Appeals, which affirmed on 26 April 1977. On 4 May 1977, respondent allowed Jordan a limited driving privilege which permitted him to drive to Winston-Salem and Charlotte.

James "Dickie" Pardue was charged with possession of more than fifty pounds of marijuana in Wilkes County. Johnson testified that he had gone to school with Pardue and that they were neighbors. He stated that soon after Pardue was charged with the possession of fifty pounds of homegrown marijuana in his basement, Pardue came to see him. Pardue asked Johnson for assistance and ultimately paid him five hundred dollars. On Pardue's behalf, Johnson approached respondent and advised him that Pardue had gone to school with him and that he was "a real good boy." He further advised the respondent that he would really appreciate it if the respondent would put Pardue on probation. The respondent agreed. Johnson advised that one of his used car employees and a part-time magistrate was available as a character witness. The respondent advised Johnson to arrange that, and the employee did testify on Pardue's behalf. That evening the respondent advised that he "took care of Dickie or my boy or whatever." Commission Exhibit VI shows that Pardue was indicted on 26 September 1977 for possession with intent to sell and deliver fifty pounds of marijuana and with manufacture of marijuana. This marijuana was seized pursuant to a search conducted of Pardue's residence. Pardue pleaded guilty to possession of fifty pounds of marijuana before the respondent, with the only plea bargain being the dismissal of the manufacturing charge. The respondent placed the defendant on probation.

It was through James "Dickie" Pardue that Johnson first met Charlie Reid Vaden. Johnson testified that Vaden was related to Pardue by marriage and that Pardue brought him to see Johnson. Vaden advised Johnson that he had received an eighteen-month active sentence in Yadkin County District Court for shooting up a car and he desired Johnson's assistance. Johnson advised him to engage John Hall as his attorney. When the case came up for trial in Yadkin County, Johnson went to court and spoke with the respondent. He advised the respondent that he had a friend who had received an eighteen-month sentence and that he, Johnson, would like for him to help Vaden. Johnson also advised the respondent that Vaden had a codefendant named Young. The respondent asked Johnson who the lawyer was, and Johnson advised him it was John Hall. Respondent advised that "he'd take care of it or try to help." Immediately after talking with the respondent, Johnson saw Vaden and Young and told them that everything would be all right. Johnson testified that he later learned that the case was dismissed on the search warrant. Johnson testified he was paid twelve hundred dollars for his assistance in this matter.

Commission Exhibit VII shows that on 23 September 1977, Reid Vaden and Gregory Young were arrested as a result of shooting out four automobile windowshields at William Anderson's car lot. A search warrant was obtained from Magistrate Motley by Deputy Dennis Poplin which resulted in the seizure of a pistol from the vehicle in which Vaden and Young were apprehended shortly after the shooting incident. William Anderson, the owner of the damaged vehicles, testified that he lived directly across from his place of business and was awakened by the sound of gunfire on 23 September 1977. Anderson observed the Volkswagen vehicle pass by and observed the damage. He reported what he had observed to law enforcement officers. Later that evening, he appeared before Magistrate Motley and testified as to what he observed. He testified in district court in Yadkin County but was not notified as to any other disposition.

Ultimately this matter came up in Yadkin County before the respondent and was heard in Wilkes County. An order was signed by respondent, prepared on John Hall's stationery, which suppressed evidence obtained by the search. As a basis for the suppression, the order finds insufficient basis in the search warrant

to find that the informant was reliable. District Attorney Mike Ashburn testified that the court file was not in Wilkes County when the matter was heard. The first notice that the district attorney had that the evidence had been suppressed came when Mr. Ashburn was routinely pulling the files in calendaring the cases for trial; it was then that this order was discovered. This occurred after respondent had left the district. The order was discovered in March; it had been signed on 2 December and filed on 4 January 1978.

Vaden continued to see G. T. Johnson about various matters. Vaden asked Johnson on several occasions to dispose of traffic tickets. In turn, Johnson contacted respondent about these matters. In one case, Vaden contacted Johnson concerning Billy Joe Ramsey's speeding ticket. Vaden introduced Ramsey to Johnson and asked him to help Ramsey. Thereafter, Johnson contacted the respondent about it and asked if he would help with it. Johnson testified that he gave the respondent the pink copy of the citation, and the respondent advised that he would get some lawyer or friend to handle it. Thereafter, Johnson testified that the respondent wrote to him and advised him as to which law firm to forward the court costs.

Commission Exhibit XIV contains the citation given to Billy Joe Ramsey for speeding 64 m.p.h. in a 45 m.p.h. zone. The Commission heard the testimony of Edward L. Powell, an attorney in Winston-Salem, who testified that respondent called him concerning the Ramsey ticket. Powell stated that the respondent said that he had a friend who had a traffic case in the next day or so in Winston-Salem and asked for someone in his firm to handle it. Powell replied that they would do so. The respondent indicated that the person would not be there for court and asked that they try to do the case with a waiver of appearance. Powell testified that he appeared in Forsyth District Court and represented Mr. Ramsey and obtained a judgment for him. Within the next day or so, Powell stated that he wrote a short letter to the respondent and sent a copy of the bill of costs paid by the firm. Powell testified that he had never seen nor did he know Mr. Ramsey and he did not know G. T. Johnson.

Johnson testified that Dennis Pardue, the nephew of Dickie Pardue, is the son of Vestal Pardue who ran a store across the

road from Johnson's house. He stated that Vestal asked him if he could help Dennis, who had been arrested on drug charges in Surry County. Vestal asked if the respondent would be the judge as he had been introduced to the respondent when the respondent and Johnson had stopped by Vestal's store on one occasion when they were carrying mulch to the respondent's home in Greensboro. Johnson advised Vestal to keep him posted, and about a week before the case came up, Vestal advised Johnson that the respondent was going to be the judge. Johnson testified that he called the respondent at Dobson during the first part of the week he was holding court and advised him that the nephew of the man "who run the store at the foot of the hill" was in court. Johnson advised that he didn't think there was much to it and that he would like for the respondent to help him and not to send him off. Johnson testified that the respondent replied that he would, and that he did help him. Johnson stated that he did not charge for this but did it for friendship.

Commission Exhibit IX indicates that the defendant was indicted on 4 September 1980 for possession with intent to sell and deliver methaqualone. The transcript of plea indicates that the defendant pleaded to felony possession of a Schedule II substance and would receive a suspended sentence on the condition that he spend a certain number of weekends in the county jail to be determined by the court. The respondent placed the defendant on probation and did not require any weekends to be served.

Reid Vaden was arrested along with Carl McLaurin and others in High Point on a marijuana charge. Johnson testified that Vaden came to see him and asked if he could help him with his troubles. Johnson sent him to see John Hall and ultimately collected sixteen thousand three or four hundred dollars from Vaden on behalf of Vaden and McLaurin for the purpose of arranging probation for the two of them. Johnson led him to believe that the money was being paid to "his people." Vaden and McLaurin entered pleas of guilty during the November 1981 trial. Vaden began cooperating with the SBI in an effort to determine the disposition of the money paid to Johnson.

The case came on for sentencing on 15 December 1981 and was continued by defense motion to 18 January 1982 in High Point. On that day, Vaden visited Johnson with news that the

respondent would be presiding in High Point. Johnson advised that the respondent was expected to attend a Christmas party at his lake house and he would discuss it with him at that time.

Vaden checked with Johnson on 5 January to determine the status of his case before the respondent. On that day, Johnson telephoned the respondent in Greensboro, verified that the judge would be holding court in High Point on 18 January, and told the respondent that he needed to discuss a matter with him. Arrangements were made for the respondent to come to Johnson's house two days later, on 7 January 1982. Johnson testified that the respondent arrived at about six o'clock, and Johnson said "he got right into it." Johnson stated that he explained to the respondent that two fellows had a problem in High Point, that they both worked for R. J. Reynolds, that they were good friends, and that Johnson really wanted to help them keep their feet on the ground. The respondent replied that he would help if he could. Johnson advised who the lawyer was and asked the judge "If they plead guilty to something that's mandatory . . . what can you do in a situation like that?" Johnson stated that the respondent replied: "I'll . . . Well, I'd talk to the D.A. and see if he would—ask him to reconsider." At that point, Vaden arrived and Johnson introduced him to the respondent. The respondent excused himself to go to the bathroom and Johnson and Vaden talked a couple of minutes. Vaden then shook hands with the respondent and left.

After Vaden left, Johnson told the respondent, "that's the fellow I'm trying to help" and "I don't know why in hell he come in here at a time like this." At that point, Johnson gave the respondent the key to the lake house and some groceries. The following morning, Friday, 8 January, the respondent returned the key to Johnson. They briefly discussed the Vaden matter, and Johnson testified that the respondent advised Johnson that Vaden should obtain some character letters.

The following day Vaden again visited Johnson's residence, and Johnson advised him concerning his conversations with the respondent about his case and the advice concerning character letters. Johnson then indicated that he would need five thousand more dollars. Arrangements were made to meet on Monday, 11 January, in Winston-Salem, where the transfer of the money took

place. Johnson was arrested by SBI agents shortly after this transfer.

With respect to *finding 9(a)*, the evidence disclosed:

Johnson testified that a friend of his had "lined up" three girls to take to his lake house. One of the girls had received a speeding ticket on which she desired Johnson's assistance. After dinner and drinks, Johnson had sex with one of the girls. Approximately a week after this incident, Johnson called the girl with whom he had engaged in sexual relations and "lined up" her and one of the other girls for him and respondent to "take out." For some reason, that arrangement did not come to pass. Approximately three weeks thereafter, Johnson was served with arrest warrants charging him with the rape of the girl with whom he had engaged in sexual relations. The matter came up in Wilkes County District Court, where it was dismissed for lack of jurisdiction on 23 March 1973. The victim appears as Kathy Lovette. [Johnson's lake house is located in Alexander County.] Johnson testified that after he was aware that Ms. Lovette sought to charge him with rape, he approached the respondent and asked him "if he'd help." Johnson informed respondent that there was no rape to it and that she was one of the girls that he and the respondent were to have taken out. The respondent replied that it bothered him.

The respondent then informed Johnson that he would call Butch Zimmerman. Thereafter, the respondent told Johnson that he called Butch Zimmerman and that just as he got into a discussion of the matter, Butch hung up on him. Johnson testified that the respondent told him that Zimmerman had told the respondent that the call was unethical and said he would not discuss it with the respondent.

H. W. "Butch" Zimmerman, Jr. testified that he is the Solicitor of the Twenty-Second Judicial District and has been so since 1970. Alexander is a county in that district. Zimmerman testified that his first knowledge of a case involving G. T. Johnson alleging rape came about as a result of a call he received in 1973 at his home in Lexington. The call was from respondent to an apartment that Zimmerman and his wife were living in at the time. The respondent began discussing the rape case involving G. T. Johnson, and Zimmerman became upset and abruptly hung

up the phone. Zimmerman testified that he considered the call and discussion to be improper since he "felt like he should not be talking to me about a case [like] that." Thereafter, there was a period of estrangement between Zimmerman and respondent that lasted for some time.

Later, Zimmerman spoke with Kathy Lovette and her lawyer about the case, in a conversation which he tape recorded and retained. Based thereon, he drew a bill of indictment which was submitted to the Alexander County Grand Jury on 9 April 1973. Zimmerman testified that it was his opinion that a bill should be submitted. The grand jury found not a true bill. Zimmerman further testified that although he had tried several cases before respondent, he did not socialize in the evenings with him.

The respondent admitted calling Butch Zimmerman but denied he did so on behalf or at the request of G. T. Johnson. He testified that he had received some information from "a source in Wilkes County" that the young lady "had some motive and was unreliable." He confirmed that Butch Zimmerman hung up on him, apparently resenting his call. The respondent admitted that he and Zimmerman were "at odds" for a while after this call. The respondent testified that his "source" was Bob Parker. Respondent presented Bob Parker as a witness, but Parker failed to corroborate this alleged conversation.

Evidence supporting *finding 9(c)*:

Vontenia Robinette was charged in Alexander County with sale and delivery of marijuana. Robinette was acquainted with G. T. Johnson through Johnson's vending business, because Robinette had assisted him in the placement of machines in various locations. After his arrest, he came to Johnson's car lot and solicited Johnson's assistance. He agreed to pay Johnson two thousand dollars for his help and influence. Johnson referred him to John Hall, and when the case came up in court, Johnson approached the respondent about it. He advised the respondent that Robinette was a friend of his who had helped him out in his business. He advised the respondent that he would appreciate it if he could help him out, and the respondent replied that he would do so and put him on probation. Johnson said he asked the respondent "not to send him off" and "so he put him on probation."

Commission Exhibit IV shows that during the 8 March 1976 term of superior court in Alexander County, over which the respondent presided, Robinette pleaded guilty in the case 75CR1112. Robinette entered a plea of guilty to felonious sale of marijuana. This was a straight-up plea, with no plea bargain. SBI Agent Richard Lester testified that an undercover agent had purchased some six pounds of marijuana from Robinette. The respondent accepted the defendant's plea and entered a probationary judgment against the defendant which included special conditions relating to the consent search of the defendant's person, place, or vehicle by law enforcement or probation officers and to the house arrest of the defendant for six months.

A short time after this sentence was imposed, Robinette came back to see Johnson. As Johnson testified, Robinette said the policemen in Taylorsville would stop him and search his vehicle which was apparently full of carpentry and painting supplies. Robinette said he wanted to get out from under that part of the probation judgment. Johnson told Robinette that he would contact the respondent and ask him if he would do away with that part of it. Johnson testified that he contacted respondent, and the respondent related that he would sign an order striking the condition. Respondent advised Johnson to have someone draw up the paper. Johnson related this conversation to Robinette and advised him to go see John Hall because he would know what to do to fix up the proper papers. Johnson also advised him to tell Hall to get the paper to the respondent and that the respondent would take him off that part of it. Robinette advised Johnson later that he did do so.

Commission Exhibit IV contains an order prepared on the stationery of John Hall which is entitled "Order" and is signed and dated by the respondent on 28 April 1976. In that order, the respondent finds that two of the conditions of a suspended sentence (house arrest and search by law enforcement officer) are serving no useful purpose. It orders that those portions of the judgment ordering the defendant to remain under house arrest, save and except the time that he was gainfully employed and pursuing his employment, and the condition ordering the defendant to consent to a search of his person or vehicle without a search warrant be deleted. Having already discussed this matter with Johnson, the respondent entered this order at the request of John

Hall. The respondent recalled that John Hall asked him to strike the provision relating to search because Robinette was a handyman or house painter. This order was entered out of court.

Commission Exhibit IV-B contains a letter from the Clerk of Superior Court in Alexander County, Mr. Chapman, who certified a list of terms of superior court in Alexander County for the year 1976. The only term that the respondent held in Alexander County was 8 March through 12 March 1976 (at which term the original sentence was imposed—9 March 1976 being the date of the probation judgment). There was no term of superior court in Alexander County on 28 April 1976. In fact, the next criminal term from the one over which respondent presided on 8 March was a 12 July term presided over by Judge Rousseau. On cross-examination, Special Counsel questioned the respondent concerning an affidavit made by John Hall which was submitted to the Commission on behalf of the respondent. In that affidavit, Hall swore that he made a motion to strike these conditions at the April session in Alexander County in open court before respondent and that the respondent granted his motion and directed that he prepare an order with regard thereto. There was no April session of court over which the respondent presided, and there were no criminal sessions in Alexander (or mixed) between the March and July terms. John Hall did not testify as a witness for the respondent. He was the attorney in both Vaden cases and also in the Robinette cases.

SBI Agent Richard Lester testified that he learned of the modification several months after the trial when he happened to be in Alexander County at the sheriff's office. A deputy related to him that he had stopped Robinette and smelled alcohol. When they attempted to search the vehicle under the provisions of the probation judgment, Robinette advised them that they needed a search warrant. When they said they didn't, he told them to check the courthouse. The deputy then went to the clerk's office and found the modification. Lester testified that he saw Butch Zimmerman several days later and related this to him and Zimmerman stated that he did not know it had been changed.

Butch Zimmerman testified that he prosecuted Robinette on the original charge. He testified that he learned of the modification for the first time from Agent Lester. Zimmerman stated that

he became upset with the modification. He further testified that John Hall never communicated with him in any fashion concerning the modification.

Sam Boyd, Robinette's probation officer, testified that he was in court on the day Robinette was placed on probation and that he prepared the probation judgment. He identified the Robinette probation judgment as the one he prepared. He further testified that he was not consulted by the respondent at any time concerning a modification nor was he aware that the modification had been made. He further testified that in his experience he had never seen an order of probation changed in this way.

Edward Hedrick, an attorney from Taylorsville, testified that he represented Robinette on this offense. He testified that he appeared for Robinette at the probable cause hearing and that sometime thereafter Robinette asked Hedrick if it would offend him if he retained John Hall as additional counsel to assist in the case. Hedrick replied that it would not and Hall entered the case. Hedrick testified that both he and Hall negotiated the plea and appeared in court for the original sentence. He was not approached concerning an amendment to the probation order. Furthermore, even though he was Robinette's attorney, he learned of the deletion only after it occurred, either from Robinette or from a local officer.

Evidence supporting *finding 9(d)*:

Carol Bryson Pruitt (now Bowen) appeared before the respondent on Friday 17 December 1971, in Forsyth County Superior Court on a charge of driving under the influence in case number 71CR35584. This case was on appeal from a Forsyth District Court adjudication of guilt on 22 November 1971. In the district court, the defendant, upon her conviction for DUI, received a sentence of six months suspended for three years, with a fine of one hundred dollars and costs. Before the respondent, the defendant pleaded to careless and reckless driving. This disposition, which took place less than four weeks from the district court proceeding, occurred on the last day of the last two-week criminal session of Forsyth County Superior Court over which the respondent presided from that date through 1 July 1972. This case was also not on the printed calendar. James C. Yeatts, the Assist-

ant District Attorney who prosecuted this case, testified that this term would have been the respondent's last term there.

Carol Bryson Pruitt testified that prior to her appearance in Forsyth Superior Court before the respondent, she had known him previously. She testified that she met him at the Gold Leaf Supper Club in Winston-Salem a year, or maybe two years, before the trial. After meeting him that night, she and the respondent went out and had sexual relations. Approximately three weeks before she appeared in court, Ms. Pruitt testified that she saw the respondent at a restaurant. She testified that he smiled and spoke, and she asked to talk with him, but he indicated he was with some people. She then saw the respondent when she appeared in court on this charge. Thereafter, she testified that she called him that afternoon and told him that she would like to see him. She testified that he agreed to meet her at Howard Johnson's. At that meeting, she asked the respondent to go off with her, but he said no. The respondent conceded that Ms. Pruitt's testimony was basically true. He admitted that he met her at a nightclub one evening when he was probably in Forsyth County holding court. He testified that they went to the Holiday Inn, although he couldn't be sure, and that he engaged in sex with her.

James Yeatts testified that in December of 1971 he was employed as an assistant district attorney in Forsyth County. He testified that he worked in the district court for a couple of years and came in October of 1971 as a new superior court assistant. He stated that one day during a lunch break or recess when everyone else was out, the respondent came to him concerning this case. He testified that respondent related that "he had a lady that was either a friend of his or maybe a friend of a friend of his." The respondent told him that "this lady, or I got the impression that she was a single parent maybe supporting one or two children; and he told me that she was charged with this offense." Yeatts testified that the respondent asked "that he would like for me to—I cannot remember the exact words but to look into, help, consider something about her case." Yeatts testified that he had never had a private conversation with respondent before this time and that the respondent complimented him and told him that he was either a good prosecutor or had the potential to be a good prosecutor. As a result of this conversation, Yeatts testified that

he called the Winston-Salem Police Department in an effort to learn about the case. He stated that he attempted to speak with the arresting officer, but he could not reach him. He spoke with another officer who told him there was no breathalyzer and that she was only observed driving for a short distance.

Shortly after that, in January or February of 1972, Yeatts learned from another assistant in his office that there was a breathalyzer as well as a movie of this defendant. He testified that later that week he visited the police department and viewed the movie, which showed Ms. Pruitt to be highly intoxicated. He also learned that the breathalyzer reading was .15. Yeatts said he apologized to the officer for the mistake.

Thereafter, Yeatts stated that he obtained a transcript of the proceedings for 17 December 1971 from respondent after he learned from a court reporter that respondent had asked the reporter to prepare a copy for him in connection with another investigation. Yeatts went to see the respondent, who gave him a copy. Yeatts testified that after reading the transcript, he felt hoodwinked or fooled. Yeatts testified that he had learned the reputation of respondent during the period from 17 December 1971 until the time that he obtained the transcript. He related that reputation as follows: "The reputation that I knew about Judge Kivett there in Winston-Salem was that he liked the women, maybe intimately." He stated that he was not familiar with that reputation in December of 1971.

The respondent testified that he asked Mr. Yeatts to look into it. He said he did so at the request of her attorney, Harold Wilson. Mr. Wilson is now deceased. Mr. Yeatts testified that he did not recall any discussions about this case with Harold Wilson. The respondent testified that he recognized Ms. Pruitt when she came around to be sentenced. Respondent conceded that, upon reflection, it would have been better not to have been involved in this matter.

Evidence supporting *finding 9(e)*:

Mrs. Peggy King, who is currently employed as a probation officer for the State of North Carolina, testified that she will have been a probation officer for fifteen years in October. When she was first employed, she worked a total of eight counties out of

her office in Statesville. One of those counties was Rowan. In late 1969 or early 1970, she had occasion to be in Rowan County during court. She testified that she was in the probation office during the noon recess when Frank Montgomery, who was clerk of court at that time, and the respondent came by the office and asked her to go to lunch. She agreed to accompany them to a public restaurant near the depot in Salisbury. Mrs. King testified that at the luncheon the respondent placed his leg to her left leg several times, and she asked him not to do that. She testified that he persisted again, and she told him that if he did it again, she would hit him. She testified that she told him that she was a married lady and was he not a married man. She testified that he said that he wasn't but his wife was. Concerning the contact, she testified:

> I remember that I had a dress on, because . . . because we could not wear pants suits or anything up until maybe 1974 or so. . . . He placed his—I don't know which leg; I just don't know—his leg around my left leg and in between my legs.

She testified that when he did this, she hit him in the arm or shoulder. After she hit him, the respondent stated that he had never been hit by a lady probation officer. On cross-examination, Mrs. King testified that she considered this activity on the part of the respondent to be a sexual assault. She testified that this occurred in late 1969 or early 1970.

One of respondent's own witnesses, Jack Harris, an attorney in Statesville, testified that Mrs. King's general reputation and character was good. He also indicated that she was well thought of as a probation officer. As well, Wanda Anderson, the woman with whom the respondent admitted engaging in sexual relations at G. T. Johnson's lake house, recalled that the respondent related that a female probation officer had struck him on a prior occasion.

Evidence supporting *finding 9(f)*:

W. Douglas Albright testified that he is a judge of the superior court in Greensboro and has been so since 1975. Judge Albright related that on 17 December 1982, between 4:00 and 4:15 p.m., he received a call at his home from the respondent. Judge Albright related that the tone of the respondent's voice was very different from the voice that he had heard on many occasions;

that it was urgent and very agitated. The respondent stated that he was calling from High Point. He related that he had just received evidence from an unimpeachable source that the District Attorney, Mike Schlosser, had made a deal with a Donna Smith in order to put this woman before the grand jury on the following Monday. Respondent related that this witness was supposedly to implicate him in connection with some type of drug deal at Green's Supper Club sometime back. He related that Schlosser was trying to ruin him and that the girl is unreliable. Respondent then told him that he, Judge Albright, was his last hope. Judge Albright testified that: "[H]e desperately needed me to issue a restraining order to stop the grand jury from coming in on Monday; and as I recall he said, 'Doug help me on this. You know I'd do the same for you.' "

Judge Albright testified that there was a pause and that he responded as follows: "Charlie, on whose motion is such an order to be issued?" Judge Albright stated that there was another pause and his response was "What do you mean?" Judge Albright responded, "Charlie, if it were to come out that you as the target of the grand jury investigation, the one to be indicted, and me a sitting judge had conferred and strategied and confederated to stop the grand jury from sitting so they couldn't indict you and prevented a bill from being submitted that was to be submitted, that they might make a case of obstruction of justice." Judge Albright further testified that he told the respondent that it wouldn't look right and how could it be justified.

Judge Albright stated that respondent's response was: "You won't do it then?" and Judge Albright told him: "No." Then the respondent said, "All right . . . I don't know what to do. I guess I'll have to call someone in Raleigh." Judge Albright related that at that point, without any further discussion, respondent hung up. Judge Albright stated that it was an abrupt termination of the conversation. Judge Albright estimated the length of the phone conversation to have been not less than five nor more than seven minutes.

At 4:28 p.m., Judge Albright called Franklin Freeman at the Administrative Office of the Courts in Raleigh and related the conversation as it had occurred. He later had a longer conversation with Franklin Freeman that evening. On Monday, no grand jury came in.

The respondent testified that he called Judge Albright and asked him to "restrain the grand jury until Judge McKinnon could get there." He further testified that "I told Judge Albright that if he felt that there was any impropriety in it, I did not want him to do anything." Lisa Tate, the daughter of respondent's lawyer Richard Tate, was called as a corroborating witness for the respondent. She testified that she overheard respondent's conversation with Judge Albright. She stated that the respondent asked Judge Albright if he would "convince Mr. Schlosser" not to take this action.

We hold that each of the findings of fact by the Judicial Standards Commission is supported by ample competent clear and convincing evidence. *In re Nowell, supra,* 293 N.C. 235, 237 S.E. 2d 246. We therefore accept the Commission's findings and adopt them as our own.

[4] We now consider whether, upon these findings, respondent's actions constitute willful misconduct in office, conduct prejudicial to the administration of justice, or both. Each case arising from the Judicial Standards Commission is to be decided upon its own facts. *In re Hardy,* 294 N.C. 90, 240 S.E. 2d 367 (1978). It is settled law that this Court is not bound by the recommendations of the Judicial Standards Commission and that this Court must consider all of the evidence and exercise its independent judgment as to whether it should censure, remand, or dismiss the proceedings against respondent. *In re Martin,* 295 N.C. 291, 245 S.E. 2d 766 (1978).

The following fundamental principles of judicial decorum, due administration of justice, and due process are pertinent to this determination:

1. "The place of justice is an hallowed place; and therefore not only the bench, but the foot-pace and precincts and purprise thereof, ought to be preserved without scandal and corruption." C. Northup, *The Essays of Francis Bacon* 168 (1936).

2. "A judge should uphold the integrity and independence of the judiciary." Canon 1, North Carolina Code of Judicial Conduct, 283 N.C. 771 (1973).

3. "A judge should avoid impropriety and the appearance of impropriety in all his activities." Canon 2, Code of Judicial Conduct, *supra.*

4. "A judge should perform the duties of his office impartially and diligently." Canon 3, Code of Judicial Conduct, *supra.*

5. A judge should, except as authorized by law, "neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." Canon 3(A)(4), Code of Judicial Conduct, *supra.*

6. "Any disposition of a case by a judge for reasons other than an honest appraisal of the facts and the law, as disclosed by the evidence presented, will amount to conduct prejudicial to the proper administration of justice." *In re Peoples, supra,* 296 N.C. 109, 154, 250 S.E. 2d 890, 916.

7. "The fact that a judge receives no personal benefit, financial or otherwise, from his improper handling of a case does not preclude his conduct from being prejudicial to the administration of justice. The determinative factors aside from the conduct itself, are the results of the conduct and the impact it might reasonably have upon knowledgeable observers." *Id.*

8. "The trial and disposition of criminal cases is the public's business and ought to be conducted in open court. The public, and especially the parties, are entitled to see and hear what goes on in the court." *Id.*

9. "A criminal prosecution is an adversary proceeding in which the district attorney as an advocate of the State's interest, is entitled to be present and be heard. Any disposition of a criminal case without notice to the district attorney who was prosecuting the docket when the matter was not on the printed calendar for disposition, improperly excluded the district attorney from participating in the disposition." *Id.*

10. " 'A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding.' " *Id.* (citation omitted).

The terms "willful misconduct in office" and "conduct prejudicial to the administration of justice" are, like fraud, so multiform as to admit of no precise rules or definition. *Id.* As Chief Justice Branch stated for the Court in *In re Martin*, 302 N.C. 299, 316, 275 S.E. 2d 412, 421 (1981):

> We do not agree, nor have we ever held, that "wilful misconduct in office" is limited to the hours of the day when a judge is actually presiding over court. A judicial official's duty to conduct himself in a manner befitting his professional office does not end at the courthouse door. *See In re Haggerty*, 257 La. 1, 241 So. 2d 469 (1970). Whether the conduct in question can fairly be characterized as "private" or "public" is not the inquiry; the proper focus is on, among other things, the nature and type of conduct, the frequency of occurrences, the impact which knowledge of the conduct would likely have on the prevailing attitudes of the community, and whether the judge acted knowingly or with a reckless disregard for the high standards of the judicial office.

Upon applying these principles to respondent's conduct, we hold that respondent's conduct constituted willful misconduct in office and conduct prejudicial to the administration of justice. The evidence shows that over the years respondent has pursued a course of conduct which reflects at least a reckless disregard for the standards of his office.

[5] The findings in 9(b) and (e), which we have adopted, constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The relationship between Johnson and respondent placed respondent in a position where Johnson could insidiously and directly impose his will upon respondent. The respondent's position as a judge was compromised. This conduct violated Code of Judicial Conduct Canons 1, 2, and 3, as well as precepts 6, 8, 9, and 10 set forth above. Respondent's conduct with respect to the female probation officer brought the judicial office into disrepute. It, too, violated Canon 2. This conduct (9(b) and (e)), standing alone, is insufficient to support an order of removal. "A judge should be removed from office and disqualified from holding further judicial office only for the more serious offense of wilful misconduct in office." *In re Peoples, supra*, 296 N.C. at 158, 250 S.E. 2d at 918. However, it does support an order of censure of respondent.

[6] The remaining findings, which we have adopted, 9(a), (c), (d), and (f) constitute willful misconduct in office, supporting an order of removal.

Finding 9(a) involves respondent's telephone call to Solicitor Zimmerman. Johnson testified that after he was charged with rape, he talked to respondent about the charge and asked him if he could help him. Respondent told Johnson that he would call Zimmerman and did so. Solicitor Zimmerman, realizing that it was improper for respondent to call him about a pending case, became angry, cursed, and hung up the telephone. Later, respondent related this series of events to Johnson. Respondent's argument that he only wanted to inform Zimmerman that the prosecuting witness was not reliable and that he should look into the case carefully does not ring true. Even if it were true, it would avail the respondent little. Judges should not advise solicitors about their private opinions concerning pending cases, and especially ex parte, in the absence of defendant and his counsel. Can it be said that it would be appropriate for a judge to advise a solicitor, ex parte, that the state had a good case and that he should prosecute with full vigor? When the judge enters into this realm he becomes an advocate and abrogates his position of impartiality. This conduct violated Code of Judicial Conduct Canons 1 and 3, and precepts 5, 6, 8, and 10 set out above. We hold that the respondent's conduct with respect to this finding constitutes willful misconduct in office.

The actions of respondent in sentencing and in thereafter changing the probation judgment in the case of Vontenia Robinette constitute willful misconduct in office (finding 9(c)). To procure Johnson's assistance in this case, Robinette paid him $2,000. Johnson requested that respondent help him. Respondent told Johnson he'd "try to help him and put him on probation or something." Robinette was placed on probation. A short time later, Robinette complained to Johnson about officers searching him pursuant to the terms of the probation judgment. Johnson again went to respondent, who agreed to modify the judgment. Johnson told Robinette to go to attorney John Hall and Hall would know what papers to prepare for the judge. He did so, and respondent signed an order eliminating the "consent to search" condition as well as the "house arrest" condition. This order was entered without notice to the solicitor, probation officer, or

Robinette's original attorney, Edward Hedrick. It was entered on 28 April 1976, a time when respondent was not assigned to hold court in Alexander County.

Respondent argues that the "consent to search" condition was invalid and that he removed it upon the request of attorney Hall. Hall, although available, was not called by respondent as a witness. N.C.G.S. 15A-1343(b)(15) was amended effective 1 July 1978 to restrict searches as a condition of a probation judgment to those performed by a probation officer. In *State v. Moore*, 37 N.C. App. 729, 247 S.E. 2d 250 (1978), the court held that probation judgments entered prior to 1 July 1978 with a search condition by law enforcement officers were valid. Contrary to respondent's argument, the evidence shows that he also included a "search by any law enforcement officer" condition in the probation judgment of James "Dickie" Pardue. This judgment was entered by respondent on 2 December 1977, nineteen months *after* respondent amended the Robinette judgment.

We hold that this action by respondent violated Canon 3(A)(4) of the Code of Judicial Conduct, 283 N.C. 771, and precepts 6, 8, 9, and 10 set out above, and constitutes willful misconduct in office. *In re Edens*, 290 N.C. 299, 226 S.E. 2d 5 (1976) (judge disposed of criminal case outside courtroom and out of session without notice to district attorney); *In re Crutchfield*, 289 N.C. 597, 223 S.E. 2d 822 (1976) (judge granted limited driving privileges ex parte).

We hold that respondent's actions in suggesting to an assistant district attorney that he "help" Carol Pruitt with respect to her driving under the influence charge constitute willful misconduct in office (finding 9(d)). Respondent met Carol Pruitt at the Gold Leaf Supper Club in Winston-Salem a year or two before her trial on this charge. Respondent went out with her and had sexual relations with her. Ms. Pruitt did not see respondent again until about three weeks before her trial in respondent's court. At that time he spoke to her, and she told him that she wanted to talk with him. Respondent replied that he was with some people and was busy and could not speak with her. Assistant District Attorney Yeatts testified that respondent came to his office during a lunch break and indicated to him that Ms. Pruitt was a friend of his or a friend of a friend, that she was a single parent supporting one or two children, and requested that he look into the case and

"help." The court records show that the case was not on the printed calendar for this session, which was the last that respondent would hold in the district during the six-month assignment. Yeatts made some investigation in the case and decided to accept a plea to careless and reckless driving. After the plea was taken and sentence imposed by respondent, Yeatts discovered that there was evidence of a breathalyzer reading of .15 and also a movie of Ms. Pruitt at the time of her arrest, portraying her as being highly intoxicated.

Respondent testified that he approached Yeatts about the case because Pruitt's attorney, Harold Wilson, wanted to know whether the state would accept a plea to a lesser offense. Wilson was deceased at the time of the formal hearing. Respondent further stated that at the time he discussed the case with Yeatts, he did not recall who the woman was, but that he did recognize her when she appeared before him in court on the charge.

After the case was disposed of by respondent, Ms. Pruitt called him that afternoon and asked him to meet her at Howard Johnson's parking lot. Respondent did so, and Ms. Pruitt offered to go off with him, but he refused to do so. Respondent spoke with her about her drinking problem and left. Respondent admitted that Ms. Pruitt's testimony was basically true.

The superior court judge is the dominant person during court sessions. This is particularly true with young, inexperienced lawyers and prosecutors. When asked whether respondent's discussion of the Pruitt case affected his decision to accept the lesser plea, Yeatts made this poignant reply: "Well, of course, in 1971 and I guess still in 1983, when a superior court judge comes to you and asks you to do something as an assistant DA, you usually do it. You usually move however he says for you to move. I did as he requested, if that's what you're asking."

The use of a judge's office to grant leniency or favors to a defendant because of sexual activities between a judge and a defendant is willful misconduct in office. *In re Martin*, *supra*, 302 N.C. 299, 275 S.E. 2d 412. The actions of respondent in this respect were improper and wrong and done intentionally in his official capacity as a superior court judge. *In re Edens*, *supra*, 290 N.C. 299, 226 S.E. 2d 5. Respondent's conduct violated Canon 3(A)(4) of the Code of Judicial Conduct, *supra*, and precepts 6, 8,

and 10 hereinabove set forth. Respondent abandoned his position as an impartial judge and became an advocate on the behalf of Ms. Pruitt.

Finding 9(f) involved respondent's efforts to prevent the convening of the Grand Jury of Guilford County. The evidence supporting this finding clearly and convincingly proves an attempt by respondent to obstruct justice and to do so for his own benefit. Judge Albright's testimony is plain and unequivocal.

Although the evidence supports a conclusion that it constitutes a criminal offense, an attempt to obstruct justice, it is not necessary that conduct be criminal in order to constitute willful misconduct in office. Obstruction of justice is a common law offense in North Carolina. Article 30 of Chapter 14 of the General Statutes does not abrogate this offense. N.C. Gen. Stat. § 4-1 (1981). Article 30 sets forth specific crimes under the heading of *Obstructing Justice*, such as: N.C.G.S. 14-223, resisting arrest; N.C.G.S. 14-221, breaking into jails; N.C.G.S. 14-221.1, altering evidence of criminal conduct; N.C.G.S. 14-225.1, picketing with intent to influence the administration of justice; N.C.G.S. 14-225.2, harassment of jurors; N.C.G.S. 14-226, intimidating witnesses. There is no indication that the legislature intended Article 30 to encompass all aspects of obstruction of justice. This is illustrated by the legislature placing N.C.G.S. 14-220, bribery of jurors, surely an obstruction of justice offense, in Article 29, *Bribery*.

"At common law it is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice. The common law offense of obstructing public justice may take a variety of forms . . . ." 67 C.J.S. *Obstructing Justice* §§ 1, 2 (1978). Respondent's conduct with respect to the attempt to prevent the convening of the grand jury would support a charge of common law obstruction of justice. It also violates Canons 1, 2(A), 3(A)(4), and precepts 8, 9, and 10 above set forth. We hold respondent's actions under finding 9(f) constitute willful misconduct in office.

Respondent also raises the following issues:

[7] 1. That the Judicial Standards Commission violated the requirements of notice under JSC Rule 7. This rule requires that a judge be notified of a preliminary investigation with respect to

his conduct and that he be informed of the nature of the charges. A respondent is also to be informed that he has the right to present relevant matters to the Commission if he so chooses. In this case, the notice sent to respondent fully informed him of the nature of the charges being investigated and specifically set forth eight events or transactions involved. He was also advised of his right to submit materials to the Commission for their consideration during the investigation and, in fact, respondent did so. We hold that the Judicial Standards Commission complied with Rule 7 and that respondent's due process rights were not violated. *In re Martin, supra*, 302 N.C. 299, 275 S.E. 2d 412.

[8] 2. Respondent argues that the combination of the investigative and judicial functions within the Judicial Standards Commission violated respondent's due process rights. This argument has been resolved against respondent by this Court in *In re Nowell, supra*, 293 N.C. 235, 237 S.E. 2d 246. "It is well settled by both federal and state case decisions that a combination of investigative and judicial functions within an agency does not violate due process. An agency which has only the power to recommend penalties is not required to establish an independent investigatory and adjudicatory staff." *Id.* at 244, 237 S.E. 2d at 252; *Richardson v. Perales*, 402 U.S. 389, 28 L.Ed. 2d 842 (1971).

3. Respondent argues that the testimony of Joyce Gibson was so prejudicial that it rendered all other findings and recommendations a nullity. We reject this argument. We will not further stain the pages of our reports by setting out the details of this testimony. The count to which this evidence was addressed was withdrawn and not considered by the Judicial Standards Commission in making its findings and recommendations. The chairman stated, "The Commission is in no wise considering evidence of Joyce Gibson." This Court has the final authority to review the evidence in this case and determine the appropriate result. This Court has not considered the testimony of Joyce Gibson in carrying out its duties in this proceeding.

[9] 4. The Judicial Standards Commission did not err in failing to make findings concerning respondent's character or credibility. The Judicial Standards Commission is not required to make such findings. Respondent testified before the Commission, and it passed upon his credibility. There was diverse and contradictory

evidence upon which a finding could be made as to respondent's character. In its recommendation, the Commission recited that it "heard the evidence presented and . . . observed the demeanor and *determined the credibility of the witnesses* . . . ." (Emphasis added.) Further it was not required to do in this respect.

[10] 5. Respondent contends that the principles of the ex post facto doctrine and his reelection to office after the conduct complained of bar this proceeding. We do not agree. The statute creating the Judicial Standards Commission was effective 1 January 1973. Only the conduct contained in findings 9(d) and (e) occurred prior to 1 January 1973. Counsel for the Commission argues, and we think properly, that the ex post facto doctrine does not prohibit the Commission from considering evidence of conduct by a judge that would constitute grounds for impeachment prior to 1 January 1973. The remedies provided by the establishment of the Judicial Standards Commission on 1 January 1973 did not abolish removal proceedings by impeachment but are cumulative thereto. *In re Martin, supra*, 295 N.C. 291, 245 S.E. 2d 766. Finding 9(d) with respect to Carol Pruitt constituted "corruption or other misconduct in his official capacity" by respondent within the meaning of N.C.G.S. 123-5 (1974) before its amendment effective 13 April 1974. This statute sets forth the grounds for impeachment of judicial officers. The assault by respondent on probation officer King would constitute the basis for a criminal prosecution, "the conviction whereof would tend to bring his office into public contempt." *Id.*

Therefore, all of the acts of respondent found by the Commission constituted grounds for removal at the time they were done. The ex post facto doctrine applies only to criminal prosecutions. *N.C. State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E. 2d 827 (1981), *modified and aff'd*, 304 N.C. 627, 286 S.E. 2d 89 (1982); 16A C.J.S. *Constitutional Law* § 437 (1956). Judicial disciplinary proceedings are not criminal actions. *In re Nowell, supra*, 293 N.C. 235, 237 S.E. 2d 246. Nor do the procedural changes in the law with respect to judicial removal vitiate this proceeding. *In re Martin, supra*, 295 N.C. 291, 245 S.E. 2d 766; *N.C. State Bar v. DuMont, supra*, 52 N.C. App. 1, 277 S.E. 2d 827. *Procedural* changes of the law in criminal cases are not violations of the ex post facto doctrine. *Dobbert v. Florida*, 432 U.S. 282, 53 L.Ed. 2d 344 (1977).

These proceedings against respondent did not violate the ex post facto doctrine.

[11] Neither is respondent protected by what has been referred to as "pardon by reelection." This Court rejected the argument in *In re Martin, supra,* 302 N.C. 299, 275 S.E. 2d 412 (1981). Nothing in the facts of this proceeding remove it from the holding in *Martin.*

The review of this proceeding has been a most serious undertaking by this Court. The preservation of the due administration of justice and the integrity and independence of the judiciary is one of the most important responsibilities of this Court. History has taught that without it, all else fails. "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35 (1970). When we ask the question, suggested by Chief Justice Sharp in *In re Peoples, supra,* 296 N.C. 109, 250 S.E. 2d 890, our duty is manifest: What would be the quality of justice and the reputation of the courts for dispensing impartial justice if every judge conducted himself and exercised the duties of his office as Judge Kivett?

For the reasons stated and in the exercise of our independent judgment of this proceeding, it is ordered by the Supreme Court of North Carolina in conference on 6 December 1983 that respondent, Charles T. Kivett, be and he is hereby censured for the conduct specified in findings 9(b) and 9(e) of the Judicial Standards Commission.

It is further ordered by the Supreme Court of North Carolina in conference on 6 December 1983 that respondent, Charles T. Kivett, be and he is hereby officially removed from office as a judge of the General Court of Justice, Superior Court Division, Eighteenth Judicial District, for the willful misconduct in office specified in findings 9(a), (c), (d), and (f) of the Judicial Standards Commission. In consequence of his removal, respondent is disqualified from holding further judicial office and is ineligible for retirement benefits. N.C. Gen. Stat. § 7A-376 (1981).

Justice EXUM did not participate in the consideration or decision of this proceeding.

STATE OF NORTH CAROLINA v. ROBERT CARLMAN BONDURANT

No. 426A82

(Filed 6 December 1983)

1. Jury § 5.1— jury selection—proposed selection of jurors opposed and unopposed to capital punishment—correctly refused

The trial judge correctly refused to permit jury selection in accordance with a method proposed by defendant in which the jury would have been composed of both those opposed and unopposed to capital punishment for the purpose of determining guilt and then, at the sentencing phase, replacing those opposed by alternates who are unopposed to the death penalty since such a method contravenes G.S. 15A-2000(a)(2) which contemplates that the same jury which determines guilt will recommend the sentence.

2. Homicide § 21.5— first degree murder—sufficiency of evidence

The evidence was sufficient to support a verdict of murder in the first degree where the evidence tended to show that defendant, in the front seat of a car which contained four other people, pointed a .45 caliber revolver at the victim's head; that there was no evidence that the decedent provoked this menacing gesture in any way; that another occupant of the car testified that defendant said to the victim "You don't believe I'll shoot you, do you?"; that each occupant of the car stated that defendant held the gun on the decedent for at least two minutes and that they were begging him not to shoot; that unmindful of their pleadings, defendant shot the victim in the head; and that the .45 caliber revolver was a "single action" type which required that the hammer had to be pulled back and set and the trigger pulled before it fired.

3. Criminal Law § 170.2— improper question by prosecutor not requiring mistrial

The trial court properly denied defendant's motion for a mistrial after, on cross-examination of defendant, he was asked if he had "unlawfully kill[ed] and slay[ed] one Ricky Cook." Objection to this question was immediately sustained, the question was in reference to an involuntary manslaughter conviction in which defendant killed Ricky Cook when he was driving a car without a license at a speed of up to 120 miles per hour while under the influence of alcohol, and the question was asked in good faith and conformed to the law of involuntary manslaughter.

4. Criminal Law § 45.1— experimental evidence—properly excluded

The trial court did not abuse its discretion in excluding a photograph illustrative of defendant's brother's testimony which was offered to impeach the testimony of two prosecution witnesses. The witnesses had testified that they had lived in an apartment over a building and that on the night of the murder they had observed cars similar to that occupied by defendant and his companions drive up in front of the building; that the area where the car stopped was well lighted; that there was at least one light on inside the car; that at least one of the windows in the car was down; that they could hear the occupants talking loudly in an argumentative tone; that one of the witnesses saw a passenger in the front seat shoot out the window; and that both witnesses saw

the same person point a gun into the backseat and after several minutes heard another gunshot and saw the car speed away. Defendant sought to introduce evidence that, from the apartment window, the witnesses would have been unable to see a person sitting in the front seat of the automobile but the trial judge properly ruled that the evidence sought to be admitted had been developed by means of an experiment, and the findings of fact found to support his ruling were supported by the evidence offered on voir dire.

5. Criminal Law § 102.10— jury argument—reference to prior convictions or criminal conduct—improper—not prejudicial

Although a prosecutor improperly argued defendant's prior misdeeds for purposes other than mere impeachment in his argument to the jury, the remarks were not such that the trial judge was required to declare a mistrial *sua sponte* since each time defendant objected to the challenged remarks, the objections were sustained and the trial judge carefully instructed the jury that they were to consider the evidence of defendant's past behavior only as he would explain in his charge, and since the judge later gave a complete and accurate instruction relating to the jury's consideration of defendant's prior acts of misconduct.

6. Criminal Law § 113.1— recapitulation of evidence by trial court—error immaterial

In a prosecution for first degree murder where the trial court, in summarizing the evidence, stated that defendant said something to the effect that "You don't believe I'll kill you" rather than "You don't believe I'll shoot you," the error was not "plain error" mandating a new trial for defendant since how defendant commented was relatively immaterial in that the express desire to shoot someone in the context in which it was stated was synonymous with killing him.

7. Homicide § 24.2— first degree murder—instruction regarding malice

In a prosecution for first degree murder, the trial judge correctly instructed the jury that malice and unlawfulness are implied from an intentional shooting with a deadly weapon since there was no evidence in the case of the elements of heat of passion on sudden provocation or self-defense, and since even if an instructional error was committed, the first-degree murder verdict rendered any error harmless beyond a reasonable doubt.

8. Criminal Law § 135.4— death case—proportionality review—sentence of death excessive and disproportionate

In a prosecution for first degree murder, the death sentence imposed was disproportionate within the meaning of G.S. 15A-2000(c)(2) in that it did "not rise to the level of those murders in which [the Court] [has] approved the death sentence upon proportionality review." Defendant did not murder his victim while in the perpetration of another felony; defendant did not coldly calculate the commission of the crime for a long period of time; the murder was not torturous as in other death cases; there was substantial evidence indicating that defendant and his traveling companions were highly intoxicated; there was no motive for the killing; and immediately after defendant shot the victim, he exhibited a concern for the victim's life and remorse for his action

by directing the driver of the automobile to the hospital and by entering the hospital himself to seek medical assistance for the decedent. In no other capital case among those in our proportionality review did the defendant express concern for the victim's life or remorse for his action by attempting to secure immediate medical attention for the deceased.

APPEAL by defendant from *Smith, Judge,* at the 22 March 1982 Criminal Session of SURRY County Superior Court.

Defendant was arrested on 6 April 1981 pursuant to a warrant charging the first-degree murder of Michael Roby Reynolds. On 29 June 1981, defendant was indicted for this crime by the Surry County grand jury. Defendant entered a plea of not guilty to the offense charged.

At trial, the State offered evidence tending to show that on the night of 5 April 1981, defendant was drinking beer and shooting pool at Tilley's Grocery in Mount Airy, North Carolina. Defendant called his stepson, Randy Hawks, to come to Tilley's and take him home. As defendant and Hawks prepared to leave the store, they met some friends of defendant, Monty Vernon, Mark Snow and the deceased, Michael Roby Reynolds. The five of them had a brief discussion and decided to ride around together and drink beer. Hawks agreed to drive the group in his automobile.

After they had driven around for a short while, defendant directed Hawks to Mayberry Paint and Wallpaper, defendant's place of employment. Defendant Bondurant and Monty Vernon went inside the store and returned a few minutes later with two guns, a .22 caliber pistol and a .45 caliber revolver. Defendant and Vernon then joined the others in the car and they continued to drive around and drink beer.

The group next stopped at the Snack Shack in Mount Airy. Defendant and Vernon went in to have a drink while the others remained in the car, listening to the radio. Defendant unsuccessfully attempted to sell the guns to several of the patrons and, shortly thereafter, he and Vernon rejoined the group outside. Defendant climbed into the front seat with his stepson, while Vernon rode in the back with Snow and Reynolds. Defendant carried the two weapons in the front with him, along with a shotgun he had earlier purchased at Tilley's Grocery.

Randy Hawks then drove the group to the Cupboard Number 5 on Highway 89. After Hawks pulled into the parking lot, defendant rolled down the window on the passenger side of the car and fired the .22 caliber pistol into the air several times. Mark Snow testified that following this action by defendant, Reynolds asked if they could go home because he had to get up early for work the next morning. After the decedent spoke about going home, defendant reached for the .45 caliber revolver, turned to Reynolds in the back seat and pointed the gun at his head. Vernon, Hawks and Snow each testified that defendant pointed the weapon at Reynolds for at least two minutes. Vernon further recalled that defendant taunted the victim by saying, "You don't believe I'll shoot you, do you?" Everyone in the car begged defendant not to shoot Reynolds, but defendant ignored their protestations and fired the weapon, shooting the victim in the head.

Defendant then turned and directed his stepson to Northern Hospital of Surry County. While enroute to the emergency room, defendant pointed the gun at Mark Snow for "two or three minutes" and asked him what he would say when they got to the hospital.

Upon arrival at the hospital, defendant went in to seek medical assistance for Reynolds. When he returned with the hospital attendants who removed the victim from the car, defendant told Hawks and Vernon to go wash the blood out of the car and to throw the guns away. Hawks and Vernon complied with defendant's demands. Defendant then reentered the hospital and talked with several police officers regarding the incident. Defendant told each of them that the shooting was an accident. The officers testified that none of the occupants of the car, including defendant, appeared to be drunk or under the influence of alcohol.

Finally, the State presented the testimony of several witnesses which tended to show that defendant had a violent and quick temper with a history of shooting into objects. Their testimony also revealed that defendant had a history of alcohol abuse which tended to aggravate his outbursts of temper.

Defendant's evidence, which included his own testimony, revealed that he planned to attend the automobile races in North Wilkesboro on 5 April 1981. Since the races were postponed due to rainy weather, defendant and a friend, Sonny Montgomery, de-

cided to spend the afternoon riding around Surry County and parts of Virginia. Before leaving on the trip, defendant purchased several cartons of beer at Tilley's Grocery. Montgomery had three bottles of whiskey in the truck. Defendant testified that while they drove around, he drank all of the beer and part of Montgomery's liquor.

Late in the afternoon, Montgomery drove to his home and defendant came inside with him. Montgomery's wife and daughter testified that defendant was very drunk. Defendant stayed at Montgomery's house for a short while talking and then Montgomery took him to Tilley's Grocery where he met Vernon, Snow and Reynolds.

Defendant's evidence is consistent with that presented by the State regarding Hawks' arrival to take defendant home, the agreement among the five of them to ride around drinking beer and the stops they made during the trip. Defendant's evidence differs, however, as to what occurred in the parking lot at the Cupboard Number 5.

Defendant admitted that after Hawks drove the car into the parking lot and turned off the ignition, he picked up the .22 caliber pistol and fired it out the window several times. Defendant testified that he then retrieved the .45 caliber revolver and, as he started to shoot it out the window, he heard someone in the back seat say something to him. He stated that as he turned around to respond, the gun accidentally discharged, shooting Reynolds in the head.

Several witnesses for defendant testified that they saw Vernon, Snow and Reynolds on the night of 5 April and that each of these men was under the influence of alcohol. Several other witnesses stated that they observed defendant both before and after the shooting and that he was highly intoxicated.

The jury returned a verdict of guilty of first-degree murder.

A sentencing hearing was held pursuant to G.S. 15A-2000 *et seq.*, following the first-degree murder conviction.

The State presented no evidence during the sentencing phase of the trial, electing to rely on its evidence presented during the guilt determination phase.

Defendant presented the testimony of several relatives, including his wife, Claudine Bondurant. The essence of their testimony was that defendant had a drinking problem; that he was kind to his family, visiting with them often; and that he had a good relationship with his children. Maggie Poore, defendant's employer, testified as to defendant's excellent work habits and described him as a dependable employee.

The trial court submitted two aggravating circumstances:

1. Was this murder especially heinous, atrocious or cruel?

2. Was this murder part of a course of conduct in which Robert Carlman Bondurant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against another person or other persons?

The trial court submitted the following mitigating circumstances:

1. Does Robert Carlman Bondurant have no significant history of prior criminal activity?

2. Was the capacity of Robert Carlman Bondurant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law impaired?

3. Was Robert Carlman Bondurant married to Claudine Bondurant and:

a. Was he a good husband which you deem to have mitigating value?

b. Was he a good provider which you deem to have mitigating value?

4. Was Robert Carlman Bondurant the father of Shannon or Jeff Bondurant or both and:

a. Did he have a good relationship with either or both of them which you deem to have mitigating value?

b. Did he frequently visit with either or both of them which you deem to have mitigating value?

5. Was Robert Carlman Bondurant employed on the 5th day of April, 1981, which you deem to have mitigating value?

6. Did Robert Carlman Bondurant help his family on the farm as he was growing up which you deem to have mitigating value?

7. Has Robert Carlman Bondurant been a hardworking individual during his life which you deem to have mitigating value?

8. Did Robert Carlman Bondurant acquire:

a. a high school diploma or the equivalent thereof which you deem to have mitigating value?

b. two years of education at a community college which you deem to have mitigating value?

9. Has Robert Carlman Bondurant expressed remorse for the death of Michael Roby Reynolds which you deem has mitigating value?

10. Did Robert Carlman Bondurant, after the shooting of Michael Roby Reynolds:

a. Direct Randy Hawks to the hospital which you deem to have mitigating value?

b. Seek medical assistance at the hospital for Michael Roby Reynolds which you deem to have mitigating value?

11. Has Robert Carlman Bondurant been a loving and kind brother to his sisters and brothers which you deem to have mitigating value?

12. Was Robert Carlman Bondurant cooperative with law enforcement officers after the shooting of Michael Roby Reynolds which you deem to have mitigating value?

13. Do you find any other circumstance or circumstances which you deem to have mitigating value?

The jury found beyond a reasonable doubt that both aggravating circumstances existed and that these were sufficiently substantial to call for the imposition of the death penalty. The jury also found the existence of three mitigating circumstances: that defendant sought medical assistance for his victim, that he cooperated with law enforcement officers and, under number 13, that since the event of 5 April 1981, defendant had shown con-

sideration and respect toward his stepson. The jury specifically rejected the mitigating circumstances of impaired capacity and lack of significant prior criminal activity. They also found that defendant's education, work habits and relationship to his family had no mitigating value. Finally, 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 court sentenced defendant to die for the first-degree murder of Michael Roby Reynolds and defendant appealed his death sentence directly to this Court pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Charles M. Hensey, Assistant Attorney General, for the State.

Stephen G. Royster and Michael F. Royster for defendant appellant.

BRANCH, Chief Justice.

Guilt-Innocence Phase

By his first assignment of error, defendant contends that by death qualifying the jury and excluding for cause those who expressed opposition to the death penalty, the trial court violated his rights as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Defendant concedes the decided cases are against him and presents no arguments in support of his position that were not carefully considered by this Court in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980); *State v. Davis*, 305 N.C. 400, 290 S.E. 2d 574 (1982); and *State v. Ladd*, 308 N.C. 272, 302 S.E. 2d 164 (1983). This contention is without merit.

[1] Defendant further argues that the trial judge erred in denying his pretrial motion concerning the manner in which the jurors should have been selected. Defendant's motion reads as follows, in pertinent part:

> that jurors who may be opposed to capital punishment be allowed to sit . . . during the guilt or innocence phase of . . . [the] trial . . .; and, further, that the State and defendant be

> permitted to pick an alternate juror who is not opposed to capital punishment to take the place of the juror who is opposed to capital punishment to sit as a juror during the sentencing phase of . . . [the] trial.

We hold that the trial judge correctly refused to permit jury selection in accordance with the method proposed by defendant. Selecting a jury composed both of those opposed and unopposed to capital punishment for the purpose of determining guilt and then, at the sentencing phase, replacing those opposed by alternates who are unopposed to the death penalty contravenes G.S. 15A-2000(a)(2), which contemplates that the same jury which determines guilt will recommend the sentence. General Statute 15A-2000(a)(2) permits alternate jurors to serve during the sentencing phase in extraordinary circumstances involving the death, incapacitation or disqualification of an empaneled juror, but does not provide for the exchange of jurors for the sentencing phase based upon their convictions concerning the death penalty. This assignment is overruled.

[2] Defendant next contends that the trial judge erred in denying his motion to dismiss at the close of the State's evidence and at the close of all the evidence. He argues that there was not sufficient evidence of premeditation and deliberation to carry the case to the jury on the charge of first-degree murder.

When defendant elected to offer evidence on his own behalf at trial, he thereby waived his right to assert as error on appeal the denial of his motion for dismissal made at the close of the State's evidence. G.S. 15-173. We therefore consider only his motion to dismiss made at the close of all the evidence.

In considering this assignment of error, we apply the familiar rule that upon a motion for dismissal, all the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Thomas*, 296 N.C. 236, 250 S.E. 2d 204 (1978); *State v. Snead*, 295 N.C. 615, 247 S.E. 2d 893 (1978). When so considered, if there is substantial evidence to support a finding that the offense has been committed and the defendant was the perpetrator of the offense, the motion to dismiss should be denied. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Thomas, supra.* Premeditation has been defined as "thought beforehand for some length of time no matter how short," while deliberation is "an intention to kill executed by the defendant in a 'cool state of blood' in furtherance of a 'fixed design to gratify a feeling of revenge or, to accomplish some unlawful purpose.' " *State v. Calloway,* 305 N.C. 747, 751, 291 S.E. 2d 622, 625 (1982).

When considered in the light most favorable to the State, the evidence in the instant case reveals that after firing the .22 caliber pistol, defendant retrieved the .45 caliber revolver and turned to point it at Reynolds' head. There is no evidence that the decedent provoked this menacing gesture in any way. Monty Vernon testified that defendant said to the victim, "You don't believe I'll shoot you, do you?" Each occupant of the car stated that defendant held the gun on the decedent for at least two minutes and that they were begging him not to shoot. Unmindful of their pleadings, defendant shot Reynolds in the head. The State presented evidence that the .45 caliber revolver was a "single action" type; that to fire the weapon the hammer had to be pulled back and set and the trigger pulled.

We hold that there was plenary and substantial evidence from which the jury could infer that defendant acted with premeditation and deliberation when he shot and killed Michael Roby Reynolds. The trial court properly denied defendant's motion to dismiss.

[3] Defendant next assigns as error the trial court's denial of his motion for mistrial following the district attorney's first question to him on cross-examination.

Defendant took the witness stand and testified extensively on his own behalf. On cross-examination, he was asked: "Mr. Bondurant, on May 30, 1968, did you unlawfully kill and slay one Ricky Cook?" Objection to this question was immediately sustained and a motion for mistrial denied. Defendant was then asked: "Mr. Bondurant, on the 13th day of January, 1970, were you charged and convicted of involuntary manslaughter?" Defendant replied: "Yes sir; as a result of a car accident." Defendant further admitted that on the evening that he struck and killed Ricky

Cook, he was driving the car without a license at speeds up to 120 miles per hour while under the influence of alcohol.

Defendant's argument is that the first question implied that he had been convicted of voluntary manslaughter as opposed to involuntary manslaughter. We do not agree.

Involuntary manslaughter is the unlawful and unintentional killing of another human being without malice and which proximately results from (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976).

The first question posited to defendant was ". . . did you unlawfully kill and slay one Ricky Cook?" The prosecutor's emphasis was on the *unlawfulness* of defendant's act and unlawfulness is clearly an element of the crime for which defendant had been convicted. Contrary to defendant's contention, the question did not suggest an intentional act and thereby imply that defendant had been convicted of voluntary manslaughter.

Since the prosecutor's question was, by defendant's own admission, asked in good faith and since the question conformed to the law of involuntary manslaughter, we hold that the trial judge did not abuse his discretion in denying defendant's motion for mistrial.

[4] We next consider defendant's contention that the trial judge erred in excluding certain testimony of Clark Bondurant and in excluding a photograph illustrative of his testimony.

The challenged evidence was offered to impeach the testimony of two prosecution witnesses, Helen Dianne Bowman and Fern Tate. These two women testified, in substance, that on 5 April 1981, they lived in an apartment over The Cupboard Number 5 in Bannertown, near Mount Airy, North Carolina. Their testimony was that sometime after 11:00 p.m. on 5 April, they observed a car similar to that occupied by defendant and his companions drive up in front of The Cupboard between the gas pumps. Each remembered that the area where the car stopped was well lighted and that there was at least one light on inside the car. They also recalled that at least one of the windows in the car was down and that they could hear the occupants talking

loudly in an argumentative tone. Ms. Tate testified that she saw the passenger in the front seat shoot out the window. Both Ms. Tate and Ms. Bowman saw the same person point a gun into the back seat. After several minutes, they heard another gunshot and saw the car speed away. They copied down the license number of the automobile and Ms. Tate called the police to report the incident.

In order to impeach the testimony of Ms. Bowman and Ms. Tate, defendant sought to introduce testimony of his brother, Clark Bondurant. Several days prior to trial, Clark, defendant's wife, defense counsel and a photographer drove the car in which the group was riding on the night of the shooting to The Cupboard Number 5. They parked the automobile between the gas pumps in front of the building and took photographs of the car from ground level and from the apartment above. At trial, defense counsel asked Clark Bondurant to describe what he saw from the apartment window. The prosecution objected and a *voir dire* was held. Clark testified on *voir dire* that from the apartment window, he was unable to see a person sitting in the front seat of the automobile. He further stated that he was unable to see the object which the person in the front seat was holding, a broom handle intended to approximate the length of the gun held by defendant on the night of 5 April.

Following the *voir dire*, the trial judge ruled that the evidence sought to be admitted had been developed by means of an experiment. He further ruled that the conditions under which the experiment was conducted were too dissimilar from those existing on 5 April 1981 to permit the admission of Clark Bondurant's testimony and a photograph taken from the apartment.

Defendant first argues that the viewing of the inside of the car from the apartment window was not an experiment and that the trial judge erred by considering it in that context.

Resolution of this argument requires little discussion. An experiment is simply a restaging of past events in which significant conditions are artificially reproduced and results observed. 1 Brandis, North Carolina Evidence § 94 (2d rev. ed. 1982).

The procedure conducted by Clark Bondurant and others was an admitted attempt to recreate the scene observed by Ms. Bow-

man and Ms. Tate on the night of 5 April. Furthermore, the viewing was made in an obvious effort to discredit the testimony of the two women by showing that Clark was unable to see what they described from the same vantage point. Clearly, the trial judge correctly denominated the viewing an experiment.

Defendant further argues that even if the procedure is appropriately considered an experiment, the testimony regarding the viewing should have been admitted because the experiment was conducted under conditions substantially similar to those existing on 5 April 1981.

We note that the trial judge is commonly afforded broad discretion in determining whether the conditions and circumstances of an experiment are sufficiently similar to those sought to be duplicated to render the results admissible. *State v. Carter*, 282 N.C. 297, 192 S.E. 2d 279 (1972).

After hearing the *voir dire* evidence, the trial judge made findings of fact and entered conclusions of law as follows:

> 1. That defendant's exhibits 1, 2, and 3 are all photographs taken in the daylight hours at Cupboard No. 5, and the events of April 5, 1981, at Cupboard Number 5, as described by the witnesses, occurred during the evening hours and during darkness.
>
> 2. That the vehicle depicted in defendant's exhibits 1, 2 and 3 is in approximately the same location as it was on April 5, 1981, when the events occurred giving rise to this trial.
>
> 3. That on April 5, 1981, when the events occurred which gave rise to this trial, the interior lights of the car depicted in defendant's Exhibits 1, 2 and 3 were burning.
>
> 4. That at the time of the taking of defendant's Exhibits 1, 2 and 3, only one person was in the back seat of the vehicle depicted in said exhibits; and on the night of April 5, 1981, there were three persons in the back seat of the said vehicle.
>
> Based on the foregoing findings the court concludes as follows:
>
> 1. That what might be seen through the rear window glass of the vehicle depicted in defendant's Exhibit Number 3 would

be increased by simply moving the vehicle depicted in said exhibit a slight distance.

2. That the angle of view from above the vehicle depicted in defendant's Exhibits 1, 2 and 3 would be greatly influenced by the height of an individual above the window sill, as would the view of the camera, and there has been no showing that the camera lens at the time of the taking of defendant's Exhibits 1, 2 and 3 approximated the height of the view of either the witness Dianne Bowman or Fern Tate.

3. That it is common knowledge and the court takes judicial notice that one's view into a darkened area from a lighted area is not the same as viewing from a darkened area or through a darkened area into a lighted area, the view of the latter being the better of the two.

4. That the height of the alleged pistol and its exact location in the vehicle would affect one's ability to view the same from above particularly when one considers that the location of the vehicle as shown in defendant's Exhibits 1, 2 and 3 is approximate.

5. That the conditions under which defendant's Exhibits 1, 2 and 3 were taken do not even approximate the conditions existing on April 5, 1981, as hereinabove concluded, and for that reason the same should not be admitted, nor should the same be admitted as indicating what the view from a window above the vehicle so depicted was on the night of April 5, 1981.

It is clear that the crucial findings of fact are supported by the evidence offered on *voir dire*. That evidence establishes only two circumstances that were ascertainably similar between the night in question and the staged recreation—the automobile and The Cupboard Number 5. The location of the car and viewers, the lighting conditions and the relative positions of the passengers and the weapon were not demonstrably similar.

We therefore hold that the trial judge did not abuse his discretion in excluding evidence of this experiment.

[5] Defendant contends that the trial judge erred in failing to declare a mistrial following improper jury arguments by the prosecutor.

The argument which forms the basis for defendant's first exception under this assignment of error was as follows: "Somebody somewhere said that the best way to tell the future is to look in the past, particularly when you are talking about human beings. You look at their past conduct and you can pretty well tell what their future is going to be." Defense counsel's objection was immediately sustained, a motion to strike allowed and the court instructed the jury to disregard the remarks and to consider evidence of defendant's past deeds only as the judge would later explain in his charge.

The following argument forms the basis of defendant's second exception: "And you put that with, 'You don't believe I'll shoot you' and you put that with a man with a record like he's got of shooting into cars, a truck, shooting into a floorboard, shooting into the side of the wall and the ceiling and shooting the window lights out—" Again defendant's objection was sustained and a cautionary instruction given. Defendant did not make a motion for mistrial after either argument.

While it is proper to refer to evidence of prior acts of misconduct in the arguments on the issue of credibility, we agree with defendant that the prosecutor here improperly argued defendant's prior misdeeds for purposes other than mere impeachment. The district attorney was, it seems, attempting to use these prior acts as substantive evidence of defendant's guilt.

Conceding the impropriety of the prosecutor's arguments, we must determine whether the remarks were such that the trial judge was required to declare a mistrial *sua sponte.*

In a capital case, the trial judge may order a mistrial only with the consent of the defendant unless such a ruling is necessary to attain the ends of justice. *State v. McKenna,* 289 N.C. 668, 224 S.E. 2d 537, *death sentence vacated,* 429 U.S. 912 (1976). It is our conclusion that such an order was not required in this case.

Each time defendant objected to the challenged remarks, the objections were sustained and the trial judge carefully instructed the jury that they were to consider the evidence of defendant's past behavior only as he would explain in his charge. The judge then later gave a complete and accurate instruction relating to the jury's consideration of defendant's prior acts of misconduct.

We hold that the district attorney's remarks did not constitute prejudice to defendant such that the trial judge was required to declare a mistrial on his own motion.

[6] Defendant's sixth assignment of error relates to a misstatement by the trial judge during his recapitulation of the State's evidence. The trial court summarized a portion of the evidence as follows: "That the defendant then took a .45 caliber Ruger pistol, that he pointed it at Michael Roby Reynolds and said something to the effect that, 'You don't believe I'll kill you.' " Prosecution witness Monty Vernon had actually testified that while defendant pointed the pistol at the victim's head, he heard defendant say: "You don't believe I'll *shoot* you, do you?" (emphasis added).

Defendant argues that the trial judge's substitution of the word "kill" for "shoot" suggested to the jury that defendant was guilty of premeditated murder.

Defendant concedes that he did not object to the trial judge's summation of the evidence and that when invited to offer corrections to the instructions given, he failed to bring this misstatement to the court's attention. Defendant argues, however, that this single deviation from the evidence presented constitutes "plain error" entitling him to a new trial.

"In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E. 2d 375, 378-79 (1983). Even when the "plain error" rule is applied, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Odom* at 661, 300 S.E. 2d at 378, *quoting Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

In the instant case, a review of the whole record reveals no "plain error" mandating a new trial for defendant. The uncontroverted evidence is that defendant pointed a .45 caliber revolver at Reynolds' face, cocked it, and held it on the victim for at least two minutes before firing. Whether defendant commented, "You don't believe I'll shoot you" or "You don't believe I'll kill you" is relatively immaterial. The expressed desire to shoot someone in this context is synonymous with killing them. We simply

do not believe the trial judge's misstatement connoted a premeditated intent to kill any more than the use of the word "shoot" would have under the factual circumstances of this case. This assignment is dismissed.

[7] Defendant next contends that the trial judge erred in his instruction to the jury that malice and unlawfulness are implied from an intentional shooting with a deadly weapon. Defendant bases this contention on the fact that there was some evidence of the absence of malice and unlawfulness, as evidenced by the trial court's instructions on voluntary and involuntary manslaughter.

We agree with defendant that when there is some evidence justifying an instruction concerning self-defense or heat of passion killing upon sudden provocation, any presumption of malice arising from a finding that defendant intentionally inflicted the wounds with a deadly weapon disappears, leaving only a permissible inference which the jury may accept or reject. *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *reversed on other grounds*, 432 U.S. 233 (1977). "The State is not required to prove malice and unlawfulness unless there is some evidence of their non-existence, but once such evidence is presented, the State must prove these elements beyond a reasonable doubt." *State v. Simpson*, 303 N.C. 439, 451, 279 S.E. 2d 542, 550 (1981).

We conclude that the trial judge correctly instructed the jury on the presumption of malice arising from the intentional use of a deadly weapon. We reach this conclusion because our careful review of the entire record reveals no evidence negating the existence of malice and justifying the manslaughter instructions given.

There were no claims of self-defense or heat of passion raised by defendant during the trial and, in fact, no evidence to support such claims. Defendant's theory of the case was that he accidentally shot the victim and the trial judge carefully and correctly instructed that the burden was on the State to disprove, beyond a reasonable doubt, defendant's assertion of accidental death.

Furthermore, any possible error placing the burden upon defendant to show absence of malice was cured by the jury's verdict of murder in the first degree.

In *State v. Bush*, 307 N.C. 152, 297 S.E. 2d 563 (1982), we held that when a defendant is convicted of premeditated and deliberate murder in the first degree, the State has not relied upon a mere presumption of malice. In finding a defendant guilty beyond a reasonable doubt of a willful, deliberate and premeditated killing, the jury has necessarily rejected beyond a reasonable doubt the possibility that the defendant acted in self-defense or in the heat of passion. *See Street v. Warden*, 423 F. Supp. 611 (D. Md. 1976), *aff'd*, 549 F. 2d 799 (4th Cir. 1976) (unpublished opinion), *cert. denied*, 431 U.S. 906 (1977); *Wilkins v. Maryland*, 402 F. Supp. 76 (D. Md. 1975), *aff'd*, 538 F. 2d 327 (4th Cir. 1976) (unpublished opinion), *cert. denied*, 429 U.S. 1044 (1977).

We hold that the trial judge did not err in his instructions to the jury with regard to the presumption of malice arising from an intentional killing with a deadly weapon, since there was no evidence in the case of the elements of heat of passion on sudden provocation or self-defense. Even assuming, *arguendo*, that the instructional error contended by defendant was committed, the first-degree murder verdict rendered any error harmless beyond a reasonable doubt. This assignment of error is overruled.

Finally, defendant argues that the trial judge erred in denying his motion to set aside the verdict as being against the greater weight of the evidence.

Motions to set aside the verdict are addressed to the discretion of the trial court and refusal to grant the motion is not reviewable on appeal in the absence of abuse of discretion. *State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979), *cert. denied*, 446 U.S. 911 (1980). If there is sufficient evidence to support the verdict, then the trial judge has acted within his discretion in denying the motion. *State v. Leigh*, 278 N.C. 243, 179 S.E. 2d 708 (1971).

Based upon our earlier reviews of the evidence, we conclude that there was sufficient evidence to support the verdict of first-degree murder and therefore no abuse of discretion has been shown. This assignment of error is without merit.

Sentencing Phase

Defendant has raised numerous assignments of error relating to the sentencing phase of the trial. We have carefully reviewed each of them and find them to be without merit.

[8] We do not discuss defendant's various contentions, however, because in conducting our proportionality review as required by G.S. 15A-2000(d)(2), we find that the sentence of death is excessive and disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

As a final matter in every capital case, we are directed by G.S. 15A-2000(d)(2) to review the record and 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 an exhaustive review of the transcript, record on appeal, briefs and oral arguments, we have concluded that the evidence supports the aggravating factors found by the jury. We also conclude that the record is devoid of evidence indicating that the sentence may have been imposed under the influence of passion, prejudice or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review.

In *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, --- U.S. ---, 104 S.Ct. 202 (1983), we established that

> [i]n 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.

308 N.C. at 79, 301 S.E. 2d at 355. In describing the methods this Court will employ in making our comparisons, we further stated in *Williams* that

> 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 . . . . 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.

308 N.C. at 81-82, 301 S.E. 2d at 356.

After reviewing the approximately 65 life sentence cases and 13 death sentence cases in the proportionality pool, we find that although the crime committed by this defendant was a senseless, unprovoked killing, "it does not rise to the level of those murders in which we have approved the death sentence upon proportionality review." *State v. Jackson*, 309 N.C. 26, 46, 305 S.E. 2d 703, 717 (1983).

In the instant case, defendant did not murder Michael Roby Reynolds while in the perpetration of another felony. *Cf. State v. Craig & Anthony*, 308 N.C. 446, 302 S.E. 2d 740 (1983); *State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, *cert. denied*, --- U.S. ---, 103 S.Ct. 474 (1982); *State v. Taylor*, 304 N.C. 249, 283 S.E. 2d 761 (1981), *cert. denied*, --- U.S. ---, 103 S.Ct. 3552 (1983); *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982). The facts further demonstrate that defendant did not coldly calculate the commission of this crime for a long period of time as did the defendant in *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, *rehearing denied*, 448 U.S. 918 (1980). This is evidenced by defendant's attempt to sell the gun which he used to kill the victim shortly before the killing. Finally, the record in this case does not reveal a torturous murder of the sort perpetrated by the defendants in *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335, *cert. denied*, --- U.S. ---, 104 S.Ct. 202 (1983); *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, --- U.S. ---, 103 S.Ct. 503 (1982); and *State v. McDowell*, 301 N.C. 279, 271 S.E. 2d 286 (1980), *cert. denied*, 450 U.S. 1025 (1981).

There was substantial evidence presented at trial which indicated that defendant and his traveling companions were highly

intoxicated on the evening of 5 April 1981. There appears to have been no motive for the killing; defendant was among friends and up until the incident at The Cupboard Number 5, he behaved amiably toward the other passengers in the car.

We deem it important in amelioration of defendant's senseless act that immediately after he shot the victim, he exhibited a concern for Reynolds' life and remorse for his action by directing the driver of the automobile to the hospital. Defendant himself entered the hospital to seek medical assistance for the decedent. In no other capital case among those in our proportionality pool did the defendant express concern for the victim's life or remorse for his action by attempting to secure immediate medical attention for the deceased.[1] *E.g., State v. Pinch*, 306 N.C. 1, 292 S.E. 2d 203, *cert. denied*, --- U.S. ---, 103 S.Ct. 474 (1982), *rehearing denied*, 103 S.Ct. 839 (1983). Finally, we note that defendant readily spoke with policemen at the hospital, confessing that he fired the shot which killed Michael Reynolds but explaining that the shooting was accidental.

Considering both the crime and the defendant, we hold as a matter of law that the death sentence imposed in this case is disproportionate within the meaning of G.S. 15A-2000(d)(2). We are therefore required by the statute to sentence defendant to life imprisonment in lieu of the death sentence.

By this action, we intend no criticism of the able trial judge. The proportionality review is a duty vested solely in this Court by statute.

The sentence of death is vacated and defendant is hereby sentenced to imprisonment in the State's prison for the remainder of his natural life. Defendant is entitled to credit for days spent in confinement prior to the date of this judgment.

1. By emphasizing this particular factor in mitigation of defendant's act, we do not mean to imply that this factor is determinative of our proportionality consideration. In conducting our proportionality review, we will consider the totality of the circumstances presented in each individual case and the presence or absence of a particular factor will not necessarily be controlling.

Guilt-Innocence Phase: No error;

Sentencing Phase: Death sentence vacated, sentence of life imprisonment imposed.

MALCOLM M. LOWDER, MARK T. LOWDER AND DEAN A. LOWDER, PLAINTIFFS v. ALL STAR MILLS, INC., LOWDER FARMS, INC., CAROLINA FEED MILLS, INC., ALL STAR FOODS, INC., ALL STAR HATCHERIES, INC., ALL STAR INDUSTRIES, INC., TANGLEWOOD FARMS, INC., CONSOLIDATED INDUSTRIES, INC., AIRGLIDE, INC., AND W. HORACE LOWDER, DEFENDANTS AND CYNTHIA E. LOWDER PECK, MICHAEL W. LOWDER, DOUGLAS E. LOWDER, LOIS L. HUDSON, INDIVIDUALLY AND AS *GUARDIAN AD LITEM FOR* STEVE H. HUDSON, BRUCE E. HUDSON, BILLY J. HUDSON, ELLEN H. BALLARD, JENELL H. RATTERREE, DAVID P. LOWDER, JUDITH R. LOWDER HARRELL, EMILY P. LOWDER CORNELIUS AND MYRON E. LOWDER, INTERVENING DEFENDANTS

No. 89PA83

(Filed 6 December 1983)

1. **Attorneys at Law § 3; Receivers § 1— appointment of plaintiffs' attorney as counsel for receivers**

The trial court erred in its appointment of plaintiffs' attorneys as counsel for the receivers of the seven corporate defendants since the plaintiffs' interests are not identical to those of the receivers in that plaintiffs are attempting to recover assets in an undetermined amount for the benefit of two corporate defendants from the other five corporate defendants, and the receivers are charged with preventing injury to the property in controversy and preserving all the assets for the security of all parties in interest.

2. **Attorneys at Law § 7; Receivers § 12.2— improper appointment of attorneys for receivers—allowance of counsel fees**

Although it was error for the trial court to appoint plaintiffs' attorneys as counsel for the receivers of the corporate defendants, the trial court could properly allow reasonable fees to the attorneys for their services to the receivers under orders of the court.

Justice COPELAND dissenting in part.

ON certiorari to review the decision of the Court of Appeals, 60 N.C. App. 275, 300 S.E. 2d 230 (1983), affirming in part and reversing in part orders entered by *Seay, J.*, on 2 October 1981 in Superior Court, STANLY County. Heard in the Supreme Court 12 September 1983.

This suit was instituted on 11 January 1979. The claim for relief is in the nature of an individual action by minority shareholders and a derivative action. It concerns the operation of seven corporations owned by the Lowder family. Plaintiffs seek damages and other relief, contending that defendant Horace Lowder has abused his authority as chief executive officer of the corporate defendants, wrongfully diverting funds and assets from two of the corporations in which plaintiffs have an interest into the other five corporations which are basically owned by Horace Lowder. Plaintiffs are represented in this action by the Moore, Van Allen and Allen firm, of Charlotte and Raleigh.[1]

On 5 February 1979, Judge Seay appointed co-receivers to operate the corporations as a single business and enjoined defendant Lowder from interfering in the receivership in any way. On 14 February 1979, Judge Seay entered a supplemental receivership order which appointed Moore and Van Allen to serve as attorneys for the receivers. Defendants appealed the injunction, the receivership order, and the supplemental receivership order.

After review by the Court of Appeals, reported in 45 N.C. App. 348, 263 S.E. 2d 624 (1980), this Court heard the appeal, its opinion being reported in 301 N.C. 561, 273 S.E. 2d 247 (1981). The Court, among other things, affirmed the receivership order and upheld the authority of the trial judge to enter orders concerning the receivership out of the county and out of the district. Reference to these opinions is made for further factual background of this case.

After the case was remanded to the superior court, defendants filed some twenty-five motions. These included a motion to vacate the order appointing Moore and Van Allen as counsel for the receivers, a motion to have Moore and Van Allen disqualified as counsel for plaintiffs, and motions to set aside the approval of: the settlement of an outstanding tax claim with the federal government, the sale of certain assets, the payments which were awarded the receivers for their services, and the payments for the services of their accountants and attorneys. Defendants also filed a motion to recuse the trial judge.

1. Prior to a 1 January 1983 merger, the name of the firm was Moore and Van Allen.

On 2 October 1981, Judge Seay entered thirty separate orders, including orders approving the tax settlement, denying the motions to vacate the supplemental receivership order, and awarding fees and expenses to receivers, accountants, and attorneys. The trial court referred the recusal motion to Judge Mills for decision. Judge Mills found that Judge Seay was not required to recuse himself.

Defendants appealed seventeen of the trial judge's orders. The Court of Appeals affirmed the trial court in every respect but two, finding (1) that it was error to appoint Moore and Van Allen as attorneys for the receivers, and (2) it was error to allow counsel fees for Moore and Van Allen for their services on behalf of the receivers.

Plaintiffs, defendants, and intervening defendants sought discretionary review of this Court of Appeals decision. On 3 May 1983, this Court allowed plaintiffs' petition for discretionary review pursuant to N.C.G.S. 7A-31(a).

Moore, Van Allen and Allen, by John T. Allred and Randel E. Phillips, for plaintiffs and receivers, appellants.

DeLaney, Millette, DeArmon and McKnight, P.A., by Ernest S. DeLaney, for defendant appellees.

Hopkins, Hopkins & Tucker, by William C. Tucker, for intervening defendant appellees.

MARTIN, Justice.

The nearly five years of litigation in this matter have generated a factual and procedural history that is voluminous and complex. Details not relevant to the issues we address here are set forth in our earlier opinion, *supra.*

We have granted discretionary review in this case for the limited purpose of considering two questions raised by plaintiffs: First, whether the Court of Appeals erred in holding that Moore and Van Allen, as counsel for plaintiffs, could not serve as counsel for the receivers; second, whether the Court of Appeals erred in holding that the trial court could not award counsel fees to Moore and Van Allen for their services to the receivers.

For reasons which follow, we agree with the Court of Appeals that the trial court committed error in appointing plaintiffs' counsel to represent the receivers in this action. Defendants' motions to vacate the order authorizing employment of Moore and Van Allen as counsel for the receivers should have been granted. We do not agree, however, that because Moore and Van Allen should not have been appointed in the first place, they are not now entitled to reasonable payment for beneficial services rendered to the receivership throughout the course of this action under the orders of the court. On this second issue, we reverse the Court of Appeals.

[1] Plaintiffs argue that "the representation of the receivers by plaintiffs' counsel does not, in the posture of this case, create a conflict of interest." We have carefully reviewed the law of receivership, pertinent cases, including those cited by the parties, and the intricate series of facts both leading up to and comprising this litigation. We conclude that this case does present a very real and unavoidable conflict of interest for attorneys placed in the position of serving simultaneously the plaintiffs in this action and the court-appointed receivers. The interests of plaintiffs, defendant corporations, defendant Horace Lowder, intervening defendants, and receivers are not best served by upholding Judge Seay's February 1979 appointment of Moore and Van Allen to that troublesome position. We believe this is true despite the significant delay and additional expense that may result.

This Court has already upheld the decision by the trial judge to appoint co-receivers to serve during the pendency of the litigation. *Lowder v. Mills, Inc.*, 301 N.C. 561, 577, 273 S.E. 2d 247, 256 (1981). We begin our analysis of the proper role for the receivers' attorneys with a review of details in the case relevant to the 5 February 1979 order authorizing the receivership and the subsequent appointment of Moore and Van Allen as counsel for the receivers.

In his order Judge Seay assigned to co-receivers Henry C. Doby, Jr. and John Bahner stewardship over seven corporations: All Star Mills, Inc., Lowder Farms, Inc., All Star Foods, Inc., All Star Hatcheries, Inc., All Star Industries, Inc., Consolidated Industries, Inc., and Airglide, Inc. By order of the court, upon qualification of the receivers, title to all of the corporate defend-

ants' property, whether real, personal, tangible or intangible, immediately vested in these receivers. They were ordered to take possession of the assets, facilities, and offices of the corporate defendants, together with all of their records, correspondence, books of account, corporate minute books, and all other corporate records. They were to continue, manage, and operate the businesses until further order of the court.

While the trial court found that these companies collectively constituted one integrated business enterprise and directed the receivers to continue to operate them as such, there was evidence before the court that each coporation was a separate entity, with separate articles of incorporation, its own set of stockholders, its own set of creditors, its own tax identification number, and separate state and federal tax returns.

Judge Seay found that "[d]efendant W. Horace Lowder has at all times material to this suit exercised sole management responsibility for the business affairs of all the corporate defendants and has excluded plaintiff and other shareholders of said companies from participation in their management." The order appointing operating receivers for all seven corporations and enjoining defendant Lowder from continued control of their affairs rested on numerous findings of his misconduct set forth in *Lowder v. Mills, Inc., supra*, 301 N.C. 561.

In the order appointing counsel for the receivers, the trial court stated:

> The Court has concluded that, in the interest of justice, and in order to minimize professional expenses which will be paid by the corporations as a result of this receivership, the law firm of Moore and Van Allen should be employed by the Receivers to render legal advice to them concerning day-to-day activities, and the marshalling of assets, and pursuit of claims against third parties, and for the purpose of continuing the prosecution of this action to the end that any assets which should belong to All Star Mills or Lowder Farms are identified, and returned to them.
>
> Because plaintiffs bring this action derivatively, they have interests that are identical to those of All Star Mills, and Lowder Farms. As a result, the Court finds as a fact that

Moore and Van Allen has no conflict to prevent them from representing the Receivers.

. . . .

The Court has considered this matter at length, and has had numerous, lengthy discussions with the Receivers, and has concluded that this approach is the only viable approach to the problems currently presented. The only *potential* conflict which the Court sees in this arrangement is that the Receivers act on behalf of all the corporations (except Carolina Feed Mills, Inc.), even though two of them may have claims against the rest. The Court finds as a fact, however, that no current conflict exists. If an *actual* conflict appears to arise in the course of this litigation, the parties are directed to report the matter to the Court so that it may be dealt with at that time.

Defendants had vigorously opposed the presence of the Moore and Van Allen firm in this lawsuit, not only as counsel for the receivers but, also and foremostly, as counsel for the plaintiffs. We briefly note the facts leading to the firm's involvement in the case.

The record shows that prior to the filing of this action, when defendant Horace Lowder was appealing from his income tax evasion conviction, he retained the law firm of Brown, Brown and Brown. The matters in which Mr. R. L. Brown III represented Mr. Lowder in his criminal case are now involved in this action. Plaintiff Malcolm Lowder, dissatisfied with the manner in which the family companies were being managed, conferred with R. L. Brown in regard to these matters. In determining to bring this action, he retained Mr. Brown, who then associated with the Moore and Van Allen firm. The latter firm signed the complaint as plaintiffs' counsel, but the Brown firm will receive a part of any contingent fee received by Moore, Van Allen and Allen. Plaintiffs' attorneys are being paid by the individual plaintiffs. There was evidence before the court that plaintiff Malcolm M. Lowder has agreed to pay Moore and Van Allen on an hourly basis in the event fees are not recovered from the corporations. This fee arrangement is in turn "subject to contingencies which will increase amounts due upon a successful conclusion of the shareholders'

derivative action, state court receivership proceedings, bankruptcy proceedings and other related litigation."

The Court of Appeals has rejected defendants' conflict of interest arguments with respect to the firm's role as counsel for plaintiffs. *Lowder v. Mills, Inc.*, 60 N.C. App. 275, 282, 300 S.E. 2d 230, 234 (1983). We do not disturb or reconsider that part of its decision here.

Against this factual background of the case, we now review and apply the well settled law of receivership to determine the two issues before us.

The judicial creation of a receivership is a harsh, drastic, and extraordinary remedy. *Lowder v. Mills, Inc., supra*, 301 N.C. 561. In an interlocutory order, it takes custody of a defendant's property out of his hands. Upon his appointment by the court, the receiver is vested with title to all the real and personal property of the defendant corporation. While it does not affect the existence of the corporation, it does, however, end the powers of the stockholders and directors. They can make no contract to bind the corporation after the appointment. 1 Clark, *Law of Receivers* § 59 (3d ed. 1959). *See also* Golding, *Corporate Receivership in North Carolina*, 32 N.C.L. Rev. 149 (1954).

With respect to the court, the parties to the suit in which he is appointed, creditors and other interested persons, and the property in receivership, the position of the receiver is that of an officer of the court. He may be considered a "quasi-trustee," holding legal title and possession as the agent of the court for the beneficial owners. He is not appointed for the benefit of either party and does not derive his authority from either one. The parties have no authority over him and have no right to determine what liability he may or may not incur. The receiver is a representative and protector of the interests of creditors and shareholders alike in the property of the receivership. 65 Am. Jur. 2d *Receivers* §§ 3, 135, 138-140 (1972).

It is well settled that wherever there is a fiduciary relationship, the strictest rule as to impartiality and disinterest is enforced for the protection of both the trustee and the beneficiary. *Cahall v. Lofland*, 107 A. 769 (Del. Ch. 1919). Thus it follows that no one ordinarily may be appointed receiver whose personal inter-

ests would substantially conflict with his unbiased judgment and duties as receiver. *Law of Receivers, supra,* § 115.

This same general rule of impartiality holds good in selecting counsel for the receiver. The following is a comprehensive statement of the rule and the reasons for the rule:

> Sec. 47. To employ counsel, and limitations thereof.— When a receiver is directed by the court appointing him to employ counsel to assist him in the discharge of his duties, it is the receiver's duty to select an independent counsel rather than one who is acting for either party in the action. This rule is intended to protect the rights of those parties; if, therefore, they make no objection, the receiver may employ the solicitor of either to aid him in the discharge of his trust. . . . But courts are not inclined to favor this practice, unless the employment is made in strictly good faith and with the assent of the parties, for the manifest reason that counsel's duty to his client, as one of the parties to the cause, may conflict with his performing impartially his duties as counsel to the receiver, who is bound to see that all creditors and parties interested are treated alike during the time of the receivership, and in this respect should be seconded in his efforts by his counsel.[1]

1. *Heffron v. Flower,* 35 Ill. App. Rep. 200. The Court in this case said: "The counsel of the receiver in such a case should be as far as possible removed from the temptation to partiality. He should be free from that personal bias which might, at a critical passage, induce him to give advice prejudicial to one of the litigants, when another course could have been adopted consistent with the interests of both. The duty of complainant's counsel is to guard his interests at all times, and against all persons, by all honorable means. Faithfulness in their engagement to him cannot be, if they are allowed to represent the receiver, and his duty required action that complainant disapproved. In that event which client would appellees serve? It may be said that when such a dilemma is presented, they could choose one, and discharge themselves from obligation to another. If the dilemma was clearly seen, no doubt they would so act; but selfish interest is liable to conceal such difficulty, or to present it as a temporary matter, or as a thing of slight importance, and so the law saves the painful necessity of decision by forbidding the double employment."

Gluck and Becker, *Receivers of Corporations* § 47 (2d ed. 1896).

The exception to the general rule is implied in the above. Where there is a perfect identity of interests between the plaintiffs and the receivers or where the parties have consented, the

exception may arise. *Cf. Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279, *disc. rev. denied*, 296 N.C. 740 (1979) (counsel allowed to represent stockholders in derivative actions against company after representing the company in rehabilitation proceedings).

A further elaboration on the *exception* to the general rule which prohibits attorneys for the parties from serving as attorneys to the receivers follows:

> There are many suits brought, particularly suits presenting a simple contract claim and asking for the appointment of a receiver of a large corporation, *in which plaintiff's claim is admitted by defendant.* In other words, the main object of such a suit is the honest and efficient administration of the assets of the corporation. In such a case the real work involved is handling the assets of the corporation and the main issues are as a rule contests between various creditors concerning priorities of rights.

Law of Receivers, supra, § 115(a) (emphasis added).

The general rule, not its exception, clearly applies to the case before us.

Plaintiffs' arguments to the contrary notwithstanding, the fact that they sue derivatively on behalf of All Star Mills, Inc. and Lowder Farms, Inc. does not automatically create "the perfect identity of interests" between the plaintiffs and receivers in this case which would eliminate a conflict of interest problem. On the facts of this case, the plaintiffs' interests are not identical to those of the Mills and Farms corporations, whose interests are, in turn, identified with those of the receivers.

Plaintiffs seek to recover assets in an undetermined amount from the other five corporate defendants for the benefit of Mills and Farms.

The receivers, on the other hand, are by definition charged with preventing injury to the property in controversy and preserving all the assets, pendente lite, for the security of all parties in interest.

As noted by the Court of Appeals, "this case presents a different picture than most receiverships in which there is only one

corporation with assets to be protected." *Lowder v. Mills, Inc., supra*, 60 N.C. App. at 285, 300 S.E. 2d at 236.

The claim which plaintiffs are asserting derivatively on behalf of Mills and Farms against the corporate defendants is vigorously disputed by defendants. Moreover, as attorneys for the plaintiffs, the Moore, Van Allen and Allen firm is and has been in the position of having a real pecuniary interest in plaintiffs succeeding in this lawsuit. Yet the five defendant corporations must look to them as attorneys for the receivers for a full and impartial commitment to the protection of their property pending the outcome of this lengthy matter.

Judge Seay saw in these circumstances a "potential" but not a real or current conflict. We disagree. "[T]he law does not tolerate that the same counsel may appear on both sides of an adversary proceeding, *even colorably. . . .*" *Arrington v. Arrington*, 116 N.C. 170, 179, 21 S.E. 181, 184 (1893) (emphasis added). This involves no reflection upon the moral integrity either of the receiver or his counsel. It is based on the frailties of human nature, and the effects of unconscious influences upon conduct where there are ties of a business, professional, or social nature. *Cahall v. Lofland, supra*, 107 A. at 769.

The ultimate end of a receivership is to enable the court to accomplish, so far as practicable, complete justice between the parties before it. To this end, we hold that on the facts of this case there exists a conflict of interest sufficiently grave to disqualify Moore, Van Allen and Allen as counsel for the receivers of the seven corporate defendants.

[2] We turn next to the second issue before us: whether the Court of Appeals erred in its holding that because counsel for receivers had been wrongfully appointed, payment of their legal fees should not have been authorized.

In his order of 2 October 1981, Judge Seay authorized payment of legal fees to Moore and Van Allen for services rendered the receivership during the period 9 February 1979 to 16 May 1979. Only these fees, totalling $45,985.18, are at issue before this Court. The expenses and fees which have accrued since May 1979, if any, do not appear of record but would also remain uncompensated if the ruling of the Court of Appeals were allowed to stand.

In their petitions to the trial court for authorization to pay their attorneys for professional services rendered to the corporations in receivership, the receivers noted that they were attaching the original statements received from the law firms, that they had examined the statements, and that they found them to be reasonable. In the 2 October 1981 order approving the payment of fees and expenses, Judge Seay found as facts that, among other things:

> 3. In accordance with those orders, the Receivers employed these firms and the firms performed valuable services for the Receivers in representing them in this case, and in representing the corporate defendants before the United States Tax Court.
>
> 4. These firms rendered statements to the Receivers for work performed by them during the month of February, 1979, for services actually performed during that month on behalf of the Receivers. [He made the same finding with respect to March, April and May, 1979.]
>
> 5. Those statements were true and accurate reflections of amounts billed for services requiring special legal or accounting skill, actually performed, at the normal hourly rates charged by the firms, and for expenses advanced by the firms . . .
>
> 6. The amounts billed for fees, and expenses advanced, by these firms are, under all the circumstances, reasonable, and the services performed were of benefit to the Receivers, and defendant corporations, and their estates.
>
> 7. After petitions for these fees had been filed, defendant W. Horace Lowder, purporting to act for the corporate defendants, filed petitions for relief for the corporations in Bankruptcy Court. As a result of those filings, further proceedings in this Court were enjoined. As a result, this Court was unable to rule on these petitions for fees for work performed.
>
> 8. The bankruptcy proceedings have now been dismissed, and there is no just reason to delay any longer in passing on these petitions for fees.

There is evidence before the court that the following compensable services were rendered under court orders by Moore and Van Allen during the four-month period of time at issue before this Court:

At the very outset of the receivership, steps had to be taken to enable the receivers to assume their duties in an orderly manner. Certain intervening defendants had to be ejected from the offices of the companies where they were conducting a sit-in. It became necessary to obtain an order modifying the preliminary injunction to prevent defendant Horace Lowder from interfering with and obstructing the receivers. Contempt proceedings were instituted to secure Lowder's compliance with the receivership order and to obtain records which he had been ordered to provide. The receivers required assistance in gaining possession of corporate mail, bank accounts, lockboxes, and other corporate assets.

The receivers' attorneys then rendered immediate assistance in the tax proceedings against the companies. They spent considerable time assisting tax counsel with the tax claims. Prior to the receivership, an administrative proceeding had been instituted under the Occupational Health and Safety Act against All Star Foods and dealt with, without the aid of counsel, by Horace Lowder. The attorneys represented the receivership in this matter and also in a summary ejectment proceeding brought against the receivers by one of the intervening shareholders. The attorneys assisted with the inventory of corporate records and assets which had been required by the receivership order. They prepared fee petitions in behalf of the receivers. When Horace Lowder instituted bankruptcy proceedings, the attorneys advised the receivers regarding the effect of these proceedings, assisting them in the orderly transfer of assets and responsibilities to the bankruptcy court.

We note that the Court of Appeals has upheld the decision by Judge Seay to dismiss defendants' objections to certain aspects of the process whereby the respective attorneys' and accountants' fees were determined. Here we are concerned only with the question of whether the trial court properly authorized the receivers to pay Moore and Van Allen the amounts requested for February through mid-May 1979 and to pay them forthwith.

It is not disputed that those employed by a receiver to assist in the administration of a receivership should understand that their compensation is subject to trial court review and approval. *See* Wyatt, *State Court Receiverships in North Carolina*, 17 Wake Forest L. Rev. 745 (1981). Costs of administration of a receivership include, *inter alia*, such items as reasonable and proper compensation for the receiver's attorney for services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receivership. *King v. Premo & King, Inc.*, 258 N.C. 701, 129 S.E. 2d 493 (1963).

It is also well settled that the trial court order fixing and awarding fees to counsel for receivers is reviewable on appeal. *Law of Receivers, supra*, § 643. In this state the allowance of counsel fees to a receiver by the superior court is prima facie correct. The Supreme Court will alter the same only when they are clearly inadequate or excessive, or based on the wrong principle. The proper standard is what is reasonable and fair. *King v. Premo & King, Inc., supra; Hood, Com'r of Banks v. Cheshire*, 211 N.C. 103, 189 S.E. 189 (1937). This, of course, concerns the issue of *how much* to award counsel for the receivers.

With regard to the question of *whether* to award fees for counsel, the Court of Appeals wrote: "We have held that it was error to appoint Moore and Van Allen as attorneys for the receivers so we reverse those portions of the orders which authorized the payment of fees to them." *Lowder v. Mills, Inc., supra*, 60 N.C. App. at 287, 300 S.E. 2d at 237. No authority was cited. Defendants, in turn, have argued to this Court "the rule in *Farwell*," an 1896 Illinois case involving active frauds and breaches of trust by the receiver's attorney. The mandatory prohibition in that case is as follows:

> [W]e hold it is the duty of courts of chancery to strictly enforce the principle, clearly established, that a receiver will not be permitted to employ as his counsel one whose interests, in person or as attorney for another, are hostile to the interests represented by and the duties of such receiver, and, it being the duty of the attorney to know the law in that behalf, it was his duty to decline to accept employment by the receiver, and his doing so and seeking to act on both sides with such hostile interests, is *fraud, and the order* . . .

allowing fees to Sutherland as attorney for the receiver must be set aside.

Farwell v. Great Western Tel. Co., 161 Ill. 522, 613, 44 N.E. 891, 920 (1896) (emphases added).

An across-the-board application of this rule leads to the unalterable conclusion that "a lawyer can under no conceivable circumstances recover for services rendered in the same suit to parties having opposing interests." *Strong v. International Building, Loan & Investment Union*, 183 Ill. 97, 102, 55 N.E. 675, 676 (1899).

We decline to adopt this rigid and simplistic interpretation of the relevant law in the case before us. We believe the more appropriate analysis is as follows:

> Where the employment of an attorney by a receiver is unlawful by reason of his employment by an adverse party, he should not *for that reason* be denied a reasonable compensation for services which were necessary or valuable to the receiver, when performed with the usual fidelity and ability. . . . Charges properly excluded would be for services rendered in a manner influenced by the attorney's professional connection with the adverse party.

Clapp v. Clapp, 1 N.Y.S. 919 (1888) (emphasis added). *See also Bartelt v. Smith*, 145 Wis. 31, 129 N.W. 782 (1911).

Other more recent legal authorities are not in conflict with this more tempered approach:

> Where an improper person has been employed, it is held that fees should not be allowed, *at least where* the services were rendered in a manner influenced by the attorney's connection with the adverse party. Reasonable compensation may be made where there is no conflict of interest or duties and services rendered were valuable and performed with fidelity.

75 C.J.S. *Receivers* § 383 (1952) (emphasis added). *See also* 66 Am. Jur. 2d *Receivers* § 190 (1973).

Moore and Van Allen were not interlopers in this matter. They have not committed fraud upon the court. They have served

since 1979 under a court-ordered appointment. The procedural history of this litigation demonstrates that, as attorneys for the receivers, they were on occasion constrained to engage in activities and make decisions which inevitably elicited strong objection from both parties.

The trial judge was aware from the start of the potential—if not real—danger to the rights of the five corporate defendants created by this dual representation situation. Nevertheless, he found that the fees and expenses stated by the law firm were incurred while rendering professional services to the receivership in behalf of all the defendant corporations. The evidence supports this finding. The trial judge did not abuse his discretion in awarding the counsel fees. We therefore hold that on the facts of this case, the order awarding legal fees to the Moore and Van Allen firm for services rendered as attorneys for the receivers should be upheld.

The decision of the Court of Appeals is

Affirmed in part; reversed in part.

Justice COPELAND dissenting in part.

I must respectfully dissent in part. I do not agree with the majority opinion holding that under the facts there exists a conflict of interest sufficiently grave to disqualify Moore, Van Allen and Allen as counsel for the receivers of the seven corporate defendants. Judge Seay has unflinchingly stuck with this difficult matter from its inception. Many obstacles have been thrown in his path. I would return the matter to Judge Seay or some other judge assigned to Stanly County, for further hearings and appropriate findings as to the potential conflict of interest.

I concur in that portion of the opinion approving the order awarding legal fees to the Moore, Van Allen and Allen firm for services rendered as attorneys for the receivers.

IN THE MATTER OF: BRADFORD P. DAILEY, D.D.S., JUDICIAL REVIEW OF THE DECISION OF THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS v. NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

No. 134PA83

(Filed 6 December 1983)

1. **Physicians, Surgeons and Allied Professions § 5— professional licensing board disciplinary hearing—standard of care**

The Court of Appeals erred in applying the standard of G.S. § 90-21.12, relating to civil liability for medical malpractice, to a professional licensing board disciplinary hearing. The standard of practice by which a dentist's negligence or incompetence is to be measured under the Dental Practice Act is a statewide standard of care. Prior to invoking disciplinary measures as authorized under G.S. 90-41(a), the Board must first be satisfied that the care provided by the licensee was not in accordance with the standards of practice among members of the dentistry profession situated throughout the State of North Carolina at the time of the alleged violation.

2. **Physicians, Surgeons and Allied Professions § 5— remand of dental board decision for consideration of appropriate standard of care—benefit of additional expert testimony necessary**

The State Board of Dental Examiners was not authorized to enter its final agency decision upon remand without the benefit of additional expert testimony that the care provided by the respondent was not in accordance with the standards of practice among members of the dentistry profession *situated throughout the State* at the time of alleged violations where the previous decision had been rendered in terms of standard of care in the dentist's community.

NORTH Carolina State Board of Dental Examiners appeals from a unanimous decision of the Court of Appeals, 60 N.C. App. 441, 299 S.E. 2d 473 (1983), which reversed in part and affirmed in part a judgment entered by *Brannon, J.*, at the 17 August 1981 Civil Session of Superior Court, WAKE County. Following this Court's denial of the Board's petition for discretionary review on 3 May 1983, we allowed its petition for reconsideration on 7 July 1983. Heard in the Supreme Court on 8 November 1983.

On 15 October 1979 the North Carolina State Board of Dental Examiners, pursuant to G.S. § 90-41.1 and G.S. § 150A-23, issued a notice of hearing to respondent Bradford P. Dailey, D.D.S., to determine whether respondent had violated G.S. § 90-41(a)(12), (13), (14), (19), and (21) which provide that the Board may "[r]evoke or suspend a license to practice dentistry" and "[i]nvoke such

other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper" if such licensee:

(12) Has been negligent in the practice of dentistry;

(13) Has employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article or under Article 16 of this Chapter, can lawfully be done or performed only by a dentist or a dental hygienist licensed in this State;

(14) Is incompetent in the practice of dentistry;

(19) Has, in the practice of dentistry, committed an act or acts constituting malpractice;

(21) Has permitted a dental hygienist or a dental assistant in his employ or under his supervision to do or perform any act or acts violative of this Article, or of Article 16 of this Chapter, or of the rules and regulations promulgated by the Board.

The specific factual allegations pertinent to this appeal included, *inter alia*:

I. That at all times relevant to the matters involved in this notice, Dr. Dailey was licensed to practice dentistry in North Carolina;

II. (a) That during the period April through July, 1978, Mayona Morris Baldree was a dental patient under the care of Dr. Dailey;

(b) That during the period stated above, Dr. Dailey extracted Ms. Baldree's lower right third molar (tooth #32) without x-raying the tooth before or after the extraction;

(c) That a large portion of the root tip was left in the extraction site;

(d) That Ms. Baldree returned to Dr. Dailey's office on several occasions after the extraction complaining of pain, and he again failed to x-ray the site or to provide any appropriate treatment.

(e) That an individual engaged in the practice of dentistry in a community similar to that in which Dr. Dailey was conducting his practice would, or should, in the exercise of reasonable care and diligence, have discovered and treated the condition stated above.

(f) That Dr. Dailey failed and neglected to discover or treat such condition or having discovered it, failed to advise of the need for treatment.

(g) That the failures and neglect related in the immediately preceding paragraph constituted negligence in the practice of dentistry, incompetence in the practice of dentistry, and malpractice in the practice of dentistry, all in violation of North Carolina General Statutes 90-41(a)(12), 90-41(a)(14), and 90-41(a)(19).

V. (a) That during the period October, 1977 through May, 1978, Barbara Elaine Lanzer was a dental patient under the care of Dr. Dailey.

(b) That in October, 1977, Dr. Dailey represented to Ms. Lanzer that he had performed a root canal on her lower left first molar (tooth #19).

(c) That Dr. Dailey either did not perform a root canal as he represented or having done so, did so improperly or incompletely and as a result, infection perforated the tooth and it was subsequently lost.

(d) That the procedures performed by Dr. Dailey as outlined above, constituted negligence in the practice of dentistry, incompetence in the practice of dentistry, and malpractice in the practice of dentistry, all in violation of North Carolina General Statutes 90-41(a)(12), 90-41(a)(14), and 90-41(a)(19).

With respect to allegations of negligence in his treatment of two additional patients and to allegations of employing, aiding and abetting or permitting an unlicensed person to practice dentistry in violation of G.S. § 90-41(a)(13) and (21), the Board concluded that Dr. Dailey had committed no violations and those allegations are not before us.

Following a hearing conducted 19 January 1980, the Board made, *inter alia*, the following findings of fact: (We underline certain portions to emphasize the standard employed by the Board.)

3. During the period from April through July, 1978, Mayona Morris Baldree was a dental patient under respondent's care.

4. On June 22, 1978, respondent attempted to extract Ms. Baldree's lower right third molar (tooth No. 32).

5. However, the said molar broke off during the extraction procedure by the respondent and a portion of the root tip, seven millimeters in length, was left by him in the extraction site.

6. Respondent advised Ms. Baldree that a portion of the root remained, and he then immediately attempted to remove it by elevators.

7. Respondent, however, was not able to remove the remaining root tip by means of the elevator procedure.

8. Respondent then sutured the wound and furnished Ms. Baldree written instructions concerning precautions to avoid a dry socket.

9. Respondent did not advise Ms. Baldree that he was not able to remove the remaining root tip.

10. On two occasions thereafter, within the week following the extraction procedure by the respondent, Ms. Baldree returned to his office complaining of pain in the area of the extraction.

11. Nevertheless, respondent did not x-ray the extraction site on either of the two subsequent visits.

12. Respondent, furthermore, did not take steps to remove the root tip in the extraction site but simply attempted to treat the patient, even on the second post-operative visit of the patient, for a dry socket.

13. On July 14, 1978, Ms. Baldree went to another general dentist practicing in New Bern and complained to him of pain on the right side of her face.

14. Ms. Baldree told the second dentist that respondent had extracted tooth No. 32 and that she still experienced pain in that area.

15. However, Ms. Baldree did not tell the second general dentist that a root tip remained in the area of tooth No. 32.

16. The second dentist took a periapical x-ray which indicated the presence of a root tip in the extraction site.

17. Upon seeing the broken root tip, the second dentist immediately referred Ms. Baldree to an oral surgeon practicing in New Bern, North Carolina.

18. The oral surgeon examined the second dentist's x-ray, saw the root tip in place, and with Ms. Baldree's consent, surgically removed the tip.

19. The oral surgeon thereafter took a post-operative x-ray which showed that the root tip had been completely removed.

20. The standard of practice on or about June and July, 1978, among members of the health care profession of general dentistry *with similar training and experience as the respondent and situated in the New Bern, North Carolina community or similar communities* was that a dental patient should be told when a root tip had been left in the patient's mouth after an extraction procedure.

21. The standard of practice on or about June and July, 1978, among members of the health care profession of general dentistry with *similar training and experience as the respondent and situated in the New Bern, North Carolina community or similar communities* was that a x-ray should be taken of a patient when a root tip had been broken off during an extraction to determine if it was feasible to leave that tip in because of the trauma that may be attended to removing it, and that in any event, if an x-ray was not taken at the time the root had been broken, an x-ray should be taken when the patient returns later to the dentist's office complaining of pain.

22. The standard of practice on or about June and July, 1978, among members of the health care profession of general

dentistry *with similar training and experience as the respondent and situated in the New Bern, North Carolina community or similar communities* was that having failed to remove the root tip during an initial extraction procedure and having later determined the presence of a dry socket on the patient's second post-operative visit, steps should be taken by a general dentist on that second post-operative visit for the removal of the root tip himself or by referring the patient to an oral surgeon.

. . . .

25. During the period from October, 1977, through May, 1978, Barbara Elaine Lanzer was a dental patient under respondent's care.

26. On October 5, 1977, respondent represented to Ms. Lanzer that he had performed a root canal on her lower first left molar (tooth No. 19).

27. Respondent charged Ms. Lanzer a fee of $100.00 for performing a root canal on tooth No. 19, which fee is commensurate with a completed root canal procedure.

28. Respondent's written record of treatment of Ms. Lanzer contains the notation dated 10-5-77: "tooth 19—root canal—filled with cavit," with the words, "filled with cavit" marked out, and the words, "filled—gutta percha" written in the margin in a different hand.

29. The notation, "filled with gutta percha," was written in respondent's hand.

30. However, respondent testified that the root canal on tooth No. 19 was not filled with gutta percha but was, in fact, filled with Sargenti paste, N-2.

31. Sargenti paste is a radiopaque substance which would be visible to x-ray or other forms of radiation.

32. Subsequently, Ms. Lanzer became a patient of another dentist engaged in the general practice of dentistry in New Bern, North Carolina.

33. On September 25, 1978, periapical (around the apex of the root of a tooth) x-rays of Ms. Lanzer's tooth No. 19

were taken which revealed no indication that a conventional root canal had been done on that tooth.

34. Ms. Lanzer's tooth No. 19 subsequently was diagnosed as being abscessed by the second dentist and he thereafter opened it on September 26, 1978, in order to drain it and determine whether the tooth was salvageable.

35. When tooth No. 19 of Ms. Lanzer was opened, the second general dentist discovered that it was perforated (pierced with holes) and was not salvageable.

36. Furthermore, when the tooth No. 19 of Ms. Lanzer was opened on September 26, 1978, no filling material at all was found in the root canal.

37. Neither Sargenti paste nor gutta percha would absorb or resorb into the body within the time in question, approximately twelve months.

38. In fact, no completed root canal filling of any kind was ever placed in the root canal of tooth No. 19 of Ms. Lanzer by the respondent on or about October, 1977.

39. The standard practice on or about October, 1977, among members of the health care profession of general dentistry *with similar training and experience as the respondent and situated in the New Bern, North Carolina community or similar communities* was that when a root canal is performed, the canal is filled with filling material.

Based on these findings, the Board concluded, *inter alia*, that:

1. The standard of practice on or about June and July, 1978, among members of the health care profession of general dentistry *with similar training and experience as the respondent and situated in the New Bern, North Carolina community or similar communities* was that a dental patient should be told when a root tip had been left in the patient's mouth after an extraction procedure.

2. The standard of practice on or about June and July, 1978, among members of the health care profession of general dentistry *with similar training and experience as the respondent and situated in the New Bern, North Carolina com-*

munity or similar communities was that an x-ray should be taken of a patient when a root tip had been broken off during an extraction to determine if it was feasible to leave that tip in because of the trauma that may be attended to removing it, and that in any event, if an x-ray should be taken when the patient returns later to the dentist's office complaining of pain.

3. The standard of practice on or about June and July, 1978, among members of the health care profession of general dentistry *with similar training and experience as the respondent and situated in the New Bern, North Carolina community or similar communities* was that having failed to remove the root tip during an initial extraction procedure and having later determined the presence of a dry socket on the patient's second post-operative visit, steps should be taken by a general dentist on the second post-operative visit for the removal of the root tip himself or by referring the patient to an oral surgeon.

4. The acts and omissions on the part of the respondent in his treatment of Mayona Morris Baldree on or about June and July, 1978, do not comply with the standard of practice among members of the health care profession of general dentistry *with similar training and experience as the respondent and situated in New Bern, North Carolina or similar communities,* and such acts and omissions on the part of the respondent constitute negligence and malpractice in the practice of dentistry within the meaning of N.C.G.S. Sec. 90-41(a)(12) and N.C.G.S. Sec. 90-41(a)(19).

. . . .

7. The standard practice on or about October, 1977, among members of the health care profession of general dentistry *with similar training and experience as the respondent and situated in the New Bern, North Carolina community or similar communities* was that when a root canal is performed, the canal of the root is filled with filling material.

8. The acts and omissions on the part of the respondent in his treatment of Barbara Elaine Lanzer on or about October, 1977, do not comply with the standard of practice

among members of the health care profession of general dentistry *with similar training and experience as the respondent and situated in New Bern, North Carolina or similar communities*, and such acts and omissions on the part of the respondent constitute negligence and malpractice in the practice of dentistry within the meaning of N.C.G.S. Sec. 90-41(a)(12) and N.C.G.S. Sec. 90-41(a)(19).

The Board suspended Dr. Dailey's license to practice dentistry for a period of six months "with the final four (4) months of the said suspension itself suspended for three (3) years from the date of respondent's surrendering of his license on the condition that respondent not violate any of the provisions of N.C.G.S. Sec. 90-41(a)" during which time Dr. Dailey was placed on unsupervised probation.

From this Final Agency Decision, respondent appealed. The case was heard before Smith, J., at the 15 December 1980 nonjury civil session of Superior Court, Wake County. Judge Smith found and concluded that "the Board's Findings of Fact 1 through 19, 23 through 38 and 40 and 41, and Conclusions of Law 5, 6, 9 and 10 [were] supported by competent, material and substantial evidence properly admitted in the record." Judge Smith further found and concluded, however, that

> while there is substantial evidence in the record to support the Board's findings and conclusions as to the standard of practice among members of the health care profession of general dentistry, the record before the Court does not contain substantial evidence to support the Board's Findings of Fact 20, 21, 22 and 39 and Conclusions of Law 1, 2, 3, 4, 7 and 8 to the extent that those Findings and Conclusions state the standard of practice among dentists *with similar training and experience as the Petitioner and situated in the New Bern, North Carolina community or similar communities.*

Judge Smith therefore ordered

> that the Board's Final Agency Decision of July 29, 1980, is hereby AFFIRMED in all respects, except that the portions of the Board's Findings of Fact 20, 21, 22 and 39 and Conclusions of Law 1, 2, 3, 4, 7 and 8 that state the standard of practice among dentists *with similar training and experience*

as the Petitioner and situated in the New Bern, North Carolina community or similar communities are hereby REVERSED and the matter is REMANDED to the Board for further Findings of Fact and Conclusions of Law not inconsistent with the JUDGMENT of the Court. (Emphasis in original.)

We are unable to determine from Judge Smith's order whether he recognized that the Board had improperly applied a "same or similar community" standard, or whether he simply remanded the case upon finding insufficient evidence of a "same or similar community" standard. Clearly, the Board interpreted the order to require the application of a statewide standard.

On remand, the Board, without hearing any additional testimony or taking any additional evidence with regard to the statewide standard, amended its Findings of Fact 20 through 22 and 39 and its Conclusions of Law 1 through 4, 7 and 8 and, on 1 April 1981, issued a Final Agency Decision on Remand which stated: (We underline portions to highlight the change in the standard employed.)

20(A). The standard of practice on or about June and July, 1978, *for general dentists licensed to practice in North Carolina* was that a dental patient should be told when a root tip has been left in the patient's mouth after an extraction procedure.

21(A). The standard of practice on or about June and July, 1978, *for general dentists licensed to practice in North Carolina* was that when a root tip has broken off during an extraction an x-ray should be taken to determine the feasibility of leaving the tip in because of trauma that might be attendant to removing it, and that in any event, if an x-ray were not taken at the time the root had been broken, an x-ray should be taken when the patient returns later to the dentist's office complaining of pain.

22(A). The standard of practice on or about June and July, 1978, *for general dentists licensed to practice in North Carolina* was that having failed to remove a root tip remaining after an extraction procedure and having later determined the presence of a dry socket on the patient's second post-operative visit, the general dentist should on the occa-

sion of the second post-operative visit either take steps for the removal of the root tip himself or refer the patient to an oral surgeon.

39(A). The standard of practice on or about October, 1977, *for general dentists licensed to practice in North Carolina* was that when a root canal is performed, the canal is filled with filling material.

Based on the Board's Final Agency Decision as amended herein and the foregoing Further Findings of Fact, the Board hereby makes the following:

FURTHER CONCLUSIONS OF LAW

1(A). Respondent's failure to inform Mayona Morris Baldree that he had left a root tip in her mouth after an extraction procedure did not comply with *the standard of practice among general dentists licensed to practice in North Carolina* and was a dereliction from professional duty resulting in injury, loss, or damage to Ms. Baldree, thereby constituting negligence and malpractice in the practice of dentistry within the meaning of G.S. 90-41(a)(12) and G.S. 90-41(a)(19).

2(A). Respondent's failure to take an x-ray of the extraction site when Ms. Baldree returned to his office complaining of pain in the site, an x-ray not having been taken when a root tip had broken off during an extraction procedure, did not comply with *the standard of practice among general dentists licensed to practice in North Carolina* and was a dereliction from professional duty resulting in injury, loss, or damage to Ms. Baldree, thereby constituting negligence and malpractice in the practice of dentistry within the meaning of G.S. 90-41(a)(12) and G.S. 90-41(a)(19).

3(A). Respondent's failure either to attempt removal of the root tip himself or to refer Ms. Baldree to an oral surgeon on the occasion of her second post-operative visit did not comply with *the standard of practice among general dentists licensed to practice in North Carolina* and was a dereliction from professional duty resulting in injury, loss, or damage to Ms. Baldree, thereby constituting negligence and

malpractice in the practice of dentistry within the meaning of G.S. 90-41(a)(12) and G.S. 90-41(a)(19).

4(A). Having undertaken to perform a root canal procedure on Ms. Lanzer, Respondent's failure to fill the canal with filling material did not comply with *the standard of practice among general dentists licensed to practice in North Carolina* and was a dereliction from professional duty resulting in injury, loss, or damage to Ms. Lanzer, thereby constituting negligence and malpractice in the practice of dentistry within the meaning of G.S. 90-41(a)(12) and G.S. 90-41(a)(19).

The Board reinstated, without alteration, its earlier decision to suspend Dr. Dailey's license to practice dentistry.

Respondent appealed from the Final Agency Decision on Remand, and by Judgment filed 24 August 1981, Judge Brannon affirmed.

The Court of Appeals reversed that portion of the Board's findings and conclusions which were "phrased in terms of a standard of practice observed in 'North Carolina.' " 60 N.C. App. at 443, 299 S.E. 2d at 475. The Court of Appeals determined that G.S. § 90-21.12, relating to civil liability for medical malpractice, provided the appropriate standard of practice to be applied in this case and held that "[i]t is clear from the wording of the statute that the test is not that of a statewide standard of health care, but rather a standard of practice among members of the same health care profession situated in the *same or similar communities*." *Id.*

The Court of Appeals further reversed finding of fact 39 and conclusions of law 7 and 8, pertaining to Dr. Dailey's treatment of Ms. Lanzer as being unsupported by the evidence.

Bailey, Dixon, Wooten, McDonald & Fountain, by Ralph McDonald and Carson Carmichael, III, attorneys for appellant, N.C. State Board of Dental Examiners.

Sumrell, Sugg & Carmichael, by Fred M. Carmichael and Rudolph A. Ashton, III, attorneys for appellee, Bradford P. Dailey, D.D.S.

MEYER, Justice.

[1] The primary issue on this appeal is whether the Court of Appeals erred in applying the standard of G.S. § 90-21.12, relating to civil liability for medical malpractice, to a professional licensing board disciplinary hearing. We hold that it did.

This appeal is from an administrative hearing held pursuant to the Dental Practice Act, N.C.G.S. Chapter 90, Article 2, and the Administrative Procedure Act, N.C.G.S. Chapter 150A, Article 3, to determine whether respondent should be disciplined for alleged violations of the Dental Practice Act. G.S. § 90-21.12, on the other hand, provides that:

> § 90-21.12. Standard of health care.
>
> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

G.S. § 90-21.12 thus establishes a standard of care below which a health care provider may be held *civilly liable in damages*. Clearly, G.S. § 90-41 and G.S. § 90-21.12 serve different purposes. Admittedly the violations for which a dentist may be subject to discipline include acts of "malpractice," G.S. § 90-41(a)(19). We do not believe, however, that this language was intended to incorporate a standard applicable in actions for damages "for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of . . . dental . . . care." G.S. § 90-21.12. In fact, G.S. § 90-41 was first enacted in 1935, long before the 1975 enactment of G.S. § 90-21.12. Therefore, the standard of health care enunciated under G.S. § 90-21.12 is inapplicable.

The Dental Practice Act is silent as to the standard of practice by which a dentist's negligence or incompetence is to be

measured. In considering the regulatory, licensing and disciplinary functions of the North Carolina State Board of Dental Examiners, we hold that a statewide standard must be applied. That is, prior to invoking disciplinary measures as authorized under G.S. § 90-41(a), the Board must first be satisfied that the care provided by the licensee was not in accordance with the standards of practice among members of the dentistry profession situated throughout the State of North Carolina at the time of the alleged violation.

The North Carolina State Board of Dental Examiners, like all other professional licensing boards, was created to establish and enforce a uniform statewide minimum level of competency among its licensees. Applicants are required to meet a minimum statewide standard prior to being granted a license, G.S. § 90-30; and licensees are required, irrespective of location in the State, to comply with the rules and regulations promulgated by the Board. Likewise we believe that the decision of whether an applicant or licensee has violated *any* of the factors enumerated in G.S. § 90-41 authorizing disciplinary action must also be viewed in the context of a uniform statewide standard.[1] In this respect Judge Smith was correct in remanding the case for findings and conclusions based on a statewide standard of practice.

[2] We do not agree with the Board, however, that it was authorized to enter its Final Agency Decision Upon Remand without the benefit of additional expert testimony that the care provided by the respondent was not in accordance with the standards of practice among members of the dentistry profession *situated throughout the State* at the time of the alleged violations.

The Board argues that because it is an administrative agency "composed of experts," it may make its own judgment of the evidence and reject even uncontradicted expert testimony. *Util-*

1. We note that language similar to that in G.S. § 90-41(a)(12), (14) and (19) appears in numerous other health profession licensing statutes: *see* G.S. § 90-14(a)(11) (Supp. 1983) (Practice of Medicine); G.S. § 90-121.2(a)(12), (14) and (19) (Supp. 1983) (Optometry); G.S. § 90-136(3) (Osteopathy); G.S. § 90-154(5), (6) (Supp. 1983) (Chiropractic Medicine); G.S. § 90-171.37(5) (Supp. 1983) (Nursing Practice); G.S. § 90-202.8(a)(12), (13) (Supp. 1983) (Podiatrists); G.S. § 90-229(a)(5), (10) (Dental Hygiene); G.S. § 90-270.36(7) (Physical Therapy); G.S. § 90-270.60(a)(4) (Marital and Family Therapy).

ities Commission v. Duke Power Co., 305 N.C. 1, 287 S.E. 2d 786 (1982). Thus, reasons the Board, as a professional licensing body it is authorized to substitute its own expertise for that of expert witnesses, and is therefore authorized to make an independent determination of the standards of practice required for continued licensure without the benefit of expert testimony.

We first point out that *Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 287 S.E. 2d 786, was a utility rate case. G.S. § 150A, the Administrative Procedure Act, specifically exempts the Utilities Commission from its coverage. G.S. § 150A-1. The cornerstone of the Administrative Procedure Act is a requirement that there be preserved a record for judicial review. Implicit in this requirement is the necessity for reasoned evaluation and analysis of evidence presented before the agency upon which its determination must be based. As stated in *Arthurs v. Board of Registration*, 383 Mass. 299, ---, 418 N.E. 2d 1236, 1244 (1981),

> 'This startling theory [that the Board could use its own expertise without the evidentiary basis of that expertise appearing in the record], if recognized, would not only render absolute a finding opposed to uncontradicted testimony but would render the right of appeal completely inefficacious as well. A board of experts, sitting in a quasi-judicial capacity, cannot be silent witnesses as well as judges.' The board may put its expertise to use in evaluating the complexities of technical evidence. However, the board may not use its expertise as a substitute for evidence in the record.

(Citations omitted.) *Accord, Wood v. Texas State Bd. of Medical Examiners*, 615 S.W. 2d 942 (Tex. 1981); *Dotson v. Tex. State Bd. of Medical Exam.*, 612 S.W. 2d 921 (Tex. 1981); *Franz v. Board of Medical Quality Assur.*, 31 Cal. 3d 124, 181 Cal. Rptr. 732, 642 P. 2d 792 (1982); *Farney v. Anderson*, 14 Ill. Dec. 346, 56 Ill. App. 3d 677, 372 N.E. 2d 151 (1978).

Thus, while it is true that " '[t]he determination whether by common judgment certain conduct is disqualifying is left to the sound discretion of the board,' " *In re Hawkins*, 17 N.C. App. 378, 395, 194 S.E. 2d 540, 551, *cert. denied*, 283 N.C. 393, 196 S.E. 2d 275, *cert. denied*, 414 U.S. 1001 (1973), the record must include an indication of the basis upon which the board or other agency exercised its expert discretion. On this issue, the following observa-

tion by the Supreme Court of the United States is applicable and bears repeating.

> We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice [no findings and no analysis to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion]. Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.'

Burlington Truck Lines v. United States, 371 U.S. 156, 167, 9 L.Ed. 2d 207, 215 (1962) (citations omitted).

Having reviewed the testimony of record, we agree with Judge Smith and find substantial, competent evidence to support those findings of fact and conclusions of law as set out and affirmed in Judge Smith's Judgment of 20 February 1981. We reverse the decision of the Court of Appeals and remand the case to that court for further remand to the North Carolina State Board of Dental Examiners for the purpose of taking additional testimony respecting the statewide standard of practice and whether the care provided by the respondent was in accordance with that standard.

Reversed and remanded.

LUMBEE RIVER ELECTRIC MEMBERSHIP CORPORATION AND NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION v. THE CITY OF FAYETTEVILLE, THE PUBLIC WORKS COMMISSION OF THE CITY OF FAYETTEVILLE, AND SOUTHWEST DEVELOPMENT CORPORATION OF CUMBERLAND COUNTY

No. 126PA83

(Filed 6 December 1983)

1. Appeal and Error § 10.1— allowance of motion to amend record on appeal

A motion pursuant to Appellate Rule 9(b)(6) to amend the record on appeal to include an affidavit which was attached to defendant city's response to plaintiffs' motion for a preliminary injunction was allowed by the Supreme Court.

2. Electricity § 2.3— city's extension of electric service outside corporate limits—within reasonable limitations

The City of Fayetteville's extension of electric service to a residential subdivision located four miles outside the corporate limits and within territory assigned by the Utilities Commission to plaintiff electric membership corporation was "within reasonable limitations" as that term is used in G.S. 160A-312 and was therefore proper where the evidence showed that Fayetteville was serving 22 customers and plaintiff was serving five customers within a one-half mile radius of the subdivision entrance; within a one mile radius of the same point Fayetteville was serving 229 customers and plaintiff was serving 75 customers; the development of the subdivision requires a three-phase electrical power supply; Fayetteville has had a three-phase line immediately adjacent to the subdivision since 1973, and on the date this action was filed such three-phase service was available directly across the street from the entrance to the subdivision tract; plaintiff had only a single-phase line within 170 feet of the entrance to the subdivision, and its nearest three-phase line was located approximately 1,850 feet from the nearest boundary of the subdivision and 3,174 feet from the entrance to the subdivision; and it would have required five days construction time and an expenditure of $11,700 to make plaintiff's three-phase service available to the subdivision.

3. Rules of Civil Procedure § 41— nonjury trial—dismissal of action

In a nonjury case, G.S. 1A-1, Rule 41(b) provides a procedure whereby, at the close of plaintiff's evidence, the judge can give judgment against plaintiff not only because his proof has failed in some essential aspect to make out a case but also on the basis of facts as he may then determine them to be from the evidence then before him.

4. Electricity § 2.3— city's extension of electricity outside city limits—construction of charter and statute together

A provision of the city charter of Fayetteville authorizing the city to extend its electric system and to sell electricity anywhere within Cumberland County must be construed together with G.S. 160A-312 with the result that

the City of Fayetteville can only extend electric service outside its corporate limits "within reasonable limitations."

ON discretionary review of a decision of the Court of Appeals, 60 N.C. App. 534, 299 S.E. 2d 305 (1983), reversing a judgment in favor of defendant-appellants entered on 1 October 1981 by *Braswell, J.*, in Superior Court, CUMBERLAND County. Heard in the Supreme Court 13 September 1983.

Plaintiffs (Lumbee River Electric Membership Corporation is hereinafter referred to as the "EMC") instituted this action on 1 June 1981 by filing a complaint seeking a temporary restraining order, preliminary injunction and permanent injunction prohibiting the City of Fayetteville and the Fayetteville Public Works Commission (hereinafter "Fayetteville") from furnishing electric service to a new residential subdivision (Montibello) owned by Southwest Development Corporation and located approximately four miles outside the corporate limits of the City of Fayetteville. On the basis of the verified complaint, Judge Lee issued a temporary restraining order restraining Fayetteville from further constructing and upgrading electric service facilities to the subdivision in question pending a hearing on the request for a preliminary injunction. Following a hearing on the request for a preliminary injunction, held 19 June 1981, Judge Brannon found as a fact that plaintiffs had failed to show a likelihood of success on the merits. Judge Brannon therefore dissolved the temporary restraining order and denied the request for a preliminary injunction. The case was subsequently heard on its merits by Judge Braswell, sitting without a jury. At the close of plaintiffs' evidence, and prior to presentation of Fayetteville's evidence, Fayetteville moved for a directed verdict. (The trial court and the Court of Appeals properly treated Fayetteville's motion as a motion to dismiss.) By order dated 1 October 1981 Judge Braswell allowed Fayetteville's motion and entered a judgment of dismissal against plaintiffs. The plaintiffs appealed to the Court of Appeals and that court concluded that the facts found together with the stipulations of the parties did not support the trial judge's conclusions, reversed the trial court and remanded the case for further proceedings. We disagree with the result and the reasoning of the Court of Appeals' decision and, for the reasons stated herein, reverse the decision of the Court of Ap-

peals and remand the case to that court for reinstatement of judgment of the trial court.

William T. Crisp, Joyce L. Davis and Robert F. Page, attorneys for plaintiff-appellees Lumbee River Electric Membership Corporation; and North Carolina Electric Membership Corporation.

Reid, Lewis & Deese, by Richard M. Lewis, Jr. and Renny W. Deese; Spruill, Lane, Carlton, McCotter & Jolly, by J. Phil Carlton, attorneys for defendant-appellants.

J. Phil Carlton and Ernie K. Murray, attorneys for the amicus curiae, the Towns of Scotland Neck and Shelby and the Cities of Gastonia, Greenville, Newton and Rocky Mount, North Carolina.

MEYER, Justice.

[1] Before proceeding with the opinion in chief, it is necessary to dispose of a motion in the cause pending before this Court.

On the day of the oral argument before this Court, Fayetteville filed a written motion pursuant to Rule 9(b)(6) of the Rules of Appellate Procedure to amend the record on appeal to include the affidavit of Mr. Claude I. Burkhead, Jr., the City of Fayetteville's chief electrical engineer. The affidavit was attached to Fayetteville's response to plaintiffs' motion for a preliminary injunction, and was thus a part of the original record proper on file and available to Judge Braswell at the hearing on the motion for preliminary injunction. The affidavit was not made a part of the record on appeal to the Court of Appeals and therefore was not originally a part of the record before this Court. Plaintiffs filed a response to Fayetteville's motion to amend the record to include the affidavit, seeking its denial on the ground that the affidavit was never formally offered into evidence before Judge Braswell at the hearing on the motion for preliminary injunction. Plaintiffs contend that because the affidavit was not formally presented in evidence, it was not a part of the trial court record. We do not agree. The affidavit was attached to a formal pleading—the response. It was therefore a part of that pleading and thus a part of the record in the case. We will assume that the able and experienced trial judge who heard the motion read

the pleadings upon which the motion was based. We have allowed the motion to amend the record on appeal.

[2] The sole issue on this appeal is whether Fayetteville's extension of electric service to the Montibello Subdivision was "within reasonable limitations" as that term is utilized in G.S. § 160A-312. We conclude that it was.

Lumbee River Electric Membership Corporation is an electric membership corporation organized pursuant to Chapter 117 of the North Carolina General Statutes and is engaged in the business of furnishing electric service in several southeastern North Carolina counties, including Cumberland County where it serves approximately 3,400 of its members. North Carolina Electric Membership Corporation (of which Lumbee River EMC is a member) is organized pursuant to the same chapter of the General Statutes and is a bulk, wholesale power supplier of its member cooperatives. The City of Fayetteville is a municipal corporation existing under the laws of North Carolina. The Public Works Commission is an agency of the city which supervises, plans and operates various public utility services of the city, including the distribution of electric service. Southwest Development Corporation is the owner of the Montibello Subdivision which is located wholly within Cumberland County, contains approximately 521 acres and is located approximately four miles from the corporate limits of the City of Fayetteville. The subdivision is residential in nature and at the time here pertinent was in the early stages of development. The subdivision is located entirely within territory assigned to the EMC by order of the North Carolina Utilities Commission in 1969. Fayetteville distributes electric service at retail both within and outside the corporate limits of the city and has distributed electric service to customers in the general area of the subdivision in question both before and since the assignment of the area to the EMC in 1969, including service to new customers within the assigned area after that date.

Prior to the commencement of this action, Southwest Development Corporation requested that Fayetteville provide the electric service for Montibello Subdivision and in fact had entered into a contract with Fayetteville whereby Fayetteville is to provide electric service to Section 1 of the subdivision. Mr. John Koenig, President of Southwest, testified at a hearing on plain-

tiffs' request for a preliminary injunction that he had requested service exclusively from Fayetteville and stated his apparent reasons for doing so:

> I have scheduled an underground electrical system for section one of Montibello, and I requested in the early part of this year, in February, that PWC, Mr. Ray Munch's department, provide the power. I have other subdivisions in Cumberland County and have experience with Public Works Commission providing power to those subdivisions. I built and developed homes in what is known as Water's Edge and had power provided by PWC and then developed a new subdivision which is called Lake Shores and I have PWC in there. Montibello is my third subdivision.
>
> I consider myself as having a fair amount of experience with the Public Works Commission providing power. I have always had timely, good service from them. I have never had any problems. We have gone with underground power in Lake Shores in the development of the first section of that subdivision, and we never have encountered any problems. I think I have established an excellent working relationship with PWC. On a daily basis, we have to work together on each individual lot and the development of each phase of construction. The well site located in Lots one and two of section one of Montibello requires three-phase power.
>
> Around February, I requested Public Works Commission to provide the power. I have had some experience with the Commission providing power. I also have a real estate company in which we sell existing or new homes, perhaps somewhere around an average of five hundred homes per year. Over the last several years you develop an extraneous factor in what the consumer, the ultimate consumer, the home owner, would like to have. . . . My experience with reference to the dependability of power that has been provided by the Public Works Commission is excellent.
>
> The well site requires three-phase electrical power because of the size of the subdivision and the reliability of having adequate water. . . .
>
> I . . . entered into a contract with the Public Works Commission for the providing of power to section one of the

> Montibello Subdivision. Prior to my request to the Public Works Commission to provide the electrical power to section one of the Montibello Subdivision, I knew that Lumbee River was out in that general area, but I did not know the exact location of their line. I did not make any request to Lumbee River to service Montibello. I have exclusively asked Public Works Commission to provide electrical power to the subdivision, and the power has been provided.

The two earlier subdivisions, Water's Edge and Lake Shores, are outside the city limits of Fayetteville.

When this action was begun, Fayetteville was serving 22 customers, and the EMC 5 customers within a one-half mile radius of the subdivision entrance, and within a one mile radius of the same point, Fayetteville was serving 229 customers and the EMC 75 customers.

It is quite clear from the record evidence that in order to provide adequate service to the Montibello Subdivision, three-phase (as opposed to single-phase) electric service was and is required. Fayetteville has had a three-phase line immediately adjacent to the subdivision proper since 1973. In 1981, at the request of the developer, Fayetteville extended its three-phase line some 1,148 feet to the desired connection point at the entrance to Section 1 of the subdivision. Thus on the date this action for injunctive relief was filed by plaintiffs, Fayetteville's three-phase line was in fact available directly across the street from the entrance to the subdivision tract. The EMC had no three-phase line adjacent to the subdivision but did have a single-phase electric line within 170 feet of the entrance to Section 1 of the subdivision. The single-phase line had been in existence since 1948 and was once used to serve a customer directly across the street from the subdivision entrance. Prior to 1957 that line served a residence on the tract of land now occupied by the subdivision. The EMC's three-phase line is located 1,850 feet from the nearest boundary of the subdivision and approximately 3,174 feet from the entrance to Section 1 of the subdivision. It would require 5 days for the EMC to extend its three-phase service to the subdivision and the extension would cost $11,700.00.

With this brief factual background, we move now to a consideration of Fayetteville's authority or lack thereof to serve the Montibello subdivision.

Municipalities owning and operating their own electric systems do so upon the authority of specific provisions of the city or town charter or of Article 16 of Chapter 160A of the General Statutes which allows municipalities to operate public enterprises, including "[e]lectric power generation, transmission, and distribution systems." G.S. § 160A-312 is the specific statute which authorizes municipalities to operate their various public enterprises, including electic systems, outside the corporate limits "within reasonable limitations."

At least as early as 1917 our Legislature enacted legislation authorizing a municipality to "own and maintain its own light . . . system to furnish . . . light to the city and its citizens. . . ." 1917 N.C. Public Laws, ch. 136, subch. XI, § 1. In 1929, some twelve years later, this provision was amended to add the words, "[a]nd to any person, firm or corporation desiring the same *outside the corporate limits*, where the service is available." 1929 N.C. Public Laws, ch. 285, § 1 (emphasis added). It is interesting to note that the version of the statute in effect in 1965, when the Electric Act was enacted, was then G.S. § 160-255 which did not contain the "within reasonable limitations" language. The Legislature left G.S. § 160-255 intact when it enacted the 1965 Electric Act and that statute was amended numerous times over the years until it was replaced by the current G.S. § 160A-312 in the 1971 rewrite of the "Cities and Towns" chapter of the general statutes. The "within reasonable limitations" language was not added until the 1971 rewrite. 1971 N.C. Sess. Laws, ch. 698. That language had appeared as dictum in a statement by this Court twenty years earlier in *Grimesland v. Washington*, 234 N.C. 117, 66 S.E. 2d 794 (1951). The case involved two municipal electric systems competing in a rural area in which one claimed an exclusive right to serve in an area far from its corporate limits, and the question was whether a municipality was required to have a certificate of convenience and necessity from the North Carolina Utilities Commission. The 1965 Electric Act, appearing in G.S. § 160A-331 to -338 and G.S. § 62-110.2, does not empower or authorize municipalities to operate electric systems outside corporate limits, nor does it restrict such service. Insofar as the General Statutes

are concerned, the sole authority for, and the only restriction upon municipalities furnishing electric service outside corporate limits is found in G.S. § 160A-312.

The crucial issue on this appeal, *i.e.*, whether Fayetteville's extension of service to Montibello Subdivision was "within reasonable limitations," will be determined by the proper interpretation of this Court's prior decision in *Domestic Electric Service v. City of Rocky Mount*, 285 N.C. 135, 203 S.E. 2d 838 (1974). Indeed, the parties to this action have acknowledged, as does the opinion of the Court of Appeals, that the present case is controlled by our decision in *Domestic Electric*. We find it appropriate to review the issues involved in that case and this Court's determination of those issues.

In *Domestic Electric* the City of Rocky Mount attempted to furnish electric service outside the city limits to Cokey Apartments, Ltd. A large number of apartments were under construction on a tract of land lying partially within and partially outside the city limits. The precise location of the apartments was outside the city limits in a territory assigned by The North Carolina Utilities Commission to Domestic Electric Service, Inc., a small investor-owned utility no longer in existence. Cokey requested service from the city and entered into a contract with the city for its electric service. Domestic had an adequate electric line in existence immediately adjacent to the tract on which the apartments were being constructed and the city's nearest line was 675 feet away and inside the city limits. The city began construction of a line outside the corporate limits to reach the apartments and Domestic brought a proceeding to enjoin the construction. The trial court concluded that the city had the right to serve the apartments to the exclusion of Domestic. The Court of Appeals reversed and held that Domestic in fact had the exclusive right to serve all new customers within the territory assigned to it. This Court found that the Court of Appeals erred in holding that G.S. § 62-110.2(c)(1) gave Domestic the exclusive right to serve all new customers in the territory assigned to it by the Commission. Although, based on the facts in that case, we went on to hold in *Domestic Electric* that the extension by the municipality there was not "within reasonable limitations" and therefore "affirmed" the result reached by the Court of Appeals, we clearly modified the decision of that court.

We now examine the precise considerations and holding of *Domestic Electric* from the words of the opinion authored by Justice Lake:

> Prior to the enactment of Ch. 287 of the Session Laws of 1965, investor-owned electric power companies and electric membership corporations, unless restricted by contract, were free to compete, in areas outside the corporate limits of municipalities, for the patronage of users and potential users of electric power.
>
> . . . .
>
> . . . [A] municipality, operating its own electric distribution system for the service of its inhabitants, had the right, under Ch. 285 of the Public Laws of 1929, codified as G.S. 160-255 (now G.S. 160A-312), to extend its lines beyond its corporate limits 'within reasonable limitations' and thus to compete in rural areas with investor-owned power companies and with electric membership corporations.
>
> 'In the absence of a valid grant of such right by statute, or by an administrative order issued pursuant to statutory authority, and in the absence of a valid contract with its competitor or with the person to be served, a supplier of electric power, or other public utility service, has no territorial monopoly, or other right to prevent its competitor from serving anyone who desires the competitor to do so.'
>
> . . . .
>
> Frequent litigation between investor-owned power companies and electric membership corporations grew out of contracts between them defining and limiting territories to be served by each. To avoid or reduce such litigation and uneconomic duplication of transmission and distribution systems, the investor-owned electric utilities and the electric membership corporations, throughout the State, collaborated in recommending to the Legislature the enactment of Ch. 287 of the Session Laws of 1965. The language of the Act was the result of their collaboration and agreement and was carefully chosen for the accomplishment of this purpose. The Act contained two parts. The first, relating to electric service within the corporate limits of municipalities, is codified as G.S.

160A-331 to G.S. 160A-338, including subsequent amendments not pertinent to this appeal. The second, relating to electric service outside the corporate limits of municipalities, is codified as G.S. 62-110.2.

. . . .

The second part of the Act of 1965, relating to electric service outside the corporate limits of municipalities, defines, also in great detail, the rights of, and restrictions upon, 'electric suppliers' in such areas. G.S. 62-110.2(a)(3) defines 'electric supplier' to mean 'any *public utility* furnishing electric service or any electric membership corporation.' (Emphasis added.)

. . . .

. . . [A] municipality is not an 'electric supplier' as that term is used in G.S. 62-110.2.

G.S. 62-110.2(c)(1) provides:

'In order to avoid unnecessary duplication of electric facilities, the . . . . [Utilities] Commission is authorized and directed to assign, as soon as practicable after January 1, 1966, to *electric suppliers* all areas, by adequately defined boundaries, that are outside the corporate limits of municipalities and that are more than 300 feet from the lines of all *electric suppliers* as such lines exist on the dates of the assignments * * *. The Commission shall make assignments of areas in accordance with public convenience and necessity, considering among other things, the location of existing lines and facilities of *electric suppliers* and the adequacy and dependability of the service of *electric suppliers*, but not considering rate differentials among *electric suppliers.*' (Emphasis added.)

G.S. 62-110.2(b)(8) provides:

'Every *electric supplier* shall have the *right* to serve *all premises* located wholly within the service area assigned to it pursuant to subsection (c) hereof.' (Emphasis added.)

G.S. 62-110.2(b)(10) provides:

'No *electric supplier* shall furnish electric service to any premises in this State outside the limits of any incorporated

> city or town except as permitted by this section * * *. (Emphasis added.)
>
> The Act of 1965, including G.S. 62-110.2, did not, without more, alter the competitive rights of municipalities, investor-owned utilities and electric membership corporations to compete for patronage in areas outside the corporate limits of municipalities. Any premises in any such area could, prior to an assignment of such area by the Utilities Commission, have been served by any of the three competitors chosen by the user (assuming no contract restricting competition and assuming an extension to serve such user would fall within the 'reasonable limitation,' applicable to service by the municipality).

285 N.C. at 139-143, 203 S.E. 2d at 841-843 (citations omitted).

The Court in *Domestic Electric* then went on to explain that the territory in which the apartments were located had been assigned and the assignee, Domestic, had the right to serve all premises located wholly within the territory and that no other "electric supplier," meaning no other electric membership corporation or investor-owned utility, could serve any premises located in the territory assigned to Domestic. The Court specifically held, however, that the assignment of the territory did not preclude the *city* from serving the customer:

> An assignment of territory by the Utilities Commission can, of course, have no greater effect than that which is given to it by the statute, the Commission having no authority except that conferred upon it by the statute. *Utilities Commission v. Woodstock Electric Membership Corp., supra,* at p. 119.
>
> Thus, we hold that the assignment to Domestic by the Utilities Commission of the area which includes the Cokey Apartments did not automatically preclude the City of Rocky Mount from extending its service lines into the area.

285 N.C. at 143-144, 203 S.E. 2d at 843.

Having found no impediment to the municipality's right to serve the customer by reason of the assignment of the territory

to Domestic, and finding no intent on the part of the Legislature to deprive municipal corporations of the authority to serve new customers outside the corporate limits, the Court then examined the city's authority under G.S. § 160A-312 and stated:

> Its power to extend its lines and distribute electric current beyond its corporate boundaries is expressly restricted to 'reasonable limitations.'
>
> . . . .
>
> . . . 'The term "within reasonable limitations" does not refer solely to the territorial extent of the venture but embraces all facts and circumstances which affect the reasonableness of the venture.'
>
> In the present instance, the investor-owned utility, to which the territory has been assigned by the Utilities Commission 'in accordance with public convenience and necessity,' had its service lines in the immediate vicinity of the Cokey Apartments and was ready, able and willing to serve Cokey.

285 N.C. at 144-45, 203 S.E. 2d at 844.

The Court concluded that the extension by the city of its electric service to serve Cokey Apartments would exceed "reasonable limitations" and therefore was beyond the authority of the city.

The primary issue addressed by the Court in *Domestic Electric* was whether a municipality owning its own electric distribution system could serve a new customer requesting its service where that customer was located outside the corporate limits within an area assigned by the Utilities Commission to an investor-owned utility or electic membership corporation. We answered that issue in the affirmative.

It is clear that the result reached by the Court of Appeals in the case *sub judice* was based on its mistaken belief that "[t]he facts in the present case are substantially similar to those in [*Domestic Electric*]." Though the factual situations of *Domestic Electric* and this case are *seemingly* similar they are in fact not *substantially* similar. They are seemingly similar because in both cases the customer was a residential complex near the municipality; both municipalities desired to furnish service at the

customer's request by extensions beyond their corporate limits; and the area in question had been "assigned" to an "electric supplier" who desired to furnish service. While those similarities exist, there are striking dissimilarities in those factors which are determinative, *i.e.*, those factors which bear directly on the issue of whether the extension in question was "within reasonable limitations."

In *Domestic Electric*, this Court, quoting *Service Company v. Shelby*, 252 N.C. 816, 115 S.E. 2d 12 (1960), stated: " '[t]he term, "within reasonable limitations" does not refer solely to the territorial extent of the venture but embraces *all facts and circumstances which affect the reasonableness of the venture.*' " 285 N.C. at 144, 203 S.E. 2d at 844 (emphasis added). The Court also noted that an extension of the city's electric service, reasonable at the time prior cases were decided, "would not necessarily be reasonable in the present day under the circumstances disclosed in the record before us." In *Domestic Electric* this Court considered the fact that the territory was "assigned"; the nature of the potential provider (IOU, electric membership corporation or municipality), and the fact that the service and rates of IOUs are regulated by the North Carolina Utilities Commission; that the service (but not the rates) of electric membership corporations are similarly regulated and the fact that neither the rates nor the service of municipalities is regulated (except by municipal authorities); the distance of the potential customer from the corporate limits of the municipality; and customer choice. However, none of these considerations was determinative. The determinative factors considered by the Court in *Domestic Electric* were each electric provider's level of current service in the area in question and particularly in the immediate vicinity of the potential customer, and the readiness, willingess, and ability of each to serve the potential customer.

In applying the determinative factors of *Domestic Electric* to this appeal, we have already noted with regard to current service in the area and in particular in the immediate vicinity of the potential customer, that Fayetteville was serving 22 customers and the EMC 5 customers within a one-half mile radius of the subdivision entrance. Within a one mile radius of the same point Fayetteville was serving 229 customers and the EMC 75 customers. Fayetteville has had a three-phase line immediately adja-

cent to the subdivision proper since 1973, and on the date this action was filed such three-phase service was available directly across the street from the entrance to the subdivision tract. The EMC had only a single-phase line, within 170 feet of the entrance to the subdivision, and its nearest three-phase line was located approximately 1,850 feet from the nearest boundary of the subdivision and 3,174 feet from the entrance to the subdivision.

With regard to the readiness, willingness, and ability to serve factor, unquestionably both Fayetteville and the EMC had the desire or willingness and the financial and physical ability (not to be confused with readiness) to serve the potential customer. With regard to readiness, Fayetteville's three-phase service was immediately available whereas the EMC's three-phase service was 1,850 feet from the nearest boundary of the subdivision and 3,174 feet from the subdivision entrance and would have required five days construction time and an expenditure of $11,700 to make its three-phase service equally available. It cannot be said that the EMC was "ready" to furnish service.

With regard to these determinative factors, the able trial judge found, *inter alia*, as facts:

> VII. That the development of Section I of the Montibello Subdivision requires a three-phase electrical power supply; that since approximately 1973 PWC has had a three-phase power line immediately adjacent to the Montibello Subdivision; that Lumbee has had only a single-phase source of power adjacent to said Subdivision; and that said single-phase source of power has been in existence since approximately 1948; and that the only three-phase power source Lumbee has had near the Montibello Subdivision is located approximately 1,850 feet from said Subdivision.
>
> VIII. That on or about the time this action was commenced PWC provided electrical service to 22 and 229 customers within one-half and one mile radii, respectively, of the Montibello Subdivision; that Lumbee comparably served only 5 and 75 customers within the same respective areas; and that PWC presently has, and has had, a significant commitment in the distribution of electrical energy in the general area surrounding the Montibello Subdivision.

IX. That both PWC and Lumbee have the ability to provide and maintain adequate three-phase electrical power to Section I of the Montibello Subdivision; but that the providing of three-phase power by Lumbee to said Montibello Subdivision would duplicate a PWC three-phase power line previously existing and being located adjacent to said Subdivision.

Based upon these and his other findings of fact, the trial judge made, *inter alia*, the following conclusions of law:

V. That any extension by Lumbee of a three-phase electrical power line to the Montibello Subdivision would constitute an uneconomic duplication of PWC's previously existing three-phase electrical distribution system.

VI. That PWC may extend its electrical service outside its municipal boundaries; and that under the facts and circumstances herein presented, its extension of services to the Montibello Subdivision is 'within reasonable limitations' within the meaning of NCGS 160A-312.

We conclude that the trial judge's findings of fact were fully supported by the evidence and that those findings in turn fully support his conclusions of law.

When this matter was heard on the merits by Judge Braswell, he was sitting without a jury. At the close of plaintiffs' evidence, Fayetteville moved for a directed verdict and the trial court properly treated the motion as a motion for dismissal of the action pursuant to Rule 41(b) of our Rules of Civil Procedure on the ground that upon the facts presented by plaintiffs and the law, plaintiffs had shown no right to relief. The pertinent portion of Rule 41(b) is as follows:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of

all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section . . . operates as an adjudication upon the merits.

G.S. § 1A-1, Rule 41(b).

[3] A Rule 41(b) motion challenges the sufficiency of plaintiff's evidence to establish plaintiff's right to relief. *See Pegram-West Inc. v. Hiatt Homes, Inc.*, 12 N.C. App. 519, 184 S.E. 2d 65 (1971). In a nonjury case, section (b) of this rule provides a procedure whereby, at the close of plaintiff's evidence, the judge can give judgment against plaintiff not only because his proof has failed in some essential aspect to make out a case but also on the basis of facts as he may then determine them to be from the evidence then before him. *O'Grady v. Bank*, 296 N.C. 212, 250 S.E. 2d 587 (1978); *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973). The trial judge sits as a trier of the facts and may weigh the evidence, find the facts against the plaintiff and sustain the defendant's motion under section (b) of this rule at the conclusion of the plaintiff's evidence, even though the plaintiff has made out a prima facie case which would have precluded a directed verdict for the defendant in a jury case. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1; *Williams v. Liles*, 31 N.C. App. 345, 229 S.E. 2d 215 (1976); *Neasham v. Day*, 34 N.C. App. 53, 237 S.E. 2d 287 (1977); *Newsome v. Newsome*, 43 N.C. App. 580, 259 S.E. 2d 577 (1979); *see generally* Annot., 55 A.L.R. 3d 272 (1974).

The function of the trial judge as trier of the facts is to evaluate the evidence without any limitation as to inferences favorable to plaintiff. *Dealers Specialties, Inc. v. Housing Services*, 305 N.C. 633, 291 S.E. 2d 137 (1982). The findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if, *arguendo*, there is evidence to the contrary. *See Ingram, Comr. of Insurance v. Insurance Agency*, 50 N.C. App. 510, 274 S.E. 2d 497, *modified and affirmed*, 303 N.C. 287, 278 S.E. 2d 248 (1981). The trial court's judgment therefore must be granted the same deference as a jury verdict. *Murray v. Murray*, 296 N.C. 405, 250 S.E. 2d 276 (1979).

Where, as here, the trial judge's findings are supported by the evidence and those findings in turn support his conclusions of

law, they are binding on appeal. We believe that the Court of Appeals' conclusion and its opinion is inconsistent with these principles. The Court of Appeals erred in reversing the trial court's judgment through a misunderstanding and misapplication of our decision and the law announced by this Court in *Domestic Electric.*

[4] We agree however with that portion of the opinion of the Court of Appeals which holds that the provision of the city charter of Fayetteville authorizing the city to extend its electric system and to sell electricity anywhere within Cumberland County (1979 Sess. Laws, ch. 557, § 6.19) must be construed together with the provision of G.S. § 160A-312 with the result that the City of Fayetteville Public Works Commission can only extend electric service outside its corporate limits "within reasonable limitations."

> A municipal corporation has only such powers as are granted to it by the General Assembly in its specific charter or by the general laws of the State applicable to all municipal corporations, and the powers granted in the charter will be construed together with those given under the general statutes.

Riddle v. Ledbetter, 216 N.C. 491, 492, 5 S.E. 2d 542, 543 (1939).

For the reasons hereinabove stated the decision of the Court of Appeals is reversed and the case is remanded to that court for reinstatement of the judgment of the trial court.

Reversed and remanded.

STATE OF NORTH CAROLINA v. EDWARD ROY EFFLER

No. 117A83

(Filed 6 December 1983)

1. Indictment and Warrant § 7; Rape and Allied Offenses § 3— first degree sexual offense—sufficiency of indictment

In a prosecution for a first degree sexual offense, an indictment which charged that defendant did "commit a sexual offense with Johnny Lamar

Guess, a child of the age of twelve or less, the defendant being at least four years older than this child, in violation of the following law: G.S. 14-27.4" was sufficient to charge an offense and was a sufficient indictment upon which the grand jury could act.

2. **Criminal Law § 34.8; Indictment and Warrant § 13— bill of particulars alleging two sexual offenses occurring on one day—evidence presented showing second sexual crime occurred two weeks later—evidence of second crime admissible as evidence of common plan or scheme**

In a prosecution for first degree rape, first degree sexual offense and incest where defendant categorically denied any wrongdoing, no prejudice resulted from the admission of testimony concerning a 28 May offense of fellatio due to a "misleading" bill of particulars which had stated that acts of anal intercourse and fellatio had occurred on 15 May 1982. Nor was there prejudice in admitting testimony of another crime since evidence of the 28 May offense of fellatio tended to establish a common plan or scheme embracing a series of crimes and the evidence of the similarity of the circumstances was properly admitted.

3. **Indictment and Warrant § 13— bill of particulars—time of offense different from time alleged at trial**

No prejudice resulted to defendant from the fact that a bill of particulars stated that the alleged rape of defendant's daughter occurred in "the afternoon hours" while the testimony at trial tended to indicate that the offense occurred between 6:30 p.m. and 9:00 p.m. A child's uncertainty as to the time or the particular day the offense charged was committed goes to the weight of the testimony rather than to its admissibility, and the State clearly placed defendant on notice that the victim was a child and that therefore the information provided in the bill of particulars should not be relied upon for any degree of certainty.

4. **Criminal Law § 92.2— consolidation of rape and sex offense for trial—no error**

The trial court did not err in consolidating for trial defendant's offenses of first degree rape and first degree sexual offenses where the evidence tended to show that in less than a month, the defendant, the noncustodial parent, allegedly took advantage of his children during visitations to engage in sexual acts and where the disclosure of the events took place while the children were together with their mother watching a television program involving sexual abuse of children. G.S. 15A-927 and G.S. 15A-926(a).

BEFORE *Owens, J.*, at the 1 November 1982 Regular Criminal Session of Superior Court, BUNCOMBE County, defendant was convicted of first degree rape, first degree sexual offense and incest. From two concurrent life sentences defendant appeals pursuant to G.S. § 7A-27(a). Motion to bypass the Court of Appeals on a ten year sentence for incest was allowed 1 July 1983. Heard 9 November 1983 in the Supreme Court.

Defendant was charged with the first degree rape of his daughter, Norma Diane Effler, nicknamed Cissy, on or about 8 June 1982. At the time of the offense the victim was ten years old. The incest charge arose out of this incident. Defendant was further charged with first degree sexual offense with his eleven year old stepson, Johnny Lamar Guess, on or about 15 May 1982. At the time of these incidents the defendant and Linda Effler, the mother of the children, were divorced. Defendant was living with Deborah Daniels.

Johnny Lamar Guess testified that approximately four weeks prior to his birthday in June, he and his sister visited the defendant. Deborah Daniels and his sister left to play bingo. After threatening the child with a gun, the defendant forced him to undress and to engage in anal intercourse.

Cissy Effler testified that on 8 June 1982 the defendant picked her up at a swimming pool where she and her brothers had been taken by their cousin, Marsha Calloway. Apparently their mother, Linda Effler, had been hospitalized and the children were being cared for by relatives and by Linda Effler's boyfriend. Because the defendant and Deborah Daniels had recently moved into a small mobile home, it was not possible to keep more than one child at a time. Ms. Calloway testified that rather than take his daughter, Cissy, she had requested that defendant take either Johnny or the younger brother Samuel home with him on 8 June. Ms. Calloway had a daughter Cissy's age and the girls were looking forward to seeing each other. The defendant indicated that he would take only his daughter.

After leaving the swimming pool, Cissy, the defendant and Deborah Daniels shopped and ate at a restaurant. Deborah then left to attend evening classes at AB Tech in Asheville. The classes ran from 6:30 p.m. to 9:00 p.m. It was during Deborah's absence that the alleged rape took place. Cissy Effler testified that after Deborah left, the defendant called her into the trailer, removed her clothes, and engaged in sexual intercourse with her.

Neither child reported the sexual assaults until early July when, as a result of watching a television program on sexually abused children, they became upset and told their mother. Cissy Effler was examined at Memorial Mission Hospital on 7 July 1982.

The examining physician's findings were consistent with Cissy's allegations of sexual abuse. The examination revealed a perforated hymen, a yellowish vaginal discharge, inflammation and tenderness of the external genital area and a larger than normal vaginal opening. No physical examination was performed on Johnny Lamar Guess.

The defendant testified on his own behalf and denied the charges. On cross-examination he admitted four convictions for driving under the influence, two convictions for assault on a female, and one conviction of child abuse, that case involving Johnny Lamar Guess.

Of defendant's four assignments of error, two concern the sufficiency of the indictment charging him with first degree sexual offense which, taken together with the Bill of Particulars specifying the acts of anal intercourse and fellatio, resulted in the admission of testimony concerning not only the 15 May offense of anal intercourse for which defendant appears to have been indicted, but a subsequent offense of fellatio which, contrary to the Bill of Particulars, allegedly took place on or about 28 May. Defendant further contends that the State's proof as to the time of the alleged rape varied from its Bill of Particulars, thereby depriving him of his right to a fair trial. Finally, defendant assigns as error the trial court's granting the State's motion to consolidate the rape and sexual offense charges for trial. We affirm defendant's convictions.

Rufus L. Edmisten, Attorney General, by George W. Lennon, Assistant Attorney General, for the State.

James M. Glover and Ann B. Peterson, Assistant Appellate Defenders, for defendant-appellant.

MEYER, Justice.

[1] Defendant first attempts to argue that his conviction for first degree sexual offense is in violation of his constitutional right to indictment. The indictment upon which defendant's conviction for first degree sexual offense was based charged that on or about 15 May 1982, in Buncombe County, the defendant did "commit a sexual offense with Johnny Lamar Guess, a child of the age of 12 or less, the defendant being at least 4 years older than this child, in

violation of the following law: G.S. 14-27.4." In answer to defendant's Motion for a Bill of Particulars, the State provided defendant with the following information:

> Please be advised that this case involves a young child of 12 years old; therefore, times, dates and locations cannot be as exact as when dealing with adult victims. However, in view of the foregoing the State, being as specific as possible, makes the following answer:
>
> (1) The date of the alleged offense occurred sometime in later spring, probable (sic) in the month of May, and all the available information is May 15, 1982.
>
> (2) The time of the offense was sometime during the day light hours.
>
> (3) The place of the alleged offense was at the Defendant's residence.
>
> (4) The acts constituting the alleged offense was (sic) both fellatio and anal intercourse.

At trial, Johnny Lamar Guess testified that during the spring of 1982 he had scheduled visitations with his stepfather every other two weeks; that his birthday was 12 June; that about four weeks prior to his birthday he visited his stepfather and on that occasion he was forced to engage in an act of anal intercourse; that two weeks later he again visited his stepfather; and that on this occasion he was forced at knifepoint to engage in an act of fellatio.

Defendant concedes that under the authority of *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978) and *State v. Edwards*, 305 N.C. 378, 289 S.E. 2d 360 (1982), together with the provisions of G.S. § 15-144.2, the indictment in the present case is sufficient to charge the offense. In *Edwards* we specifically held that an indictment drafted pursuant to G.S. § 15-144.2(b) without specifying which sexual act was committed is sufficient to charge the crime of first degree sexual offense and to inform the defendant of such accusation. We pointed out that should a defendant require additional information on the nature of the specific sexual act with which he stands charged, he may move for a Bill of Particulars. Defendant nevertheless takes the position that in spite of the pro-

visions of G.S. § 15-144.2, "the indictment in this case is insufficient to charge a crime and that judgment and commitment for first degree sexual offense deprives the defendant of his right to indictment by grand jury guaranteed by Art. I, § 22 of the North Carolina Constitution."

As we understand defendant's argument on this question, he does not challenge the indictment either as depriving him of his constitutional right to notice or on a claim of double jeopardy. Those issues were resolved in *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878, and in *State v. Edwards*, 305 N.C. 378, 289 S.E. 2d 360. Rather, "defendant's complaint is that the conviction in this case is in violation of his constitutional right to indictment itself." That is, defendant "can be convicted of a crime only when the grand jury has charged in the indictment that he committed those acts which are the elements of the offense." While the argument may be academically intriguing, we find it unpersuasive.

We are satisfied that the indictment charging the defendant with first degree sexual offense was proper in every respect. In so holding, we merely emphasize that the purpose of Article I, § 23 of the North Carolina Constitution, which states that every person charged with a crime has the right to be informed of the accusation, is threefold: to enable a defendant to have a fair and reasonable opportunity to prepare his defense; to avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense; and to enable the court to proceed to judgment according to the law in the case of a conviction. *See State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563, *cert. denied*, 434 U.S. 998 (1977); *State v. Jenkins*, 238 N.C. 396, 77 S.E. 2d 796 (1953); *State v. Thomas*, 236 N.C. 454, 73 S.E. 2d 283 (1952). The indictment in the present case meets these constitutional requirements.

[2] Defendant next contends that the court erred in admitting evidence of an alleged sexual act of fellatio because that act occurred not on or about 15 May, as specified in the Bill of Particulars, but rather on or about 28 May.

Defendant was indicted for first degree sexual offense which allegedly occurred on 15 May 1982. The Bill of Particulars specified that the acts involved were anal intercourse *and* fellatio. Following the evidence presented at trial, it became apparent that the only sexual offense which occurred on 15 May and there-

fore for which the defendant was being tried was the act of anal intercourse, and the trial judge so instructed the jury to this effect. Nevertheless, the victim was permitted to testify as to the 28 May incident involving the first degree sexual offense of fellatio.

Defendant argues that "[w]hen the State has filed a bill of particulars, the defendant is entitled to rely on it" and "[t]he State's evidence must be limited to the particulars in the bill." According to defendant, prejudice resulted because he was "misled" into believing that he would "be facing an allegation that he committed two sexual acts on one particular day, when the State planned to offer evidence of two sexual acts on separate days, two weeks apart." We believe that any "prejudice" which might have resulted from the admission of testimony concerning the 28 May offense of fellatio was not due to the "misleading" nature of the Bill of Particulars. Defendant categorically denied any wrongdoing. The fact that he might have been prepared to defend against two, rather than one act of first degree sexual offense alleged to have taken place on 15 May was therefore of no consequence. Error, if any, resulted not from the variance in the dates but rather from the admission of this testimony as evidence of a crime other than that charged.

Under the well-established rules enunciated in *State v. McClain*, 240 N.C. 171, 176, 81 S.E. 2d 364, 367 (1954), "[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." *See State v. Williams*, 308 N.C. 357, 302 S.E. 2d 438 (1983). This Court has been "very liberal in admitting evidence of similar sex crimes." *State v. Greene*, 294 N.C. 418, 423, 241 S.E. 2d 662, 665 (1978). Under our settled case law the focus is on the similarity of circumstances of the two crimes. *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982); *State v. Freeman*, 303 N.C. 299, 278 S.E. 2d 207 (1981). With these principles in mind and noting the similarities between the 15 May sexual assault (anal intercourse) and the 28 May sexual assault (fellatio) on defendant's stepson, we hold that the victim's testimony concerning the 28 May incident was admissible.

[3] Defendant next contends that he was deprived of the right to a fair trial because the State's proof as to the time of day of the alleged rape of Norma Diane Effler varied from the time specified in the Bill of Particulars. With respect to the charges of rape and incest, the State supplied at defendant's insistence and in response to defendant's Motion for a Bill of Particulars, information which stated that the offense occurred on or about 8 June 1982, "in the afternoon hours," at defendant's residence. According to the testimony at trial, the offense occurred sometime between 6:30 p.m. and 9:00 p.m. while Deborah Daniels attended evening classes.

Citing to *State v. Christopher*, 307 N.C. 645, 300 S.E. 2d 381 (1983), defendant contends that his reliance on the time of the offense as set out in the Bill of Particulars led to "trial by ambush" because he produced in court only those witnesses who had knowledge about the events that occurred in the afternoon hours of the day in question. This evidence did, indeed, prove that until Deborah Daniels left for classes, the defendant was never alone with his daughter.

Of significance, however, is the fact that prior to answering defendant's Bill of Particulars, the prosecutor stated:

> Please be advised that this case involves a young child of 10 years old; therefore, *times*, dates and locations cannot be ad (sic) exact as when dealing with adult victims. However, in view of the foregoing the State, being as specific, as possible, makes the following answer:

(Emphasis added.)

Furthermore, in *State v. King*, 256 N.C. 236, 123 S.E. 2d 486 (1962), we held that a child's uncertainty as to the time or particular day the offense charged was committed goes to the weight of the testimony rather than its admissibility, and nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed where there is sufficient evidence that the defendant committed each essential act of the offense. *Accord State v. Tessnear*, 254 N.C. 211, 118 S.E. 2d 393 (1961).

If there was a "trial by ambush" in this case, it was orchestrated solely by the defendant. Because of defendant's per-

sistent efforts, the State made a good faith effort to provide him with the approximate date and time of the offense. In so doing, the State prefaced this information with a caveat which, consistent with our case law, clearly placed defendant on notice that the victim was a child and therefore the information provided should not be relied upon for any degree of certainty. Under these circumstances, defendant's attempt to argue reliance is untenable. Moreover, having been informed of the date of the alleged offense, the focus of defendant's alibi defense, if any, should more properly have been for the period of time covering Deborah Daniels' absence, irrespective of whether it was afternoon or early evening.

The evidence at trial raised significant conflicts concerning the events during the late afternoon and early evening hours on the day of the alleged rape. Deborah Daniels testified that she, the defendant, and Cissy ate dinner at the trailer on 8 June and then she took Cissy and the defendant to her father's home where they remained until Deborah's classes were over. The defendant's testimony, however, was silent concerning details of the events during the late afternoon or early evening hours. He did testify that Deborah Daniels' brother was at the trailer for some period of time that evening. Deborah Daniels testified that her brother was not present. Neither Deborah's father nor her brother testified at trial. These conflicts were resolved by the jury.

The record is devoid of any indication whatsoever that defense witnesses were unavailable; that defendant was surprised in any way by the State's evidence; or that defendant intended to present an alibi defense. In post-trial motions and on appeal, no affidavit or statement has been presented regarding the prospective testimony of any witness not called at trial. In sum, the defendant has failed to meet his burden of establishing prejudice.

[4] Finally, defendant contends that the rape and sex offense charges were improperly consolidated for trial.

G.S. § 15A-926(a) provides in pertinent part:

> (a) Joinder of Offenses.—Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected

together or constituting parts of a single scheme or plan. Each offense must be stated in a separate count as required by G.S. 15A-924.

We have addressed this question most recently in *State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983), in which Justice Martin, writing for the Court, pointed out that

> This statute [15A-926], which became effective in 1975, differs from its predecessor, in part by disallowing joinder on the basis that the acts were of the same class of crime or offense when there is no transactional connection among the offenses. *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978). *See also State v. Silva*, 304 N.C. 122, 282 S.E. 2d 449 (1981); *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981); *State v. Powell*, 297 N.C. 419, 255 S.E. 2d 154 (1979). As we stated in *Silva*:
>
> > A mere finding of the transactional connection required by the statute is not enough, however. In ruling on a motion to consolidate, the trial judge must consider whether the accused can receive a fair hearing on more than one charge at the same trial; if consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated. *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978); *State v. Davis*, 289 N.C. 500, 508, 223 S.E. 2d 296, 301, *death sentence vacated*, 429 U.S. 809, 97 S.Ct. 47, 50 L.Ed. 2d 69 (1976). A motion to consolidate charges for trial is addressed to the sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion. *E.g., State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981); *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296. If, however, the charges consolidated for trial possess no transactional connection, then the consolidation is improper as a matter of law. *See* G.S. § 15A-926(a).
>
> 304 N.C. at 126, 282 S.E. 2d at 452.

While it is true that G.S. § 15A-926 does not permit joinder of offenses solely on the basis that they are of the same class, the nature of the offenses is one of the factors which may properly be

considered in determining whether certain acts or transactions constitute parts of a single scheme or plan as those words appear in the statute. *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662.

The facts of this case present a unique set of circumstances which, although by no means compelling, provide grounds for permissible joinder of the charges. Here, in less than a month, the defendant, the noncustodial parent, allegedly took advantage of his children during visitations to engage in sexual acts. As their father he was in a position of dominance and used his position to exert his influence over them. In each case, the defendant waited until he was alone with the child, at home. With his daughter, he engaged in vaginal intercourse, and with his stepson, he engaged in anal intercourse. The disclosure of these events took place while the children were together with their mother watching a television program involving sexual abuse of children.

We add further that defendant has shown no prejudice by the joinder. The evidence disclosed a similar *modus operandi*, similar circumstances with respect to the victims, similar location and similar motive. In short, evidence of each crime would have been admissible at the trial of the other to prove intent, plan or design. *See State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662; *see also State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (otherwise admissible to prove identity). We therefore hold that, based solely on the peculiar facts of this case, the trial judge did not abuse his discretion in consolidating the two cases for trial.

Having thus determined that the joinder of the two charges was proper in the first instance, we further note that defendant has made no showing that severance was necessary to insure a fair determination by the jury on each offense. G.S. § 15A-927. Defendant made no motion for severance during the trial or after its conclusion. Nevertheless, we have carefully reviewed the transcript of the trial and find no basis upon which the motion, if made, should have been granted. The evidence before the jury was not complicated. The jury instruction clearly separated the two offenses. The two offenses were not so separate in time or place or so distinct in circumstance that consolidation unjustly or prejudicially hindered or deprived defendant of his ability to defend one or the other of the charges.

No error.

Hardee v. Hardee

JOHNNIE GAYLON HARDEE, INDIVIDUALLY AND JOHNNIE GAYLON HARDEE AS ADMINISTRATOR OF THE ESTATE OF LAVELLE HARDEE, DECEASED v. WALTON E. HARDEE AND WIFE, LURA G. HARDEE, VERNA H. PARRISH AND ODELL F. HARDEE

No. 381A83

(Filed 6 December 1983)

1. Cancellation and Rescission of Instruments § 10.2— undue influence inducing deed—sufficiency of evidence

Plaintiff's evidence was sufficient for submission to the jury on the issue of whether a deed from plaintiff's deceased father should be set aside on the ground of undue influence where it tended to show that although plaintiff had been estranged from his deceased father for most of plaintiff's life, he had, after the death of his father's second wife in March 1980, begun to visit his father to try to establish a relationship with him; plaintiff was the deceased's only heir; the deceased was taken suddenly ill in May 1980 and diagnosed as suffering from a malignant brain tumor which was surgically removed on 26 May after which he was hospitalized until 16 June; after surgery the deceased was physically weak, mentally confused, and lacked the capacity to know or understand the nature and consequences of his actions; his mental condition never improved after the surgery; on 13 June two defendants and one defendant's husband secured the deed in question from an attorney's office and took it with them to deceased's hospital room where they secured his signature in the presence of a notary public; no one other than deceased, the two defendants, one defendant's husband, and the notary were present in the room at the time; and the deed was procured without the knowledge of deceased's attorney in fact.

2. Evidence § 11.7— testimony barred by Dead Man's Statute

In an action to set aside on grounds of mental incapacity and undue influence a deed executed by plaintiff's deceased father following surgery for a brain tumor, plaintiff's testimony that, at a time before his father became ill with the brain tumor, his father "stated that he would like to walk over the property lines with me so I would know where the points were" and that he and his father did walk the property in question and "look at the lines and corners" tended mostly to prove deceased's dispositive intent before his illness rather than his mental capacity and was inadmissible under the hearsay rule and the Dead Man's Statute, G.S. 8-51.

APPEAL by right from a decision of a divided panel of the Court of Appeals, 63 N.C. App. 321, 304 S.E. 2d 626 (1983), finding no error in a jury verdict for plaintiff and judgment entered thereon by *Judge Samuel Britt* at the 15 March 1982 Session of HARNETT Superior Court.

Johnson & Johnson, P.A., by W. A. Johnson and Sandra L. Johnson for plaintiff appellee.

Morgan, Bryan, Jones & Johnson by Robert C. Bryan for defendant appellants.

EXUM, Justice.

This is an action for damages and to set aside a deed conveying real property on the grounds of mental incapacity and undue influence. At trial the jury answered the mental capacity issue favorably to defendants and the undue influence issue favorably to plaintiff. The questions on appeal are whether the evidence is sufficient to be submitted to the jury on the undue influence issue and whether the trial court erred in admitting into evidence a certain conversation between plaintiff, Johnnie Hardee, and the deceased grantor. A majority of the Court of Appeals answered both questions favorably to plaintiff. Chief Judge Vaughn dissented on both questions. We hold that it was prejudicial error to admit the challenged evidence and the evidence was sufficient to be submitted to the jury on the undue influence issue. We, therefore, reverse the Court of Appeals in part and remand for a new trial.

I.

The following facts are either stipulated or uncontradicted:

Defendants Walton Hardee and wife, Lura, had four children: Lavelle Hardee, the deceased; Silas Elmer Hardee; and defendants, Odell Hardee and Verna Hardee Parrish. Plaintiff, Johnnie Hardee, is the only child of Lavelle and the grandson of Walton and Lura. In 1973 Walton divided his land among his four children, retaining a life estate. As a part of this division Walton conveyed to Lavelle a 49-acre tract which is the subject of this lawsuit.

When plaintiff Johnnie Hardee was about a year old, he left home with his mother who was estranged and ultimately divorced from his father, Lavelle. Thereafter Lavelle remarried. Johnnie did not get along with his father's second wife, Betty, and never again after moving away lived with his father. He was estranged from his father until Betty Hardee died in March 1980. After her death Johnnie began to visit his father every week or so.

Lavelle Hardee was a perfectly normal, healthy, outgoing, and friendly man until early May 1980 when he began to complain to family members and associates of severe headaches. His employer, David Stroud, who was also a close friend, noted Lavelle's complaints about headaches and some unusual abnormalities in the manner in which Lavelle performed his work as an automobile mechanic.

On 25 May 1980 x-rays revealed that Lavelle suffered from a large brain tumor which was surgically removed on 26 May and diagnosed to be malignant. After the surgery Lavelle continued to be hospitalized until he was discharged on 16 June 1980. He died intestate on 21 September 1980. Plaintiff is the duly qualified administrator of his father's estate.

While hospitalized post-operatively, Lavelle, on 9 June 1980, executed a power of attorney in favor of David Stroud which was filed in the Harnett County Registry on 10 June 1980. On 13 June, Lavelle executed and delivered to his parents, Walton and Lura Hardee, a deed to the 49-acre tract which Walton had earlier conveyed to Lavelle in 1973 and in which Walton had reserved a life estate.

On 10 July 1980 Walton and Lura Hardee executed and delivered a deed to this 49-acre tract to defendant Odell Hardee and Verna Hardee Parrish.

Other evidence in the case will be summarized below in our discussion of the legal question to which it relates.

At trial the dispositive issues were submitted to and answered by the jury as follows:

> 1. Did Lavelle Hardee on June 13, 1980 lack mental capacity to execute the deed from Lavelle Hardee to Walton E. Hardee and wife, Lura G. Hardee?
>
> Answer: No.
>
> 2. Was Lavelle Hardee induced to execute the deed of June 13, 1980 by the undue influence of the defendants, or any of them?
>
> Answer: Yes.

The jury also, upon the trial court's instructions, answered a damages issue favorably to plaintiff. Whereupon Judge Britt, presiding, entered judgment for the plaintiff setting aside the deeds dated, respectively, 13 June and 10 July 1980 and ordering that plaintiff have and recover the damages awarded by the jury.

II.

[1] Defendants argue that their motion for directed verdict and judgment notwithstanding the verdict should have been allowed because the evidence was insufficient to support submission of the undue influence issue to the jury. A majority of the Court of Appeals concluded that the evidence was sufficient, and we agree.

We adhere to the well-settled principle that in determining the sufficiency of evidence relied on by plaintiff, it must be viewed in the light most favorable to plaintiff and plaintiff is entitled to every reasonable inference arising from the evidence. *See Cutts v. Casey*, 278 N.C. 390, 411, 180 S.E. 2d 297, 307 (1971). *Accord Daughtry v. Turnage*, 295 N.C. 543, 246 S.E. 2d 788 (1978); *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973).

This Court has recognized the difficulty a party faces in proving undue influence in the execution of a document. *In re Andrews*, 299 N.C. 52, 54, 261 S.E. 2d 198, 199 (1980). Something must operate upon the mind of a person allegedly unduly influenced which has a controlling effect sufficient to destroy the person's free agency and to render the instrument not properly an expression of the person's wishes, but rather the expression of the wishes of another or others. "It is the substitution of the mind of the person exercising the influence for the mind of the [person executing the instrument], causing him to make [the instrument] which he otherwise would not have made." *In re Will of Turnage*, 208 N.C. 130, 131, 179 S.E. 332, 333 (1935). No test has emerged by which we can measure with mathematical certainty the sufficiency of the evidence to take the issue of undue influence to the jury. *See In re Beale's Will*, 202 N.C. 618, 163 S.E. 684 (1932). Several factors have been isolated which bear on the question. They include:

1. Old age and physical and mental weakness of the person executing the instrument.

2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.

3. That others have little or no opportunity to see him.

4. That the instrument is different and revokes a prior instrument.

5. That it is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of his bounty.

7. That the beneficiary has procured its execution.

In re Mueller's Will, 170 N.C. 28, 30, 86 S.E. 719, 720 (1915). This list does not purport to contain all facts and circumstances which might suggest the existence of undue influence. Such a list would be limitless. Furthermore, the difficulty in detecting undue influence is ordinarily enhanced by the often adroit and cunning tactics employed by those attempting to exercise it. *Andrews*, 299 N.C. at 54, 261 S.E. 2d at 199. We remain guided, finally, by the maxim that "[u]ndue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence." *In re Will of Everett*, 153 N.C. 83, 87, 68 S.E. 924, 925 (1910).

Evidence in this case favorable to the plaintiff tends to show the following:

Although plaintiff had been estranged from his deceased father for most of plaintiff's life, he had, after the death of his father's second wife in March 1980, begun to visit his father to try to establish a relationship with him. Plaintiff was the deceased's only heir. The deceased was taken suddenly ill in May 1980 and diagnosed as suffering from a malignant brain tumor which was surgically removed on 26 May after which he was hospitalized until 16 June. After surgery the deceased was physically weak, mentally confused, and lacked the capacity to know or understand the nature and consequences of his actions. His mental condition never improved after the surgery. One of plaintiff's witnesses, Silas Elmer Hardee, the deceased's brother, testified that when he visited the deceased in the hospital in June:

> I would say something to him and he would say yes or no but you couldn't get anything out of him. He just wouldn't talk. . . . [H]e just didn't look right. . . . [H]e just got to where he just didn't really know what you were talking about; he didn't comprehend everything that was going on. . . . After he left the hospital and went to the nursing home . . . his mental condition continued to slowly go down; . . . but he got to where he couldn't even talk at all, he wouldn't even say a word.

The deceased on 9 June executed a power of attorney naming his employer and friend, David Stroud, as attorney in fact. Stroud advised defendant Odell Hardee "that I had a power of attorney from Lavelle. Odell Hardee knew that Lavelle had turned his affairs over to me, and so did Mrs. Parrish and Mr. Walton Hardee was aware of it also. . . ." The power of attorney "gave me authority to execute deeds for Lavelle Hardee as I understood it."

Knowing that the deceased had "turned his affairs over to" his friend and employer, Stroud, defendants Walton Hardee and Verna Parrish and Mrs. Parrish's husband, William, on 13 June secured the deed in question from an attorney's office in Lillington. They took the deed with them to Lavelle's hospital room where they secured his signature in the presence of a notary public. No one other than Lavelle, these defendants, Mr. Parrish, and the notary were present in the room at the time. These defendants and Mr. Parrish had "stayed in Lavelle's room about 30 to 45 minutes before the deed was mentioned." These defendants and Mr. Parrish secured the deed without the knowledge of Lavelle's then attorney in fact, David Stroud. Stroud did not learn of the execution of the deed until he was advised about it by plaintiff after Lavelle's death.

Although defendants presented evidence that Lavelle was alert and aware of what he was doing on the day the deed was executed and had the mental capacity to know and understand the nature and effect of his executing the deed, plaintiff's evidence was to the contrary. The jury resolved the mental capacity issue against plaintiff. Nevertheless, the jury could yet have found, consistently with its answer to the mental capacity issue, that when Lavelle executed the deed he was physically and mentally weak. The deed does disinherit the natural object of Lavelle's bounty,

his only son and heir, with whom, according to plaintiff's evidence, a good relationship was beginning to form. At least one of the immediate beneficiaries, Walton Hardee, and one of the ultimate beneficiaries of the transaction, Verna Hardee Parrish, procured, or helped to procure the deed's execution. The deed was executed without the knowledge of David Stroud, whom the procuring defendants knew was Lavelle's attorney in fact.

The jury could find, therefore, several of the badges of undue influence previously recognized by this Court. Taken together, all the facts and circumstances are sufficient to permit a rational trier of fact to find the deceased, Lavelle Hardee, to have been unduly influenced in the execution of the instrument in question.

III.

[2] Defendants contend the Court of Appeals erred when it concluded that evidence of a certain conversation between plaintiff and deceased was admissible. We think this contention has merit.

Plaintiff testified that beginning in March 1980 he began to visit his father regularly. On the first of these visits, plaintiff said he and his father discussed the 49-acre tract of land here in question. Plaintiff was permitted to testify, over strenuous objection, that his father "stated that he would like to walk over the property lines with me so I would know where the points were." Thereafter, he and his father did walk the tract and "look at the lines and corners." Plaintiff then testified that his father's mental condition at this time was "perfectly normal."

The Dead Man's Statute provides that "a party or a person interested in the event . . . shall not be examined as a witness in his own behalf or interest . . . . against . . . a person deriving his title or interest from, through or under a deceased person . . . concerning a personal transaction or communication between the witness and the deceased person . . . ." N.C. Gen. Stat. § 8-51 (1981). Four factors trigger the provision's application:

(1) Plaintiff (the witness) was a party to and interested in the action;

(2) Plaintiff testified in his own behalf;

(3) Plaintiff testified against persons (appellants) who derived their title or interest from the deceased . . . and

(4) Plaintiff's testimony concerned a personal communication between himself and the deceased.

See Peek v. Shook, 233 N.C. 259, 261, 63 S.E. 2d 542, 543 (1951). The statute by its terms applies to the challenged testimony.

We have, however, recognized an exception to this rule of exclusion which permits an interested party to testify regarding his communications with the deceased to show the basis upon which the witness has formed an opinion as to the deceased's mental capacity. *Whitley v. Redden*, 276 N.C. 263, 272, 171 S.E. 2d 894, 901 (1970). Often, however, evidence as to mental capacity bears on the undue influence issue. *In re Will of Ricks*, 292 N.C. 28, 38, 231 S.E. 2d 856, 863 (1977). After examining earlier authorities the Court in *Ricks* concluded:

> Thus it seems an oversimplification of the rules to say that an interested witness may testify to transactions and communications with a deceased only if such testimony is considered on the mental capacity but not if it bears on the question of undue influence. The real distinction in the cases is whether the testimony is offered mostly to show the basis for the witness's opinion as to the deceased's mental condition or whether it is offered mostly to prove some other fact in issue. In the former instance the probative value of the testimony rests simply on the fact that the transactions or communications *occurred.* In the latter it rests on the truth of whatever assertions are contained in the transactions or communications related. In the former instance there is no hearsay involved and the testimony is generally admissible, while in the latter the hearsay nature of the testimony renders it inadmissible.

Id. at 38, 231 S.E. 2d at 863-64. In *Ricks* we delineated three criteria by which to resolve questions of admissibility of these kinds of communications:

> (1) If the probative value of such testimony rests mostly on demonstrating the basis for the witness's opinion as to the deceased's mental state, it is admissible under appropriate limiting instructions notwithstanding the provisions of [the Dead Man's Statute]. (2) If the probative value of such testimony rests mostly on demonstrating the basis for such an opinion, it is admissible under appropriate limiting instruc-

> tions even when the mental state of the deceased is relevant to both the mental capacity and undue influence issues. (3) If the probative value of such testimony rests mostly on its tendency to prove certain facts in issue relevant to issues other than the deceased's mental state, [the Dead Man's Statute] and the hearsay rule render it inadmissible and limiting instructions will not cure the prejudice resulting from its admission.

Id. at 42, 231 S.E. 2d at 866.

Plaintiff suggests the evidence of his conversation with his father was offered mostly to show the basis for his opinion that his father's mental capacity was normal in March and April 1980 before the effects of the brain tumor became manifest; therefore the evidence is admissible under the first prong of the *Ricks* test. A majority of the Court of Appeals agreed with this contention, saying

> [The] evidence bears *primarily*, if not wholly, on the accuracy of plaintiff's assessment of his father's mental capacity. It was proper for plaintiff to show that he knew when Lavelle Hardee was mentally competent (when Lavelle Hardee was able to point out his lines in March) and mentally incompetent (when Lavelle Hardee was in the hospital just prior to signing the questioned deed).

Dissenting from this conclusion, Chief Judge Vaughn said:

> I believe that the testimony was offered to show Lavelle's dispositive intent. . . . The statement, however, is the *only* evidence in the record which tends to show that Lavelle had any intention of giving his property to Johnnie. Obviously, the statement's real significance was that it tended to show Lavelle's alleged dispositive intent, and thus was inadmissible hearsay and in violation of G.S. 8-51. I conclude, therefore, that, at the very least, this error would entitle defendants to a new trial.

We agree with Chief Judge Vaughn. There was no issue regarding the deceased's mental capacity in March and April 1980. No party contested the fact that deceased was then and had always been a perfectly normal individual mentally and physically

until the onset of symptoms in May 1980 caused by his brain tumor. The issue joined by the evidence in the case was whether deceased lacked mental capacity to execute a deed on or about 13 June 1980 following his brain surgery. Evidence of deceased's mental state at other, remote times is not relevant. The real effect of plaintiff's testimony regarding his conversations with his father in March-April 1980 was this: At a time when his father was concededly physically and mentally normal he intended for plaintiff to have the 49-acre tract which he later deeded to others. The testimony did not purport to show the basis for the witness's opinion of the deceased's mental state when the deed was executed. Therefore, neither the first nor second of the *Ricks* criteria are met. The probative value of this testimony rested mostly on its tendency to prove deceased's dispositive intent before his illness; therefore, the third *Ricks* criterion suffices to render it inadmissible.

The question of the existence of undue influence is, as usual, relatively close. Indeed, the Chief Judge of the Court of Appeals thought it was insufficient even to be submitted to the jury, a conclusion with which we have disagreed. Plaintiff's inadmissible testimony regarding his conversations with the deceased supported plaintiff's position on both dispositive issues submitted to the jury. As Chief Judge Vaughn noted, it "is the *only* evidence" of deceased's intention that plaintiff was to have the property. We cannot say that had this evidence not been admitted the jury's verdict would have been the same. Defendants, therefore, are entitled to a new trial.

For the reasons given the decision of the Court of Appeals is reversed in part and affirmed in part. The case is remanded to the Court of Appeals for further remand to Harnett Superior Court for a new trial.

Reversed in part; affirmed in part; remanded.

STATE OF NORTH CAROLINA v. PERRY WAYNE LOWERY

No. 230A83

(Filed 6 December 1983)

1. **Homicide §§ 8.1, 21.5— first degree murder—sufficiency of evidence—intoxication—premeditation and deliberation**

In a prosecution for first degree murder, substantial evidence was presented which tended to show that defendant killed his victim after forming a deliberate and premeditated intent to kill, and although portions of defendant's evidence tended to show that he was intoxicated and doing strange things at a nightclub, this evidence did not warrant a finding, as a matter of law, that defendant was incapable of forming the specific intent to kill.

2. **Homicide § 7.1— first degree murder—defense of unconsciousness—insufficient evidence to require dismissal of charge**

In a prosecution for first degree murder, although there was some evidence that defendant may have been unconscious as the result of an alcoholic blackout at the time he shot his victim, the evidence was insufficient to require the jury to so find.

APPEAL by defendant from a judgment of the Superior Court entered following his conviction of murder in the first degree.

Before the *Honorable Anthony M. Brannon, Judge Presiding,* and a jury, at the 14 November 1982 Session of Superior Court, HOKE County, defendant was found guilty of murder in the first degree. The defendant was sentenced to life imprisonment. Pursuant to G.S. § 7A-27(a) (1981), defendant appeals his conviction and sentence as a matter of right.

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

John Wishart Campbell, for the defendant-appellant.

FRYE, Justice.

The sole issue presented for this Court's review is whether the trial court erred in denying defendant's motion to dismiss the charge of first degree murder at the close of all the evidence. The defendant seeks a new trial because of the trial court's alleged error in submitting first degree murder as a possible verdict to the jury. For the reasons stated in this opinion, we hold that the trial court did not err in denying defendant's motion to dismiss the

first degree murder charge. Therefore, we find no error in the proceedings leading to defendant's conviction of murder in the first degree and sentence of life imprisonment.

The State's evidence at trial tended to show that on the night of 8 May 1982 and during the early morning hours of 9 May 1982, defendant and some of his friends were at Bradie's Place, a local nightclub in Hoke County. Bradie's Place is a large club which consists of an old and a new section. The combined sections can accommodate at least four hundred people. The rules and regulations of Bradie's Place prohibit all patrons from bringing any weapons into the club. In order to enforce this rule, all men are physically patted down and then searched with a metal detector prior to being admitted to the club. Although women are not searched prior to entering the club, they are prohibited from bringing pocketbooks into the club.

Between 12:15 and 12:30 a.m. on 9 May 1982, the victim, Terry Locklear, walked between the defendant and another patron of the club who was standing approximately six to seven feet away from the defendant. Locklear was walking in the general direction of the front door of Bradie's Place. The defendant hollered, "Hey Terry," after Locklear had passed him. As Locklear turned around, the defendant removed his hand from behind his back, pointed a .32 caliber semi-automatic pistol at the victim and then shot him. As a result of the gunshot wound, Locklear died within minutes. The defendant had an odor of alcohol about his person when the crime was committed, but all indications were that he was not highly intoxicated. There was also evidence that approximately two years prior to the occurrence of this incident, Locklear had cut the defendant during the course of a fight between them.

The defendant's evidence at trial tended to show that he spent the major portion of 8 May 1982 with his good friend and brother-in-law, Lacy Lowery. The defendant started drinking at approximately 10:30 a.m. and drank continuously throughout the day and night. During this time period, defendant drank a case of twelve-ounce beers and one-half of a fifth of rum. He also smoked alone or shared with others between 10 and 15 marijuana cigarettes, and he took one pill of a mind altering drug.

Dr. Riley Jordan, M.D., testified concerning the effects of alcohol and drugs on the body. He stated that alcohol and drugs could cause an individual to have an alcoholic blackout. In Dr. Jordan's opinion, a five foot ten inch, one hundred and eighty pound man, who in a period of twelve hours drank as much alcohol and smoked as much marijuana as the defendant had, "could likely be subject to suffering an alcoholic blackout." Dr. Jordan had not personally examined the defendant.

Other evidence adduced by the defendant tended to show that he was highly intoxicated on the day and night in question. Witnesses testified that he exhibited uncharacteristic behavior at Bradie's Place by dancing with a man and grabbing a woman's derriere. Defendant testified that he did not remember going to Bradie's Place or what happened while he was there.

At the conclusion of all the evidence, the defendant's motion to dismiss the charge of first degree murder was denied by the trial court. The jury was given three possible verdicts: (1) Guilty of murder in the first degree, (2) Guilty of murder in the second degree; or, (3) Not guilty. The jury returned a verdict of guilty of murder in the first degree.

A.

[1] Defendant contends that he was so intoxicated when he fatally shot Terry Locklear that he was incapable of forming a deliberate and premeditated intent to kill, and therefore, the trial court erred in failing to reduce the charge from first degree murder to second degree murder and in denying his motion for dismissal of the first degree murder charge. As an alternative reason for not submitting the first degree murder charge to the jury, the defendant contends that he was unconscious as a result of suffering an alcoholic blackout when he shot the victim.

A motion for dismissal pursuant to G.S. § 15A-1227 tests the sufficiency of all the evidence to carry the case to the jury and is the same as a motion for judgment as in the case of nonsuit under G.S. § 15-173. *State v. Jenkins*, 300 N.C. 578, 590, 268 S.E. 2d 458, 466 (1980). Therefore, cases pertaining to the sufficiency of the evidence under G.S. § 15-173 are also applicable to motions made pursuant to G.S. § 15A-1227. *State v. Powell*, 299 N.C. 95, 98, 261 S.E. 2d 114, 117 (1980).

The question for the court in ruling upon defendant's motion for dismissal is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If substantial evidence of both of the above has been presented at trial, the motion is properly denied. *Powell*, 299 N.C. at 98, 261 S.E. 2d at 117; *See State v. Roseman*, 279 N.C. 573, 580, 184 S.E. 2d 289, 294 (1971). In considering a motion to dismiss, the evidence must be considered 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. Bright*, 301 N.C. 243, 257, 271 S.E. 2d 368, 377 (1980). Contradictions and discrepancies in the evidence are strictly for the jury to decide. *State v. Bolin*, 281 N.C. 415, 424, 189 S.E. 2d 235, 241 (1972).

The trial court in considering a motion to dismiss is concerned only with the sufficiency of the evidence to carry the case to the jury; it is not concerned with the weight of the evidence. *State v. McNeil*, 280 N.C. 159, 162, 185 S.E. 2d 156, 157 (1971). The test of whether the evidence is sufficient to withstand a motion to dismiss is whether a reasonable inference of defendant's guilt may be drawn from the evidence, and the test is the same whether the evidence is circumstantial or direct. *Bright*, 301 N.C. at 257, 271 S.E. 2d at 377. If the trial court determines that a reasonable inference of defendant's guilt can be drawn from the evidence, then the defendant's motion to dismiss should be denied and the case should be submitted to the jury. *State v. Smith*, 40 N.C. App. 72, 79, 252 S.E. 2d 535, 540 (1979); *See State v. Rowland*, 263 N.C. 353, 358, 139 S.E. 2d 661, 665 (1965).

In the instant case, in order to convict defendant of first degree murder, the State had to produce evidence sufficient to satisfy the jury beyond a reasonable doubt that defendant unlawfully killed Terry Locklear with malice and in the execution of an actual specific intent to kill, formed after premeditation and deliberation. *State v. Hamby*, 276 N.C. 674, 678, 174 S.E. 2d 385, 387 (1970), *death sentence vacated*, 408 U.S. 937, 33 L.Ed. 2d 754, 92 S.Ct. 2862, *conformed to*, 281 N.C. 743, 191 S.E. 2d 66 (1972). If at the time of the killing, the defendant was so intoxicated as to be utterly incapable of forming a deliberate and premeditated intent to kill, he could not be found guilty of first degree murder,

because an essential element of the crime would be missing. *See State v. Propst*, 274 N.C. 62, 71-72, 161 S.E. 2d 560, 567 (1968). However, "no inference of the absence of deliberation and premeditation arises from intoxication as a matter of law," *State v. Murphy*, 157 N.C. 614, 619, 72 S.E. 1075, 1077 (1911), because intoxication does not necessarily render a person incapable of engaging in the thought process of premeditation and deliberation.

In deciding whether the trial court erred in denying defendant's motion to dismiss the first degree murder charge, this Court must decide whether there is substantial evidence of each essential element of the offense charged, in this case, first degree murder.[1] *Powell*, 299 N.C. at 98, 261 S.E. 2d at 117 (1980). Stated more specifically, the question before this Court is whether the evidence, when considered in the light most favorable to the State, tends to show that defendant was so intoxicated when he fatally shot Locklear that he was utterly incapable of forming a deliberate and premeditated intent to kill. If any evidence reasonably tended to show that defendant formed the specific intent to kill Locklear and that this intention to kill was preceded by premeditation and deliberation, then the denial of defendant's motion was proper. *State v. Simmons*, 240 N.C. 780, 785, 83 S.E. 2d 904, 908 (1954). The general rule is that the jury determines whether the mental condition of the accused was so far affected by intoxication that he was unable to form a guilty intent to kill, unless the evidence is not sufficient to warrant the submission of the question to the jury. *Hamby*, 276 N.C. at 679, 174 S.E. 2d at 388 (1970), *death sentence vacated*, 408 U.S. 937, 33 L.Ed. 2d 754, 92 S.Ct. 2862, *conformed to*, 281 N.C. 743, 191 S.E. 2d 66 (1972).

Applying the foregoing principles to this case, we find that substantial evidence of each essential element of murder in the first degree was presented at trial, and that the evidence did not show that defendant was utterly incapable of forming a deliberate and premeditated intent to kill. The State's evidence showed that the defendant, without any apparent provocation, fatally shot Locklear with a .32 caliber pistol, a deadly weapon. Malice and

1. Since there is no question in this case about the defendant being the perpetrator of the crime, that question which is also raised by the motion to dismiss will not be addressed.

unlawfulness may be presumed from the intentional killing of another with a deadly weapon. *State v. Jackson*, 284 N.C. 383, 388, 200 S.E. 2d 596, 599 (1973).

Premeditation and deliberation, essential elements of murder in the first degree, have been defined as follows by this Court. Premeditation means thought beforehand for some length of time, however short. *State v. Buchanan*, 287 N.C. 408, 417, 215 S.E. 2d 80, 85 (1975). Deliberation means an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose, and not under the influence of a violent passion suddenly aroused by some lawful or just cause or legal provocation. *State v. Reams*, 277 N.C. 391, 401-02, 178 S.E. 2d 65, 71 (1970), *cert. denied*, 404 U.S. 840, 30 L.Ed. 2d 74, 92 S.Ct. 133 (1971), *quoting*, *State v. Benson*, 183 N.C. 795, 798, 111 S.E. 869, 871 (1922). Since a specific intent to kill is a necessary constituent of the elements of premeditation and deliberation, proof of premeditation and deliberation is also proof of intent to kill. *State v. Jones*, 303 N.C. 500, 505, 279 S.E. 2d 835, 838-39 (1981).

In the instant case, substantial evidence was presented which tended to show that defendant killed Locklear after forming a deliberate and premeditated intent to kill. The defendant picked up his loaded pistol from his mother's house approximately two hours before the shooting occurred. Despite the security system employed at Bradie's Place, which included a pat down and the searching of all males with a metal detector, defendant was able to smuggle his gun into the club. No evidence was presented at trial that Locklear said anything to the defendant or provoked him in any manner prior to the shooting incident. The defendant yelled, "Hey Terry," as Locklear was walking toward the front door of the club. As Locklear turned around, the defendant pulled a gun from behind his back, aimed it at Locklear and fatally shot him. As testified to by the defendant at trial, his gun would not fire unless the hammer was pulled back prior to the actual pulling of the trigger. After being advised of his rights by Detective Hart of the Hoke County Sheriff's Department, defendant asked if the boy was dead, which tends to show that he was aware of his prior actions.

The defendant's evidence, taken in the light most favorable to the State, tended to show that defendant was capable of form-

ing the specific intent to kill. During the afternoon hours he played basketball with some of his friends and was able to "handle the basketball," "throw it at the hoop," and "catch the rebounds." While the defendant and some of his friends were riding around town drinking, they took one of their companions home for being drunk and rowdy and for misbehaving. Before going out later in the evening, the defendant was concerned enough about his personal appearance to either go to his house or to his sister's house to shower and change clothes. Approximately two hours before the shooting, defendant stopped by his mother's house to pick up his .32 caliber pistol. After arriving at Bradie's Place, the defendant was able to maneuver about the club, including the old and new sections, without requiring the assistance of anyone. Viewing this evidence in the light most favorable to the State, it constitutes "substantial evidence" (i.e., a reasonable inference) that defendant was capable of forming a deliberate and premeditated intent to kill.

Therefore, although other portions of defendant's evidence tended to show that he was intoxicated and doing strange things at the club (i.e., he grabbed a woman's derriere and he was seen dancing with a man), this evidence did not warrant a finding, as a matter of law, that defendant was incapable of forming the specific intent to kill.

After reviewing the foregoing evidence, we find that substantial evidence was presented at trial which tended to show that defendant unlawfully killed Terry Locklear with malice and in the execution of an actual specific intent to kill, formed after premeditation and deliberation. Additionally, the defendant's evidence of his apparent state of intoxication did not, as a matter of law, prove that he was incapable of forming a deliberate and premeditated intent to kill. The mere fact that defendant had been drinking, without evidence that he was intoxicated to a degree precluding premeditation and deliberation, does not present a defense to a charge of first degree murder. *State v. Cureton*, 218 N.C. 491, 494, 11 S.E. 2d 469, 470-71 (1940). Therefore, the trial court did not err in denying defendant's motion to dismiss the charge of first degree murder.

B.

[2] Defendant's alternate claim that the charge of first degree murder should have been dismissed because of his being uncon-

scious as a result of an alcoholic blackout is without merit. Defendant testified that he did not remember going to Bradie's Place or what happened while he was there. He also offered the testimony of Dr. Riley Jordan who stated that the ingestation of alcohol and drugs could cause someone to suffer an alcoholic blackout, which causes them to lose recall for a certain period of time. Even though recall is lost, the individual suffering from an alcoholic blackout apparently knows what he is doing while he is engaging in the forgotten act, according to Dr. Jordan's testimony. He also stated that an alcoholic blackout would not likely occur from one day of drinking. Dr. Jordan's comments were based on his general knowledge of alcoholic blackouts. He was not able to specifically relate any of his comments to the defendant because he had not physically examined the defendant, and he knew nothing about the defendant's physical or psychological condition on the day or night in question.

Generally, a person who is unconscious at the time he commits an act which would otherwise be criminal cannot be held responsible for the act. *State v. Mercer*, 275 N.C. 108, 116, 165 S.E. 2d 328, 334 (1969), *rev'd on other grounds*, 287 N.C. 266, 215 S.E. 2d 348 (1975). This is so because one who is completely unconscious when he commits an act, otherwise punishable as a crime, cannot know the nature and quality thereof or whether it is right or wrong. *Id.* at 117, 165 S.E. 2d at 335. Nevertheless, although unconsciousness is always of legal significance, it is not always a complete defense to a crime when it is induced by voluntary intoxication. *Id.* at 119, 165 S.E. 2d at 336; *State v. Williams*, 296 N.C. 693, 700, 252 S.E. 2d 739, 744 (1979).

In the instant case, there was abundant evidence adduced at trial that defendant voluntarily ingested drugs and alcohol prior to fatally shooting Locklear. Assuming, *arguendo*, that the defendant's evidence was sufficient to permit a jury finding that defendant was unconscious when he shot Locklear, it does not point so unerringly to that conclusion as to require such a finding. At most, this evidence contradicts the State's evidence which tended to show that the defendant was conscious when he fatally shot Locklear. As contradictions and discrepancies in the evidence are to be resolved by the jury, the question of defendant's guilt or innocence of murder in the first degree was properly submitted to the jury. *State v. Bolin*, 281 N.C. 415, 424, 189 S.E. 2d 235, 241

(1972). The jury resolved those contradictions and discrepancies against the defendant when it found him guilty of murder in the first degree.

Based upon our careful review of all the evidence presented at trial, we hold that the trial court did not err in denying defendant's motion to dismiss the charge of first degree murder. In the proceedings leading to defendant's conviction of murder in the first degree and sentence of life imprisonment, we find

No error.

STATE OF NORTH CAROLINA v. PHILLIP THOMAS ROBBINS, JR.

No. 60A83

(Filed 6 December 1983)

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

The State's evidence was sufficient to support a jury finding that defendant intentionally assaulted the victim with a deadly weapon and thereby proximately caused her death so as to support conviction of defendant of second degree murder where it tended to show that defendant threatened one of the victim's daughters and also stole a gun one week prior to the incident in question; defendant inexplicably arrived at the victim's workplace and drove away with her; the two were seen parked on a dirt road later that night fighting; the victim screamed for help just before falling out of the car; the victim had been shot three times at close range, with one defensive-type gunshot wound in her hand; the victim died as a result of multiple gunshot wounds inflicted by the same gun stolen by defendant; and when asked who had done this to her, the victim mumbled a name which sounded much like defendant's.

2. Homicide § 14.4— reducing second degree murder to voluntary manslaughter —burden on defendant

In order for an accused to reduce the crime of second degree murder to voluntary manslaughter, he must rely on evidence presented by the State or assume a burden to go forward with or produce some evidence of all elements of heat of passion on sudden provocation. In order to do this, defendant in the instant case must have shown (1) that he shot the victim in the heat of passion, (2) that this passion was provoked by the acts of the victim which the law regards as adequate provocation, and (3) that the shooting took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.

3. Homicide § 27.1— failure to instruct on voluntary manslaughter—no error

The trial court in a murder prosecution did not err in failing to instruct on the lesser included offense of voluntary manslaughter where the State's evidence tended to show that defendant intentionally shot the victim with a pistol, that two passersby observed smoke coming from the automobile occupied by defendant and the victim, that the occupants were subsequently observed fighting, and that guns of the type used could produce clouds of smoke, but there was no evidence that the fight was provoked by the victim, which person was the aggressor in the fight, or that the fighting occurred prior to or during the shooting.

4. Homicide § 27.2— insufficient evidence of involuntary manslaughter

The State's evidence in a murder case did not permit the jury to infer that there was no intentional discharge of defendant's weapon so as to require the trial court to submit involuntary manslaughter as a possible verdict where it tended to show that one week prior to the shooting, defendant had quarreled with members of the victim's family, had threatened "to get" one of them and had stolen a gun; during a scuffle between defendant and the victim in an automobile, the victim screamed for help, and afterwards as she lay on the road, she indicated that someone was responsible for the wounds and mumbled a name which sounded much like defendant's; and the victim was shot three times.

APPEAL by defendant from the judgment of *Lee, Judge*, entered at the 8 November 1982 Session of ORANGE County Superior Court.

Defendant was charged in an indictment, proper in form, with the first-degree murder of Annie Bernice Fuller Carroway. Defendant entered a plea of not guilty to the charge.

At trial, the State's evidence tended to show the following:

At about 3:00 p.m. on 21 June 1982, Annie Bernice Fuller Carroway was seen getting into her yellow 1974 Buick preparing to leave Cone Mills where she worked first shift. A co-worker saw defendant, who went by the name of Jackie, seated in Mrs. Carroway's car on the passenger side. Although defendant knew Mrs. Carroway, had dated her daughter Velvalla for about a year, and had at times stayed in Mrs. Carroway's home in Hillsborough, he had never taken her to work or picked her up from work. Shortly after 5:00 that afternoon, the car with its two passengers was seen at a convenience store. Defendant pumped gas as Mrs. Carroway stood by and watched. Nothing was unusual about the appearance of the two.

Between 8:00 and 8:30 p.m. that evening, Mrs. Brenda Emory saw a yellow 1974 Buick, occupied by two unidentified black persons, in front of her house on Kiger Road in Orange County, northeast of Hillsborough. Shortly thereafter, as she drove to pick up her children, Mrs. Emory saw the same car again at an intersection about one-half mile from her house. The car, later identified as Mrs. Carroway's car, was still occupied by two black persons. Defendant and the victim were both black.

At approximately 9:00 p.m., Bob Lloyd and Cannie Bacon saw the same car parked on Kiger Road. Smoke was coming out of the car. The two occupants of the car were fighting. As Mr. Lloyd drove past Mrs. Carroway's car, one of the occupants blew the horn. Ms. Bacon testified that Mrs. Carroway screamed for help and fell out of the car. She ran toward Lloyd's vehicle and then fell face down in the road. At that point, the driver of Mrs. Carroway's car, later identified by Ms. Bacon as defendant, drove away from the scene. Mr. Lloyd left to seek assistance. Mrs. Carroway was taken to North Carolina Memorial Hospital where she died. Neither Mr. Lloyd nor Ms. Bacon testified to having heard gunshots at any point.

The medical examiner who performed the autopsy testified that Mrs. Carroway was shot three times at close range—once in the right hand and twice in the abdomen. It was the medical examiner's expert opinion that the cause of death was multiple gunshot wounds.

Several of the persons who arrived at the scene of the incident on Kiger Road asked Mrs. Carroway who had done this to her. Those who heard her testified that she mumbled and did not speak clearly, but her responses were variously heard as "Jack Adams," "Jack," "Obbins," "Abrams," or "Ubbins."

Earnest Thompson testified that one week prior to the shooting incident, defendant stole from him a .22 caliber Harrison and Richardson gun. The day following the shooting of Mrs. Carroway, police seized that same gun from a taxicab driver in Durham to whom it had been sold by defendant and another man. A special agent of the North Carolina State Bureau of Investigation testified that one of the bullets removed from Mrs. Carroway's body had been fired from the .22 caliber revolver which the Durham police recovered from the taxicab driver.

Steven Thomas Carpenter, an expert in the field of firearms and tool mark identification, testified that the discharge of a weapon such as the one used would produce gun residue, and would produce, if fired in a car, smoke for approximately 15 or 20 seconds. He added that, if air were circulating in the car, the gunshot residue would be disbursed "at a much faster rate." He also testified that the discharge of the gun would create a "loud sound" and that hearing protectors were needed when testing the guns.

There was also evidence that on 13 June 1974, one week prior to the incident, defendant had quarreled with the deceased's daughters Velvalla and Walinda and had threatened to "get" one of them.

Mrs. Carroway was five feet seven inches tall and weighed approximately 195 pounds.

Defendant presented no evidence. The jury returned a verdict of guilty of second-degree murder. Following a sentencing hearing, the trial judge found certain aggravating and mitigating factors and that the aggravating factors outweighed the mitigating factors. He thereupon imposed the maximum sentence of life imprisonment. Defendant appealed to this Court as a matter of right.

Rufus L. Edmisten, Attorney General, by Michael R. Morgan, Assistant Attorney General, for the State.

Alonzo Brown Coleman, Jr., and Donald R. Dickerson for defendant-appellant.

BRANCH, Chief Justice.

[1] Defendant first assigns as error the trial judge's denial of his motion to dismiss on grounds of insufficient evidence. Defendant contends that the State failed to show the existence of malice sufficient for the jury to find him guilty of second-degree murder.

The test of the sufficiency of the evidence in a criminal case is whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense of that charged. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971); *State v. Mason*, 279 N.C. 435, 183 S.E. 2d 661 (1971).

> 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; . . . .

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

Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Downey*, 253 N.C. 348, 117 S.E. 2d 39 (1960). Malice may be express or implied and it need not amount to hatred or ill will, but may be found if there is an intentional taking of the life of another without just cause, excuse or justification. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). Furthermore, we have often stated the well-settled rule in this jurisdiction that,

> 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.

State v. Jones, 287 N.C. 84, 100, 214 S.E. 2d 24, 35 (1975).

In the instant case, the evidence tended to show that defendant, known as "Jackie," threatened one of the victim's daughters and also stole a gun one week prior to the incident in question; that he inexplicably arrived at the victim's workplace and drove away with her; that the two were seen parked on a dirt road later that night fighting; that the victim screamed for help just before falling out of the car; that she had been shot three times at close range, with one defensive-type gunshot wound in her hand; that she died as a result of multiple gunshot wounds inflicted by the same gun stolen by defendant; and that, when asked who had done this to her, she mumbled replies which sounded like "Ubbins," "Obbins," "Jack Adams," "Abrams," and "Jack."

We hold that the evidence in this case was sufficient to support a jury finding that defendant intentionally assaulted Mrs. Carroway with a deadly weapon and thereby proximately caused her death. This assignment is overruled.

Defendant next contends that the trial judge erred in failing to instruct on the lesser included offense of voluntary manslaughter. Defendant in essence argues that the circumstances surrounding the shooting are in doubt, and since no one knows what actually occurred, the ambiguity in the evidence would permit the jury to infer that the shooting was a result of heat of passion upon adequate provocation. We disagree.

Defendant relies for support on the case of *State v. Manning*, 251 N.C. 1, 110 S.E. 2d 474 (1959). There the Court first held that certain of the solicitor's statements constituted prejudicial error. The Court then, without any prior statement as to the facts in the case, considered the defendant's contention that the judge erred in not instructing on voluntary manslaughter. The Court stated in summary fashion and without citation to authority:

> In respect to this contention this Court is of the opinion that the fact that defendant and his wife were together in the woods 10 minutes (R. p. 32), as the State's evidence tends to show, before any shots were heard is a circumstance that requires a charge on manslaughter.
>
> The evidence discloses that there were no eyewitnesses to the shooting, and no one of the State's witnesses knows what actually took place on this occasion. It rests in speculation.

251 N.C. at 5-6, 110 S.E. 2d at 477.

Our reading of the entire transcript in that case, however, reveals that there is plenary evidence from which a jury might find premeditation, deliberation, and an intentional assault with a deadly weapon from which to presume malice, and none from which it might find heat of passion upon adequate provocation. We, therefore, conclude that the *Manning* Court incorrectly found error in the failure to instruct on voluntary manslaughter. That portion of *Manning* that finds error in the failure of the trial judge to instruct on voluntary manslaughter is accordingly overruled.

It is the duty of the trial court to instruct the jury on the law applicable to the substantive features of the case arising on the evidence, and when there is evidence to support the lesser in-

cluded offense of voluntary manslaughter, defendant is entitled to have that offense submitted to the jury under proper instructions. *State v. Montague*, 298 N.C. 752, 259 S.E. 2d 899 (1979). Voluntary manslaughter is the unlawful killing of a human being without malice, premeditation or deliberation. *State v. Rummage*, 280 N.C. 51, 185 S.E. 2d 221 (1971). One who kills a human being under the influence of sudden passion, produced by adequate provocation, sufficient to negate malice, is guilty of manslaughter. *State v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135 (1971).

In *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *reversed on other grounds*, 432 U.S. 233 (1977), we stated that once the State proves beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the deceased with a deadly weapon which proximately resulted in death, the presumptions of malice and unlawfulness are raised. The burden is then upon the defendant "to go forward with or produce some evidence of all elements of self-defense or heat of passion on sudden provocation, or rely on such evidence as may be present in the State's case." *Id.* at 650, 220 S.E. 2d at 588. We further observed:

> If, after the mandatory presumptions are raised, there is no evidence of a heat of passion killing on sudden provocation and no evidence that the killing was in self-defense, *Mullaney* permits and our law requires the jury to be instructed that defendant must be convicted of murder in the second degree. If, on the other hand, there is evidence in the case of *all* the elements of heat of passion on sudden provocation the mandatory presumption of malice disappears but the logical inferences from the facts proved remain in the case to be weighed against this evidence. If upon considering all the evidence, including the inferences and the evidence of heat of passion, the jury is left with a reasonable doubt as to the existence of malice it must find the defendant not guilty of murder in the second degree and should then consider whether he is guilty of manslaughter.

Id. at 651, 220 S.E. 2d at 589. (Emphasis added.)

[2] In order for an accused to reduce the crime of second-degree murder to voluntary manslaughter he must rely on evidence presented by the State or assume a burden to go forward with or produce some evidence of all elements of heat of passion on sud-

den provocation. In order to do this, defendant in instant case must have shown three things: first, that he shot the victim Carroway in the heat of a passion; second, that this passion was provoked by acts of victim Carroway which the law regards as adequate provocation; and, third, that the shooting took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled. See 40 Am. Jur. 2d, "Homicide," § 56 (1968).

[3] This record is barren of any evidence tending to show that defendant's passion was provoked by the acts of the victim Carroway which the law regards as adequate provocation. Defendant presented no evidence. The State's evidence showed that two passersby observed smoke coming from the automobile occupied by defendant and the victim Carroway. While the occupants were subsequently observed fighting, there is no evidence that the fight was provoked by the victim Carroway; neither is there evidence of which of the two might have been the aggressor in the fight. Likewise, there is no evidence that the fighting occurred prior to or during the shooting. In fact, the two observers testified that they saw the scuffle *after* they noticed the smoke coming from the car. In light of the firearms expert's testimony that guns of the type used could produce clouds of smoke and did cause loud noise upon discharge, there is an inference, at least, that rather than being provoked by the affray, the shooting actually occurred *prior to* the scuffle. In any event, the State's evidence does not show, and defendant has not gone forward with any evidence to show, heat of passion on sudden provocation.

We therefore hold that the trial judge did not err in failing to instruct on the lesser included offense of voluntary manslaughter.

[4] Defendant contends, finally, that the trial court erred in failing to instruct on the offense of involuntary manslaughter.

The law applicable to defendant's contention is stated in *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976), as follows:

> Involuntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission. *State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407.

Id. at 321, 230 S.E. 2d at 153. In *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963), this Court stated:

> It seems that, with few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, *in the absence of intent to discharge the weapon*, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter. (Citations omitted.) (Emphasis added.)

Id. at 459, 128 S.E. 2d at 893.

Defendant contends that the mere fact that the evidence shows a scuffle between the victim and him is sufficient to permit the jury to infer that there was no intentional discharge of the weapon. We disagree. Defendant did not testify or put on any evidence in the instant case. The State's evidence tends to show that one week prior to the shooting, defendant had quarreled with members of deceased's family, had threatened "to get" one of them and had stolen a gun. The evidence further tended to show that, during the scuffle as witnessed on Kiger Road, Mrs. Carroway screamed for help, and that afterwards as she lay on the road, she indicated that someone was responsible for the wounds and mumbled a name which sounded much like defendant's. The evidence also showed that Mrs. Carroway was shot three times. The State's evidence, if believed, tends to show an intentional shooting. There is no evidence from which the jury might infer that there was an unintentional discharge of the weapon. *See State v. Gerald*, 304 N.C. 511, 284 S.E. 2d 312 (1981); *State v. Oxendine*, 300 N.C. 720, 268 S.E. 2d 212 (1980). This assignment is overruled.

Defendant received a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. LOUIE CARLOS YSAGUIRE ALIAS LUIS GARCIA

No. 100A83

(Filed 6 December 1983)

1. **Jury § 2.1— denial of motion for special venire—jury for defendant's trial and for accomplice's trial selected from same venire—no abuse in discretion**

There was no abuse of discretion in the trial court's denial of defendant's motion for a special venire or for a continuance until a special venire could be obtained where, although both defendant's trial and his accomplice's trial were severed, the jury for each trial was selected from the same venire. The fact that defendant's jurors were exposed to voir dire questions by his accomplice's attorneys and to his accomplice's contentions regarding his accomplice's potential defense of insanity, and the fact that one of the jurors stated that he "assumed" defendant's accomplice had been convicted when he observed defendant's accomplice being escorted from the courtroom in handcuffs, were not sufficient to show an abuse of discretion. G.S. 15A-1240.

2. **Jury § 6.1— denial of motion for individual voir dire—no abuse of discretion**

Defendant's contention that the probing of particular jurors on voir dire regarding sensitive matters infects and taints the remainder of the venire, without more, was insufficient to support defendant's contention that the trial court abused its discretion in refusing to allow individual voir dire of the prospective jurors and sequestration of the remainder of the venire during the selection process.

3. **Criminal Law § 138— ordering prison terms to run consecutively—no violation of Fair Sentencing Act**

The imposition of consecutive sentences for the crimes of rape, first degree sex offense, first degree burglary and armed robbery did not violate either the Fair Sentencing Act or any constitutional proportionality requirement.

Justice MITCHELL concurs in result.

APPEAL by defendant from a judgment of *Judge Wiley F. Bowen*, entered at the 29 November 1982 Criminal Session of JOHNSTON Superior Court, imposing two life sentences. N.C. Gen. Stat. § 7A-30 (1981). Defendant's motion to bypass the Court of Appeals in two companion cases in which lesser sentences were given was allowed. *Id.* § 7A-31.

Rufus L. Edmisten, Attorney General, by David Roy Blackwell, Assistant Attorney General, and Isaac T. Avery, III, Special Deputy Attorney General, for the State.

Thomas S. Berkau for defendant appellant.

EXUM, Justice.

Through this appeal, defendant seeks review of his convictions and sentences for two sexual assaults, a burglary and a robbery. He contends there were errors in the process by which his jury was selected and the trial judge's imposition of consecutive sentences. We find no error in either the guilt or sentencing phases.

I.

On 2 June 1982, the victim of these crimes, a 63-year-old retired school teacher, registered and checked into a room at Johnson's Motor Lodge in Smithfield, North Carolina, stopping overnight while en route to New York from Orlando, Florida. Late that evening, she responded to a loud knocking at her motel room door. Although she barely opened the door, two men burst into the room. During the next hour, these two men repeatedly raped her by force and against her will. Both men forced her to perform fellatio on them and committed other sexual assaults. One man brandished a knife and threatened to kill her while these assaults occurred. After the sexual assaults, the two men demanded money and ransacked the victim's purse. They took cash, credit cards, and traveler's checks. Before leaving the room, they bound and gagged the victim, left her facedown on the bed, and urinated on her.

Defendant was charged in four proper indictments with first degree rape, first degree sexual offense, first degree burglary, and armed robbery. The indictments concerning the rape and sexual offenses charged that defendant used a deadly or dangerous weapon and was aided and abetted by Joe Fornocker Smith. Smith was charged in separate indictments. Upon considering the state's motion to join the two cases for trial and defendant's amended motion to sever, the court severed the cases against Smith from those against defendant. Pretrial motions for a change of venue and for a special venire were denied.

At the conclusion of the state's evidence in defendant's trial, defendant's motion to dismiss was denied. Defendant offered no evidence. The jury returned verdicts of guilty to each of the four offenses. Defendant was sentenced to two terms of life imprisonment, respectively, for the first degree rape and first degree sex-

ual offense convictions and two fourteen-year terms, respectively, for the burglary and armed robbery convictions. Each sentence constituted either a mandatory or presumptive sentence for the respective offense and was ordered to run consecutively.

II.

[1] Defendant initially challenges the trial court's denial of his motion for a special venire or for a continuance until a special venire could be obtained.

Although both the instant trial and the Smith trial were severed, the jury for each trial was selected from the same venire. Defendant's trial and the Smith trial were called on 30 November 1982 during a criminal session of Johnston Superior Court. Before jury selection, the trial court denied defendant's motions to continue and for a special venire. Jury selection for defendant's trial followed jury selection for the Smith trial. Those selected as jurors and alternates for Smith's trial were then excluded from the venire and defendant's jury was selected from the remaining venire persons.

When the Smith jury was impaneled, the trial court released the remaining venire persons. Selected petit jurors were instructed not to discuss the cases. Defendant's jury was sequestered during Smith's trial.[1] When the Smith jury retired to deliberate, defendant's trial commenced. During the return of the Smith verdict and the attendant sentencing, the defendant's jury was secluded in the grand jury room.

Defendant contends that because the jurors selected for his trial were in the courtroom during jury selection for the Smith trial, his jurors were exposed to voir dire questions and to Smith's contentions regarding Smith's potential defense of insanity. This, defendant urges, so tainted the jurors who determined his guilt that they could not give him a fair trial.

Decisions on motions for a special venire or to continue until a special venire is obtained remain in the sound discretion of the

1. Defendant's trial counsel in arguing his motion for a new venire conceded before the trial court: "I realize the jury panel has not been in here during the course of the [Smith] trial, but the DA and . . . [Smith's] attorney . . . have made opening brief remarks about their case."

trial judge. *State v. Weimer*, 300 N.C. 642, 647, 268 S.E. 2d 216, 219 (1980). Defendant bears the burden of demonstrating an abuse of this discretion. *State v. Silhan*, 297 N.C. 660, 667, 256 S.E. 2d 702, 706 (1979); *State v. Morgan*, 9 N.C. App. 624, 177 S.E. 2d 457 (1970), *appeal dismissed*, 277 N.C. 458, 178 S.E. 2d 225 (1971). To fulfill this burden, defendant need show, at least, some actual prejudice which results from the trial court's denial of the motions and which prevents defendant from receiving a fair and impartial trial. *See State v. Boykin*, 291 N.C. 264, 229 S.E. 2d 914 (1976).

Defendant points to nothing in the record which supports his contentions. The record does not contain the jury selection process nor does it reveal any challenges to the trial court's decisions to seat any particular juror. The trial court's decision to select different petit juries successively from the same venire to try, respectively, Smith and defendant and to sequester defendant's jury during the Smith trial was, without more, well within the proper exercise of its discretion.

Defendant does submit the affidavit of one of his jurors, Charles Stowers. According to the affidavit, Stowers and the other jurors were in the grand jury room waiting to be called into court. Some of the jurors observed Smith being escorted from the courtroom in handcuffs. Smith's demeanor was abusive. Stowers "assumed" Smith had been convicted. He knew Smith and defendant were allegedly accomplices.

The testimony of a juror may be used to impeach his verdict only in certain limited circumstances. N.C. Gen. Stat. § 15A-1240 (1978). This statute states, in pertinent part:

> (a) Upon an inquiry into the validity of a verdict, no evidence may be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.
>
> . . .
>
> (c) After the jury has dispersed, the testimony of a juror may be received to impeach the verdict of the jury on which he served, subject to the limitations in subsection (a), only when it concerns:

(1) Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him; or

(2) Bribery, intimidation, or attempted bribery or intimidation of a juror.

Suffice to say that Stowers' affidavit does not reveal anything permitted by subsection (c)(1) or (2). Even if Stowers and other jurors "assumed," or knew, defendant's accomplice had been convicted, neither he nor they had been exposed to any of the evidence by which such conviction was obtained. Their mere knowledge of Smith's conviction is not enough, standing alone, to compromise their ability to listen anew to and fairly judge the evidence in defendant's case. Were it otherwise, accomplices could never be jointly tried and we could never rely, as we often do, on a jury's ability to consider independently the guilt of each defendant in a joint trial.

III.

Defendant next challenges the trial court's refusal to allow individual voir dire of the prospective jurors and sequestration of the remainder of the venire during the selection process. This is a ruling within the trial court's discretion and absent a showing of abuse of discretion it will not be held for error. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979); *State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1977). The record contains none of the voir dire proceedings. It reveals nothing about any juror's knowledge of the evidence in the instant case or in the Smith case. In essence, defendant suggests that the probing of potential jurors on voir dire regarding sensitive matters infects and taints the remainder of the venire. That speculation, without more, will not support a challenge to the trial court's discretion. *Barfield*, 298 N.C. at 323, 259 S.E. 2d at 526. *See State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

IV.

[2] In defendant's final assignment of error,[2] he challenges the sentencing judge's decision to order each of the four prison terms

2. Defendant also assigned error to the trial court's denial of his motion to dismiss at the close of all the evidence based upon insufficiency of the evidence and

to run consecutively. Defendant contends this decision violates the North Carolina Fair Sentencing Act, N.C. Gen. Stat., ch. 15A, Art. 81A, and the United States Constitution. We disagree.

The Fair Sentencing Act represents the General Assembly's reaction to what it perceived as unjustified disparity in criminal sentencing. *See* Comment, *Criminal Procedure—The North Carolina Fair Sentencing Act*, 60 N.C. L. Rev. 631 (1982). Through the use of presumptive terms of imprisonment for various classifications of criminal offenses, the legislature attempted to promote more uniformity in sentencing. In the absence of explicit aggravating or mitigating circumstances, persons who commit similar criminal acts are to be similarly sentenced. Although the General Assembly did not address the issue of consecutive sentences in the Fair Sentencing Act, it left substantially intact another statute which vests the sentencing judge with discretion to impose either consecutive or concurrent sentences. N.C. Gen. Stat. § 15A-1354(a) (1978). Since that statute was in effect when the legislature enacted the Fair Sentencing Act, the legislature by leaving it substantially intact must have intended that the sentencing judge retain the discretion to impose sentences consecutively or concurrently. One commentator, in an exhaustive study of the operation of the Fair Sentencing Act, notes that the sentencing judge under section 1354(a) "may also decide whether terms are to run consecutively or concurrently for multiple offenses." 60 N.C. L. Rev. at 636. Leaving sentencing judges with unbridled discretion on the matter of whether to run multiple sentences concurrently or consecutively conflicts with the general theory of uniformity sought by fair sentencing. Nevertheless, our legislature, in espousing both the spirit and the letter of fair sentencing in North Carolina, elected to incorporate the freedom for judges to impose consecutive sentences. Since that is the prerogative of the legislature, we find nothing inherent in consecutive sentencing which violates our Fair Sentencing Act.

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his motion *in limine* to require the victim to avoid referring to defendant as a Mexican while she testified. In his brief, defendant concedes that sufficient evidence existed to permit the case to go to the jury and that the victim never referred to defendant as a Mexican during her testimony. Accordingly, he concedes these assignments of error are without merit. In an abundance of caution, we have reviewed the record with an eye toward these two contentions. We are satisfied both that sufficient evidence existed and that no reference to defendant being Mexican was made by the victim during her testimony.

[3] Defendant seeks a proportionality analysis of his sentences. Although he cites no authority in support of his request, we recognize that under the Eighth Amendment "a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Solem v. Helm*, --- U.S. ---, ---, 103 S.Ct. 3001, 3009 (1983). We need determine, therefore, whether the imposition of consecutive sentences against defendant resulted in a punishment so grossly disproportionate to the crimes committed that it violates the Eighth Amendment.

In undertaking this analysis, we are guided by the axiom that ordinarily on sentencing decisions appellate courts do not substitute their judgment for that of the trial court.

> Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

Id. n. 16.[3] Only in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment.

The imposition of consecutive life sentences, standing alone, does not constitute cruel or unusual punishment. *See State v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216 (1966). A defendant may be convicted of and sentenced for each specific criminal act which he commits. *See State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980).

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3. We recognize that in capital cases this Court has been authorized by statute, in effect, to oversee a jury's determination that the death penalty is an appropriate sentence. N.C. Gen. Stat. § 15A-2000(d). We have been given no such authorization in non-capital cases. In non-capital cases we do not, and are not required to, conduct factual comparisons of different cases to determine whether a given sentence is constitutional.

Here, we place great weight on the gravity of the offenses. *See Solem*, 103 S.Ct. at 3010. The jury convicted defendant of four specific and distinct criminal acts. These acts constitute some of the most serious crimes recognized by our statutes. In each offense he was aided and abetted by an accomplice and a deadly weapon was used. Defendant received either the mandatory (in the rape and sex offense cases) or the presumptive sentence (in the burglary and armed robbery cases) for each offense. There was also no evidence indicating that these offenses were committed negligently or under duress or provocation. *See id.* at 3011.

Even a cursory review of multiple offense cases in which a rape was committed reveals that consecutive sentences are frequently imposed.[4] *See generally State v. Waters*, 308 N.C. 348, 302 S.E. 2d 188 (1983); *State v. Chatman*, 308 N.C. 170, 301 S.E. 2d 71 (1983); *State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983); *State v. Pratt*, 306 N.C. 673, 295 S.E. 2d 462 (1982); *State v. See*, 301 N.C. 388, 271 S.E. 2d 282 (1980) (each involving consecutive life sentences for first degree rape and another offense). Defendant's consecutive sentences do not represent an unusual punishment in North Carolina.

While the consecutive running of these sentences means defendant will serve a considerable period of incarceration before becoming eligible for parole, we find nothing so grossly disproportionate in this sentencing judgment for these criminal offenses to justify our upsetting via the Eighth Amendment the traditional sentencing prerogatives of the legislature and the trial court. *See Rummel v. Estelle*, 445 U.S. 263, 274 (1980).

Accordingly, we hold that the imposition of consecutive sentences for the crimes of rape, first degree sex offense, first degree burglary and armed robbery violates neither the Fair Sentencing Act nor any constitutional proportionality requirement.

Defendant received a fair trial free from prejudicial error and sentences which conform both to our statutes and any appli-

4. Defendant offers no authority regarding the imposition of consecutive sentences on him. He simply refers to one instance where another defendant in an unrelated case received a life sentence for first degree murder. We find defendant's attempted comparison unpersuasive.

cable constitutional provisions. Accordingly, in the proceedings below we find

No error.

Justice MITCHELL concurs in result.

IN THE MATTER OF: HUYCK CORPORATION, PLAINTIFF v. C. C. MANGUM, INC., DEFENDANT AND THIRD PARTY PLAINTIFF v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC., THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND THE STATE OF NORTH CAROLINA, THIRD PARTY DEFENDANTS

No. 524A82

(Filed 6 December 1983)

1. **State § 4.3— action for funds due under highway construction contract—failure to exhaust administrative remedies**

The superior court had no jurisdiction over a highway contractor's third-party action against the State and the Department of Transportation for wrongful withholding of funds under a highway construction contract where the contractor had not exhausted its administrative remedies before the State Highway Administrator as required by G.S. 136-29, since the statute requires that certain administrative remedies be pursued as conditions precedent to a civil suit.

2. **State § 4.3— action for monies due under highway construction contract—validity of statute**

The statute concerning claims against the State for monies allegedly due pursuant to highway construction contracts does not offend the constitutional guarantee to trial by jury.

3. **State § 4.3— claim against State for indemnification—jurisdiction of superior court**

The superior court had jurisdiction of a highway contractor's third-party claim against the State and the Department of Transportation for indemnification in a negligence action against the contractor where the highway construction contract was alleged to be the basis for the duty of the State and the Department of Transportation to remove certain gas pipelines ruptured by the contractor but the claim for indemnification arose out of the operation of tort law and was not based on the contract.

Justices MARTIN and FRYE did not participate in the consideration or decision of this case.

In re Huyck Corp. v. Mangum, Inc.

APPEAL of right from a decision by a divided panel of the Court of Appeals, 58 N.C. App. 532, 293 S.E. 2d 846 (1982), affirming the decision of *Judge Brannon*, presiding in the Superior Court for WAKE County. *See* N.C. Gen. Stat. § 7A-30(2) (1981).

Rufus L. Edmisten, Attorney General, by Evelyn M. Coman, Assistant Attorney General, for the North Carolina Department of Transportation and the State of North Carolina, third-party defendant appellants.

Spears, Barnes, Baker & Hoof by Alexander H. Barnes; and Hatch, Little, Bunn, Jones, Few & Berry by John B. Ross, for third-party plaintiff appellee.

EXUM, Justice.

This appeal involves the interpretation of N.C. Gen. Stat. § 136-29, which permits claims against the State of North Carolina for monies allegedly due pursuant to highway construction contracts. We must determine how this statute applies to third-party claims against the State in a negligence action against the third-party plaintiff, a highway construction contractor, when these third-party claims seek both indemnification from the State and payment of monies allegedly due the third-party plaintiff under the highway construction contract.

I.

Plaintiff, Huyck Corporation, instituted a civil action seeking $32,155.37 compensatory and $50,000 punitive damages for the negligence of defendant-appellee, C. C. Mangum, Inc. (hereinafter Mangum). Mangum ruptured natural gas pipelines in the vicinity of plaintiff's manufacturing plant, causing plaintiff to discontinue operations on two occasions. At the time of its allegedly negligent conduct, Mangum was performing under a contract with the North Carolina Department of Transportation (hereinafter DOT) to do construction work on United States Highway 1, north of Raleigh.

After Huyck commenced its action, Mangum filed a third-party complaint against the State and DOT (hereinafter ap-

pellants),[1] seeking both indemnification for its liability, if any, to Huyck and $250,000 as "liquidated delay damages withheld from it by DOT."[2] The Superior Court for Wake County denied motions by appellants to dismiss based upon lack of jurisdiction and sovereign immunity. The Court of Appeals affirmed by a divided panel. This appeal followed.

II.

[1] We first consider Mangum's claim for wrongful withholding of funds by appellants, apparently pursuant to the contract's liquidated damages provision. This claim, as we understand the allegation, is based on the terms of the contract. As an action on the contract, it is governed by the applicable statute. That statute provides, in pertinent part, that

> (a) Upon the completion of any contract for the construction of any State highway awarded by the Department of Transportation to any contractor, if the contractor fails to receive such settlement as he claims to be entitled to under his contract, he may, within 60 days from the time of receiving his final estimate, submit to the State Highway Administrator a written and verified claim for such amount as he deems himself entitled to under the said contract setting forth the facts upon which said claim is based. In addition, the claimant, either in person or through counsel, may appear before the State Highway Administrator and present any additional facts and argument in support of his claim. Within 90 days from the receipt of the said written claim or within such additional time as may be agreed to between the State Highway Administrator and the contractor, the State Highway Administrator shall make an investigation of said claim and may allow all or any part or may deny said claim and shall have the authority to reach a compromise agreement with

1. Mangum also filed a third-party complaint against Public Service Company of North Carolina, but it is not a party to this appeal and this aspect of the case is not before us.

2. The record contains no copy of the highway construction contract. Our analysis as it pertains to the contract is based solely on the parties' allegations about it. Thus, we express no opinion regarding the effect of or procedural methods of enforcing any contractual provision whereby the state indemnifies Mangum for liability incurred pursuant to performance of the contract.

the contractor and shall notify the contractor in writing of his decision.

(b) As to such portion of the claim as is denied by the State Highway Administrator, the contractor may, within six (6) months from receipt of said decision, institute a civil action for such sum as he claims to be entitled to under said contract by the filing of a verified complaint and issuance of summons in the Superior Court of Wake County or in the superior court of any county wherein the work under said contract was performed. The procedure shall be the same as in all civil actions except as herein and as hereinafter set out.

(c) All issues of law and fact and every other issue shall be tried by the judge, without a jury . . . .

N.C. Gen. Stat. § 136-29 (1981). Section 136-29(b) plainly provides that Mangum can maintain his contract claim only after the State Highway Administrator has rendered a decision denying its claim.

Although Mangum does not dispute that it has failed to follow this course,[3] it suggests that the statute is permissive, not mandatory.[4] In other words, the administrative action is merely an option in lieu of, rather than a condition precedent to a court action. We disagree. The statutory language belies that contention by stating that the presentation of a "claim to the State Highway Administrator . . . shall be a condition precedent to bringing [a court] action under this" statute. N.C. Gen. Stat. § 136-29(d).

We have previously considered this situation regarding a very similar statute and find that decision controlling in this instance. *Middlesex Construction Corp. v. The State of North*

3. Mangum contends that the requirement of first pressing a claim with the State Highway Administrator was not included in its contract with the DOT. The statute itself, however, incorporates these provisions into every highway construction contract. *See* N.C. Gen. Stat. § 136-29(e) (1981).

4. Mangum argues that if the provision dealing with claims before the State Highway Administrator is mandatory, then it denies Mangum due process and equal protection by denying Mangum's recourse to the courts to enforce the contract. This contention fails to recognize that the administrative procedure is a condition precedent to rather than a substitute for a judicial action. Mangum may maintain an action in court after exhausting its administrative remedies.

Carolina ex rel. State Art Museum Building Commission, 307 N.C. 569, 299 S.E. 2d 640 (1983). In *Middlesex*, we held that the statute authorizing civil actions on state contracts for construction or repair work governed when and how such actions could be maintained. The legislature determines under what circumstances the state may be sued. *Id.* at 573-75, 299 S.E. 2d at 642-44. That statute, like the one *sub judice*, requires that certain administrative remedies be pursued as conditions precedent to a civil suit. *See* N.C. Gen. Stat. § 143-135.3 (1983).

We conclude here, as we did in *Middlesex*, that the legislature could not have made its intention clearer. Before a party may pursue a judicial action against the state for money claimed to be due under a highway construction contract, it must first pursue its administrative remedies. *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E. 2d 611, 615 (1979).

[2] Mangum also asserts that the statute abrogates its right to trial by jury. The North Carolina Constitution guarantees a trial by jury. *See* N. C. Const. art. I, § 25. But that guarantee applies only where the prerogative existed at common law or by statute at the time the Constitution was adopted. *In re Wallace*, 267 N.C. 204, 207, 147 S.E. 2d 922, 923 (1966). Prior to the enactment of this statute, and certainly at common law, Mangum could not institute this action against the state due to the doctrine of sovereign immunity. The right itself was created by this statute which never intended nor provided for a trial by jury. Therefore, the statute does not offend the constitutional guarantee to trial by jury.

Mangum has not exhausted its administrative remedies. The trial court had no jurisdiction over its third-party action for wrongful withholding of funds. Accordingly, the Court of Appeals erred in affirming the trial court's denial of appellants' motion to dismiss Mangum's third-party claim for wrongful withholding of funds under the contract. The dismissal shall be without prejudice to Mangum to file a new claim within one year of the filing of this opinion, which claim shall otherwise comply with N.C. Gen. Stat. § 136-29. *See Middlesex*, 307 N.C. at 575, 299 S.E. 2d at 644.

III.

[3] We next consider the validity of Mangum's third-party action for indemnity against appellants. Although Mangum alleges the DOT's "breach of warranty" and "breach of contract" in support

of its claim for indemnity, the claim more clearly sounds in tort. The third-party complaint alleges the state failed to remove the natural gas pipelines:

> In the event the court should determine that C. C. Mangum is liable to Huyck Corporation because its machinery ruptured said gas lines at either location on either occasion, C. C. Mangum was exposed to such liability by the Department of Transportation's breach of its warranty to C. C. Mangum and its failure to move such lines as promised and C. C. Mangum is entitled to indemnification from the Department of Transportation and the State of North Carolina for any sum which C. C. Mangum might be adjudged liable to Huyck Corporation herein.

These allegations evolve from basic tort principles for indemnification.

Negligence may arise from an act or omission when a duty to act falls upon a party. That party's obligation or duty to act may flow from explicit requirements, *i.e.*, statutory or contractual, or may be implied from attendant circumstances. *See Wilson v. Lowe's of Asheboro Hardware, Inc.*, 259 N.C. 660, 131 S.E. 2d 501 (1963). When a contract induces the act or omission, it creates "the state of things which furnishes the occasion of the tort, and in all such cases the remedy is an action on the case." *Jackson v. Central Torpedo Company*, 117 Okla. 245, 247, 246 P. 426, 428 (1926), *quoted with approval in Peele v. Hartsell*, 258 N.C. 680, 129 S.E. 2d 97 (1963). Regardless of its source, a duty to act subjects a party to liability for the failure to use due care in acting upon that duty. *See Pinnix v. Toomey*, 242 N.C. 358, 87 S.E. 2d 893 (1955).

Tort law provides for indemnity of one secondarily liable by one who is primarily liable. "The law permits an adjudication in one action of primary and secondary liability between joint tortfeasors who are not *in pari delicto*. A defendant secondarily liable may have the tortfeasor primarily liable brought into the action by alleging a cross action for indemnification against him." *Edwards v. Hamill*, 262 N.C. 528, 530-31, 138 S.E. 2d 151, 153 (1964).

The theory of Mangum's third-party claim for indemnification seems to be this: Appellants had the primary duty to move the

gas pipelines, and they failed to do so. Appellants' failure to move the pipelines is the primary cause, and Mangum's rupturing the pipes the secondary cause, of the resulting damages. Therefore, Mangum's liability to Huyck is secondary to appellants. Thus, Mangum alleges a claim for indemnification arising out of operation of tort law. The highway construction contract is alleged to be the basis for appellants' duty to remove the pipes, but it is not alleged to be the basis for appellants' obligation to indemnification by Mangum. The highway construction contract claims statute has no application to this claim for indemnification.

Since the state may be joined as a third-party defendant in a tort action for indemnification in the state courts, *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 332, 293 S.E. 2d 182, 187 (1982), the Court of Appeals properly affirmed the trial court's denial of appellants' motion to dismiss for lack of jurisdiction of this claim.

We express no opinion on the validity of Mangum's theory or whether, even if valid, the theory will be supported by the facts developed at trial.

For the reasons stated herein, the decision of the Court of Appeals is affirmed in part and reversed in part. The matter is remanded to that court with instructions to remand to the superior court for further proceedings not inconsistent with this opinion.

Affirmed in part; reversed in part; and remanded.

Justices MARTIN and FRYE did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ODELL HOCKETT

No. 405A83

(Filed 6 December 1983)

1. Criminal Law § 66.1 – identification testimony – credibility – question for jury on weight to give testimony

Defendant's contention that the court should review its previous decisions and change the rule concerning identification testimony to require the trial

court to determine, on a case-by-case basis, whether other conflicting evidence as to identification would require the court to remove the question from the jury is without merit. The trial court cannot invade the province of the jury and make case-by-case rulings on the credibility of witnesses and the weight to be given their testimony.

2. **Criminal Law § 102.1— prosecutor's remarks in argument to jury—failure to sustain objection—no abuse of discretion**

In a prosecution for a first degree sexual offense and armed robbery, there was no abuse of discretion in the trial court's refusal to sustain defendant's objections to two of the prosecutor's arguments to the jury.

3. **Criminal Law § 119— request for instructions—failure to give—error**

In a prosecution for a first degree sexual offense and armed robbery, the trial court committed reversible error by refusing to answer questions asked by the jury having to do with the effect of a threat of harm or force with a deadly weapon where the questions gave a clear indication that the jury was uncertain as to the difference in the elements between first degree sexual offense and second degree sexual offense and between robbery with a dangerous weapon and common law robbery. G.S. 15A-1232 and G.S. 15A-1234.

APPEAL by defendant as a matter of right from the judgments of *Farmer, Judge,* entered at the 28 March 1983 Criminal Session, CUMBERLAND County Superior Court. Defendant was charged in indictments, proper in form, with first degree sexual offense and armed robbery. The jury returned verdicts of guilty as to both charges and Judge Farmer imposed a sentence of life imprisonment as to the first degree sexual offense. We allowed defendant's motion to bypass the North Carolina Court of Appeals with respect to the conviction of robbery with a firearm, in which Judge Farmer imposed a sentence of fourteen (14) years to commence at the expiration of the life sentence imposed for the first degree sexual offense.

In relevant part, the evidence for the State tended to show the following: About 3:00 a.m. on 21 April 1982, Julia Underhill was working as the cashier at The Modern Mart Convenience Store on Ramsey Street in Fayetteville, North Carolina. At that hour she was outside the store cleaning the parking lot. There were present at that time Charlie and Rita Baxley (husband and wife). The Baxleys were sitting in their automobile. A car driven by a black male drove up to the gas pumps. He got out of his car and walked toward the store entrance, passing by Mrs. Baxley. The black male and Mrs. Underhill went into the store. Mr. and Mrs. Baxley left the parking lot.

After entering the store, the black male, later identified as the defendant, jumped over the counter to where Mrs. Underhill was standing and demanded all the money. He threatened to blow her brains out. Mrs. Underhill saw the man's hand in his pocket on what she determined was the handle of a gun. After removing the money from the cash register, he forced Mrs. Underhill to disrobe and perform oral sex on him. He was wearing no gloves and touched the counter and window with his hands.

After the defendant departed, the victim, Mrs. Underhill, called the police who arrived soon thereafter. Pursuant to their investigation, a paper towel containing semen was obtained, as were fingerprint lifts from the window. The semen was determined to be consistent with a broad category of persons which included defendant. The prints lifted proved not to be those of the defendant.

Later, when Mrs. Underhill talked with the detectives, she gave them a description of her assailant and helped construct a composite drawing of him. The technician assisting Mrs. Underhill had to use a black grease pencil in order to make the suspect's beard dark enough to satisfy her description since he did not have any foils or overlays of beards dark enough to suit her. When shown a photographic line-up including a picture of Hockett, Mrs. Underhill pointed him out but remarked that she could only be fifty percent sure he was the man since his hair style was different in the photograph. She identified Hockett at trial and described the man as having a close beard and a full, neat moustache. Several photographs of Hockett, taken at various times before and after April 1982, were introduced into evidence at trial by the defendant. They show him with different degrees of facial hair but none show a heavy beard on the side of his face. Hockett testified that his beard did not grow much on the side of his face. The photographs also show Hockett to have a relatively thin moustache which, according to Hockett and another witness, was the way his moustache always has appeared.

Mrs. Baxley testified that as the man passed her they exchanged smiles. She described him as having a beard close to the face, a full moustache, big white pretty teeth, and a big smile. About two months later she was shown a photographic line-up and at the direction of police officers attempted mentally to put a

beard on the subjects in the line-up. She picked Hockett's picture as being the man she saw go into the store that night. She also made an in-court identification of Hockett.

Defendant Hockett offered evidence through himself and others that his appearance had always been consistent with his appearance in the photographs introduced into evidence with regard to his moustache and lack of significant facial hair on the side of his face. He also offered evidence that he is missing his top front teeth and was without them in April 1982. Defendant presented additional testimony that he has never had any false teeth or dental plates.

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

Attorney General Rufus L. Edmisten by Assistant Attorneys General Grayson B. Kelley and Dennis P. Myers, for the State.

Assistant Public Defender John G. Britt, Jr., for the defendant.

COPELAND, Justice.

Defendant brings forward and argues four assignments of error which he contends require a reversal and either a dismissal of the charges against him or a new trial. We conclude there must be a new trial because of the failure of Judge Farmer to answer a question asked by the jury relative to the legal effect of the presence or absence of a weapon.

[1] In the first assignment of error the defendant in effect is urging this Court to abandon several previous rulings. More specifically, the defendant asks us to hold that in cases where two witnesses, with ample opportunity to observe the defendant, provide positive in-court identifications of that defendant, the trial court should nevertheless remove the case from the province of the jury when there is some evidence which tends to show that the identifications were not accurate. In this case, the victim, Mrs. Underhill, not only made a positive in-court identification of the defendant, but she also testified to the fact that she had previously identified the defendant from a photographic line-up.

The uncontradicted evidence shows that she had ample opportunity to observe the defendant under well-lighted conditions. In addition, the witness Rita Baxley testified that the well-lighted conditions enabled her to clearly view the defendant. She also provided a positive in-court identification as well as a pre-indictment identification of the defendant from a photographic line-up.

Certainly there can be no great question as to whether there was sufficient evidence that the crimes in question were actually committed.

We stated in *State v. Green*, 296 N.C. 183, 189, 250 S.E. 2d 197, 201 (1978) that if the witness had a "reasonable possibility of observation sufficient to permit subsequent identification, . . . the credibility of the witness and the weight of his or her identification testimony is for the jury." (Quoting *State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977).) Again we considered this proposition of identification of a defendant in *State v. Turner*, 305 N.C. 356, 289 S.E. 2d 368 (1982), where in a unanimous opinion by Justice Britt, we restated the above mentioned general rule. The defendant concedes that this is the rule, but asks us to review our previous decisions and change the rule to require the trial court to determine, on a case-by-case basis, whether other conflicting evidence as to identification would require the court to remove that question from the jury. He advocates the application of this rule even when the witness had sufficient opportunity to observe the defendant. It seems that the defendant is asking us to promulgate a rule which would require the trial court to invade the province of the jury and make case-by-case rulings on the credibility of witnesses and the weight to be given their testimony. This we refuse to do. This assignment is without merit and is overruled.

[2] We next consider whether the trial court committed reversible error by overruling defendant's objections to the prosecutor's remarks in his argument to the jury. This contention encompasses defendant's next two assignments of error.

The record discloses that during the closing argument of defense counsel to the jury, he reviewed the evidence which the State had presented and then stated "none of us are safe if you can be convicted on something like that." Further, he indicated that the jury should "use the same standards you would apply to

any other citizen, the same standard you would want applied to yourself." In doing so, counsel for the defendant attempted to personalize the case and asked the jury to consider that they themselves were in danger of conviction of a crime if they convicted the defendant on the evidence which had been presented. In the district attorney's final argument, he commented on defense counsel's argument by stating:

> He just said that if two people witness something happening and come in the courtroom—you could be one of those persons, your husband, your wife—and tell what you saw, that that is not enough for twelve other people to base their decision on. That is saying that you are not believable.

Defendant objected to the prosecutor's argument on the grounds that it traveled outside the facts and law relevant to this case. The trial judge ruled that the district attorney could argue his contentions. Later the prosecutor, after referring to the rights of the defendant, further pointed out that:

> There are some other rights you should consider: the rights you have, the rights Julia Underhill has, the rights your family has, the right to be able to go to work somewhere and try to make an honest living.

Upon an objection by defense counsel, the trial judge admonished the prosecutor to argue the evidence, but refused to instruct the jury to disregard the prosecutor's statements.

We stated in *State v. Monk*, 286 N.C. 509, 515, 212 S.E. 2d 125, 130-131 (1975), speaking through Justice Huskins in a unanimous opinion, that "It is the duty of the prosecuting attorney to present the State's case with earnestness and vigor and to use every legitimate means to bring about a just conviction . . . Counsel for both sides are entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom." See also: *State v. Craig*, 308 N.C. 446, 302 S.E. 2d 740 (1983). It is left to the trial judge's sound discretion to determine whether counsel has abused the wide latitude accorded him in the argument of hotly contested cases. We have determined that we will not review the judge's exercise of discretion unless there exists such gross impropriety in the argument as would likely influence the jury's verdict. *State v. Myers*, 299

N.C. 671, 263 S.E. 2d 768 (1980); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). We conclude that there was no such gross impropriety in the case before us and this assignment is overruled.

[3] In his fourth assignment of error defendant maintains that Judge Farmer committed reversible error by refusing to answer questions asked by the jury having to do with the effect of a threat of harm or force with a deadly weapon.

It is the duty of the trial judge to "declare and explain the law arising on the evidence relating to each substantial feature of the case." *State v. Everette*, 284 N.C. 81, 87, 199 S.E. 2d 462, 467 (1973). N.C. Gen. Stat. § 15A-1232 requires the trial court to "declare and explain the law arising on the evidence." In this case defendant agrees that the trial court did give adequate and proper instructions on the law and on the evidence in its charge to the jury. However, the defendant argues that the court erred in failing to give additional instructions to the jury in response to the jury's question as to the effect of a threat of harm with a dangerous weapon. N.C. Gen. Stat. § 15A-1234 provides that the judge *may* give appropriate additional instructions to "respond to an inquiry of the jury made in open court." We do not believe that the judge is required to repeat instructions which have been previously given to the jury in the absence of some error in the charge. We held in *State v. Dawson*, 278 N.C. 351, 365, 180 S.E. 2d 140, 149 (1971) that "needless repetition is undesirable and has been held erroneous on occasion."

In this case, after three hours of deliberation, the jury submitted a written request to the court. It read:

> Is the threat of harm or force with a deadly weapon the same as actually having or using a weapon?

This is clearly a question asking for clarification on a point of law. Judge Farmer unfortunately and incorrectly interpreted the question as relating to a matter of fact "which the jury must decide." He indicated that the court could not answer the question. The jury foreman then restated the question thusly:

> Well, what we are asking is, if an individual threatens another individual as to, I'll blow your head off or I'll shoot

> you, by law, whether that individual actually has a gun or not, is he guilty as if he had a gun, if he did not have one by that threat?

We interpret the question to be "If one threatens to blow another's head off but does not actually have a gun—is he guilty to the same degree as if he did actually have a gun?". This is a clear indication that the jury had questions about the legal difference; i.e. the difference in the elements between first degree sexual offense and second degree sexual offense and between robbery with a dangerous weapon and common law robbery.

Judge Farmer refused to review the elements, stating as his reason that there were two separate charges involved in the case and the elements are different. It is true that the elements are different, but each offense has one thing in common, *i.e.* the possession and display of a dangerous or deadly weapon or the absence thereof, which determines whether an offender is guilty of the offense charged or a lesser degree of the offense.

Defense counsel asked the court to answer the question of the jury in the negative. This would have been a proper and correct response to the question as asked by the jury. Judge Farmer had correctly stated in his charge to the jury:

> Second-degree sexual offense differs from first-degree sexual offense only in that it is not necessary for the State to prove beyond a reasonable doubt that the defendant employed or displayed a dangerous or deadly weapon.

It is obvious that the jury had some question as to whether the State had proved beyond a reasonable doubt that the perpetrator of this offense was armed with a dangerous or deadly weapon, and thus, they were inquiring as to the effect of such a finding upon their determination of guilt on the various offenses charged. The testimony indicated that the defendant had his hand in his pocket and the victim could see "the shape of a gun" but she could never see "the actual—I guess, you call it the body of the gun. I saw the handle with his hand around it."

After having given appropriate and correct instructions to the jury, the trial court was obviously reluctant to elaborate as to a portion of the charge without repeating the entire charge. The

court advised the jury that it should continue with its deliberations, if possible, and try to recall the charge which had been given. Judge Farmer further told the jury that if it had additional questions the court would consider them, but would not go into one part of the charge without giving the entire charge again.

We have said that "In determining the propriety of the trial court's instructions to the jury, we must consider the instruction [sic] in their entirety and not in detached fragments." *State v. Howard*, 305 N.C. 651, 653-654, 290 S.E. 2d 591, 592 (1982). Regardless of the unfortunate situation in which Judge Farmer was placed, we must conclude that the trial court committed reversible error and a new trial must be had.

We feel that the trial court should have at least reviewed the elements of the offenses if it was not going to directly answer the question as defense counsel had requested. It is clear that the jury did not understand the differences in the degrees of the offenses and did not understand how the presence or absence of a gun would affect the degree of guilt as to both offenses.

We hold that the failure of the trial court to answer the questions of the jury on an important point of law was prejudicial error and the conviction must be reversed and a new trial granted.

New trial.

STATE OF NORTH CAROLINA v. WILLIAM FRANKLIN EFIRD

No. 226A83

(Filed 6 December 1983)

1. Criminal Law § 82.2— physician-patient privilege—records of county public health department—admissibility in evidence

In this prosecution of defendant for the first degree rape of his seven-year-old stepdaughter in which the evidence showed that the victim suffered from gonorrhea, the trial court properly permitted a county public health nurse to testify that records of her office revealed that defendant was treated for gonorrhea two days after the crime since, (1) under G.S. 8-53.1, the physician-patient privilege is not available in cases involving child abuse, and the medical records were admissible as evidence with regard to the cause or source of the victim's disease; (2) the trial judge properly used his discre-

tionary authority to compel disclosure under G.S. 8-53 upon finding that such disclosure was necessary to a proper administration of justice; and (3) there was no indication that the public health nurse had prepared the medical records under the direction of a physician, and the nurse's testimony was thus not privileged under G.S. 8-53.

2. **Criminal Law § 99.9— examination of witness by trial judge—no expression of opinion**

In a prosecution for rape of a seven-year-old child, the trial court did not express an opinion in asking questions of the victim's physician concerning how long the victim had had gonorrhea before the disease was diagnosed as such by the physician.

3. **Rape and Allied Offenses § 5— rape of child—sufficiency of evidence**

Testimony by the seven-year-old victim was sufficient to overcome defendant's motion for nonsuit in a prosecution for first degree rape under G.S. 14-27.2(a)(1).

DEFENDANT appeals as a matter of right from a mandatory life sentence entered by *Wood, J.*, during 13 December 1982 Criminal Session of Superior Court, CABARRUS County.

Defendant was tried upon an indictment, proper in form, charging him, pursuant to N.C. Gen. Stat. § 14-27.2(a)(1), with the first degree rape of Tammy Renee Efird, a child under twelve years of age. On 15 December 1982, the jury returned a verdict finding the defendant guilty of first degree rape.

The evidence for the State tended to show that on 5 June 1982 Tammy Renee Efird, age seven years and ten months, and her two younger brothers were taken by their mother, Judy Pegg Efird, to visit Tammy's stepfather, the defendant William Franklin Efird. Upon their arrival, the children were instructed by the defendant to take a nap. The only bedroom in the house contained two beds. Defendant placed Tammy in the smaller of the two beds, while placing her brothers in the other larger bed.

The brothers fell asleep but Tammy remained awake watching television while lying in bed. Thereafter, according to Tammy, the defendant entered the bedroom, moved the sleeping brothers to the smaller bed and then asked Tammy to get into the bigger bed with him. She refused to lie down with him because she was scared. She also refused to remove her clothes as he requested.

The defendant completely disrobed himself and then proceeded to undress Tammy. With both of them naked, he again told Tammy to get into the bed. When Tammy began crying after refusing him, the defendant picked her up and put her on the bed with him.

Tammy testified that the defendant "rolled over and stuck his worm" into her and "bounced up and down." When the defendant removed himself from Tammy, he told her he would beat her if she told anyone. Frightened, Tammy did not relate what had occurred to her mother when she returned home the next day.

On 12 August 1982, Tammy was taken by her mother and aunt, Barbara Honeycutt, to the office of Dr. David A. Lockhart, a physician who specializes in pediatrics. Dr. Lockhart examined Tammy and determined that a vaginal discharge she had been experiencing was caused by the venereal disease gonorrhea.

While returning home from the doctor's office, Tammy implicated her mother's boyfriend, Joel Lott. Later that evening Tammy came to her mother crying and admitted she had told a lie. She had been afraid to tell the truth because the defendant had threatened to beat her if she ever revealed that he had sexual intercourse with her. Tammy recited the same events to her aunt and also to Lisa Sloop, a Protective Services worker with the Cabarrus County Department of Social Services.

At trial the State introduced into evidence, through Janice Odell, a public health nurse supervisor with the Cabarrus County Health Department, the results of tests administered by her office. Those records revealed that both the defendant and Tammy's mother were treated for venereal disease on 7 June 1982. The records further showed that Joel Lott presented himself for treatment for venereal disease on 18 August 1982.

The defendant took the stand and denied any sexual contact with Tammy during her overnight visit with him. He further testified that he had never had sexual intercourse with Tammy.

Rufus L. Edmisten, Attorney General, by George W. Boylan, Assistant Attorney General, for the State.

James C. Johnson, Jr., for the defendant.

COPELAND, Justice.

[1] The defendant presents four assignments of error. He first claims that his medical records maintained by the Cabarrus County Health Department were improperly allowed into evidence. The State offered testimony that the defendant was afflicted with gonorrhea for the purpose of corroborating the testimony of the child that the defendant was her assailant. The defendant argues that such introduction did not constitute an exception under N.C. Gen. Stat. § 8-53.3, and thus was a violation of the confidential communication privilege between patient and physician. We disagree.

First, we note that the defendant has mistakenly relied upon N.C. Gen. Stat. § 8-53.3, which concerns communications between a psychologist and his client. Obviously, such a relationship does not exist in the case sub judice. The applicable statute relating to the physician-patient privilege is N.C. Gen. Stat. § 8-53. However, we have determined that N.C. Gen. Stat. § 8-53.1 is controlling here. This statute provides:

> Notwithstanding the provisions of G.S. 8-53, the physician-patient privilege shall not be ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the North Carolina Juvenile Code, Subchapter XI of Chapter 7A of the General Statutes of North Carolina.

This statute is read in pari materia with our Juvenile Code, in particular, N.C. Gen. Stat. § 7A-551 which states:

> Neither the physician-patient privilege nor the husband-wife privilege shall be grounds for excluding evidence of abuse or neglect in any judicial proceeding (civil, criminal, or juvenile) in which a juvenile's abuse or neglect is in issue nor in any judicial proceeding resulting from a report submitted under this Article, both as said privileges relate to the competency of the witness and to the exclusion of confidential communications.

In essence, the physician-patient privilege, created by N.C. Gen. Stat. § 8-53, is not available in cases involving child abuse.

According to the evidence, the Child Welfare Unit of the Cabarrus County Department of Social Services received a complaint of child abuse involving Tammy Efird. Their investigations prompted initiation of the charges against the defendant. There was unequivocal evidence that the seven-year-old girl in this case had been sexually abused, which would invoke applicability of these statutes. Therefore, these medical records were admissible as evidence with regard to the cause or source of her disease.

It appears that the trial judge relied upon the exception to the physician-patient privilege of N.C. Gen. Stat. § 8-53, which grants a trial judge discretionary authority to compel disclosure if he finds such disclosure to be "necessary to a proper administration of justice." Although the trial court should have relied upon N.C. Gen. Stat. § 8-53.1, as we have stated earlier, it was not prejudicial error for it to use N.C. Gen. Stat. § 8-53. At trial and in his separate order dated 14 December 1982 (allowed as An Addendum to Record on Appeal by this Court), Judge Wood found the following: the alleged assault occurred on 5 June 1982; the defendant received treatment for gonorrhea on 7 June 1982; Tammy was determined to be afflicted with gonorrhea on 12 August 1982; Tammy had similar vaginal irritations which "could have been gonorrhea" on 18 June 1982; and that females generally contract gonorrhea through sexual intercourse with an infected man. The trial court then concluded that the medical records were relevant to a litigated issue. We hold that the trial court's findings and conclusions were sufficient to take these records out of the privileged communication rule of N.C. Gen. Stat. § 8-53.

The statute affords the trial judges wide discretion in determining what is necessary for a proper administration of justice. *State v. Taylor*, 304 N.C. 249, 271, 283 S.E. 2d 761, 776 (1981); 1 Brandis on N.C. Evidence § 63 (1982). Justice Moore in *Sims v. Charlotte Liberty Mutual Ins. Co.*, 257 N.C. 32, 39, 125 S.E. 2d 326, 331 (1962) emphasized that "[j]udges should not hesitate to require the disclosure where it appears to them to be necessary in order that the truth be known and justice be done." We are satisfied that the trial judge did not abuse his discretion.

Finally, with regard to this first assignment of error, the physician-patient privilege statute does not require exclusion unless defendant's communication is with a "person duly author-

ized to practice physic" (i.e. medicine). This privilege has been interpreted to include entries in hospital records made by or under the direction of physicians and surgeons. *Sims*, at 38, 125 S.E. 2d at 331. However, this statute does not include "nurses, technicians and others; unless they were assisting, or acting under the direction of a physician or surgeon. *Id.*

In this case nothing in the record before us indicates that Nurse Janice Odell had prepared the medical records in question under the direction of a physician. Thus, the testimony of Nurse Odell was not privileged information under N.C. Gen. Stat. § 8-53. The records offered through Nurse Odell were relevant and competent evidence, which were properly admitted.

[2] Defendant's next two assignments of error concern the questioning of the State's witness by the trial court. The defendant contends that Judge Wood, in asking the victim's physician certain questions, elicited answers to matters material to the State's case that "otherwise would not have come in against the defendant." Further, he argues that the judge implied an opinion favorable to the State regarding this testimony, which prejudiced the jury against the defendant. The two pertinent exchanges appear below:

THE COURT: When did you see her previously?

A. It was in July. I can look at the date. She was seen in the Emergency Room July 18. Her complaint at that time was going to the bathroom a lot, burning when she passed her water, and lower abdominal pain.

Q. Could that have been gonorrhea at that time, looking back on it now?

A. Retrospectively, I'm sure it could have been.

Q. Now what is the normal course of conduct for the disease?

A. Well—

THE COURT: That was July when?

A. July 18.

Several minutes later the court then inquired:

THE COURT: Let me ask a question to try to clarify this thing in my mind. Is there any way you can tell or do you have an opinion after examining this little girl on the 12th of August, 1982, as to how long she had had gonorrhea?

A. Well, looking at the amount of infection she had, I would say she had had it a fair amount of time. I do have a time from July when I saw her until August, and I would say that more than likely, she had it in July when I saw her in the Emergency Room, and that progressed rather extensively from that time.

THE COURT: It is your opinion she probably had it in July when you saw her in the Emergency Room?

A. More than likely. She didn't have it enough when I examined her, didn't have enough discharge for me to consider the diagnosis. It's a diagnosis that more and more we're beginning to consider in any child that has urinary symptoms. We're beginning to look at it more and more.

THE COURT: You didn't run a test on her in July?

A. Did not. Just the urine.

THE COURT: Right, just the urine test. Now, gonorrhea untreated would just go on and on?

A. It could go on and on, but usually, like in her case, it would come to a head. It would get so bad that somebody —some obvious treatment would be indicated. I think she was brought in because the mother couldn't handle the discharge.

THE COURT: So much discharge the mother couldn't handle it?

A. Yes.

After careful scrutiny, we have determined that Judge Wood's inquiry did not adversely prejudice the defendant. Numerous cases recognize the well established rule that the judge may, on his own prerogative, participate in the examination of witnesses. *State v. Pearce*, 296 N.C. 281, 250 S.E. 2d 640 (1979); 1 Brandis on N.C. Evidence § 37 (1982). In fact, the trial judge has a duty to question a witness in order to clarify the testimony be-

ing given, *State v. Norwood*, 303 N.C. 473, 279 S.E. 2d 550 (1981); *State v. Hunt*, 297 N.C. 258, 254 S.E. 2d 591 (1979), or "to elicit overlooked, pertinent facts." *State v. Monk*, 291 N.C. 37, 50, 229 S.E. 2d 163, 171 (1976). However, the trial judge must carefully scrutinize his questioning to insure that it does not impermissively suggest an opinion as to the guilt or innocence of a criminal defendant, the credibility of a witness, or any other matter which must be determined by a jury. *Hunt* at 263, 254 S.E. 2d at 596.

In the first section of the challenged inquiry, Judge Wood attempted to elicit the date upon which an event occurred. The trial court's second intervention clearly reveals an attempt to clarify and promote a better understanding of the doctor's testimony. Further, we find nothing in either exchange which the jury could reasonably interpret as an expression of the court's opinion.

[3] Finally, defendant asserts that the trial court erred in denying his motion to dismiss at the close of the State's evidence. Tammy Renee Efird testified unequivocally as to the assault upon her by the defendant. This testimony alone, when considered in the light most favorable to the State, as we must do, is sufficient to overcome defendant's motion for nonsuit.

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

No error.

STATE OF NORTH CAROLINA v. CHRISTOPHER WADE CARROLL

No. 378A83

(Filed 6 December 1983)

1. Criminal Law § 66.16— in-court identification of defendant properly admitted

There was clear, competent and convincing evidence to support the trial court's conclusion that the prosecuting witness's identification of defendant was based on her observation of him at the time of the incident where the witness had seen the defendant from a distance several times before the attack; she was able to observe the defendant from a distance of about ten inches for several seconds; she gave the police a description of his weight, height, hairstyle and clothes; and she got a good look at him while he was standing on her porch prior to his forcing his way into the victim's apartment.

2. Criminal Law § 66.14— in-court identification as curing improper pretrial identification

Where a trial court's conclusion that a victim's in-court identification was of independent origin was properly supported by the findings of fact, the victim's identification testimony was admissible notwithstanding alleged defects or irregularities in a pretrial photographic identification procedure.

APPEAL by defendant from a decision of the Court of Appeals, 62 N.C. App. 623, 303 S.E. 2d 556 (1983), one judge dissenting, affirming defendant's conviction of first degree burglary and attempted second degree rape, judgment entered by *Friday, J.*, at the 8 March 1982 Criminal Session of Superior Court, BUNCOMBE County.

The testimony at trial disclosed the following pertinent facts: On 6 November 1981, the victim, Lisa Felmet, was leaving her apartment for work. It was about 5:30 a.m. and thus still dark outside. She turned off the lights in her living room. Upon opening the front door, she encountered a man standing on her front porch. His hand was covering the lower part of his face "as if he was to hide a mustache." The man forced his way into Ms. Felmet's apartment and pushed her to the floor. The door remained partially open. As they struggled, he placed one hand on her private parts and tried to unbutton her blouse with the other hand. Ms. Felmet screamed for help throughout the assault. After a brief struggle, about ten seconds, the man ceased his attack and ran from the apartment. The only light in the room was that which shone through the doorway from the porch light. The victim immediately reported the incident to the Asheville Police Department and they responded promptly.

Later that day the victim viewed a photographic line-up, consisting of six photographs. All the individuals in this line-up were represented by two pictures, except the defendant who was shown in only one picture, a side view. Ms. Felmet picked the defendant's picture out of this line-up and told the police she thought he was the assailant. However, because the police only had a side view photograph, the victim asked to see a front view picture of him in order to be certain of the identification. A front view picture of the defendant was subsequently taken and included in a second photographic line-up shown to Ms. Felmet on 11 November 1981.

Following the second identification, defendant was arrested and charged with first degree burglary and attempted rape. He subsequently was convicted by a jury of both offenses and the court imposed an active prison sentence of fifteen years for the burglary and a concurrent three years for the attempted rape, from which the defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Arthur E. Jacobson; and Joel B. Stevenson, for the defendant.

COPELAND, Justice.

Defendant contends that the trial court erred in admitting the in-court identification of defendant by the prosecuting witness, Lisa Felmet. Defendant first argues that the circumstances at the time of the assault were such that the victim could not have recognized defendant as the assailant, thus the in-court identification was not of independent origin. Defendant further argues that the photographic line-ups shown to the prosecuting witness were so impermissibly suggestive that it was impossible to have any reasonable assurance that her identification was correct. We believe this assignment of error is without merit and does not entitle the defendant to a new trial.

[1] Defendant first contends that the victim's in-court identification could not reasonably be based upon her observation of him at the time of the crime. In *State v. Thompson*, 303 N.C. 169, 172, 277 S.E. 2d 431, 434 (1981), we stated that:

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

In the case *sub judice*, Judge Friday found the following facts on *voir dire*: The prosecuting witness had seen the defendant on

other occasions from her window and her front porch, inasmuch as he lived in her apartment complex. She testified that she had often observed him across the lot and that she had viewed him on a motorcycle on earlier occasions and also had seen him but did not know his name. That on the morning in question she had turned off her interior light, but that her porch light was on. She stated that she saw the defendant for a couple of minutes, that he had on a plaid shirt and dark britches, and he had his hand over his mouth; that he rushed in, and for several seconds she was very close, ten inches away from his face. She picked the defendant out of a photographic line-up on the same day as the attack. She asked to see a front view line-up to make sure, and five days later she again picked out the defendant. Judge Friday found that the prosecuting witness's identification of defendant was based on her observation of him at the time of the incident.

Upon careful review of the record we find clear, competent and convincing evidence to support the court's findings. The witness had seen the defendant from a distance several times before the attack, although she did not know his name. She was able to observe the defendant from a distance of about ten inches for several seconds. She gave the police a description of his weight, height, hairstyle and clothes. She got a good look at him while he was standing on the porch. We believe this is ample to support the court's finding that the victim's in-court identification was based upon her observation of him at the time of the crime. *See State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983); *State v. Corbett*, 307 N.C. 169, 297 S.E. 2d 553 (1982); *State v. Jackson*, 306 N.C. 642, 295 S.E. 2d 383 (1982).

[2] Defendant contends further that numerous defects and irregularities surrounding the photographic identification procedure rendered that procedure impermissibly suggestive. 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.' " *Chatman* at 175-76, 301 S.E. 2d at 75 (citations omitted). It is also well-settled, however, 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." *Jackson* at 649, 295 S.E. 2d at 388.

In the case *sub judice* we have held that following a *voir dire* to determine the admissibility of the victim's in-court identification, the trial judge found facts, fully supported by the *voir dire* testimony, that the victim had an adequate opportunity to view the defendant at the time of the crime, in reasonable lighting and in close proximity. Based on these findings the trial court concluded that the victim's "identification of the defendant was based on her own observation of the defendant at the time in question. . . ." The court's conclusion, properly supported by the findings of fact, was that the in-court identification was of independent origin. Therefore the identification testimony is admissible notwithstanding alleged defects or irregularities in the procedure.

Defendant received a fair trial free from prejudicial error. The opinion below is affirmed.

Affirmed.

NORTH CAROLINA EX REL. CHARLES E. HORNE, INDIVIDUALLY, AND UPON BEHALF OF ALL OTHERS SIMILARLY SITUATED, FOR THE BENEFIT OF THE CITY OF CHARLOTTE AND THE COUNTY OF MECKLENBURG, NORTH CAROLINA v. BETTY CHAFIN, HARVEY GANTT, MILTON SHORT, PAT LOCKE, DON CARROLL, CHARLES DANELLY, RON LEEPER, DR. LAURA FRECH, MINETTE TROSCH, GEORGE SELDEN, THOMAS COX, JR., INDIVIDUALLY, AND AS MEMBERS OF THE CHARLOTTE CITY COUNCIL, KENNETH R. HARRIS, INDIVIDUALLY, AND AS MAYOR OF THE CITY OF CHARLOTTE, EDWIN H. PEACOCK, ANN THOMAS, ELISABETH HAIR, W. THOMAS RAY, INDIVIDUALLY, AND AS MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MECKLENBURG, THE CHARLOTTE CHAMBER OF COMMERCE, A CORPORATION

No. 304PA83

(Filed 6 December 1983)

APPEAL as a matter of right under G.S. 7A-30(1) from the decision of the Court of Appeals, 62 N.C. App. 95, 302 S.E. 2d 281 (1983), affirming summary judgment in favor of the defendants entered by *Griffin, Judge*, on 5 January 1982 in Superior Court, MECKLENBURG County. Heard in the Supreme Court 9 November 1983.

Hugh Joseph Beard, Jr., for the plaintiff appellant.

Frank B. Aycock, III, for the defendant appellees, Chafin, Gantt, Short, Locke, Carroll, Danelly, Leeper, Frech, Trosch, Selden, Cox, and Harris.

Ruff, Bond, Cobb, Wade & McNair, by James O. Cobb and Marvin A. Bethune, for the defendant appellees, Hair, Peacock, Ray and Thomas.

Helms, Mullis & Johnston, by Robert B. Cordle, for the defendant appellee, The Charlotte Chamber of Commerce.

PER CURIAM.

The plaintiff brought this action against the defendants alleging that they illegally used tax funds to pay for a reception for members of the General Assembly and others. The plaintiff contends that these funds were used for the purpose of lobbying members of the General Assembly in an effort to induce them to pass legislation affecting the City of Charlotte and Mecklenburg County which legislation was contrary to the plaintiff's beliefs.

The defendants, city council and chamber of commerce members, filed motions under Rule 12(b)(6) to dismiss for failure to state a claim for relief. The plaintiff and the defendant county commissioners filed motions for summary judgment. After considering all materials filed during discovery and the arguments of counsel, the trial court treated the motions to dismiss under Rule 12(b)(6) as motions for summary judgment and granted summary judgment in favor of all of the defendants. The Court of Appeals affirmed.

It is not necessary that this Court consider or pass upon each of the statements contained in the opinion of the Court of Appeals in order to affirm the result reached therein. The holding of the Court of Appeals affirming summary judgment for the defendants by the trial court is

Affirmed.

WILLIAM R. COATS v. LOUIS A. JONES AND WIFE, ALICE JONES

No. 406A83

(Filed 6 December 1983)

APPEAL by the defendant-appellants pursuant to G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 63 N.C. App. 151, 300 S.E. 2d 655 (1983), reversing summary judgment for defendants entered by *Battle, J.*, on 25 May 1982 in Superior Court, WAKE County, and remanding the case for trial. Heard in the Supreme Court 8 November 1983.

The case arose out of a contract entered into in July 1978 between the plaintiff and the defendants for the construction of a house for the defendants. Plaintiff's verified complaint filed 11 January 1980 alleged that under the contract in question the plaintiff was to supervise the construction of a residence for the defendants. Plaintiff set forth four causes of action: (1) that plaintiff and defendants entered into a contract whereby the defendants agreed to pay the plaintiff a fee of $5,500.00 simply to supervise the construction of a residence and that after credit for all payments already made, there remained an outstanding balance due the plaintiff of $1,900.00 which the defendants refused to pay; (2) in performing the agreement, plaintiff had purchased materials, hired subcontractors and provided labor outside the terms of the agreement for which he was entitled to reimbursement in the amount of $766.08 which he had demanded of the defendants and which the defendants had refused to pay; (3) the plaintiff provided labor and material for "extras" for which he was due some $1,694.00 from the defendants which he had demanded and they had refused to pay; (4) the defendants had received from a manufacturer a refund of some $1,560.00 representing in part the plaintiff's labor for replacing defective paneling and defendants had failed and refused to pay the plaintiff his portion of this refund.

Defendants filed a verified answer and counterclaim on 20 March 1980 in which they denied the material allegations of the complaint, asserted as defenses that the plaintiff represented himself to be a licensed building contractor when in fact he was not (defendants contend that plaintiff occupied the position of a

general contractor rather than the position of a supervisor of construction), and that the contract involved an undertaking exceeding $30,000.00 in value. Defendants further alleged that by reason of the plaintiff's failure to be a licensed contractor, the contract was illegal and unenforceable. Furthermore, plaintiff's own failure to perform his duties under the contract excused defendants from any contractual obligations, and that if plaintiff was entitled to recovery, which defendants denied, plaintiff's failure to perform his duties under the contract resulted in damages to the defendants, entitling them to certain set-offs. Defendants further asserted counterclaims against the plaintiff for breach of contract and for negligence and prayed for damages in the amount of $13,000.00 plus interest for the plaintiff's breach of contract and the amount of $13,000.00 for plaintiff's negligence.

Defendants moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Defendants' motion was supported by the affidavit of H. M. McCown, the Secretary-Treasurer of Records for the North Carolina Licensing Board for General Contractors, to the effect that plaintiff was not a licensed building contractor during the times alleged in the complaint. The depositions of the plaintiff and the defendant Louis Jones, together with attached exhibits, were of record at the time of the hearing on the summary judgment motion. By order filed 25 May 1982, Judge F. Gordon Battle granted summary judgment against the plaintiff on all his claims, except for the right of set-off against the defendants' counterclaims. Plaintiff appealed and on 5 July 1983 a panel of the North Carolina Court of Appeals filed its decision (one judge dissenting) reversing summary judgment and remanding the case for trial. The case was decided under the provisions of G.S. § 87-1 as it appeared before the amendment effective 1 January 1982, which broadened the definition of a general contractor so as to include those who superintend or manage a project for another, the cost of which is $30,000.00 or more. Chapter 783, 1981 Session Laws of North Carolina. The majority of the panel below was of the opinion that, under the forecast of the evidence, there remained to be tried genuine material issues as to the nature of plaintiff's contractual relationship with the defendants, particularly as to whether plaintiff undertook to construct defendants' residence as a general contractor within the meaning of the statute, or whether plaintiff

was engaged as a job supervisor for a salary, not within the statutory definition.

Manning, Fulton & Skinner, by Charles E. Nichols, Jr., and Michael T. Medford, attorneys for plaintiff-appellee.

Blanchard, Tucker, Twiggs, Denson & Earls, P.A., by Margaret S. Abrams and Douglas B. Abrams, attorneys for defendants-appellants.

PER CURIAM.

We have carefully reviewed the opinion of the Court of Appeals, the briefs and authorities relating to defendants' contentions on this appeal, and the oral arguments of counsel, and we conclude that the result reached by the Court of Appeals is correct. At trial, the trial judge and counsel should be aware of our recent decision in *Brady v. Fulghum*, 309 N.C. 580, 308 S.E. 2d 327 (1983). The decision of the Court of Appeals is

Affirmed.

Lewis v. City of Washington

FRANK B. LEWIS	)	
	)	
v.	)	ORDER
	)	
THE CITY OF WASHINGTON, ET AL.	)	

No. 446P83

(Filed 6 December 1983)

THIS matter is before the Court upon plaintiff's petition for writ of certiorari to review the decision of the Court of Appeals filed on 16 August 1983. The petition is allowed for the limited purpose of entering the following order:

> The decision of the Court of Appeals is affirmed in all respects except that part of its decision which considered and reversed the trial court's denial of defendants' motion for summary judgment on the issue of plaintiff's entitlement to recover the rental in the sum of $500. As to that portion, the decision of the Court of Appeals is REVERSED and the judgment of the trial court is REINSTATED.

By order of the Court in Conference, this 6th day of December, 1983.

FRYE, J.
For the Court

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

AMERICAN NATL. INS. CO. v. INGRAM

No. 455P83.

Case below: 63 N.C. App. 38.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 6 December 1983.

COCHRAN v. PIEDMONT PUBLISHING CO.

No. 353P83.

Case below: 62 N.C. App. 548.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 December 1983. Notice of appeal dismissed 6 December 1983.

DRIGGERS v. UNITED INSURANCE

No. 475P83.

Case below: 63 N.C. App. 568.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 December 1983.

DUGGINS v. TOWN OF WALNUT COVE

No. 507P83.

Case below: 63 N.C. App. 684.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 December 1983.

DUKE UNIVERSITY v. AMERICAN ARBITRATION ASSOC.

No. 502P83.

Case below: 64 N.C. App. 75.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 December 1983.

ETHERIDGE v. ETHERIDGE

No. 350P83.

Case below: 62 N.C. App. 499.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 December 1983.

IN RE ANNEXATION ORDINANCE

No. 385P83.

Case below: 62 N.C. App. 588.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 December 1983. Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 6 December 1983.

IN RE FORECLOSURE OF TAYLOR

No. 492P83.

Case below: 63 N.C. App. 744.

Petition by Taylor for discretionary review under G.S. 7A-31 denied 6 December 1983.

IN RE SCHWEIZER

No. 423P83.

Case below: 63 N.C. App. 565.

Petition by Schweizer for discretionary review under G.S. 7A-31 denied 6 December 1983.

IN RE SOUTHVIEW PRESBYTERIAN CHURCH

No. 300P83.

Case below: 62 N.C. App. 45.

Petition by County of Cumberland for discretionary review under G.S. 7A-31 denied 6 December 1983.

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

JUSTUS v. DEUTSCH

No. 332P83.

Case below: 62 N.C. App. 711.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 December 1983.

LACKEY v. TRIPP

No. 504P83.

Case below: 63 N.C. App. 765.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 December 1983.

LINEBERRY v. GARNER

No. 498P83.

Case below: 63 N.C. App. 789.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 December 1983.

McMILLAN v. NEWTON

No. 486P83.

Case below: 63 N.C. App. 751.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 December 1983.

MASHBURN v. HEDRICK

No. 457P83.

Case below: 63 N.C. App. 454.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1983.

NEWMAN v. NEWMAN

No. 528P83.

Case below: 64 N.C. App. 125.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1983.

PADGETT v. STUTTS

No. 456P83.

Case below: 63 N.C. App. 565.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1983.

PATTERSON v. GASTON CO.

No. 340P83.

Case below: 62 N.C. App. 544.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 December 1983.

RAMSEY v. NORTON

No. 477P83.

Case below: 63 N.C. App. 789.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 December 1983.

RED HOUSE FURNITURE CO. v. SMITH

No. 479PA83.

Case below: 63 N.C. App. 769.

Petition by Gibson for discretionary review under G.S. 7A-31 allowed 6 December 1983.

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

SAWYER v. GOODMAN

No. 352P83.

Case below: 63 N.C. App. 191.

Petition by defendant Nelson for discretionary review under G.S. 7A-31 denied 6 December 1983.

SHARPE v. NATIONWIDE MUT. FIRE INS. CO.

No. 365P83.

Case below: 62 N.C. App. 564.

Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals denied 6 December 1983.

SNUGGS v. STANLY CO. DEPT. OF PUBLIC HEALTH

No. 411PA83.

Case below: 63 N.C. App. 86.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 6 December 1983. Motion by defendants to dismiss appeal for lack of subject matter jurisdiction denied 6 December 1983.

STATE v. BEATTY

No. 571P83.

Case below: 64 N.C. App. 511.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1983.

STATE v. BRAY

No. 563P83.

Case below: 64 N.C. App. 620.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1983.

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

STATE v. HUNT

No. 520P83.

Case below: 64 N.C. App. 81.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 6 December 1983.

STATE v. HUNTLEY

No. 361P83.

Case below: 62 N.C. App. 577.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1983.

STATE v. JOHNSON

No. 399PA83.

Case below: 63 N.C. App. 173.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 6 December 1983.

STATE v. OLDS

No. 538P83.

Case below: 64 N.C. App. 621.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1983.

STATE v. TAYLOR

No. 541P83.

Case below: 64 N.C. App. 622.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1983.

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

STATE v. WARD

No. 261P83.

Case below: 61 N.C. App. 747.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 6 December 1983.

STATE v. WHITE

No. 493P83.

Case below: 63 N.C. App. 734.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1983.

STATE v. WILSON

No. 459P83.

Case below: 63 N.C. App. 567.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1983. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 December 1983.

STEWART, CAMPBELL & HENDRIX v. FOSTER

No. 529P83.

Case below: 64 N.C. App. 210.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 December 1983.

STYLECO, INC. v. STOUTCO, INC.

No. 331P83.

Case below: 62 N.C. App. 525.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1983.

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

SWINDELL v. OVERTON

No. 323PA83.

Case below: 62 N.C. App. 160.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 6 December 1983.

VANLANDINGHAM v. NORTHEASTERN MOTORS, INC.

No. 481P83.

Case below: 63 N.C. App. 778.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 December 1983.

WEBER v. BUNCOMBE CO. BD. OF EDUC.

No. 327P83.

Case below: 62 N.C. App. 552.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 December 1983. Motion by defendants to dismiss appeal on the grounds that Notice of Appeal has no legal effect allowed 6 December 1983.

APPENDIXES

AMENDMENT TO NORTH CAROLINA
SUPREME COURT LIBRARY RULES

AMENDMENTS TO THE NORTH CAROLINA
RULES OF APPELLATE PROCEDURE

AMENDMENT
NORTH CAROLINA SUPREME COURT LIBRARY RULES

Pursuant to Section 7A-13(d) of the General Statutes of North Carolina, the following amendment to the Supreme Court Library Rules as promulgated December 20, 1967 (275 N.C. 729) and amended November 28, 1972 (281 N.C. 772), April 14, 1975 (286 N.C. 731), July 24, 1980 (299 N.C. 745), and July 19, 1982 (305 N.C. 784), has been approved by the Library Committee and hereby is promulgated:

Section 1. Rule 3 is amended to read as follows:

> *Hours.*—Except when the Library Committee authorizes that it be closed, the Library shall be open for public use on Monday through Friday from eight-thirty o'clock in the morning until five o'clock in the afternoon.

Section 2. This amendment shall become effective January 1, 1984.

This the 8th day of November, 1983.

Frances H. Hall
Librarian

APPROVED:

JAMES G. EXUM, JR.
Chairman, For the Library Committee

AMENDMENT TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 16 of the North Carolina Rules of Appellate Procedure appearing at 287 N.C. 671, 720 entitled "SCOPE OF REVIEW OF DECISIONS OF COURT OF APPEALS" is amended as follows:

1. The second sentence of subparagraph (a) entitled "How Determined" is amended to read:

> Except where the appeal is based solely upon the existence of a dissent in the Court of Appeals, review is limited to consideration of the questions properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

2. Subparagraph (b) entitled "Appellant—Appellee Defined" is hereby renumbered and redesignated as paragraph (c). This amendment in no way alters the contents of the paragraph but simply changes its alphabetical designation from (b) to (c).

3. A new subparagraph (b) to be entitled "Scope of Review in Appeal Based Solely Upon Dissent" is hereby adopted as follows:

> (b) Scope of Review in Appeal Based Solely Upon Dissent. Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues which are specifically set out in the dissenting opinion as the basis for that dissent and are properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review, pursuant to Rule 15, or by petition for writ of certiorari, pursuant to Rule 21.

Adopted by the Court in Conference this 3rd day of November, 1983, to become effective with notices of appeal filed in the Supreme Court on and after January 1, 1984. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

FRYE, J.
For the Court

AMENDMENT TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 10(b) of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, 699, is hereby amended by the addition of a new subdivision to be designated "(3)" and to read as follows:

(3) Sufficiency of the Evidence. A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action or for judgment as in case of nonsuit is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

Adopted by the Court in Conference this 7th day of July, 1983. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

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

§ 10.1. Motions in the Supreme Court and Court of Appeals

Respondent judge's motion under App. R. 37 to include as part of the record on appeal certain paperwritings previously furnished to the Judicial Standards Commission by respondent is denied by the Supreme Court. *In re Kivett*, 635.

A motion pursuant to App. R. 9(b)(6) to amend the record to include an affidavit attached to defendant city's response to plaintiffs' motion for a preliminary injunction was allowed by the Supreme Court. *Lumbee River Electric Corp. v. City of Fayetteville*, 726.

ATTORNEYS AT LAW

§ 7. Compensation and Fees; Generally

Although it was error for the trial court to appoint plaintiffs' attorneys as counsel for the receivers of the corporate defendants, the trial court could properly allow reasonable fees to the attorneys for their services to the receivers. *Lowder v. All Star Mills*, 695.

AUTOMOBILES AND OTHER VEHICLES

§ 87.8. When Negligence of One Tortfeasor does not Insulate Other Tortfeasor

The negligence of a truck driver in parking on the traveled portion of a highway and in failing to mark the parked truck with lights or flares was not insulated as a matter of law by the negligence of the driver of an automobile in driving while intoxicated. *King v. Allred*, 113.

§ 89.4. Last Clear Chance; Cases Where Evidence was Insufficient with Respect to Pedestrians and Others on or About Highway

In a tort action in which plaintiff alleged defendant negligently hit him while he was crossing the street and defendant alleged that plaintiff was contributorily negligent, the trial court properly failed to instruct on the doctrine of last clear chance. **Watson v. White**, 498.

BASTARDS

§ 10. Civil Action by Illegitimate Child to Compel Father to Furnish Support

The minor plaintiff in an action to establish paternity and obtain support was not collaterally estopped by a judgment finding that defendant was not plaintiff's father entered in an action to establish paternity brought in the mother's name by the Child Support Enforcement Agency of Johnston County. *Settle v. Beasley*, 616.

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions Available

Where the prosecution gave defense counsel the pretrial statements of two of the State's witnesses at trial, before the witnesses took the stand, the State satisfied the requirements of due process and G.S. 15A-904(a). *S. v. Jackson*, 26.

BURGLARY AND UNLAWFUL BREAKINGS

§ 6.2. Felonious Intent

The trial court in a burglary case erred in incorporating instructions concerning an intent to commit the felony of rape when the State's evidence related only to

against defendant at the second trial, had represented defendant at a bond reduction hearing and had formerly been in partnership with the attorney who represented defendant at his first trial. *S. v. Shane*, 438.

A defendant is not denied the effective assistance of counsel by the failure of his counsel to call a witness when the decision not to call the witness is shown by the record to be defendant's own. *Ibid.*

§ 62. Challenges and Voir Dire

There was no merit to defendant's arguments that "death qualification" of prospective jurors denied him his right to a fair trial; that the death penalty is cruel and unusual punishment; and that the court erred in denying his motion to empanel different juries for the guilt determination phase and the sentencing phase of his trial. *S. v. Jackson*, 26.

§ 63. Exclusion from Jury for Opposition to Capital Punishment

Defendant's right to select a jury from a cross-section of the community was not violated when the State was permitted to challenge prospective jurors for their death penalty views. *S. v. Fincher*, 1.

§ 80. Death and Life Imprisonment Sentences

Imposition of a sentence of life imprisonment for a first degree sexual offense did not constitute cruel and unusual punishment because the sexual acts occurred between a defendant who spent several years in public service and a person he claims sold sexual favors or because a codefendant who entered into a plea bargain with the State received a lesser sentence. *S. v. Shane*, 438.

CONTRACTS

§ 6.1. Contracts by Unlicensed Contractors or Businesses

The doctrine of "substantial compliance" with the general contractor's licensing statutes is rejected by the Supreme Court. *Brady v. Fulghum*, 580.

A contract illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor and cannot be validated by the contractor's subsequent procurement of a license. *Ibid.*

If a licensed contractor's license expires, for whatever reason, during construction, he may recover for only the work performed while he was duly licensed. If the contractor renews his license during construction, he may recover for work performed before expiration and after renewal. *Ibid.*

Parties not regulated by the general contractor's licensing statutes may enforce a construction contract against an unlicensed contractor. *Ibid.*

CORPORATIONS

§ 12. Transactions Between Corporation and its Officers or Agents

In an action in which plaintiff claimed that defendant, majority stockholder, breached his fiduciary duty to the corporate defendants, in which plaintiff and the individual defendant both had interests, by usurping a corporate opportunity which belonged to them, the trial court failed to focus on the appropriate issue and the findings of fact were not sufficient. *Meiselman v. Meiselman*, 279.

CORPORATIONS — Continued

§ 13. Liability of Officers and Agents to Corporation for Neglect of Duties, Mismanagement, or Wrongful Depletion of Assets

In an action by a minority stockholder in a closely held corporation, the trial court misapplied the applicable law in denying plaintiff's claim for relief under G.S. 55-125(a)(4) and G.S. 55-125.1. *Meiselman v. Meiselman*, 279.

In an action brought by a minority stockholder in a closely held corporation where the trial court entered summary judgment for the majority stockholder, the trial court's findings of fact failed to address the "rights or interests" of the minority stockholder in the family corporations, and the case must be remanded to the trial court for an evidentiary hearing to resolve the issue. *Ibid.*

CRIME AGAINST NATURE

§ 4. Instructions; Lesser Included Offenses

The trial court erred by submitting crime against nature as a lesser included offense of second degree sexual offense. *S. v. Warren*, 224.

CRIMINAL LAW

§ 5. Mental Capacity in General; Insanity

Viewing defendant's testimony as a whole, the Court concluded the testimony would not have suggested to the trial court that defendant lacked capacity to proceed, and there was no duty of the trial court on its own motion to reopen the question of defendant's mental capacity. *S. v. Heptinstall*, 231.

The trial court properly instructed the jury that defendant bore the burden of proving to their satisfaction he was insane at the time of the offense. *Ibid.*

§ 5.1. Determination of Issue of Insanity

In a prosecution for first degree murder, the trial court did not err in finding defendant competent to stand trial, although there was conflicting testimony. *S. v. Heptinstall*, 231.

§ 5.2. Mental Capacity as Affected by Unconsciousness

The trial court erred in failing to instruct the jury on the defense of unconsciousness where defendant's testimony that he suffered from a blackout at the time of the crimes was corroborated by testimony of other witnesses and by evidence of defendant's peculiar actions at the time of the crimes. *S. v. Jerrett*, 239.

§ 15.1. Prejudice, Pretrial Publicity or Inability to Receive Fair Trial as Ground for Change of Venue

In a prosecution for first degree murder, felonious breaking and entering, kidnapping and armed robbery, defendant met his burden of showing by a totality of the circumstances that a reasonable likelihood existed that he could not receive a fair trial before an Alleghany County jury, and the court erred in denying defendant's motions for a change of venue made prior to trial and during the trial. *S. v. Jerrett*, 239.

The trial court properly denied defendant's motion for a change of venue or special venire because of pretrial publicity. *S. v. Corbett*, 382.

§ 26.5. Former Jeopardy; Particular Cases; Same Acts or Transaction Violating Different Statutes

The commission of the crime of armed robbery was the basis for the conviction of defendants for first degree murder; therefore, no additional punishment may be

imposed for the convictions of armed robbery as independent criminal offenses. *S. v. Martin*, 465.

Defendant was not subject to multiple convictions or to enhanced punishment by an improper use of the same element twice when he was convicted of a first degree sexual offense on the theory that he aided and abetted two co-conspirators in a first degree sexual offense. *S. v. Polk*, 559.

§ 34. Evidence of Defendant's Guilt of Other Offenses; Inadmissibility

In a prosecution for a first degree sexual offense, attempted first degree rape and robbery with a dangerous weapon, the trial court committed prejudicial error by allowing into evidence the testimony of a rape victim who testified that defendant had raped her approximately two months after the attempted rape for which he was being tried. *S. v. Moore*, 102.

§ 34.6. Admissibility of Evidence of Other Offenses to Show Knowledge or Intent

Pieces of paper found in defendant's wallet containing the names of persons with numbers written beside the names, testimony by officers that the names on the papers were the street names for various persons who had been investigated for narcotics violations, and large amounts of cash seized from defendant were admissible to show the intent of defendant in possessing heroin and his guilty knowledge of the type of substance he possessed. *S. v. Willis*, 451.

§ 34.8. Admissibility of Evidence of Other Offenses to Show Modus Operandi or Common Plan, Scheme or Design

The trial court properly admitted into evidence testimony concerning defendants' abandoned attempt to rob merchants at a mall where within minutes the same parties were engaged in a plan which resulted in the armed robbery of a Handy Pantry store and the felony murder of an officer. *S. v. Martin*, 465.

In a prosecution for first degree rape, first degree sexual offense and incest where defendant categorically denied any wrongdoing, no prejudice resulted from the admission of testimony concerning a 28 May offense of fellatio due to a "misleading" bill of particulars which had stated that acts of anal intercourse and fellatio had occurred on 15 May 1982. *S. v. Effler*, 742.

§ 42.4. Identification of Object and Connection with Crime; Weapons

The trial court properly allowed a witness to testify that he saw two pistols in the possession of one defendant and an accomplice on the day following the armed robbery. *S. v. Martin*, 465.

§ 42.5. Identification of Object and Connection with Crime; Other Articles Found at Scene or Used or Taken in Commission of Crime

The trial court properly allowed into evidence two heaters which allegedly were taken from the crime scene. *S. v. Williams*, 170.

§ 43. Maps, Diagrams and Photographs

The trial court properly allowed a map depicting the rivers and roads in an area in which the crimes occurred into evidence. *S. v. Jackson*, 26.

In a first degree murder case it was not improper for a jury considering capital resentencing to view photographs which depicted the manner in which two victims were shot, the precise location of the gunshot wounds, and the scene of one victim's murder behind the counter in the store. *S. v. Oliver*, 326.

CRIMINAL LAW — Continued

§ 45.1. Experimental Evidence; Particular Experiments

The trial court did not abuse its discretion in excluding a photograph illustrative of defendant's brother's testimony which was offered to impeach the testimony of two prosecution witnesses. *S. v. Bondurant*, 674.

§ 50.1. Admissibility of Opinion Testimony; Opinion of Expert

The trial court committed prejudicial error in failing to strike the answer of a psychiatrist in which the psychiatrist stated his opinion but failed to state his opinion in could or might terms. *S. v. Keen*, 158.

§ 50.2. Admissibility of Opinion Testimony; Opinion of Nonexpert

The trial court properly allowed a prosecuting witness in a prosecution for a first degree sexual offense and armed robbery to testify, over objection, that no one was in the building other than she and the defendant. *S. v. Moore*, 102.

The trial court did not commit prejudicial error when it failed to instruct the jury to disregard a witness's statements identifying red stains as "bloodstains." *S. v. Wallace*, 141.

The trial court properly excluded an officer's opinion or conclusion that there were inconsistencies in a kidnapping and rape victim's statement to him about the events in question. *S. v. Corbett*, 382.

§ 66.1. Evidence of Identity by Sight; Competency of Witness; Opportunity for Observation

Photographic, lineup and in-court identifications of defendant by a kidnapping and rape victim were not inherently incredible because the victim may have consumed several beers and may have taken a dose of LSD during the day prior to the crimes. *S. v. Corbett*, 382.

A pretrial lineup identification was not impermissibly suggestive because the victim on the night of the crime saw her assailant without her glasses and in the light of a night light. *S. v. Grimes*, 606.

Defendant's contention that the court should review its previous decisions and change the rule concerning identification testimony to require the trial court to determine, on a case-by-case basis, whether other conflicting evidence as to identification would require the court to remove the question from the jury is without merit. *S. v. Hockett*, 794.

§ 66.9. Identification from Photographs; Suggestiveness of Procedure

A kidnapping victim's viewing of a newspaper photograph of defendant did not taint her subsequent lineup and in-court identifications of defendant. *S. v. Corbett*, 382.

A pretrial photographic identification procedure was not so impermissibly suggestive or conducive to misidentification as to violate defendant's right to due process even if the photograph of defendant was the only one depicting a male with both a mustache and a beard. *S. v. Grimes*, 606.

§ 66.14. Independent Origin of In-Court Identification as Curtailing Improper Pretrial Identification

Where a trial court's conclusion that a victim's in-court identification was of independent origin was properly supported by the findings of fact, the victim's identification testimony was admissible notwithstanding alleged defects or irregularities in a pretrial photographic identification procedure. *S. v. Carroll*, 809.

CRIMINAL LAW — Continued

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

There was clear, competent and convincing evidence to support the trial court's conclusion that the prosecuting witness's identification of defendant was based on her observation of him at the time of the incident. *S. v. Carroll*, 809.

§ 75. Admissibility of Confession; Tests of Voluntariness

In a prosecution for first degree murder, the trial court correctly concluded that defendant's confession was made freely and voluntarily and was admissible against him. *S. v. Booker*, 446.

§ 75.3. Effect of Confronting Defendant with Statements of Others or with Evidence

An officer's statement to a codefendant that defendant "was going to tell the truth about it" and that defendant said they were both involved was not deceptive or untruthful so as to render the codefendant's confession involuntary and a taint on defendant's subsequent confession. *S. v. Fincher*, 1.

§ 75.4. Confessions Obtained Prior to Appointment of, or in Absence of, Counsel

Where defendant was subjected to custodial interrogation in the absence of counsel after invoking his right to have counsel present during interrogation, defendant's in-custody statement is admissible only if it is found that (1) defendant initiated the further communication with the police and (2) defendant validly waived his right to counsel and to silence under the totality of the circumstances. *S. v. Lang*, 512.

§ 75.11. Waiver of Constitutional Rights; Sufficiency of Waiver

Defendant did not invoke his Fifth Amendment right to remain silent when he told officers that he did not wish to give any further written statements until he heard the truth from a codefendant. *S. v. Fincher*, 1.

§ 75.14. Defendant's Mental Capacity to Confess or Waive Rights; Generally, Insanity; Retardation

The totality of circumstances supported the trial judge's conclusions that a youthful defendant who had an I.Q. of only 73 was capable of making an understanding waiver of his *Miranda* rights and that his confessions were made voluntarily and understandingly. *S. v. Fincher*, 1.

§ 75.16. Defendant's Mental Capacity to Confess or Waive Rights; Minority

The in-custody statements of a 17-year-old defendant were inadmissible in his murder, rape, and burglary trial where he was not advised that he had a right to have a parent, guardian or custodian present during questioning. *S. v. Fincher*, 1.

§ 76.6. Confessions; Voir Dire Hearings; Sufficiency of Findings of Fact

The trial court erred in ruling that defendant's confession was admissible without making specific findings of fact as to who initiated the contact between defendant and the law officers which resulted in his confession after defendant had invoked his right to have counsel present during custodial interrogation. *S. v. Lang*, 512.

§ 77.1. Admissions and Declarations of Defendant

Two letters which were either authenticated by the defendant or his brother were properly admitted into evidence as admissions. *S. v. Williams*, 170.

CRIMINAL LAW — Continued

§ 79. Acts and Declarations of Companions, Codefendants and Co-conspirators Generally; Acts and Declarations Prior to or During Commission of Crime

Testimony by a co-conspirator that defendants went across the street "to wait on us," did not constitute an expression of opinion by a lay witness. *S. v. Martin*, 465.

The trial court did not err in permitting evidence of the sale of the murder weapon and the slain officer's pistol by a co-conspirator on the day following the commission of the charged crime. *Ibid.*

§ 80. Books, Records, and Other Writings

In a prosecution for possession of heroin, the trial court properly permitted an officer to testify that he recognized certain initials, abbreviations and names appearing on pieces of paper found in defendant's wallet as being the nicknames or street names of specified persons whom he had investigated for various narcotics violations. *S. v. Willis*, 451.

§ 82.2. Physician-Patient and Similar Privileges

In a prosecution of defendant for rape of his stepdaughter in which the evidence showed that the victim suffered from gonorrhea, testimony by a county public health nurse that records of her office revealed that defendant was treated for gonorrhea two days after the crime did not violate the physician-patient privilege of G.S. 8-53. *S. v. Efird*, 802.

§ 86.5. Particular Questions and Evidence as to Specific Acts

The district attorney could properly ask defendant whether he was "avoiding matters" in New Jersey when he left that state where the district attorney had a good faith belief that defendant was avoiding a criminal prosecution, which constituted a specific act of misconduct. *S. v. Atkinson*, 186.

§ 86.10. State's Witnesses; Accomplices; Corroboration

The trial court properly admitted a witness's prior written statement into evidence. *S. v. Martin*, 465.

§ 87. Direct Examination of Witnesses Generally; What Witnesses May Be Called; List of Witnesses

Although a witness's answer was not responsive to the question posed by the prosecutor, the answer that defendant "was nervous" was competent evidence and need not have been stricken. *S. v. Williams*, 170.

§ 90. Rule that Party is Bound by and May Not Discredit His Own Witness

In a prosecution for second degree murder, the trial court committed reversible error in allowing the State to impeach its own witness by use of prior inconsistent statements. *S. v. Cope*, 47.

§ 91. Speedy Trial

When a charge is dismissed pursuant to G.S. 15A-612 as the result of a finding of no probable cause, the computation of the time for the purpose of applying the Speedy Trial Act commences with the last of the listed items (arrested, served with criminal process, waived an indictment, or was indicted) relating to the new charge rather than the original charge. *S. v. Koberlein*, 601.

Where charges against defendant were dismissed once and then brought again, the last relevant event with regard to speedy trial purposes was when defendant was arrested after the return of the second indictment. *Ibid.*

CRIMINAL LAW — Continued

§ 92.2. Consolidation Held Proper; Related Offenses

The trial court did not err in consolidating for trial defendant's offenses of first degree rape and first degree sexual offenses. *S. v. Effler*, 742.

§ 92.3. Consolidation of Multiple Charges Against Same Defendant

The trial court erred in consolidating charges against defendant for kidnapping and rape of one victim on 16 August, kidnapping and rape of a second victim on 2 September, and kidnapping of a third victim on 10 September, but such error was not prejudicial. *S. v. Corbett*, 382.

§ 92.4. Consolidation Held Proper

Defendant failed to show the trial court abused its discretion in consolidating for trial the charges of kidnapping, robbery with a dangerous weapon, and murder in the first degree. *S. v. Jackson*, 26.

§ 98.2. Presence and Conduct of Defendant and Witnesses; Sequestration of Witnesses

Defendant failed to show that the trial judge abused his discretion in denying defendant's motion to sequester two witnesses who were housed in the same jail cell. *S. v. Jackson*, 26.

§ 99.7. Conduct of Court; Explanations, Instructions, and Admonitions to Witnesses

The trial court's admonitions to the prosecuting witness to answer truthfully questions asked her by the prosecutor and warning her of the consequences of perjury invaded the province of the jury and deprived defendant of a fair trial before an impartial judge. *S. v. Locklear*, 428.

§ 99.9. Examination of Witnesses by the Court; Particular Questions Held Proper or Not Prejudicial

The trial court did not express an opinion in asking questions of a rape victim's physician concerning how long the victim had had gonorrhea before the disease was diagnosed as such by the physician. *S. v. Efird*, 802.

§ 102.1. Latitude and Scope of Closing Arguments

In a prosecution for a first degree sexual offense and armed robbery, there was no abuse of discretion in the trial court's refusal to sustain defendant's objections to two of the prosecutor's arguments to the jury. *S. v. Hockett*, 794.

§ 102.5. Conduct in Examining or Cross-Examining Defendant and Other Witnesses; Improper Questions

The trial court properly denied defendant's motion for a mistrial after, on cross-examination of defendant, he was asked if he had "unlawfully kill[ed] and slay[ed] one Ricky Cook." *S. v. Bondurant*, 674.

§ 102.6. Particular Comments and Conduct in Argument to Jury

The prosecutor's misstatement in his jury argument that a co-conspirator's girlfriend testified that the co-conspirator took part in splitting the money from a robbery was not prejudicial error. *S. v. Abdullah*, 63.

§ 102.7. Comment on Character and Credibility of Witnesses

The prosecutor's jury argument that a lawyer vouches for the credibility of his witness and that a lawyer may not ethically put up a witness who he believes will lie was not grossly unfair or calculated to prejudice the jury. *S. v. Abdullah*, 63.

CRIMINAL LAW — Continued

It was not improper for the prosecutor to argue that six people were involved in the crimes and that, while three co-conspirators who testified for the State could have easily been convicted on their confessions, their testimony in return for sentence concessions would ensure the convictions of the other three. *Ibid.*

§ 102.9. Comment on Defendant's Character and Credibility

There was no evidence to support the prosecutor's jury argument characterizing defendant as a "conman" and a "disciple of Satan." *S. v. Jerrett*, 239.

§ 102.10. Reference in Argument to Defendant's Prior Convictions or Criminal Conduct

Although a prosecutor improperly argued defendant's prior misdeeds for purposes other than mere impeachment in his argument to the jury, the remarks were not such that the trial judge was required to declare a mistrial *sua sponte*. *S. v. Bondurant*, 674.

§ 112. Instructions on Burden of Proof and Presumptions

The trial court's instruction that "[i]f you find the facts to be as defendant's evidence tends to show them, then you are to acquit the defendant" did not place on defendant the burden of proving his innocence. *S. v. Corbett*, 382.

§ 113.1. Recapitulation or Summary of Evidence

The trial court in a robbery-murder case did not err in refusing to give defendant's requested instruction that defendant's evidence tended to show that a State's witness could not identify defendant in a lineup "after having stated that she would know the person with the gun if she ever saw him again." *S. v. Abdullah*, 63.

There was no plain error in the court's recapitulation of the evidence for failure to state to the jury that the evidence showed that one victim was unconscious immediately upon being shot. *S. v. Oliver*, 326.

In a prosecution for first degree murder where the trial court, when summarizing the evidence, stated that defendant said something to the effect that "you don't believe I'll kill you" rather than "you don't believe I'll shoot you," the error was not "plain error" mandating a new trial for defendant. *S. v. Bondurant*, 674.

§ 117.3. Charge on Credibility; State's Witnesses

In a prosecution for murder, the trial court did not err in refusing defendant's request for a special instruction that testimony of a State's witness should be carefully scrutinized if the jury found that the witness was testifying in return for special consideration from the police and prosecution. *S. v. Bare*, 122.

§ 118. Charge on Contentions of the Parties

The trial judge did not err in refusing to give defendant's requested instruction on his contention that he had presented evidence tending to show that three co-conspirators who were State's witnesses had testified falsely. *S. v. Abdullah*, 63.

§ 119. Requests for Instructions

In a prosecution for first degree sexual offense and armed robbery, the trial court committed reversible error by refusing to answer questions asked by the jury having to do with the effect of a threat of harm or force with a deadly weapon. *S. v. Hockett*, 674.

CRIMINAL LAW — Continued

§ 128.2. Mistrial; Particular Grounds

A statement by a prospective juror that in his opinion defendant was guilty did not cause the remaining prospective jurors to become unable to render a fair verdict so as to require a mistrial. *S. v. Corbett*, 382.

§ 135.3. Exclusion of Veniremen Opposed to Death Penalty

There was no merit to defendant's arguments that "death qualification" of prospective jurors denied him his right to a fair trial; that the death penalty is cruel and unusual punishment; and that the court erred in denying his motion to empanel different juries for the guilt determination phase and the sentencing phase of his trial. *S. v. Jackson*, 26.

The trial court did not err in excluding for cause fourteen jurors who unequivocally stated their opposition to the death penalty without explaining prior to the voir dire examination the procedural and substantive aspects of the sentencing process in a capital case. *S. v. Jerrett*, 239.

§ 135.4. Cases Decided Under G.S. 15A-2000

The trial court did not commit error in instructing the jury during the sentencing phase of defendant's trial that it would be required to consider the evidence offered during the guilt or innocence phase of the trial. *S. v. Jackson*, 26.

Imposition of a sentence of death does not violate a defendant's right to privacy. *S. v. Jerrett*, 239.

Defendant's kidnapping of a murder victim's wife was a crime of violence which supported the trial court's submission of the aggravating circumstance that the murder was part of a course of conduct which included the commission by defendant of other crimes of violence against another person. *Ibid.*

The death penalty was not unconstitutionally applied to defendant because at the time of defendant's trial case law required the court in a prosecution for first degree murder on the theory of premeditation and deliberation to submit to the jury the offense of second degree murder, even though the evidence did not support this offense, where defendant was convicted of felony murder. *Ibid.*

The evidence supported the trial court's submission of the pecuniary gain aggravating circumstance in a sentencing hearing in a first degree murder case. *Ibid.*

The trial court's instructions on the jury's duty to recommend the death penalty if it found beyond a reasonable doubt that the aggravating circumstance or circumstances found by it outweighed any mitigating circumstance or circumstances found by it were free from prejudicial error. *Ibid.*

In a prosecution for first degree murder, imposition of the death sentence on each defendant was not excessive since the evidence showed that one defendant killed one victim and the other defendant killed the other victim. *S. v. Oliver*, 326.

In a prosecution for first degree murder, the trial court correctly submitted as an aggravating factor that the murder of a victim was "especially heinous, atrocious, or cruel" pursuant to G.S. 15A-2000(e)(9) with respect to defendant Moore. However, as to the defendant Oliver, the aggravating circumstance was erroneously submitted since defendant Moore's statement concerning the victim's having begged for his life was made after the murder took place and the statement was inadmissible against defendant Oliver. *Ibid.*

In a sentencing hearing for a first degree murder conviction, the trial judge's statement essentially defining an especially heinous, atrocious, or cruel murder as one "occurring while a man is begging for his life," was erroneous. *Ibid.*

CRIMINAL LAW — Continued

In prosecutions for the murders of two victims, the evidence supported the submission of the aggravating factor that the crime was motivated by a desire to avoid detection and apprehension pursuant to G.S. 15A-2000(e)(4). *Ibid.*

Double jeopardy does not preclude the submission of pecuniary gain as an aggravating factor when the underlying felony is armed robbery, and G.S. 15A-2000 (e)(6) is not unconstitutionally vague. *Ibid.*

Instructions and comments to the jury that its function was punishment, not a determination of guilt or innocence, in a sentencing hearing for a first degree murder conviction was in all respects proper. *Ibid.*

In a sentencing hearing upon conviction of first degree murder, the burden of persuasion as to the existence of mitigating circumstances is on the defendant. *Ibid.*

In a sentencing hearing upon conviction of first degree murder, the unanimity requirement of a jury is only placed upon the finding of whether an aggravating or mitigating circumstance exists. *Ibid.*

Statements of a prosecutor asking one juror if she had "the backbone" to impose a sentence of death, and another juror if he had the "intestinal fortitude," were not prejudicial to defendants. *Ibid.*

Defendant showed no prejudice by the erroneous submission of a witness's testimony, that he was in protective custody, on direct examination, since the legitimate purpose for which the testimony was admitted was established during cross-examination. *Ibid.*

Although a prosecutor in a first degree murder sentencing hearing improperly argued that the burden was on defendants to satisfy the jury that there "is something about these defendants of a redeeming value that gives rise to the mitigation that will cause you to drop it down to life imprisonment," in the context of the other arguments and the instructions by the trial judge, the statement did not amount to such a gross impropriety as to require the trial judge to act *ex mero motu*, or to recall that the statement had been made and later caution the jury to disregard it during his instructions to the jury later that day. *Ibid.*

Where, in anticipation of defense counsel's similar argument, a prosecutor stated that the death penalty was not inconsistent with scriptures of the Bible, there was nothing, in the absence of objection, that amounted to plain error which would justify reversal. *Ibid.*

There was no error in the prosecutor emphasizing the victims' rights in his closing arguments to the jury in a sentencing hearing. *Ibid.*

Inasmuch as G.S. 15A-2000 provides that the same jury may determine both guilt and sentence in a capital case, and accepting an argument that a jury, properly instructed, can in fact give individualized consideration to each defendant's culpability, the Court held that defendants were not prejudiced by a joint trial in the first instance or in a resentencing hearing. *Ibid.*

In a resentencing hearing for a first degree murder conviction, a defendant's admission that he had killed whites before was introduced solely for the purpose of corroborating the testimony of another witness that the defendant had, in fact, been the "trigger man" in the murder of the victim. *Ibid.*

There was no plain error sufficient to justify awarding defendant a new trial on the basis of a witness being asked, on cross-examination, whether he was aware of defendant's prior convictions on charges of larceny, trespass, and damage to real property, and breaking or entering and larceny. *Ibid.*

CRIMINAL LAW – Continued

There was no prejudicial error in the failure of a trial judge to allow defense counsel to question a witness concerning his earlier inability to identify one defendant. *Ibid.*

There was no error in the trial judge's failure to peremptorily instruct on defendant's age as a mitigating factor. *Ibid.*

In light of previous testimony concerning the reputation of one defendant, the trial court did not err in ruling that one witness's testimony had become repetitive and in sustaining an objection concerning that testimony. *Ibid.*

Defendant failed to show how he was prejudiced by the trial judge's stating that his instructions remained the same for defendant Oliver as he had just given for defendant Moore. *Ibid.*

A defendant's sentence of death was neither disproportionate nor excessive where the murder was the result of a deliberate plan to seek out a business establishment to rob, and without the slightest provocation or excuse, to callously and in cold blood shoot at close range anyone unfortunate enough to be present at the time. *Ibid.*

In a prosecution for first degree murder, the death sentence imposed was disproportionate within the meaning of G.S. 15A-2000(c)(2) in that it did "not rise to the level of those murders in which [the Court] [had] approved the death sentence upon proportionality review." *S. v. Bondurant*, 674.

§ 138. Severity of Sentence and Determination Thereof

Pecuniary gain could not be considered as an aggravating circumstance in imposing sentences for armed robbery and conspiracy to commit armed robbery where there was no evidence that defendant was hired or paid to commit the offenses. *S. v. Abdullah*, 63.

The trial judge improperly relied on the fact that defendant was armed with a deadly weapon in enhancing defendant's sentence for armed robbery, but the trial judge could properly rely on such factor in imposing a sentence for conspiracy to commit armed robbery. *Ibid.*

In imposing sentences on defendant for kidnapping and felonious breaking and entering, the evidence supported the trial court's finding as an aggravating factor that defendant engaged in a pattern of violent conduct which indicated a serious danger to society, but the court erred in finding as aggravating factors that lesser sentences would depreciate the seriousness of the crimes and that the sentences were necessary to deter others from committing the same crimes. *S. v. Jerrett*, 239.

Where the evidence before the court was both uncontradicted and manifestly credible that defendant played a passive role in the commission of a murder, the trial court erred in failing to consider it as a mitigating factor in defendant's sentencing hearing. *S. v. Jones*, 214.

In a prosecution for murder, felonious larceny, and armed robbery and conspiracy, the trial court erroneously considered as an aggravating factor that the offense was committed for pecuniary gain since there was no evidence that defendant was "hired" or "paid" to commit the offenses. *Ibid.*

The trial court properly considered as an aggravating factor in an armed robbery case that defendant "induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants." *Ibid.*

The evidence showed that a second degree murder was excessively brutal and that the victim suffered unnecessary physical pain prior to death so as to support

CRIMINAL LAW — Continued

CRIMINAL LAW — Continued

In a prosecution for second degree murder, the trial court incorrectly considered as an aggravating factor that defendant was armed with or used a deadly weapon during the commission of the offense. *S. v. Taylor*, 570.

It is proper for a sentencing judge to use the existence of a deadly weapon to find both the aggravating factor that defendant was armed with or used a deadly weapon during the commission of the offense and to find the aggravating factor that a murder was committed during the course of conduct in which defendant engaged in an act of violence against another person. *Ibid.*

The trial court properly failed to find as a mitigating factor that defendant had "limited mental capacity" at the time of the offense. *Ibid.*

In a prosecution for armed robbery and second degree murder, the trial court properly considered as an aggravating circumstance that defendant was on pretrial release in a separate felony case, and consideration of that factor did not violate defendant's right to constitutional due process. *S. v. Webb*, 549.

Where defendant did not object to the introduction of evidence of his prior conviction or convictions, nor did he allege that he was indigent and not represented by counsel at the time of his prior conviction or convictions, the Court of Appeals erred in holding that consideration of this factor was erroneous. *S. v. Green*, 623.

The imposition of consecutive sentences for the crimes of rape, first degree sexual offense, first degree burglary and armed robbery did not violate either the Fair Sentencing Act or any constitutional proportionality requirement. *S. v. Ysaguire*, 780.

§ 138.1. Limitations on Sentence; More Lenient Sentence to Codefendant

Imposition of a sentence of life imprisonment for a first degree sexual offense did not constitute cruel and unusual punishment because the sexual acts occurred between a defendant who spent several years in public service and a person he claims sold sexual favors or because a codefendant who entered into a plea bargain with the State received a lesser sentence. *S. v. Shane*, 438.

§ 161. Necessity for, and Form and Requisites of, Exceptions and Assignments of Error in General

Under App. Rule 10(b)(1), defendants did not properly object to errors at trial where close to one-half of the errors assigned by defendants involved matters to which no objection or exception was taken at trial, and where the assignments of error were brought forward solely on the basis of defendants' subsequent insertion of the notation "exception" placed throughout the record and the trial transcript. *S. v. Oliver*, 326.

§ 162.2. Time for Objection; Generally

Defendant's objection to a line of questioning in which he was asked about his living arrangements with his fiancee prior to marriage came too late for him to complain of it on appeal. *S. v. Williams*, 170.

ELECTRICITY

§ 2.3. Competition Between Suppliers Prior to 1965

The City of Fayetteville's extension of electric service to a residential subdivision located four miles outside the corporate limits and within territory assigned by the Utilities Commission to plaintiff electric membership corporation was "within reasonable limitations" and was therefore proper. *Lumbee River Electric Corp. v. City of Fayetteville*, 726.

ELECTRICITY — Continued

§ 3. Rates

Former G.S. 62-134(e) did not permit an electric utility in a fuel clause proceeding to obtain any increase or adjustment in its rates to recover any of its expenses for purchased power. *State ex rel. Utilities Commission v. Public Staff*, 195.

The Utilities Commission erred in failing to determine in a general rate case the reasonable level of fuel expenses, including the cost of purchased power, used by an electric utility in the generation of power during the test period. *State ex rel. Utilities Comm. v. N.C. Textile Mfrs. Assoc.*, 238.

EVIDENCE

§ 11.7. Particular Evidence or Testimony Barred by Dead Man's Statute

In an action to set aside on grounds of mental incapacity and undue influence a deed executed by plaintiff's deceased father following surgery for a brain tumor, plaintiff's testimony concerning a conversation with deceased prior to his illness tended mostly to prove deceased's dispositive intent rather than his mental capacity and was inadmissible under the hearsay rule and the Dead Man's Statute. *Hardee v. Hardee*, 753.

HOMICIDE

§ 4. Murder in the First Degree; Generally

Where defendant was found not guilty of premeditated and deliberated murder, and where he was convicted of felony murder, premised upon the commission of armed robbery, but where there was insufficient evidence to support the commission of the underlying felony, there was also insufficient evidence to support defendant's conviction of felony murder. *S. v. Bates*, 528.

§ 4.2. Murder in Commission of Felony

The commission of the crime of armed robbery was the basis for the conviction of defendants for first degree murder; therefore, no additional punishment may be imposed for the convictions of armed robbery as independent criminal offenses. *S. v. Martin*, 465.

§ 7.1. Unconsciousness

In a prosecution for first degree murder, although there was some evidence that defendant may have been unconscious as the result of an alcoholic blackout at the time he shot his victim, the evidence was insufficient to require the jury to so find. *S. v. Lowery*, 763.

§ 8.1. Evidence of Intoxication

In a prosecution for first degree murder, substantial evidence was presented which tended to show that defendant killed his victim after forming a deliberate and premeditated intent to kill, and although portions of defendant's evidence tended to show that he was intoxicated and doing strange things at a nightclub, this evidence did not warrant a finding, as a matter of law, that defendant was incapable of forming a specific intent to kill. *S. v. Lowery*, 763.

§ 18. Evidence of Premeditation and Deliberation

There was no open and visible connection between defendant's statements to a witness several months prior to decedent's death and the fact to be proved in the case, which was that the murder of decedent was committed by defendant with premeditation and deliberation. *S. v. Bates*, 528.

HOMICIDE — Continued

§ 18.1. Particular Circumstances Showing Premeditation and Deliberation

The State's evidence in a prosecution for first degree murder was sufficient to infer premeditation and deliberation. *S. v. Myers*, 78.

§ 21.5. Sufficiency of Evidence of Guilt of First Degree Murder

The evidence was sufficient to support a verdict of murder in the first degree. *S. v. Bondurant*, 674.

In a prosecution for first degree murder, substantial evidence was presented which tended to show that defendant killed his victim after forming a deliberate and premeditated intent to kill, and although portions of defendant's evidence tended to show that he was intoxicated and doing strange things at a nightclub, this evidence did not warrant a finding, as a matter of law, that defendant was incapable of forming a specific intent to kill. *S. v. Lowery*, 763.

§ 21.6. Homicide by Poisoning or Lying in Wait or in Perpetration of Felony

The trial court properly denied defendant's motion to dismiss the charge of murder in the first degree. *S. v. Jackson*, 26.

§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder

The State's evidence was sufficient to support a jury finding that defendant intentionally assaulted the victim with a deadly weapon and thereby proximately caused her death so as to support conviction of defendant of second degree murder. *S. v. Robbins*, 771.

§ 21.9. Sufficiency of Evidence of Guilt of Manslaughter

The State's evidence was insufficient for the jury to find that the death of defendants' 25-day-old child was proximately caused by defendants' violation of the child abuse statute and that defendants were thus guilty of involuntary manslaughter of the child. *S. v. Byrd*, 132.

§ 23. Instructions; In General

An instruction in a prosecution for first degree murder which tended to show contradictions in defendant's statements concerning his whereabouts on the day of the murder was erroneous. *S. v. Myers*, 78.

Where the trial judge instructed that "the State . . . says and contends that the defendant is guilty of first degree murder with malice, deliberation and premeditation. The defendant says he is not guilty." and where the defendant made no objection to this portion of the instructions, the Court found no plain error. *S. v. Warren*, 224.

The trial court properly failed to instruct as to the effect of circumstantial evidence since there was both direct and circumstantial evidence of defendant's perpetration of the crime charged. *S. v. Bates*, 528.

§ 23.1. Instructions; Elements of Offense

Where the jury, after deliberating for some time, returned to ask the judge to define second degree murder, voluntary manslaughter, and involuntary manslaughter, where the trial judge reinstructed on those offenses, and defendant did not object, the trial judge did not err by failing to reinstruct on the relationship between imperfect self-defense and voluntary manslaughter. *S. v. Warren*, 224.

§ 24. Presumptions and Burden of Proof

The State was entitled to an instruction that, if the jury found that the acts of defendant indicated a total disregard for human life and were intentionally done

and proximately caused the death of the deceased, the jury might infer that the killing was unlawful and that it was done with malice. *S. v. Lang*, 512.

§ 24.1. Presumptions Arising from Use of Deadly Weapon

The trial court in a murder prosecution erred in giving the jury instructions which permitted the jury to infer malice if it found only that defendant either kicked deceased or struck her with his hand and thereby proximately caused her death. *S. v. Lang*, 512.

The evidence in a murder case required the trial court to instruct the jury that if it found beyond a reasonable doubt that defendant intentionally assaulted the deceased with his hands, fists, or feet, which were then used as deadly weapons, the jury might infer that the killing was unlawful and that it was done with malice. *Ibid.*

§ 24.2. Defendant's Burden of Meeting or Overcoming Presumption of Malice

In a prosecution for first degree murder, the trial judge correctly instructed the jury that malice and unlawfulness are implied from an intentional shooting with a deadly weapon. *S. v. Bondurant*, 674.

§ 25.1. Felony Murder Rule; Conspiracy

The trial judge properly denied defendants' motions to dismiss the charges of first degree murder. *S. v. Martin*, 465.

§ 27.1. Voluntary Manslaughter; Heat of Passion

In a prosecution for second degree murder, the evidence did not support instructions on self-defense or voluntary manslaughter. *S. v. Wallace*, 141.

The trial court in a murder prosecution did not err in failing to instruct on the lesser included offense of voluntary manslaughter because there was evidence that defendant and the victim engaged in a fight where there was no evidence that the fight was provoked by the victim or which person was the aggressor in the fight. *S. v. Robbins*, 771.

§ 27.2. Involuntary Manslaughter; Culpable Negligence

The State's evidence in a murder case did not permit the jury to infer that there was no intentional discharge of defendant's weapon so as to require the trial court to submit involuntary manslaughter as a possible verdict. *S. v. Robbins*, 771.

§ 30. Submission of Question of Guilt of Lesser Degrees of Crime, Generally; Guilt of Second Degree Murder on Charge of Premeditated and Deliberate Murder

The death penalty was not unconstitutionally applied to defendant because at the time of defendant's trial case law required the court in a prosecution for first degree murder on the theory of premeditation and deliberation to submit to the jury the offense of second degree murder, even though the evidence did not support this offense, where defendant was convicted of felony murder. *S. v. Jerrett*, 239.

§ 30.2. Guilt of Manslaughter; Generally

In a prosecution for second degree murder, the trial court properly failed to instruct on voluntary manslaughter where there was no evidence to support such an instruction. *S. v. Cope*, 47.

HOMICIDE — Continued

§ 30.3. Guilt of Manslaughter; Involuntary Manslaughter

Evidence in a prosecution for second degree murder was sufficient to merit an instruction on involuntary manslaughter, and the fact that the evidence also merited an instruction on accidental killing which was given, did not alleviate the need for an instruction on involuntary manslaughter. *S. v. Wallace*, 141.

§ 31.1. Punishment for First Degree Murder

Upon review as required by G.S. 15A-2000(d)(2), the Court found that the killing of the victim did not rise to the level of those murders in which the Court had approved the death sentence upon proportionality review. Therefore, the sentence imposed was disproportionate and the Court imposed a sentence of life imprisonment in lieu of the death sentence. *S. v. Jackson*, 26.

Where defendant was convicted of the charge of murder in the first degree based on the theory of felony murder, with armed robbery constituting the underlying felony, the trial court erred in sentencing defendant separately for the robbery. *Ibid.*

INDICTMENT AND WARRANT

§ 7. Form, Requisites, and Sufficiency of Indictment and Warrant

In a prosecution for first degree sexual offense, an indictment which charged that defendant did "commit a sexual offense with Johnny Lamar Guess, a child of the age of twelve or less, the defendant being at least four years older than the child, in violation of the following law: G.S. 14-27.4" was sufficient to charge an offense and was a sufficient indictment upon which the grand jury could act. *S. v. Effler*, 742.

§ 13. Bill of Particulars

In a prosecution for first degree rape, first degree sexual offense and incest where defendant categorically denied any wrongdoing, no prejudice resulted from the admission of testimony concerning a 28 May offense of fellatio due to a "misleading" bill of particulars which had stated that acts of anal intercourse and fellatio had occurred on 15 May 1982. *S. v. Effler*, 742.

No prejudice resulted to defendant from the fact that a bill of particulars stated that the alleged rape of defendant's daughter occurred in "the afternoon hours" while testimony at trial tended to indicate that the offense occurred between 6:30 and 9:00 p.m. *Ibid.*

§ 17.5. Variance; Particular Allegations

In a prosecution for attempting to obtain property by false pretenses, there was a fatal variance between the allegations in the indictment and the proof at trial. *S. v. Linker*, 612.

INFANTS

§ 6. Hearing for Award of Custody

Defendant failed to establish that the trial court abused its discretion in denying defendant's motion for sequestration of potential jurors and individual voir dire of prospective jurors. *S. v. Jackson*, 26.

§ 6.4. Facts Material to Award of Custody; Child's Wishes

There was no error in systematic exclusion of jurors who stated that they would "automatically" vote against the imposition of capital punishment, and the

JURY — Continued

§ 5.1. Jury Selection Generally

The trial judge correctly refused to permit jury selection in accordance with a method proposed by defendant in which the jury would have been composed of both those opposed and unopposed to capital punishment for the purpose of determining guilt and then, at the sentencing phase, replacing those opposed by alternates who are unopposed to the death penalty. *S. v. Bondurant*, 674.

§ 6.1. Voir Dire Examination; Discretion of Court

Defendant's contention that the probing of particular jurors on voir dire regarding sensitive matters infects and taints the remainder of the venire, without more, was insufficient to support defendant's contention that the trial court abused its discretion in refusing to allow individual voir dire of the prospective jurors and sequestration of the remainder of the voir dire during the selection process. *S. v. Ysaguire*, 780.

§ 7.9. Grounds for Challenge; Prejudice and Bias; Preconceived Opinions

The trial court did not err in the denial of defendant's challenge for cause of three prospective jurors who stated they had formed an opinion before trial as to defendant's guilt or innocence. *S. v. Corbett*, 382.

§ 7.11. Scruples Against, or Belief in, Capital Punishment

Defendant's right to select a jury from a cross-section of the community was not violated when the State was permitted to challenge prospective jurors for their death penalty views. *S. v. Fincher*, 1.

There was no merit to defendant's arguments that "death qualification" of prospective jurors denied him his right to a fair trial; that the death penalty is cruel and unusual punishment; and that the court erred in denying his motion to empanel different juries for the guilt determination phase and the sentencing phase of his trial. *S. v. Jackson*, 26.

The trial court did not err in excluding for cause fourteen jurors who unequivocally stated their opposition to the death penalty without explaining prior to the voir dire examination the procedural and substantive aspects of the sentencing process in a capital case. *S. v. Jerrett*, 239.

KIDNAPPING

§ 1. Definitions; Elements of Offense

A proper indictment for first degree kidnapping must not only allege the elements of kidnapping set forth in G.S. 14-39(a) but must also allege one of the elements set forth in G.S. 14-39(b). *S. v. Jerrett*, 239.

§ 1.2. Sufficiency of Evidence

The State failed to prove beyond a reasonable doubt that defendant restrained, confined or removed the victim within the meaning of G.S. 14-39 and the judgment and sentence for kidnapping must be arrested. *S. v. Jackson*, 26.

The evidence in a kidnapping case presented a jury question as to whether defendant released the victim in a safe place or whether the victim escaped or was rescued by the presence and intervention of a police officer at a convenience store. *S. v. Jerrett*, 239.

§ 1.3. Instructions

The trial court's instructions in a kidnapping case concerning whether defendant "voluntarily" released the victim in a safe place were not erroneous. *S. v. Jerrett*, 239.

LABORERS' AND MATERIALMEN'S LIENS

§ 8. Enforcement of Lien Generally

By filing its claim of lien in a bankruptcy proceeding within 180 days after last providing labor or materials on property, a company satisfied the requirement of G.S. 44A-13(a) that the action for enforcement of a lien be commenced within the 180-day period. *RDC, Inc. v. Brookleigh Builders*, 182.

MASTER AND SERVANT

§ 74. Disfigurement

Findings by the Industrial Commission did not support its conclusion that two scars around plaintiff's knee constituted "serious bodily disfigurement" compensable under G.S. 97-31(22). *Liles v. Charles Lee Byrd Logging Co.*, 150.

§ 89.3. Joinder of Employer or Insurer

In a North Carolina wrongful death action against the manufacturers of asbestos which allegedly caused decedent's death by asbestosis, defendant manufacturers were entitled to allege as a pro tanto defense the concurring negligence of decedent's employer who had paid a Virginia workers' compensation claim arising from the asbestosis. *Leonard v. Johns-Manville Sales Corp.*, 91.

MUNICIPAL CORPORATIONS

§ 12. Liability as Determined by Nature of Functions; Governmental or Proprietary Functions

A city ABC board did not have governmental immunity from liability in a suit for damages allegedly caused by its negligent failure to warn plaintiff of the excavation undertaken in the construction of an ABC store which removed lateral support from plaintiff's building on adjoining property. *Waters v. Biesecker*, 165.

NEGLIGENCE

§ 50. Excavating and Duty to Shore Up

A city ABC board did not have governmental immunity from liability in a suit for damages allegedly caused by its negligent failure to warn plaintiff of the excavation undertaken in the construction of an ABC store which removed lateral support from plaintiff's building on adjoining property. *Waters v. Biesecker*, 165.

PARENT AND CHILD

§ 2.2. Child Abuse

The State's evidence was insufficient for the jury to find that the death of defendants' 25-day-old child was proximately caused by defendants' violation of the child abuse statute and that defendants were thus guilty of involuntary manslaughter of the child. *S. v. Byrd*, 132.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 5. Licensing and Regulation of Dentists

The Court of Appeals erred in applying the standards of G.S. 90-21.12, relating to civil liability for medical malpractice, to a professional licensing board disciplinary hearing. *In re Dailey v. Board of Dental Examiners*, 710.

RAPE AND ALLIED OFFENSES — Continued

prison inmates constituted dangerous or deadly weapons or were articles which the victim reasonably believed to be dangerous or deadly weapons. *S. v. Workman*, 594.

Testimony by the seven-year-old victim was sufficient to overcome defendant's motion for nonsuit in a prosecution for first degree rape. *S. v. Efird*, 802.

§ 6. Instructions

The trial court in a first degree rape case did not err in failing to charge the jury on second degree rape where all the evidence showed that defendant used a knife while raping the victim. *S. v. Corbett*, 382.

§ 7. Verdict; Sentence and Punishment

Defendant was not subjected to multiple convictions or to enhanced punishment by an improper use of the same element twice when he was convicted of a first degree sexual offense on the theory that he aided and abetted two co-conspirators in a first degree sexual offense. *S. v. Polk*, 559.

RECEIVERS

§ 12.2. Liens, Priorities and Payment; Claims of Government

Although it was error for the trial court to appoint plaintiffs' attorneys as counsel for the receivers of the corporate defendants, the trial court could properly allow reasonable fees to the attorneys for their services to the receivers. *Lowder v. All Star Mills*, 695.

RECEIVING STOLEN GOODS

§ 5.2. Particular Cases; Evidence Insufficient

The State's evidence was insufficient to show actual or constructive possession of stolen guns by defendant so as to support his conviction of possession of stolen property. *S. v. Malloy*, 176.

ROBBERY

§ 4.3. Armed Robbery Cases Where Evidence Held Sufficient

The trial court properly denied defendant's motion to dismiss an armed robbery charge against him. *S. v. Jackson*, 26.

§ 4.5. Cases Involving Aiders and Abettors in Which Evidence Was Sufficient

The trial judge properly denied defendants' motions to dismiss the charges of armed robbery. *S. v. Martin*, 465.

§ 4.7. Cases Where Evidence Was Insufficient

Defendant's motion to dismiss the charge of robbery with a dangerous weapon should have been granted at the close of the evidence. *S. v. Bates*, 528.

§ 5.1. Instructions; Felonious Intent

The trial court in an armed robbery case did not err in failing to instruct the jury that even if it did not find that defendant was legally insane at the time the crime was committed, it could find that due to his abnormal mental condition he did not have the requisite intent to commit armed robbery. *S. v. Jerrett*, 239.

§ 5.2. Instructions Relating to Armed Robbery

In a prosecution for second degree murder and armed robbery, the trial court's summary of the evidence included statements favorable to defendant. *S. v. Webb*, 549.

ROBBERY — Continued

§ 6. Verdict and Judgment

Where defendant was convicted of the charge of murder in the first degree based on the theory of felony murder, with armed robbery constituting the underlying felony, the trial court erred in sentencing defendant separately for the robbery. *S. v. Jackson*, 26.

RULES OF CIVIL PROCEDURE

§ 8.2. Answer

The trial judge did not err in refusing to submit plaintiff's proposed instructions to the jury concerning the effect of defendant's admissions in the pleadings. *Watson v. White*, 498.

SEARCHES AND SEIZURES

§ 10. Search and Seizure on Probable Cause

The trial court properly introduced into evidence items seized from defendant's residence by authority of two search warrants. *S. v. Jackson*, 26.

§ 14. Voluntary, Free, and Intelligent Consent

There was ample evidence of record to support the trial court's findings that a 17-year-old defendant with an I.Q. of between 50 and 65 voluntarily, willingly and understandingly signed a consent to search form. *S. v. Fincher*, 1.

§ 23. Cases Where Evidence of Probable Cause is Sufficient

In a prosecution for second degree murder and crime against nature, the trial court properly denied defendant's motion to suppress the results of a visual search and chemical test performed on bloodstains in the car in which he and his accomplices were riding on the night of the murder. *S. v. Warren*, 224.

§ 39. Execution of Search Warrant; Places Which May be Searched; Time of Execution

In a prosecution for murder, the trial court properly admitted evidence from a second visual search and chemical test on bloodstains in an automobile which had been seized and stored. *S. v. Warren*, 224.

STATE

§ 4.3. Actions Against State Department of Transportation

The superior court had no jurisdiction over a highway contractor's third-party action against the State and the Department of Transportation for wrongful withholding of funds under a highway construction contract where the contractor had not exhausted its administrative remedies before the State Highway Administrator. *In re Huyck Corp. v. Mangum, Inc.*, 788.

The superior court had jurisdiction of a highway contractor's third-party claim against the State and the Department of Transportation for indemnification in a negligence action against the contractor. *Ibid.*

The statute concerning claims against the State for monies allegedly due pursuant to highway construction contracts does not offend the constitutional guarantee of trial by jury. *Ibid.*

TRESPASS TO TRY TITLE

§ 2. Presumptions and Burden of Proof

The fact that defendants were in possession of the lands in question serves as a defense against a competing marketable record title but does not, under the Real Property Marketable Title Act, establish title in defendants. *Heath v. Turner*, 483.

Even though a party establishes a marketable record title to the property in question, under G.S. 47B-3(10) it cannot extinguish a competing independent title if that competing title is created by a title transaction recorded after the beginning date for the establishment of the marketable record title. *Ibid.*

§ 4. Sufficiency of Evidence and Nonsuit

Where defendants had acquired title to an 8/11 undivided interest in the lands in question by adverse possession when an action to quiet title was commenced, their possession of the lands at the time of the commencement of the lawsuit protects, as against a competing marketable title, their 8/11 undivided interest and their right to possession of the property. *Heath v. Turner*, 483.

TRIAL

§ 11. Argument and Conduct of Counsel

In a tort action, defense counsel's remark: "Can you imagine what a low jury verdict would do to that family?" was clearly improper. *Watson v. White*, 498.

§ 38.1. Disposition of Requests for Instructions

The trial judge did not err in refusing to submit plaintiff's proposed instructions to the jury concerning the effect of defendant's admissions in the pleadings. *Watson v. White*, 498.

UTILITIES COMMISSION

§ 38. Current and Operating Expenses

Former G.S. 62-134(e) did not permit an electric utility in a fuel clause proceeding to obtain any increase or adjustment in its rates to recover any of its expenses for purchased power. *State ex rel. Utilities Commission v. Public Staff*, 195.

The Utilities Commission erred in failing to determine in a general rate case the reasonable level of fuel expenses, including the cost of purchased power, used by an electric utility in the generation of power during the test period. *State ex rel. Utilities Comm. v. N.C. Textile Mfrs. Assoc.*, 238.

WEAPONS AND FIREARMS

§ 3. Pointing, Aiming, or Discharging Weapon

The State's evidence was sufficient for the jury in a prosecution for feloniously discharging a firearm into an occupied dwelling. *S. v. Locklear*, 428.

WORD AND PHRASE INDEX

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